

IN THE NATIONAL COMPANY LAW TRIBUNAL,
KOLKATA BENCH, KOLKATA

CP (IB) No.1104/KB/2018

In the matter of:

An application for initiation of Corporate Insolvency Resolution Process 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;
And

In the Matter of:

Ranjan Kumar Sovasaria M/s Hanusita & Sons, having its office at Chamber Road, P.O. Thinsukhia - 786 125.

.....Operational Creditor

And

In the Matter of:

Apeejay Tea Limited, having its registered office at 15, Park Street, Kolkata - 700 016.

..... Corporate Debtor

Date of Hearing: 14th October 2019

Order Delivered on 18th October 2019

Coram:

Madan B Gosavi, Member (J)

Virendra Kumar Gupta, Member (T)

For the Operational Creditor : 1. Mr. Jay Saha, Advocate
2. Mr. S. Shah, Advocate

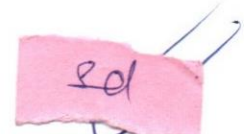
For the Corporate Debtor : 1. Mr. A. Mitra, Advocate
2. Mr. Satadeep Bhattacharya, Advocate
3. Mr. Debayan Sen, Advocate

ORDER

Per Virendra Kumar Gupta, Member (Technical)

This application has been filed under Sec.9 of the Insolvency & Bankruptcy Code, 2016 by the operational creditor, viz., Ranjan Kumar

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Sovasaria M/s Hanusita & Sons for initiation of corporate insolvency resolution process against the corporate debtor, viz., Apeejay Tea Limited. The amount of default has been claimed at Rs.48,71,688/-. The default has been claimed to have occurred in June 2016.

2. The facts, in brief, are that the goods, i.e. fertilizers, as requisitioned, by the corporate debtor were supplied by the operational creditor along with invoices and challans at the prices/rates quoted and acceptance by the corporate debtor. Goods were supplied from 2013 till December 2016. Payment was also made and invoices raised since May 2015 remained pending for payment. It is also claimed that both prior and post 2015, the corporate debtor has made payment. Last invoice was raised on 2/12/2016 and last payment was made on 20/10/2016.

3. Ld. Counsel for the operational creditor narrated these facts and drew our attention to pages 14 to 126 containing purchase orders raised by the corporate debtor and invoices of the operational creditor. Thereafter, Ld. Counsel referred to chart at pages 127 to 128 containing details of invoices remaining unpaid and also pointed out that receipt of goods under such invoices was not being denied. Ld. Counsel drew our attention to the copies of bank statement showing the transactions of remittance made by the corporate debtor. Ld. Counsel thereafter referred to pages 261 to 264, containing copy of demand notice under Sec.8 of Insolvency & Bankruptcy Code, 2016 and proof of delivery of the same on the corporate debtor. Ld. Counsel also drew our attention to the reply by the corporate debtor dated 20/7/2018 wherein the corporate debtor had raised the issue that operational creditors was in collusion with one G.M. of the corporate debtor, viz., Partha Sarathi Chatterjee and because of such situation inflated bills were raised and extra payment had been

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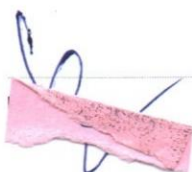
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made for supplies made by the operational creditor due to such fraud, collusion and conspiracy.

4. It is also stated that a suit had been instituted by the corporate debtor before the Hon'ble High Court at Calcutta being C.S. No.242/2017 where the operational creditor has been impleaded as defendant and the said suit is pending for adjudication. According to the Ld. Counsel for the operational creditor, such suit had no relevance to the proceedings under Sec.9 as it pertains to the alleged misconduct of its own employee. It is not a money suit and relief has been sought on the ground of fraud being perpetrated with its employee being in connivance with the respondent and on no other ground.

