BEFORE THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH
COURT- III

IB-1924/ND/2019

U/S. 9 of the IBC, 2016 and Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority), Rule, 2016

IN THE MATTER OF

M/s Satkar Logistics Private Limited
Reg. Office at:-
B-72, 2nd Floor, Rohit House,
Vishwakarma Colony,
Tughlakabad, M.B. Road,
New Delhi-110044 ...Operational Creditor

Versus

M/s Ambassador Logistics Private Limited
Reg. Office at:-
1899, 1st Floor, Opp. NDSE-I,
Uday Chand Marg,
Kotla Mubarakpur
New Delhi-110003 ...Corporate Debtor

Delivered on 11.02.2022

Coram:

Shri Bachu Venkat Balaram Das
Hon'ble Member (Judicial)

Shri Narender Kumar Bhola
Hon'ble Member (Technical)

Appearances:

Operational Creditor : Adv. Sukhbir Singh & Associates
Corporate Debtor: Adv. Dhruv Gupta

ORDER

Per: Narender Kumar Bhola, Member (Technical)

1. Under consideration is IB-1924/ND/2019 filed under Section 9 of the Insolvency & Bankruptcy Code, 2016 (hereinafter referred as 'IBC, 2016') R/w Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. The Operational Creditor, M/s Satkar Logistics Private Limited is seeking an Order to initiate Corporate Insolvency Resolution Process (hereinafter referred as 'CIRP') against the Corporate Debtor viz., M/s Ambassador Logistics Private Limited, declare moratorium and appoint Interim Resolution Professional (hereinafter referred as 'IRP').

2. The Operational Creditor/Petitioner has averred as follows: -

   a. The present petition is filed by the Operational Creditor for an operational debt of Rs. 6,66,667/- (Rupees Six Lakh Sixty-Six Thousand Six Hundred Sixty-Seven Only) which is due and payable by the Corporate Debtor along with an agreed interest at 24% per annum w.e.f. 19.10.2016 till realisation. The Operational Creditor and the Corporate Debtor were in regular business transactions as the operational creditor had rendered management/logistics services such as ocean freight charges, B/L charges, IHC/THC charges etc. to the Corporate Debtor for which various invoices were raised from time to time as per the terms and conditions contained in the said invoices by the Operational Creditor.

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b. It is submitted that over a period of time, the parties had been maintaining a running account. The Corporate Debtor has made some part payments against the said invoices which were adjusted by the Operational Creditor as "First in First Out method" and an outstanding amount of Rs. 6,66,667/- (Rupees Six Lakh Sixty-Six Thousand Six Hundred and Sixty-Seven Only) became due and payable by the Corporate Debtor along with an agreed interest @ 24% per annum.

c. Notice u/s 8 of IBC, 2016 was issued by the Operational Creditor on 27.02.2019 and same was replied by the corporate debtor on 07.03.2019. Since no payment has been made by Corporate Debtor, therefore, the present petition.

3. The Corporate Debtor has also filed reply to the captioned petition and submitted that there is pre-existing dispute as evident from the reply filed by the corporate debtor to the demand notice u/s 8 of IBC, 2016 brief of the same is as follows:

i. One additional (Second) Invoice Docket no. 172 Jun/2014-15 Dated 22nd Nov 2014 for Rs. 90,337.00/- (Rs. ninety thousand three hundred thirty-seven only) was raised after 4 months of actual date of shipment 10th July 2014. The same was brought to the notice of respondent in month of December 2014 when a/c statement by Satkar logistics Pvt. Ltd. was generated. Immediately, the respondent had raised their concern & issue with Mr. Rajan, Mr. Ronald & Accounts department as there was no such charges quoted to as at the time of shipment and no additional (second Invoice) was received at that point of time. The same is evident from e-mails exchanged between the parties. It is further stated that the claim is barred by law of limitation.

ii. The second Invoice no. Slpl-15-16/3317 raised on 04.01.2016 for Rs. 1,18,315.00/- for shipment with applicant in month of March 2015, after 11 months and rate was not same which was agreed with Mr. Rajan as per agreed rate Invoice amount should be Rs. 51,057.00.

iii. The payment made to Satkar Logistics Pvt. Ltd A/C Kotak Mahindra Bank A/C No.02052980000012 through our Bank, The Nainital bank Ltd. Cash credit A/C No.-0546000000000044 for Rs. 2,61,439.00, which has not been accounted in Satkar Logistics Pvt Ltd (A/c Statement & Books) has not been accounted for by the applicant in their books of account and thus not rendered the correct ledger and books of account.

