



IN THE NATIONAL COMPANY LAW TRIBUNAL, NEW DELHI
COURT-V

Item No.-204
IB-324/ND/2023

IN THE MATTER OF:
Sanjay Paintal

....Applicant

Vs.

Contemporary Exports LLP

.....Respondent

SECTION
U/s 9 IBC

Order delivered on 20.09.2023

CORAM:
SHRI MAHENDRA KHANDELWAL,
HON'BLE MEMBER (JUDICIAL)

SHRI RAHUL BHATNAGAR,
HON'BLE MEMBER (TECHNICAL)

PRESENT:
For the Applicant :
For the Respondent :

ORDER

Order pronounced in open Court vide separate sheets. IB-324/ND/2023 is stands **admitted**.

Sd/-

(RAHUL BHATNAGAR)
MEMBER (T)

Sd/-

(MAHENDRA KHANDELWAL)
MEMBER (J)



IN THE NATIONAL COMPANY LAW TRIBUNAL
BENCH – V, NEW DELHI
C.P (IB)/324(ND)2023

An application under section 9 of the Insolvency and Bankruptcy Code, 2016 read with rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

In the matter of:

SANJAY PAINTAL

S/o: Late Sh. K.S. Paintal
Address: B-323 Second Floor,
New Friends Colony, New
Delhi- 110025.

...Operational Creditor

Versus

CONTEMPORARY EXPORTS LLP

Address: C-536, 1st Floor,
Defence Colony, New Delhi-
110024

...Corporate Debtor

Order Delivered on: 20.09.2023

CORAM:

SHRI MAHENDRA KHANDELWAL, HON'BLE MEMBER (JUDICIAL)

SHRI RAHUL BHATNAGAR, HON'BLE MEMBER (TECHNICAL)



APPEARANCES:

For the Applicant : Adv. Sanyat Lodha

For the Respondent : Adv. Neeraj Kumar

ORDER

PER: SHRI MAHENDRA KHANDELWAL, HON'BLE MEMBER (JUDICIAL)

1. The instant application is filed by Mr Sanjay Paintal. (hereinafter referred to as 'Applicant'/ 'Operational Creditor') on 16.05.2023 under Section 9 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'the Code/IBC') read with rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (for brevity 'the Rules') with a prayer to initiate Corporate Insolvency Resolution Process ("CIRP") against Contemporary Exports LLP (hereinafter referred as 'Respondent Company/Corporate Debtor') for failing to make the payment amounting Rs.1,35,82,800/- (Rupees One Crore Thirty five lac Eighty two thousand and Eight hundred only).
2. The Respondent Company i.e Contemporary Exports LLP was incorporated on 09.08.2017 under the provisions of the Limited Liability Partnership Act, 2008 having its registered office situated at B- 323 Second Floor, New Friends Colony, New Delhi. Since the registered office of the respondent corporate debtor is in New Delhi, this Tribunal having territorial jurisdiction over the NCT of Delhi is the Adjudicating Authority in relation to the prayer for initiation of Corporate Insolvency Resolution Process in respect of respondent corporate debtor under subsection (1) of Section 60 of the Code.



Averments of the Applicants:

