IN THE NATIONAL COMPANY LAW TRIBUNAL

NEW DELHI BENCH- IV

IB No. 3113/ND/2019

IN THE MATTER OF:

M/s Kerry Indev Logistics Pvt. Ltd.
Second Floor, A block, Enkay Centre
Vamjya Nikunj, Udyog Vihar
Phase-V, NH-8, Gurgaon
Haryana-122016

...PETITIONER/ OPERATIONAL CREDITOR

VERSUS

M/s. Divineseair Logistics Pvt. Ltd.
Registered Office- 59, Vijay Block,
3rd Floor, Office No. 310, Laxmi Nagar
Delhi-110092

... RESPONDENT / CORPORATE DEBTOR

Under Section 9 of the Insolvency and Bankruptcy Code, 2016.

Order delivered on:. 18.02.2022

CORAM:

JUSTICE RAMALINGAM SUDHAKAR, HON'BLE PRESIDENT
SHRI NARENDER KUMAR BHOLA, HON'BLE MEMBER (T)
Present:

For Operational Creditor:- Mr. R V Prabhat, Adv.

ORDER

Per: NARENDER KUMAR BHOLA,
HON'BLE MEMBER (T)

The present Petition is filed under the Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter, The Code) read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (hereinafter, Rules) by Kerry Indev Logistics Pvt. Ltd., (hereinafter "applicant"), with a prayer to initiate the Corporate Insolvency Resolution Process against M/s Divineseair Logistics Pvt. Ltd. (hereinafter, Respondent/Corporate Debtor).

2. As per averments made in the petition, The Corporate Debtor had approached the Operational Creditor to avail freight forwarding services and export of the consignment via air and sea. The Corporate Debtor had requested for the export services and began seeking services of the Operational Creditor from June 2018. Later, Corporate Debtor submitted credit application form dated 10.09.2018 signed by the Authorised Representative of Corporate Debtor.

3. The Operational Creditor completed its scope of work which is elucidated by the following documents:

Sr. No.	Document No.	Date	Place of Origin	Place of Delivery
1.	Bill of Lading A1896830087	22.06.2018	Charleston, SC	TKB, New Delhi
2.	Bill of Lading SHNGBA 800313	12.06.2018	Ningbo, PT	TKB, New Delhi
3.	Bill of Lading A1806830106	28.06.2018	Charleston, SC	New Delhi

4.	House Airway Bill No. SLS0072240	17.10.2018	New Delhi	San Francisco

4. After completion of its scope of work, the Operational Creditor raised various invoices to Corporate Debtor and certain payment had been made by the Corporate Debtor. However, since, August 2018, the Corporate Debtor had not been clearing the outstanding dues/invoices. The payment for following invoices have not been cleared:

Sr. No.	Invoice No..	Date	Amount (Rs.)
1.	530-81485005884	24.08.2018	2,05,862/
2.	520-81485005886	23.09.2018	1,55,682/
3.	520-81485005887	24.08.2018	2,05,862/-
4.	520-81485009655	03.12.2018	4,23,999/

5. The Corporate Debtor has issued the following cheques in lieu of the outstanding:

a. Cheque bearing No. 184409, dated 05.06.2019, drawn on Axis Bank, New Delhi, IFSC Code No. UTIB0001362 for Rs 2,00,000/- [Rupees two lacs only].

b Cheque bearing No. 184410, dated 08.06.2019, drawn on Axis Bank, New Delhi, IFSC Code No. UTIB0001362 for Rs. 2,00,000/- [Rupees two lacs only]

c. Cheque bearing No. 184411, dated 31.05.2019, drawn on Axis Bank, New Delhi, IFSC Code No. UT1B0001362 for Rs. 2,00,000/- [Rupees two lacs only].

6. The Operational Creditor had presented the above said cheques for payment on 05.06.2019 through its Banker viz, Axis Bank, located at Noida WBO, 3rd with the endorsement "STOP PAYMENT" vide cheque return memo dated 05.06.2019.
7. The applicant issued Demand Notice dated 01.10.2019 in Form 3 under Section 8 of the Code read with Rule 5 of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 to corporate debtor which was served upon the corporate debtor.
8. As per part IV of the application, as on 26.09.2019 is Rs. 9,26,970/- and Interest amount of Rs. 1,38,055/- is due and payable by corporate debtor.
9. Upon issuance of notice, Ld. Counsel for the respondent appeared and filed reply to the present petition raising the following objections against the admission of the present petition:
    a. The corporate debtor has delivered the goods to Matak Tobacco Manufacturing Company through operational creditor. The Operational Creditor has received the payment of Rs.4,25,000/- from the party directly M/s. Kanishak Intertrade in respect of supply of goods to M/s. Matak Tobacco Manufacturing Company. The company even raised complaint regarding late delivery of goods.

b. It is further stated that the services of Operational Creditor were not satisfied, so therefore the party stopped the payment of the Corporate Debtor. So, therefore the said outstanding payment could not be cleared by the corporate Debtor. It is further stated that the corporate debtor has stopped the payment of the outstanding invoices. It is do further stated that the corporate debtor has also issued the cheques as security purpose and it was agreed the balance payment will be paid in installment, but the operational creditor has presented the said cheque without knowledge of the corporate debtor.

