

IN THE NATIONAL COMPANY LAW TRIBUNAL
ALLAHABAD BENCH
Company Petition (IB)No.290/ALD/2019

In the matter of:
The Insolvency and Bankruptcy Code,2016

AND

In the matter of:
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 :

MANOJ KUMAR DAS

.....Operational Creditor/ Applicant.

VERSUS

HORIZON DWELLINGS PVT. LTD.

.....Corporate Debtor/Respondent.

ORDER DELIVERED ON :10.06.2020

CORAM:

Hon'ble Mr. Justice (Retd.) Rajesh Dayal Khare, Member, Judicial

For the Operational Creditor: Mr. Nirnay Gupta, Advocate
For the Corporate Debtor: Mr. Abhijeet Mukherji, Advocate

Per se: Mr. Justice (Retd.) Rajesh Dayal Khare, Member (Judicial)

Order

1. The present petition is filed under Section 9 of Insolvency and Bankruptcy Code,2016 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rule,2016 by the Applicant/ operational creditor, i.e. "**Manoj Kumar**" for initiation of Corporate Insolvency Resolution Process against the Respondent/ Corporate Debtor Company "**Horizon Dwellings Pvt. Ltd.**"

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2. As per averments made in the petition , the operational creditor and the corporate debtor has entered into an agreement dated 19.09.2013 for the period of 36 months and a monthly consideration of Rs. 1,50,000/- for the first 2 years and Rs 1,65,000 for the last year was agreed which was duly cleared by the corporate debtor and subsequently the said agreement was renewed for the period of 3 years and the operational creditor used to provide advisory to the corporate debtor.
3. Further, it is contended that the petitioner rendered the services as per the terms of contract, and when the various invoices, which were raised for the payment of the services provided by the petitioner, the same was not paid in full and only part payment of about Rs.8 Lakhs was made in total by the respondent in the month of November 2017 and April 2018, without even intimating against which invoices the said amount was paid to the petitioner and when the remaining amount was not paid by the respondent inspite of repeated demand, notice under Section 8 of IBC was given to the respondent by the petitioner on 26.02.2019, **a copy of which is appended in the paper book as Annexure-H of the application.**
4. Further for the outstanding amount, several request were made to the corporate debtor to pay off the debts but no reply was received, thereafter the operational creditor issued demand notice Under Section 8 of the IBC,2016 dated 26.02.2019 demanding a total sum of Rs.33,42,483.83/-which was duly received by the respondent (**The Copy of demand notice along with the delivery report is annexed as Annexure-H of the application**) and despite demand notice being

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delivered to the Corporate debtor, no reply to the said demand notice nor any payment of the due amount has been made till the date of application. The respondent has therefore filed this petition as an operational creditor praying for initiation of Corporate Insolvency Resolution Process of the Corporate Debtor for its inability to liquidate the claim. Affidavit in compliance under Sec 9(3)(b) and Sec 9 (3)(c) of the Code are on record to corroborate the case.

5. Pursuant to the court notice issued to the Corporate Debtor, reply was filed and it was submitted by the corporate debtor that there is an existence of dispute with respect to the quantum of the amount and it was argued by the counsel by the corporate debtor that the entire amount, which is due and liable to be paid, has already been paid to the petitioner and no further amount is liable to be paid and therefore contended that the present petition is not maintainable and exorbitant arbitrary amount has been raised by the petitioner, which is not tenable in law.

6. Further it is also argued by the corporate debtor that there is deficiency of quality of service provided by the operational creditor and further as per the agreement, it is mandatory that all the disputes between the parties have to be resolved by the sole arbitrator and further it support of his contention the learned counsel for the corporate debtor has relied upon the judgment of Hon'ble NCLAT, passed in the matter ***Drulum India Pvt. Ltd. v/s Sharma Kalypso Pvt. Ltd.***

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7. It is further contended that the according to the judgment of apex Court in **Mobilox Innovations** , the dispute between the parties is related to plausible dispute and it is also stated in the counter filed by the corporate debtor that the balance amount due and payable by the corporate debtor at best is Rs. 7,67,664/- and the corporate debtor is ready to pay.
8. In reply to this, the counsel for the operational creditor has relied upon the judgment of NCLT, Delhi Bench in the matter of **M/s Suresh Chand & Sons LLP v/s M/s Bright Buildtech Private Limited** and argued that the dispute regarding the quantum of debt would not amount to pre-existing dispute and also argued that the order of NCLAT in **Drulum India Pvt. Ltd. v/s Sharma Kalypso Pvt. Ltd.** on which the petitioner has relied has been stayed by the Hon'ble Apex Court, the copy of which has been produced before the court.
9. I have gone through the documents filed by the parties and heard the arguments by both the counsels. This Adjudicating Authority is observing that:
- a) The operational creditor has provided all the necessary documents required for proving that the debt has been defaulted. While going through the agreement, copy of invoices and the bank account statement of the operational creditor, it was observed that it is admitted fact that there is work relation between the Operational Creditor and the Corporate Debtor whereby operational creditor provided service to the corporate debtor and only part payment was made for the same. The Corporate Debtor has not disputed or denied the fact that there was a work relation between the parties.

b) Further relying on the judgment of Hon'ble NCLAT in the matter of **"Manjeeet Kaur Sran vs. Tricolite Electrical Industries Ltd"** **Company Appeal (AT)(Insolvency) No. 894 of 2019** in which it was observed :