- 3.** Briefly stated the facts of the present case as averred by the applicant are that the Corporate Debtor in the year 2017 appointed the Operational Creditor to the post of Director Production and Product Development w.e.f. 01.09.2017 vide appointment letter dated 27.08.2017. Further submitted that, as per the terms of the Appointment Letter, the Operational Creditor was to be paid a gross monthly salary of Rs. 1,50,000/- per month. Additionally, an incentive of 2% of the Annual Sales of the Company based on the Audited Accounts and certified by the Company Auditor.
- 4.** Applicant submitted that the Operational Creditor, provided full service in terms to the satisfaction of the Corporate Debtor, however, the Corporate Debtor failed to pay the entire amount due to the Operational Creditor in accordance with the terms and conditions as laid down by the Appointment Letter dated 27.08.2017. Pertinently, the Corporate Debtor never raised a dispute with regard to the quality and tenure of services provided by the Operational Creditor.
- 5.** Further the Applicant submitted that the Corporate Debtor in order to avoid the legal proceedings being initiated against itself by the Operational Creditor for the non-payment of dues, entered into a Memorandum of Understanding dated 07.04.2022 ("MoU") to settle the dispute.
- 6.** Applicant submitted that, as per the said MoU, the services of the Operational Creditor were to be considered from the period of 01.09.2017 to 31.03.2022. Furthermore, the Corporate Debtor agreed to pay the Operational Creditor his entire dues amounting to Rs. 1,64,99,662.00/-. Out of the said payment, further, it was agreed that the payment amounting to



Rs. 37,29,872.00/- made to the Operational Creditor during the tenure of his services with the Corporate Debtor shall stand adjusted from the entire due amount. The balance amount of liability therefore was Rs. 1,27,69,790.00/-. Furthermore, as per the MoU, failure on the part of the Corporate Debtor to pay the balance liability on or before 30.09.2022, will incur interest at the rate of 1% per month at monthly rests on the balance amount.

7. In view of the legally outstanding liability, the Operational Creditor had issued a Demand Notice dated 25.04.2023 to the Corporate Debtor under Section 8 of the Code. The said notice was duly delivered on 26.04.2023. The Corporate Debtor despite acknowledging the liability vide email dated 05.05.2023 have failed to make payment of the same. The Corporate Debtor is liable to make the payment of the outstanding amount of INR Rs. 1,37,40,293.74/-
8. As the Corporate Debtor has no ability to pay for debts that are duly acknowledged and admitted, the present Application under Section 9 of the Code ought to be allowed to initiate Corporate Insolvency Resolution Process against the Corporate Debtor

Reply of the Respondent Corporate Debtor:

9. Per contra, the respondent through his reply submitted that all averments, statements, submissions, grounds, contentions or allegations made by the Applicant are baseless, misconceived and false, and hence, are denied in entirety
10. The Respondent submitted that the Operational Creditor was appointed to the post of Director Production and Product Development with the Corporate



Debtor vide appointment letter dated 27.08.2017 by the Corporate Debtor and on completion of the three month probation period the terms of the Appointment would be as follows:

- a. That the Operational Creditor was to be paid a gross monthly salary of Rs. 1,50,000/- per month;
- b. That Operational Creditor was to further receive an incentive of 2.00% of the Annual Sales of the Corporate Debtor based on the Audited Accounts and certified by the Auditor of the Corporate Debtor. The incentive was to be paid annually on the basis of the Audited Balance sheet of the company for the respective financial years.

- 11.** Further the Respondent submitted that, due to the financial crunch being faced by the Corporate Debtor, the Corporate Debtor was unable to pay the same from time to time. It is submitted that the Corporate Debtor had throughout the course of employment of the Operational Creditor, kept the Operational Creditor informed of its inability to pay the amount.
- 12.** The Respondent further submitted that, in February and in March of 2022 the Operational Creditor raised the issue with regard to the pending payment to be made by the Corporate Debtor to the Operational Creditor and therefore Corporate Debtor was constrained to discontinue with the services of the Operational Creditor.
- 13.** The Respondent submitted that in view to settle the issues pending between the Operational Creditor and Corporate Debtor amicably and mutually, a Memorandum of Understanding ("MOU") was executed on 07.04.2022, whereby the Corporate Debtor agreed to pay the entire amount due to the Operational Creditor by 30.09.2022. It is submitted that as per the terms of



the MoU, the final outstanding amount i.e 1,27,69,790 was to be paid to the Operational Creditor by the Corporate Debtor, however, prior to the MoU, over and above the amount as aforementioned, the Corporate Debtor had paid the Operational Creditor an amount of Rs. 37,29,872/.