iv. A refund payment of F.Y. 2014-15 & 2015-2016 of Rs. 2,42,978.00/- which was approved & confirmed by Mr. Mohd Shamim & Mr. Kuwar Pal (Finance Dept.). The email dated 1.5.2017 stating above amount will be adjusted against respondent's payments but till date not paid or adjusted in applicant's Account statement.

v. TDS amount of Rs. 24,589.00/- for F.Y. 2013- 2014 & 2014-2015 has not been credited in applicant's statement of account as evident from TDS certificate(s) thereby showing excess inflated debit balance in applicant's books of account.

vi. Closing balance of F.Y. 2014-15 and opening balance for F.Y. 2015-16 is not same as per applicant's account statement supplied to respondent, furthermore, as per the ledger's accounts of the respondent, nothing is due and payable to the applicant as evident from the ledger of the applicant in respondent's books of account for F.Y. 2014-15, 2015-16 and 2016-17.

It is further argued that the corporate debtor's financial condition is sound and running into profit and it is operational creditor against

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which proceeding under IBC is pending, hence, prayed that the petition may be dismissed in view of the circumstances discussed above.

4. The Operational Creditor also filed the rejoinder and denied all the contentions and averments raised by the corporate debtor and further submitted that the alleged dispute was raised only after receipt of section 8 notice. This Adjudicating Authority vide order dated 15.07.2021 directed the Operational Creditor to file supplementary Affidavit within 4 weeks. The Operational Creditor in compliance of above direction filed supplementary affidavit and submitted that the corporate debtor has admitted to avail the services of the operational creditor with respect to different invoices and due to delay in raising of invoices do not mitigate the admitted liability of corporate debtor. It is further stated that the Corporate Debtor is guilty of concealing the fact in respect of availing the services of Operational Creditor for M/s A-One Hydraulics A/C Ambassador Logistics Pvt. Ltd. for Rs. 76717.00/-, M/s Ferolite Jointing A/C Ambassador Logistics Pvt. Ltd. for Rs. 70000.00, Ferolite Jointing A/C Ambassador Logistics Pvt. Ltd. for Rs. 67072.00/- and Ambassador Logistics Pvt. Ltd. (NVOCC) for Rs. 47650.00/-. Said services were availed by Corporate Debtor in the form of Non- Vessel Operator Common Carrier for M/s A-One Hydraulics and M/s Ferolite Jointing which are already reflected in separate ledgers of M/s A-One Hydraulics and M/s Ferolite Jointing. Said services were availed by the corporate debtor in the name of said firms, therefore payment was also made by the Corporate Debtor hence said payment cannot be credited in favour of the Corporate Debtor. Operational Creditor had been preparing separate ledger accounts for said firms and the claimed amount has already been credited in said ledgers. Said debt amount comes to Rs. 2,61,439/- payable by corporate debtor and it cannot rum from its liability. It is further stated with respect to the alleged refund

amount that there is no agreement between the corporate debtor and operational creditor and with respect to TDS amount, it is submitted that corporate debtor has failed to raise the form-16A in favour of operational creditor and it cannot blame the operational creditor for its own acts of omission, commission and illegality. It also submitted that corporate debtor deducted the TDS amount and not deposited the same nor provided the certificate to the operational creditor, therefore, operational creditor has reversed the entry on 31st March 2015, hence, the difference of Rs. 33,534/- is reflected in the closing balance for FY 2014-15 and opening balance for FY 2015-16.

5. The Petitioner has also filed the written submission and reiterated all the facts already discussed above and further submitted that the petition is filed within 3 years after the last payment made by corporate debtor on 19.10.2016 and relied on Hon'ble Apex Court judgment in *Dena Bank (now Bank of Baroda) versus C. Shivakumar Reddy and Anr. in Civil Appeal No. 1650 of 2020.* It was held by Hon'ble Supreme Court that in view of the admission on the part of corporate debtor, the application shall not be barred by limitation. It is also stated that corporate debtor has tried to mislead this adjudicating authority by making false averments. It is further stated that the Corporate debtor has also admitted the operational debt amount of Rs. 6,66,667/- as evident from ledger account. At the end it is submitted that there is no pre-existing dispute within the ambit of section 5(6) of IBC, 2016, hence, prayed that this is the fit case for admission.