5. Ld. Counsel thereafter, contended that dispute was not with the operational creditor and referred to para 184 of reply of corporate debtor wherein no dispute regarding quantum and quality had been mentioned. It was also contended that the purchase orders were issued even after removal of the said employee of the corporate debtor and referred to pages 21 to 55 of the petition which contained purchase orders issued after 3/8/2016. It was also contended payment was also made after removal of such person. According to Ld. Counsel there was no dispute regarding claim of operational creditor in terms of provision of Sec.5(6) of Insolvency & Bankruptcy Code, 2016.

6. Ld. Counsel further emphasised on the fact that dispute was to be segregate as bona fide or malafide and in the present case the reliefs sought in the suit were of the nature of damages which was not a ground to hold that there existed a dispute prior to filing of application under Sec.9 of Insolvency & Bankruptcy Code, 2016. For this proposition, Ld. Counsel relied on the decision of the Hon'ble Supreme Court in the case of Mobilox Innovations Pvt. Ltd. vs. Kirusa Software Pvt. Ltd reported in (2018) 1SCC 533 para 5, 23, 48, 51 and 57.



Ld. Counsel also referred the case of Gandhar Oil Refinery (India) Ltd. vs. Ankit Mills and Power Ltd. (2018) SCC Online NCLAT 9743. In the rejoinder, it was also contended that the decision relied upon was factually different. He, in particular, submitted that the decision of the Hon'ble NCLAT in the case of Reliance Infra reported in (2017) SCC Online NCLAT 218 was pertaining to separate work order which was by itself an independent agreement with arbitration clause, hence, factually different altogether with the case in hand. Hence, the ratio of the decision was not at all applicable.

7. We have considered the submissions made by both the sides and perused material on record. It is noted that the purchase orders have been placed by the Corporate Debtor on the Operational Creditors for procurement of supply from time to time. On all such purchase orders it is noted that in addition to Senior General Manager signatures of General Manager (Finance) also exist. In some cases designation of employees do not appear but invariably purchase orders have been signed by two persons. In the suit filed by the Corporate Debtor only Senior General Manager and other suppliers/vendors have been made party and the other signatory to the purchase orders has not been made a party. In the petition, it has been mentioned that complaints started flowing in from large number of suppliers regarding malpractices adopted by officers in supply chain management department but not even a single complaint has been brought on record. The letters from the vendors/suppliers for release of outstanding payment have been pledged at page 153 to 157 of the reply affidavit and Corporate Debtor in the said suit has relied on such letters to justify its claim of collusiveness which, in our view, do not help this cause of the Corporate Debtor. On the basis of several judicial decisions it has been claimed that merits of the suit or its bona fides cannot be looked into by the Tribunal in view of the

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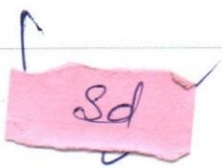
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provisions of section 8(2) readwith section 5(6) of IBC, 2016. No doubt IBC is a summary proceeding and in such proceedings the Tribunal is not supposed to act as an Trial Court. It is also not expected that what would be the fate of suit/disputed. Ultimately and at the stage of admission what is to be looked upon is that there is a pre existing dispute as regard to the claims made by an Operational Creditor or not. The dispute has been defined in section 5(6) of the IBC, 2016. The said section is reproduced as under:-

- “ 5(6)- “ Dispute” includes a suit or arbitration proceedings relating to-*
- (a) the existence of the amount of debt;*
 - (b) The quality of goods or service; or*
 - (c) The breach of a representation of warranty;*

8. In the present case, none of the conditions mentioned in the said section exist in the suit filed by the Corporate Debtor in a sense that the suit is in the realm of allegation and that too with reference to misconduct mainly of its employee. It is also settled by judicial decision that dispute must not be frivolous and should not have been created to avoid payment of legitimate debts. It is further observed that several suppliers have been impleaded and operational creditor is one of them, hence, such suit does not specifically dispute the claim of operational creditor only. This fact by itself is sufficient to make the contention of corporate debtor devoid of merits. If such kind of mechanism adopted by the corporate debtor is allowed in the IBC proceedings then none of the Operational Creditors would ever be able to initiate CIRP and thus, the very object of the IB Code would be defeated.

