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NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH

(IB)-1489(ND) 2019

In the matter of

MR. VISHAL KAUSHIK
H.No. 48, Jeevan Bima Apartments,
East Arjun Nagar, Delhi-110032

.....Operational Creditor

V/s

M/S EMU LINES PRIVATE LIMITED
201/35-A, Siddharth Chambers-II
Kalu Sarai, Hauz Khas,
New Delhi- 110016

.....Corporate Debtor

SECTION: 9 of IBC, 2016

Order delivered on: 15.10.2019

CORAM:

MS. INA MALHOTRA, MEMBER(JUDICIAL)

MS. SUMITA PURKAYASTHA, MEMBER (TECHNICAL)

PRESENT- Adv. Mukesh Rana, Adv Mamta. and
Vishal Kuashik (Petitioner himself) for the Petitioner
Advocate Uday Kumar for the Respondent

ORDER

Per Ms. Sumita Purkayastha (Member Technical)

1. The present petition has been filed invoking the provision of Section 9 of the Insolvency & Bankruptcy Code, 2016.
2. The petitioner was employed with the Respondent company and has unpaid salary/dues recoverable from the Corporate Debtor. He has

(IB)-1489(ND)2019

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15.10.19



Page 1 of 8

therefore filed this petition as an Operational Creditor praying for initiation of Corporate Insolvency Resolution Process of the Corporate Debtor for its inability to liquidate his claim of Rs. 17,73,963/-.

3. As per averment the Operational Creditor was appointed on 02.02.2006 and provided continuous service till 22.12.2018. The Operational Creditor served his notice period from 22.11.2018 to 22.12.2018 as per the terms of his employment with the Corporate Debtor. The last salary paid by the corporate debtor was of the month of October 2018 into the bank account of the operational creditor on 05.11.2018 and since then no amount towards salary. The Corporate Debtor has further failed to pay the statutory gratuity to Operational Creditor.

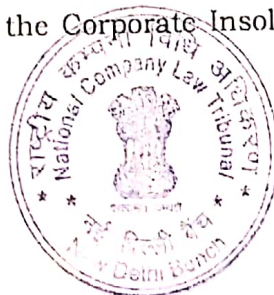
4. The Operational Creditor has claimed as detailed as under: -

Particulars	Amount (Rs.)
Gratuity due from 07.03.2006 to 22.12.2018	8,18,895/-
Salary Dues from 01.11.2018 to 22.12.2018	9,55,068/-
Total	17,73,963/-

5. The Operational Creditor issued the demand notice dated 02.05.2019 as required under Section 8 of the Code, demanding a total sum of Rs. 17,73,963/-.

6. In view of the Corporate Debtor's failure to reduce or liquidate its liability, the present petition has been filed in the required format praying for initiation of the Corporate Insolvency Resolution Process

(IB)-1489(ND)2019



Page 2 of 8

of the Corporate Debtor. Affidavit in compliance under Section 9(3)(b) and 9(3)(c) of Code are on record to corroborate his case.

Pursuant to the Court notice issued to the Corporate Debtor, they filed a reply to the present petition and stated that cheque for full and final settlement amount has already been given to the Operational Creditor for which TDS amount of Rs.1,70,000/- and Provident fund of Rs. 3600/- have been deposited on 07.12.2018 and 10.12.2018 respectively, hence full and final amount of Rs. 2,37,900/- has already been released to the Operational Creditor. The corporate debtor further states that the Operational Creditor, dissatisfied with the full and final settlement towards employment dues, has filed this petition. The observations of the Corporate Debtor, are as follows:

- i. The Corporate debtor submits that they deducted one month salary in respect of notice period and fuel charges of Rs. 38,634/-, deduction of Provident Fund and TDS as per Law & Loss of Revenue A/c LAVA International for Rs.2,21,829 due to the fact that the Operational Creditor shifted the business of LAVA international, who was the client of the Corporate debtor to its new venture named VELOCITY INTERNATIONAL LOGISTICS, whereas the Operational Creditor had assured to settle the amount due from LAVA INTERNATIONAL to the corporate debtor.
- ii. As per the averments made in the reply of the corporate debtor, the Operational Creditor did not serve the notice period and the

(IB)-1489(ND)2019



Page 3 of 8

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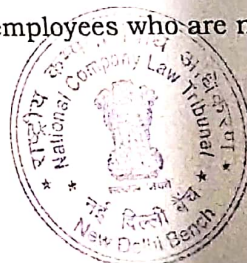
full and final settlement has been made pursuant to the date of resignation of the Operational Creditor i.e. 22.11.2019. Further the Corporate debtor states that two other Senior Employees namely Mr. Amit Kumar Sharma and Mr. Ravindra Garg had also resigned along with the Operational Creditor who served the notice period as per the appointment letter and have already received their full and final account settlement. The corporate debtor has relied and placed on record the full and final settlement letter of the above mentioned employees.

iii. The Corporate Debtor submits that they had examined the attendance record of the Operational Creditor maintained by them where it reveals that after 21.11.2018 the Operational Creditor never visited the Corporate Debtor's office and has never signed physically in attendance register, however the other two employees as mentioned in the above paragraph had proper attendance of physical signature as well as electronically at the entry gate. The Corporate debtor has filed the attendance records.

