



IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-IV

CP (IB) No.628/MB-IV/2022

Under Section 9 of the I&B Code, 2016

In the matter of:

Air India Limited

[CIN: U62200DL2007PLC161431]

...Operational Creditor/Applicant

V/s

Sovika Aviation Services Private Limited

[CIN: U7410MH2007PTC175582]

...Corporate Debtor/Respondent

Order pronounced on: 30.08.2023

Coram:

Mr. Prabhat Kumar
Hon'ble Member (Technical)

Mr. Kishore Vemulapalli
Hon'ble Member (Judicial)

Appearances (via videoconferencing):


For the Petitioner(s) : Mr. Abhay a/w Mr. U.C. Nayak, Adv.

For the Respondent(s) : Mr. Rohit Gupta a/w Ms. Rajni Mehta
i/b Vashi and Vashi, Adv.

ORDER

Per: Kishore Vemulapalli, Member (Judicial)

1. This is an Application being C.P. (IB) No. 628/MB/C-IV/2022 filed on 17-05-2022 by Air India Limited, the Operational Creditor/Applicant, under



section 9 of Insolvency & Bankruptcy Code, 2016 (I&B Code) against Sovika Aviation Services Private Limited, Corporate Debtor, for initiating Corporate Insolvency Resolution Process (CIRP).

- 1.1 The Director (Finance) of the Operational Creditor has filed Authority Letter dated 12.02.2022 in support of authorization in favour of Mr. Kishore Ramachandra Prabhu of the Operational Creditor authorising him to file the present company application on behalf of the Operational Creditor.
- 1.2 The total amount of debt claimed by the Operational Creditor in the Part 4 of the Company Petition as on 31.12.2021 is Rs. 4,43,29,384/- (Principal amount is Rs. 2,54,26,535/- and the interest @15% p.a. from its due date till 31.12.2021 on all unpaid invoices is Rs. 1,89,02,849/-). The dates of default as mentioned in the Part IV of the Application are 19.10.2017 and 03.12.2019 in relation to invoices raised for cargo handling services rendered in respect of Go Air and invoices raised in respect of Vistara respectively.
2. The Corporate Debtor, the sole Cargo Agent of M/s Go Airlines (India) Ltd and Tata SIA Airlines Limited (Vistara) entered into an agreement with the Operational Creditor and Air India Air Transport Services Limited (subsidiary of Air India Limited) (hereinafter referred to as AIATSL) on 9.04.2015 and 16.07.2016 respectively for availing X-Ray screening of cargo at Pune Airport.
 - 2.1 The Operational Creditor submits that pursuant to the said Agreement, the Operational Creditor provided X-ray screening services to the Corporate Debtor and accordingly raised invoices on monthly basis as per the Agreement. Such invoices were to be paid within 15 days of the date of receipt of such invoices. On account of non-payment of invoices, the Operational Creditor sent several reminder emails dated 17.11.2017,



04.07.2018, 05.07.2018, 09.07.2018, 04.01.2019, 11.01.2019, 08.11.2019 for payment of outstanding dues for screening of cargo for Go-Air and Vistara. Subsequently, some payments were received, which were adjusted to the account. The Corporate Debtor, vide its email dated 27.11.2019, assured the Operational Creditor payment of Rs. 1 Crore of the outstanding dues. In response to the said email, the Operational Creditor, vide its email dated 27.11.2019, 29.11.2019, requested the Corporate Debtor to submit payment schedules for the balance amount also. However, there was no response to the said emails and neither were any payments were received.

- 2.2 In furtherance of the same, several reminder emails dated 22.01.2020, 23.01.2020, 03.02.2020, 04.02.2020 & 06.02.2020 for release of the payment as per the schedule agreed by the Corporate, Debtor vide its email dated 27.11.2019 were sent by the Operational Creditor. In response to the same Corporate Debtor vide its email dated 10.02.2020 responded that they are expecting funds from Postal Authority and Income Tax refund by February end and would accordingly release the payment.
- 2.3 In view of non-payment of invoices, the Operational Creditor, vide its email dated 27.02.2020, informed the Corporate Debtor about its team's visit to the Corporate Debtor's office to discuss on pending bills and spot recovery of Rs. 50 Lakhs against total liability of Rs. 2.53 Crores outstanding as on the date. But Air India could not recover any amount on that day. However, the Corporate Debtor, vide its email dated 28.02.2020 & 09.03.2020, again assured that payment shall be made in due course.
- 2.4 Subsequently, the Operational Creditor, vide its emails dated 11.08.2020 and 09.09.2020, again requested the Corporate Debtor for payment of outstanding dues.