9. We have carefully gone through all the decisions cited by the Corporate Debtor which are factually different and hence not applicable to the present case. On the contrary, the decision as cited by the Operational Creditor lends credibility to its claim that it was internal arrangement of the Corporate Debtor



which was not functioning properly then no fault could be found with the claims of outside parties. In the facts of the present case this ratio is squarely applicable particularly when no material has been brought on record by the Corporate Debtor to substantiate its claim within the meaning of provisions of section 5(6) of IB Code 2016.

10. It reveals from the record that the applicant has not proposed any name of Interim Resolution Professional as per provisions of Sec.9(4) of the Insolvency & Bankruptcy Code, 2016. Hence, we approve the name of Shri Samya Sengupta, having registration No.IBBI/IPA-001-P00098/2017-18/10198 Mob No.9830129973 email samyax@gmail.com as IRP as he is qualified and no disciplinary proceedings are pending against him.

11. That application filed under section 7 of IBC is complete in all respects and complies with the requirements of IB Code read with relevant regulations and the debt is not barred by limitation. Accordingly, we admit the same and order as under:-

ORDER

- i. The application filed by the Operational Creditor under section 9 of the Insolvency & Bankruptcy Code, 2016 for initiating Corporate Insolvency Resolution Process against the Corporate Debtor, Apeejay Tea Limited is hereby admitted.
- ii. We declare a moratorium and public announcement in accordance with Sections 13 and 15 of the IBC, 2016.
- iii. Moratorium is declared for the purposes referred to in Section 14 of the Insolvency & Bankruptcy Code, 2016. The IRP shall cause a public announcement of the initiation of Corporate Insolvency Resolution Process and call for the submission of claims under

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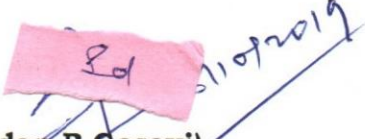
Section 15. The public announcement referred to in clause (b) of sub-section (1) of Section 15 of Insolvency & Bankruptcy Code, 2016 shall be made immediately.

- iv. Moratorium under Section 14 of the Insolvency & Bankruptcy Code, 2016 prohibits the following:
 - 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 (54 of 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.
- v. The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated, suspended, or interrupted during moratorium period.
- vi. 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.
- vii. The order of moratorium shall have effect from the date of admission till the completion of the corporate insolvency resolution process.

- viii. 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.
- ix. Necessary public announcement as per Section 15 of the IBC, 2016 may be made.
- x. Shri Samya Sengupta, having registration No.IBBI/IPA-001-P00098/2017-18/10198 Mob No.9830129973 email samyax@gmail.com is appointed as Interim Resolution Professional for ascertaining the particulars of creditors and convening a Committee of Creditors for evolving a resolution plan.
- xi. The Operational Creditor to pay a sum of Rs.2,00,000/- (Rupees Two lakh only) to IRP as advance fee as per Regulation 33(2) of IBBI (Insolvency Resolution Process for Corporate Persons) Regulation 2016 which shall be adjusted from final bill. In case further funds are required during Corporate Insolvency Resolution Process and if not provided by Committee of Creditors then IRP/RP can approach this Tribunal for that purpose.
- xii. The Resolution Professional shall conduct CIRP in time bound manner as per Regulation 40A of IBBI (Insolvency Resolution Process for Corporate Persons) Regulation, 2016.
- xiii. Registry is hereby directed under section 7(7) of the I.B.Code, 2016 to communicate the order to the Operational Creditor, the Corporate Debtor and to the I.R.P. by Speed Post as well as through e-mail.

12. List the matter on 29/11/2019 for the filing of the progress report.
13. Certified copy of the order may be issued to all the concerned parties, if applied for, upon compliance with all requisite formalities.


(Virendra Kumar Gupta)
Member (T)


(Madan B Gosavi)
Member (J)

Signed on 18th October 2019