- 14.** The Respondent submitted that, since the execution of the MoU, despite making all efforts to make the full payment of outstanding debt, the Corporate Debtor has not been in a position to pay any amounts out of the balance Rs. 1,27,69,790/- within the stipulated time under the MoU.
- 15.** It is submitted that the Covid 19 pandemic had impacted the business of the Corporate Debtor greatly and to the extent that the Corporate Debtor has still not been able to recover from the same, thus the Corporate Debtor sought time from the Operational Creditor to make the payment.
- 16.** Further submitted that the Corporate Debtor on 05.05.2023 in response to the said demand notice dated 25.04.2023, while acknowledging the liability of debt, reiterated its inability to make the payment of the amount due owing to the financial crunch being faced by the Corporate Debtor and asked the Operational Creditor for further time to make the said payment.
- 17.** Further the Corporate Debtor submitted that, as per the provision of section 5(21) of the IBC the Operational Debt means a claim in respect of provision of goods or services including employment and hence the Operational Creditor do not fall either under the category of the supply of the goods or service rendered by the Corporate Debtor therefore, the amount due which is payable on behalf of Corporate Debtor is not operational debt under the provisions of Section 5(21) of the IBC.
- 18.** It is further submitted by the Respondent that, at the time of filing the present Application there no privity of contract existed between the Operational Creditor and the Corporate Debtor, hence the Applicant is not an



Operational Creditor as per the definition laid down in Section 5(20) of the IBC which is an essential requirement to file the Application under Section 9 of the IBC

19. The Pleadings and arguments throw-up the following two issues to be decided:

1. Whether the amount due in the present application fall under the ambit of Operational Debt?
2. Whether the Applicant in the present application is an Operational Creditor?

Analysis and Findings

20. We have heard Ld. Counsel for the both the parties and perused the averments made in the application filed by the parties. The relevant documents annexed with the submissions have been examined. On-going through the submissions made by the Learned Counsel for both the Parties and on perusing the documents placed on record, it is observed that the Operational Creditor was appointed by the Corporate Debtor and as per terms and conditions of the appointment letter, he was entitled for payment of salary and other allowance. The Corporate Debtor failed to make outstanding payment of INR Rs. 1,37,40,293.74/-. Further, it is seen that section 8(1) notice was issued through speed post/Email on 25.04.2023. The



proof of dispatch and tracking report is filed, which shows that the same has been delivered on 26.04.2023.

- 21.** With regard to the Issue 1 in the present Application i.e whether the amount due in the present application comes under the ambit of operational debt, it is important to refer to the section 5(21) of the IBC which defines the meaning of “Operational Debt”. Section 5(21) of IBC is reproduced below:

*Section 5(21):-“Operational Debt” means a claim in respect of the provision of goods or **services including employment** or a debt in respect of the dues arising under any law for the time being enforce and payable to the Central Government or any State Government or any local authority*

- 22.** A bare perusal of the aforesaid provision shows that, appointment/employment of Operational Creditor by the Corporate Debtor vide letter dated 27.08.2017, for which claim is made, comes under the ambit of the definition of ‘Operational Debt’. Thus, taking into account of the above provision of law, the first issue is, therefore decided in favor of Applicant.

- 23.** The second issue in hand in with respect to “whether the Applicant in the present application is an Operational Creditor?” At this juncture, it will be advantageous to examine the definition of Operational Creditor which is defined under section 5(20) of the IBC as shown below:

*Section 5(20):- “Operational Creditor” means a person to whom an **operational debt** is owed and includes any person to whom such debt has been legally assigned or transferred.*



24. As it has been observed above that the appointment of Operational Creditor to the post of Director Production and Product Development in the Corporate Debtor Company vide letter dated 27.08.2017 by the Corporate Debtor for which payment is due comes under the ambit of Operational Debt and it is admitted fact that the Rs.1,27,69,790/- remains due and payable from the Corporate Debtor to the Applicant. Therefore, as per the above provisions of section 5(20) of IBC the petitioner is an Operational Creditor. The second issue, therefore, is also decided in favor of Applicant.