- 2.5 The Demand Notice under Form 3 of Insolvency & Bankruptcy Code, 2016 was issued on behalf of the Operational Creditor on 11.03.2022 at the registered office of the Corporate Debtor. The Corporate Debtor replied to the said notice vide its letter dated 24.03.2022.
- 2.6 The Operational Creditor further submits that the said reply is beyond the stipulated period of 10 days as prescribed by the Code. One of the contentions raised by the Corporate Debtor was that certain invoices as stated were never received and that a copy of all the invoices were annexed to the said Demand Notice. Subsequently, a copy of all the invoices was delivered to their office vide letter dated 05.04.2022.
3. The Corporate Debtor filed its Reply dated 18.08.2022 stating following reasons as to why the petition should be dismissed –
- 3.1 The Demand Notice dated 11.03.2022 is not valid a notice under Section 8 the Code. The Demand Notice was issued only on March 11, 2022, but it referred to debts which were allegedly due as of December 31, 2021. It can be noted from the Original Demand Notice that Air India Ltd. ("Air India") and not Air India Air Transport Services Ltd. (also known as Air India Airport Services Ltd.) ("AIASL") were the purported Debtors, however the Petitioner seeks to combine two separate legal entities, despite both legal entities not being party to one singular Agreement. This is an admitted position as in the said Demand Notice two separate Agreements are referenced.
- 3.2 Pre-Existing Dispute between the parties: There is a pre-existing dispute between the Parties hereto and the Respondent had not received numerous invoices, in respect of the Agreements, listed in Annexure 7 of the Original Demand Notice. Around 19 (nineteen) of the alleged invoices totalling up to a Principal value of Rs. 87,84,533/- (Rupees Eighty-Seven Lakh Eighty Four Thousand Five Hundred and Thirty Three only), were NOT previously furnished to the Respondent, prior to the Original Demand



Notice. Clause 2 of the Agreement with Air India provides that only on Air India raising monthly bills on the Respondent, was the Respondent required to make payment. In the absence of the said monthly bills / invoices being raised, Air India was not in a position to compel payment and/or allege delayed payment and interest accruing.

- 3.2.1 In so far as the remaining invoices are concerned, the same are disputed, given that the Respondent was unable to reconcile the amounts as being sought despite various requests for reconciliation of these balance invoices. The Respondent had disputed the same on account of non-provision of basis of amount claimed under each invoice, accordingly they were not required to pay the same. This communication is evident through the contemporaneous correspondence between the Parties.
- 3.2.2 Notably it is settled law that in the event there is a pre-existing dispute in terms of Section 8(2) of the Code, the proposed operational creditor as also the alleged operational debt falls out of the ambit of IBC i.e., a proceeding under the Code is thereafter not maintainable in terms of Section 9(5)(ii)(d) of the Code.
- 3.3 Suppression of the Part Payment by the Petitioner: The Petitioner has suppressed the fact that an amount of Rs. 51,76,908/- (Rupees Fifty-One Lakh Seventy-Six Thousand Nine Hundred and Eight only), has been paid to the Petitioner and has not accounted for the same in the Original Demand Notice to prejudice the rights of the Respondent. This payment was strictly without prejudice to the fact that all invoices that have been raised were disputed, accordingly, this payment cannot be taken as ground to extend the limitation period.
- 3.4 Around July 16, 2020, a Corporate Insolvency and Resolution Process ("CIRP") was initiated against the Respondent, and an Interim Resolution Professional ("IRP") was appointed. On July 19, 2020, a public announcement was issued inter alia specifying the last date for any and all



creditors of the Respondent, to submit their claims with the Resolution Professional ("RP"). Even at this stage, no claim was received from Air India. Based on settlement agreements executed by and between the Respondent and the concerned parties therein, the CIRP proceedings were eventually withdrawn as recorded in an Order dated September 23, 2021, passed by the Hon'ble National Company Law Tribunal, Mumbai.