8. Pursuant to the reply filed by the Corporate debtor, the Operational creditor filed a detailed rejoinder to the observations of the Operational Creditor, which are as follows:

i. The documents placed on record by the corporate debtor are irrelevant. The resignation letter of two employees, full and final settlement of such employees who are not a party to the present

(IB)-1489(ND)2019



Page 4 of 8

matter is highly arbitrary on the part of the corporate debtor to escape its legal liability.

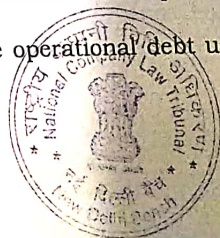
The attendance records placed on record is selective and is an incomplete document carrying names of 16 random employees out of the 500+ employees of the corporate debtor company. The name of the operational creditor is not mentioned in the attendance record relied upon by the corporate debtor. The attendance sheet records do not match with the electronic punch of the employees of the corporate debtor. The attendance register does not bear the name of the operational creditor and does not even carry the name of the operational creditor.

iii. That the employees of the company are not personally held liable to pay the dues outstanding to the company from its clients and therefore withholding the salary, gratuity and expenses of the employee is illegal. The salary of the operational creditor cannot be made conditional subject to the recovery of the dues of the corporate debtor.

iv. No notice vis a vis existence of dispute, the pre-existing or record of pendency of the dispute has been brought to the notice by the corporate debtor in its reply under Section 8 of the IBC.

v. The corporate debtor issued a cheque of Rs 2,37,000/- to escape from paying the operational debt under the garb of the

(IB)-1489(ND)2019



Page 5 of 8

said cheque vide letter dated 09.05.2019, however the same is not en-cashed by the operational creditor and does not absolve the corporate debtor from its liability.

9. Oral arguments were also heard and order was reserved. As directed both the parties have also filed written submissions. We have gone through the documents filed by both the parties and heard the arguments and perused written submissions made by both the counsels. While going through the documents Tribunal observed that the documents placed on record with respect of full and final settlement and the attendance records of the two employees cannot be relied upon by the corporate debtor to absolve its liability to pay the operational creditor and cannot deprive the operational creditor of his rightful dues/salary. The liability of the company cannot be claimed from its employees and the operational creditor cannot be made a scapegoat by the corporate debtor to realise its outstanding dues/payment from its clients. Considering the circumstances this Tribunal is inclined to admit this petition and initiate CIRP of the Respondent. Accordingly, this petition is admitted. A moratorium in terms of Section 14 of the Insolvency & Bankruptcy Code, 2016 shall come into effect forthwith staying:-

(a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgement, decree or order in any court of law, tribunal, arbitration panel or other authority;



(b) transferring, encumbering, alienating or disposing of
by the corporate debtor or any of its assets or any legal right
or beneficial interest therein;

(c) any action to foreclose, recover or enforce any
security interest created by the corporate debtor in respect
of its property including any action under the
Securitisation and Reconstruction of Financial Assets and
Enforcement of Security Interest Act, 2002;

(d) the recovery of any property by an owner or lessor
where such property is occupied by or in the possession of
the corporate debtor.

Further:

(2) The supply of essential goods or services to the
corporate debtor as may be specified shall not be
terminated or suspended or interrupted during moratorium
period.

(3) The provisions of sub-section (1) shall not apply to such
transactions as may be notified by the Central
Government in consultation with any financial sector
regulator. (4) The order of moratorium shall have effect
from the date of such order till the completion of the
corporate insolvency resolution process:

Provided that where at any time during the corporate
insolvency resolution process period, if the Adjudicating
Authority approves the resolution plan under sub-section
(1) of section 31 or passes an order for liquidation of
corporate debtor under section 33, the moratorium shall
cease to have effect from the date of such approval or
liquidation order, as the case may be."

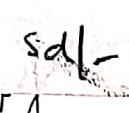
10. The Operational Creditor has not proposed the name of any IRP.

Accordingly, we appoint Mr. Ashok Kriplani, an Insolvency



Professional, registration no. IBBI/IPA-003/IP-N00009/2016-17/10071 email- ashok.kriplani1956@gmail.com duly empanelled with the IBBI as the IRP. He is directed to take such steps as are mandated under the Code, more specifically under Sections 15, 17, 18, 20 and 21 and shall file his report before the Adjudicating Authority.

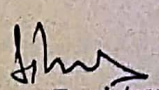
11. The Operational Creditor is directed to deposit a sum of Rs. 2 lakhs to meet the immediate expenses of IRP. The same shall be fully accountable by the IRP and shall be reimbursed by the CoC, to the Operational Creditor to be recovered as CIR costs.
12. Copy of the order be sent to both the parties as well as to the IRP.
13. To come up on for further consideration.


Sumita Purkayastha
Member (T)




Ina Malhotra
Member (J)

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Deputy Registrar
National Company Law Tribunal
CCO Complex, New Delhi-110003