6. The Corporate Debtor also filed its Written Submission reiterated all the contentions already raised in the reply and submitted that the petition is barred by the limitation and relied on Hon'ble Supreme Court in the matter of *B.K. Education Services Private Limited v. Parag Gupta and*

Associates [Civil Appeal No. 23988 of 2017]. It was held that the limitation being procedural in nature will apply retrospectively but will not operate to revive a dead remedy. The provisions of I & B Code cannot suddenly revive a debt which is no longer due as it is time barred. Finally, it was also held that the limitation act is applicable to applications u/s 7 and 9 of IB Code, and Article 137 of Limitation Act gets attracted. It is further submitted that there is genuine pre-existing dispute and prayed that the petition is not maintainable in the light of Hon'ble Supreme Court judgment in the matter of *Mobilox Innovations Private Limited v. Kirusa Software Private Limited [civil appeal 9405 of 2017]*

7. We have heard Ld. Counsels for both the parties at length, perused the application before us as well as the written submissions filed by the parties. The case laws relied upon by both sides have also been considered by us. It is seen that Operational Creditor has issued notice under section 8 of the Code on 27.2.2019 and the said notice has been duly replied by Corporate Debtor on 7.3.2019, and the present Application has been filed on 14.8.2019. In its reply dated 7.3.2019 the Corporate Debtor has only raised issues with regard to certain payments not being accounted for by Operational Creditor and nothing is shown/claimed as being prior existing dispute between the parties. It is seen from copy of ledger account annexed with Section 8 notice that parties are having running account in respect of various invoices raised by Operational Creditor for the logistics/freight services provided by it to the Corporate Debtor during the period from 1.4.2014 to 18.2.2019. The last invoice as recorded in the said ledger account is no. SLPL/15-16/3317 dated 4.1.2016 for Rs. 1,18,315/- and the last payment received from Corporate Debtor is on 19.10.2016 of Rs. 94,064.

8. It is further seen from copies of invoices enclosed with Demand Notice dated 27.2.2019 u/s 8 of the Code sent to the Corporate Debtor that all Invoices (page 101 to 158 of the Application) are made out in Corporate Debtor's name and duly accounted for in Ledger account of Corporate Debtor. The Operational Creditor has been able to establish debt and default on part of Corporate Debtor with regard to these invoices. Corporate Debtor has not provided any cogent evidence in support of its contention with regard to any pre-existing dispute, prior to the issuance of Demand Notice. In defence to the said notice, it has only raised certain issues which are at best related to reconciliation of certain payments.

9. In view of the above discussion, we are convinced that Operational Creditor has made out case against Corporate Debtor for initiation of CIRP under the Code due to non-payment of Operational Debt of Rs. 6,66,667.40. The present application has been filed on 14.8.2019 with the last payment admittedly having been made by Corporate Debtor on 19.10.2016 on running account basis, the same is held to be within limitation u/s 137 of the Limitation Act. Therefore, this Authority admits the present Application under section 9 (5) of the I & B Code, 2016.

10. Since the operational creditor has not proposed the name of the IRP, the Tribunal hereby appoints Ms. Gunjan Mittal, with registration number IBBI/IPA-003/IP-N00361/2021-2022/13756, email: (ip.gunjanmittal@gmail.com) who is and hereby appointed as the Interim Resolution Professional subject to the condition that no disciplinary proceedings are pending against such an IRP named who may act as an IRP in relation to the CIRP of the Corporate debtor and specific consent should be filed in Form 2 of Insolvency and Bankruptcy Board of India (Application to Adjudicating Authority) Rule, 2016 and make disclosures as required under IBBI (insolvency Resolution Process for Corporate

Persons) Regulations, 2016 within a period of one week from the date of this order.

11. We direct the Operational Creditor to deposit a sum of Rs. 2 lacs with the Interim Resolution Professional, namely Ms. Gunjan Mittal, to meet out the expense to perform the functions assigned to her 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 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.

12. 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 and following shall remain prohibited during the moratorium:

a. The institution of suits or continuation of pending suits or proceedings against the respondent 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 respondent 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 respondent 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 respondent.

However, during the pendency of the moratorium period, the provisions of Section 14(2) to 14(4) of the Code shall come in force.

13. A copy of this order shall be communicated to the operational creditor, 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. operational creditor is also directed to provide a copy of the complete paper book to the IRP. A copy of this order be also sent to the ROC for updating the Master Data. ROC shall send compliance report to the Registrar, NCLT.

-s-d-

(Bachu Venkat Balaram Das)
Member (Judicial)

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(Narender Kumar Bhola)
Member (Technical)