3.5 Petition barred by the Law Of Limitation : Assuming whilst denying that the Petitioner can claim the alleged amounts of AIASL, as per the Petitioner's own admissions in their Original Demand Notice, the date of default for the alleged invoices raised under the Agreement with AIASL is July 14, 2017, and for alleged invoices raised under the Agreement with Air India, the date of default is December 3, 2019. Therefore, multiple Invoices, claimed vide Annexure 7 of the Petitioner's Original Demand Notice, whether served on the Respondent or not, or whether are correct or not, are evidently barred by the law of limitation. Out of the total principal amount claimed by the Petitioner i.e., Rs. 3,06,03,443/- (Rupees Three Crores Six Lakh Four Hundred and Forty- Three only), an amount of Rs. 62,28,782/- (Rupees Sixty-Two Lakhs Twenty-Eight Thousand Seven Hundred and Eighty-Two only), is wrongfully being claimed now, as the same is beyond the prescribed period of limitation.

4 The Operational Creditor has filed Rejoinder dated 04.03.2023 stating that:

4.1 The first of such unpaid invoice fell due on 11.06.2016, and the last one fell due on 03.12.2019. That in course of accumulation of default as mentioned in Part-IV of the Company Petition, the quantum of defaulted amount as on 31.05.2017 stood at Rs. 1,04,65,670/- [Default-Principal Amount], which sufficiently surpasses the threshold limit stipulated under the provisions of the Insolvency and Bankruptcy Code, 2016.

4.2 The absence of debit notes, arbitration proceedings, and/or pending suit, itself proves that there was no pre-existing dispute between the parties. In



addition to this, the part-payments made and subsequent payment-settlement schedule issued by the Respondent/Corporate Debtor firmly establishes the stance of the Petitioner/Operational Creditor that the contentions of the Respondent/Corporate Debtor are frivolous and malicious. With regards to Paragraph 6(a)(b)(c) & (d) of the said reply, it is pertinent to note AIATSL is a ground handling agency, ad a wholly owned subsidiary of the Petitioner/Operational Creditor. That the Petitioner/Operational Creditor had provided services to the Respondent/Corporate Debtor vide both the Agreements dated 09.04.2015 & 16.07.2016. In furtherance of the same, the Petitioner/Operational Creditor raised monthly invoices for the services rendered and that the Respondent duly acknowledged the said invoices.

- 4.3 As regards rendition of services by Air India under agreement with AIATSL, it is submitted that a Memorandum of Understanding was entered into between the Petitioner and AIATSL on 18.4.2013 and transferred its Ground Handling service activities to AIATSL at various airports across India. Baggage X-ray Services are not covered under Ground Handling Services, accordingly such services came to the Petitioners, and the Petitioner came to have authority to render these services for AIATSL. This arrangement was carried out pursuant to notification dated 28.08.2009 modified vide notification dated 15.12.2017 whereby ground handling agencies were barred from undertaking the security functions. The Baggage X-ray Services are covered under security services under MoU dated 19.04.2013. The rendition of services by the Petitioner under agreement with AIATSL was never objected by the Corporate Debtor in the past.
- 4.4 The Corporate Debtor has duly acknowledged the invoices raised on it and has at no point in time disputed them. The plea of pre-existing dispute is false and frivolous.