25. Further, the Hon'ble Supreme Court in Mobilox Innovations Private Limited Vs Kirusa Software Private Limited [Civil Appeal No. 9405 of 2017 reported in (2018) 1 SCC 353, has laid down what the Adjudicating Authority has to examine in an Application under Section 9. The Hon'ble Supreme Court stated as under:

"34. Therefore, the adjudicating authority, when examining an application under Section 9 of the Act will have to determine:

- (i) *Whether there is an "operational debt" as defined exceeding Rs 1 lakh?
(See Section 4 of the Act)*
- (ii) *Whether the documentary evidence furnished with the Application shows that the aforesaid Debt is due and payable and has not yet been paid?
And*
- (iii) *Whether there is existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before the receipt of the demand notice of the unpaid Operational Debt in relation to such dispute?*

If any one of the aforesaid conditions is lacking, the Application would have to be rejected. Apart from the above, the adjudicating authority must follow the



mandate of Section 9, as outlined above, and in particular the mandate of Section 9(5) of the Act, and admit or reject the Application, as the case may be, depending upon the factors mentioned in Section 9(5) of the Act.”

- 26.** Further it is a settled proposition of law that an application under Section 9 of the Code, 2016 will have to be admitted if all the conditions stipulated in clauses (a) to (e) of Section 9(5)(i) of the IBC are satisfied.
- 27.** Having regard to the conspectus of facts of the present case and the judgment cited (supra), this Adjudicating Authority is of the considered view that the Corporate Debtor is in default of payment of the outstanding operational debt owed to the applicant and the mandatory requirements as prescribed under Section 9(5) of the Code, 2016 are satisfied.
- 28.** In view of the above, the present company application (C.P. No. (IB)- 324 (ND)/2023) stands admitted and the CIRP is hereby initiated against Contemporary Exports LLP.
- 29.** The Operational Creditor has not proposed any name of resolution professional. Therefore, this Adjudicating Authority appoints Neeraj Kumar Jain as the Insolvency Resolution Professional (IRP) of the Corporate Debtor from the available list of panel of resolution professionals as maintained by IBBI and communicated to NCLT vide its letter No IP-12011/1/2020-IBBI dated 04.07.2023. The registration number of the IRP being IBBI/IPA-001/IPP-02354/2021-2022/13615 and email id neerajjainus@gmail.com.
- 30.** We direct the applicant to deposit with the IRP a sum of Rs.2 lacs 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.

31. We also declare moratorium in terms of Section 14 of the Code. The necessary consequences of imposing the moratorium flows from the provisions of Section 14 (1) (a), (b), (c) & (d) of the Code. Thus, the following prohibitions are imposed:

“(a)The institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, 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 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 Securitization 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.”

(e)The IB Code 2016 also prohibits Suspension or termination of any license, permit, registration, quota, concession, clearances or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license, permit, registration, quota, concessions, clearances or a similar grant or right during the moratorium period.”



- 32.** The Interim Resolution Professional shall perform all his functions contemplated, inter-alia, by Sections 15, 17, 18, 19, 20 & 21 of the Code and transact proceedings with utmost dedication, honesty and strictly in accordance with the provisions of the Code, Rules and Regulations.
- 33.** It is further made clear that all the personnel connected with the Corporate Debtor, its promoters or any other person associated with the Management of the Corporate Debtor are under legal obligation under section 19 of the IBC to extend every assistance and cooperation to the Interim Resolution Professional as may be required by him in managing the day-to-day affairs of the 'Corporate Debtor'.
- 34.** 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.

Let copy of the order be served to the parties.

Sd/-

(RAHUL BHATNAGAR)
MEMBER (TECHNICAL)

Sd/-

(MAHENDRA KHANDELWAL)
MEMBER (JUDICIAL)