10. The petitioner has filed rejoinder to the reply of respondent and submitted as follows:

a) The applicant denied that there was any delay caused by Operational Creditor in sending goods to M/s Matak Tobacco Manufacturing Company. It is submitted that the cargo was received on 26.10.2018 at warehouse and shipping bill was filed on the same date 26.10.2018. Shipment was never stopped. Corporate Debtor did not clear the outstanding dues exceeding credit limit due to which the cargo was on hold for clearance of outstanding dues. Moreover, the Corporate Debtor has no role once the shipment is handed over to the airlines. The Airlines decides the planning based on several factors including terms and conditions mentioned on Airway Bill. Therefore, there was no delay on part of the Operational Creditor and without rhyme and reason the Corporate Debtor has withheld payments and has not cleared the outstanding dues.

11. We have heard Ld. Counsel for the parties. We have perused the averments made in the application, reply, and rejoinder and additional affidavits filed by the parties.

12. We have considered the objections raised by the corporate debtor regarding deficiency in services/delay in delivering goods to the parties. However, there is nothing on record to show that any complaint regarding delay in delivery was raised by any party. The Corporate Debtor has also failed to issue notice of dispute in reply to the section 8 notice, Form-3 and Form-4, denying the claim of the operational creditor.

13. The corporate debtor has also issued cheques for the payment of invoices to the operational creditor. In view of the facts and circumstances, admittedly the operational creditor has supplied goods to the corporate debtor and raised invoices accordingly. The Corporate Debtor has failed to substantiate that there is any pre-existing dispute regarding claim of the operational creditor.

14. The applicant has placed sufficient documents to show that the debt is payable by the corporate debtor and there is no dispute pending between the parties.

15. In view of the aforesaid discussion, the corporate debtor has been unable to prove any pre-existing dispute between the parties in respect of the operational debt and the operational debt since been acknowledged in the Balance Sheet for the two consecutive Financial Years 2015-16 and

2016-17, is not barred by limitation. Therefore, the present petition is admitted initiating Corporate Insolvency Resolution Process in respect of Corporate Debtor.

16. The applicant has not proposed the name of an Interim Resolution Professional; therefore, this bench appoints Mr. Anil Kumar Mittal, as the Interim Resolution Professional of the corporate debtor. The registration number of the IRP being IBBI/IPA/003IP-N00305/2020-21/13289 and email id. fcs.akmittal@gmail.com. IRP above named is appointed subject to the condition that no disciplinary proceedings are pending against him. The specific consent is required to be filed in Form 2 of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 and made disclosures made as required under IBBI (insolvency Resolution Process for Corporate Persons) Regulations, 2016.

17. We direct the applicant to deposit a sum of Rs. 2 lacs with the Interim Resolution Professional, namely Mr. Anil Kumar Mittal to meet out the expense to perform the functions assigned to him in accordance with regulation 6 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Person) Regulations, 2016. The needful shall be done within one week from the date of receipt of this order by the Operational Creditor. The amount shall however be subject to adjustment by the Committee of Creditors, as accounted for by Interim Resolution Professional, and shall be paid back to the Operational Creditor.

18. As a consequence of the application being admitted in terms of Section 9(5) of IBC, 2016, moratorium as envisaged under the provisions of

Section 14(1), shall follow in relation to the corporate debtor, prohibiting as per proviso (a) to (d) of the Code. However, during the pendency of the moratorium period, terms of Section 14(2) to 14(4) of the Code shall come in force.

19. A copy of the order shall be communicated to the applicant, Corporate Debtor and IRP above named, by the Registry. In addition, a copy of the order shall also be forwarded to IBBI for its records. Applicant is also directed to provide a copy of the complete paper book to the IRP. A copy of this order is also sent to the ROC for updating the Master Data. ROC shall send compliance report to the Registrar, NCLT.

-Sd-

(RAMALINGAM SUDHAKAR)
PRESIDENT

-Sd-

(NARENDRA KUMAR BHOLA)
MEMBER (TECHNICAL)