- 4.5 The invoices amounting to Rs. 87,84,553/- were raised on monthly basis and were duly stamped and signed by the Corporate Debtors office. The copies of such acknowledgment is places as Annexure B of the rejoinder.
- 4.6 The Corporate Debtor has not got anything on record on reconciliation issue and has also not proved the non-co-operation of the Petitioner in this regard.
- 4.7 The contention of non-enclose of invoices with Form 3 is not valid as the same is not mandatory in view of decision of NCLT in the case of TVS Automobile Solution Pvt. Ltd. V/s KPN Travels India Ltd. passed by Chennai Bench in CP(IB) 393 of 2020. Since the demand notice was issued in Form 3 the attachment of invoice was not mandatory.
- 4.8 The last payment made by the Corporate Debtor on 20.11.2018 extends the limitation period further has held in the case of ***Dena Bank V/s C Shivakumar Reddy (2021) ibclaw.in 69 SC.***
- 5 We have perused the documents and pleadings available on record and considered the arguments of both the sides.
- 5.1 The Operational debt is defined u/s 5(21) of the Code to mean “*a claim in respect of provision of goods or services including employment or a debt in respect of the repayment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority*”.
- 5.2 We find that the invoices of Rs. Rs. 87,84,553/- claimed not to have been received by the Corporate Debtor were actually received by them as is evidenced from the acknowledgment on the invoices placed as Annexure B of the rejoinder.
- 5.3 It is an admitted position that Clause 2 of the said Agreement with Air India, provides that the Petitioner was required to “...raise monthly bills for the Services provided as per the terms of the Agreement and that shall be payable by the Sovika Group within 15 days from the date of receipt of such bills by their local office at Pune. These invoices were raised and due for




payment. It is not the case of the Respondent that no services or deficient services were provided by the Petitioner. The Corporate Debtor has taken a ground that the Petitioner is claiming debt due under agreement with AIATSL also. We find that the rendition of Cargo handling services was transferred to the Petitioner and ground handling services was transferred to AIATSL as a part of internal arrangement consequent to compliance with the Civil Aviation Ministry guidelines. Nonetheless, the agreement itself includes the successors and permitted assigns. Accordingly, we do not find any merit in this contention also, more so because, the Corporate Debtor was in receipt of invoices raised by the Petitioner under agreement with AIATSL, and never objected to the fact.

- 5.4 As regards contention of mandatory enclosure of invoices with Form 3, we find that the demand notice in Form 3 is stipulated in cases where no invoice is to be issued, hence it cannot be said that enclosure of invoices with form 3 is mandatory requirement. The Ld. Counsel for the Corporate Debtor has relied upon the decision of Hon'ble NCLAT in the case of *Neeraj Jain Director of Flipkart India Private Limited vs. Cloudwalker Streaming Technologies Private Limited Company Appeal (AT) (Insolvency) No. 1354 of 2019* holding that “*the choice of issuance of demand notice u/s 8(1) of the Insolvency & Bankruptcy Code, 2016, either in Form 3 or Form 4, under the Insolvency and Bankruptcy Code Application to Adjudicating Authority Rules 2016, depends on the nature of Operational Debt. Section 8(1) does not provide the Operational Creditor, with the discretion to send the demand notice either Form 3 or Form 4, as per its convenience. The applicability of Form 3 or Form 4 depends on whether the invoice were generated during the course of transaction or not. It is also made clear that the copy of invoice is not mandatory if the demand notice is issued in Form 3 of the Insolvency and Bankruptcy Code (Application to Adjudicating Authority) Rules 2016 provided the documents to prove the existence of operational debt and the amount in default is attached with the application.* However, this



Bench finds that the Principal Bench in the case of *Tejinder Pal Setia Vs. Kone Elevator India Pvt. Ltd. and Ors. (2023) ibclaw.in 416* the Hon'ble NCLAT dealt with the identical case, and after analysiing the decision in the case of *Neeraj Jain (Supra)* held that “*The Operational Creditor is at liberty to submit Demand Notice either in Form-3 or Form-4. When Notice is issued in Form-4, copy of the Invoice is required to be attached with the Notice. The Demand Notice issued by the Operational Creditor was in Form-3, hence, no infirmity can be found in the Demand Notice, if invoices were not attached.*”. It was further held by Hon'ble NCLAT in this case that “*The present is a case where the Demand Notice issued by the Operational Creditor on the basis of supply and installation Agreement and the acknowledgement letter issued by the Corporate Debtor. In the facts of the present case, Notice having not been issued in Form-4, cannot be faulted with. There can be no defect and infirmity in Demand Notice issued in Form-3 in the facts of the present case.*”

- 5.5 The facts of this case are identical as that of *Tejinder Pal Singh (Supra)*. In this case also, the Petitioner has filed the petition on the basis of agreements and the acknowledgement by the Corporate Debtor in the form of part payment and correspondences. Since, in this case, notice has been issued in Form 3, we do not find any infirmity on the ground that invoices were not attached to the notice, as the attachment of invoices in case of Form 3 notice is not mandatory. Accordingly, we dismiss this ground also.
- 5.6 On perusal of the documents submitted by the Applicant, it is clear that an operational debt amounting to more than Rs.1,00,00,000/- (Rupees One Crore Only) is due and payable by the Corporate Debtor to the Applicant as the required threshold limit to file a petition u/s 4 of the Insolvency and Bankruptcy Code, 2016 and there is default by the Corporate Debtor in payment of debt amount. Though the Corporate Debtor has notified the existence of dispute, but this is not more than a feeble and moonshine



dispute. The application is complete and has been filed under the proper form.

- 5.7 Accordingly, this Bench is of the considered view that this Petition under section 9 filed by the Operational Creditor to initiate the CIRP in the matter of the Corporate Debtor deserves to be admitted under section 9(5)(i) of the Insolvency and Bankruptcy Code, 2016.


ORDER

- 6 This Application being C.P. (IB) No. 628/NCLT/MB/C-IV/2022 filed under Section 9 of I&B Code, 2016, filed by Air India Limited, Operational Creditor/ Applicant against Sovika Aviation Services Private Limited, Corporate Debtor for initiating Corporate Insolvency Resolution Process is **admitted**. We further declare moratorium u/s 14 of I&B Code with consequential directions as mentioned below:

- I. That this Bench as a result of this prohibits:
- 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 Operational 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 possession of the corporate debtor.



- II. That the supply of essential goods or services to the corporate debtor, if continuing, shall not be terminated or suspended or interrupted during the moratorium period.
- III. That the provisions of sub-section (1) of Section 14 of I&B Code shall not apply to
- a. such transactions as may be notified by the Central Government in consultation with any Operational sector regulator;
 - b. a surety in a contract of guarantee to a Corporate Debtor.
- IV. That the order of moratorium shall have effect from the date of this order till the completion of the corporate insolvency resolution process or until this Bench approves the resolution plan under sub-section (1) of section 31 of I&B Code or passes an order for the liquidation of the corporate debtor under section 33 of I&B Code, as the case may be.
- V. That the public announcement of the corporate insolvency resolution process shall be made immediately as specified under section 13 of I&B Code.
- VI. That this Bench hereby appoints Mr. Hajib Raghavan Viswanath, a registered insolvency resolution professional having Registration Number [IBBI/IPA-001/IP-P-01761/2019-2020/12676] and Email Id.- viswanath.geevis@gmail.com ; as Interim Resolution Professional to carry out the functions as mentioned under I&B Code, the fee payable to IRP/RP shall comply with the IBBI Regulations/Circulars/Directions issued in this regard.
- VII. The Operational Creditor shall deposit a sum of Rs. 5,00,000/- (Rupees Five lakh only) with the IRP to meet the initial CIRP cost, if demanded by the IRP to fund initial expenses on issuing public notice and inviting claims. The amount so deposited shall be interim finance and paid back to the applicant



on priority upon the funds available with IRP/RP. The expenses, incurred by IRP out of this fund, are subject to approval by the Committee of Creditors (CoC). The Remuneration of Interim Resolution Professional shall be Rs. 1,00,000/- p.m. till the constitution of CoC and decision of CoC in relation to remuneration of IRP/RP, in case it is not fixed by the Operational Creditor so far.

VIII. A copy of this Order be sent to the Registrar of Companies, Maharashtra, Mumbai, for updating the Master Data of the Corporate Debtor.

IX. The Registry is directed to immediately communicate this order to the Operational Creditor, the Corporate Debtor and the Interim Resolution Professional even by way of email or WhatsApp. **Compliance report of the order by Designated Registrar is to be submitted today.**

Sd/-

PRABHAT KUMAR
MEMBER (TECHNICAL)
30.08.2023

Sd/-

KISHORE VEMULAPALLI
MEMBER (JUDICIAL)