"11. In view of the decision of Hon'ble Supreme Court in "Innoventive Industries Ltd. Vs. ICICI Bank (2018) 1 SCC 407", the Hon. Supreme Court will consider the question of application u/s 7 and 9 observed as follows:-

"27. The scheme of the Code is to ensure that when a default takes place, in the sense that a debt becomes due and is not paid, the insolvency resolution process begins. Default is defined in Section 3(12) in very wide terms as meaning non-payment of a debt once it becomes due and payable, which includes non-payment of even part thereof or an instalment amount. For the meaning of "debt", we have to go to Section 3(11), which in turn tells us that a debt means a liability of obligation in respect of a "claim" and for the meaning of "claim", we have to go back to Section 3(6) which defines "claim" to mean a right to payment even if it is disputed. The Code gets Company Appeal (AT)(Insolvency) No. 894 of 2019 admin 5 triggered the moment default is of rupees one lakh or more (Section 4). The corporate insolvency resolution process may be triggered by the corporate debtor itself or a financial creditor or operational creditor. A distinction is made by the Code between debts owed to financial creditors and operational creditors. A financial creditor has been defined under Section 5(7) as a person to whom a financial debt is owed and a financial debt is defined in Section 5(8) to mean a debt which is disbursed against consideration for the time value of money. As opposed to this, an operational creditor means a person to whom an operational debt is owed and an operational debt under Section 5(21) means a claim in respect of provision of goods or services.

28. When it comes to a financial creditor triggering the process, Section 7 becomes relevant. Under the explanation to Section 7(1), a default is in respect of a financial debt owed to any financial creditor of the corporate debtor- it need not be a debt owed to the applicant financial creditor. Under Section 7(2), an application is to be made under sub-section (1) in such form and manner as is prescribed, which takes us to the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. Under Rule 4, the application is made by a financial creditor in Form 1 accompanied by

documents and records required therein. Form 1 is a detailed form in 5 parts, which requires particulars of the applicant in Part I, particulars of the corporate debtor in Part II, particulars of the proposed interim resolution professional in part III, particulars of the financial debt in part IV and documents, records and evidence of default in part V. Under Rule 4(3), the applicant is to dispatch a copy of the application filed with the adjudicating authority by registered post or speed post to the registered office of the corporate debtor. The speed, within which the adjudicating authority is to ascertain the existence of a default from the records of the information utility or on the basis of evidence furnished by the financial creditor, is important. This it must do within 14 days of the receipt of the application. It is at the stage of Section 7(5), where the adjudicating authority is to be satisfied that a default has occurred, that the corporate debtor is entitled to point out that a default has not occurred in the sense that the "debt", which may also include a disputed claim, is not due. A debt may not be due if it is not payable in law or in fact. The moment the adjudicating authority is satisfied that a default has occurred, the application must be admitted unless it is incomplete, in which case it may give notice to the applicant to rectify the defect within 7 days of receipt of a notice from the adjudicating authority. Under subsection (7), the adjudicating authority shall then communicate the order passed to the financial creditor and corporate debtor within 7 days of admission or rejection of such application, as the case may be.

"29. The scheme of Section 7 stands in contrast with the scheme under Section 8 where an operational creditor is, on the occurrence of a default, to first deliver a demand notice of the unpaid debt to the operational debtor in the manner provided in Section 8(1) of the Code. Under Section 8(2), the corporate debtor can, within a period of 10 days of receipt of the demand notice or copy of the invoice mentioned of a dispute or the record of the pendency of a suit or arbitration proceedings, which is pre-existing- i.e. before such notice or invoice was received by the corporate debtor. The moment there is existence of such a dispute, the operational creditor gets out of the clutches of the Code.

30. On the other hand, as we have seen, in the case of a corporate debtor who commits a default of a financial debt, the adjudicating authority has merely to see the records of the information utility or other evidence produced by the financial creditor to satisfy itself that a default has occurred. It is of no matter that the debt is disputed so long as the debt is "due" i.e. payable unless interdicted by some law or has not yet become due in the sense that it is payable at some future date. It is only when this is proved to the

satisfaction of the adjudicating authority that the adjudicating authority may reject an application and not otherwise."

12. From the aforesaid finding of the Hon'ble Supreme Court, it is clear that the claim even if disputed, if default is more than Rs. 1 lakh, the Appellant will initiate the proceedings against the 'Corporate Debtor'. Submission is made on behalf of the Appellant that the amount disputed by the 'Corporate Debtor' amounts to existence of dispute but such submission cannot be accepted. It does not come within the meaning of existence of dispute. Dispute raised regarding quantum of amount in the absence of any suit or arbitration or other evidence, it cannot be said to be pre-existing dispute.

In view of the foresaid decision, this Adjudicating Authority is of the view that in the present matter, even if there is a dispute regarding quantum of amount due to be paid by the corporate debtor and merely disputing the amount does not fall within the ambit of a pre-existing dispute under Sec 9 of the Code. And *the amount claimed in default is Rs. 33,42,483.83/- which is more than Rs One Lakh to trigger the Corporate Insolvency Resolution Process against the Corporate Debtor.*

c) It is matter of record that applicant filed a copy of invoices dated 13.09.2013 to 02.08.2016 and the copy of Renewal Agreement made on 15.09.2016 along with the present petition and the present petition is filed under section 9 of IB code 23.05.2019. A perusal of the same goes to show that invoices of this period are found well within the limitation **(As per section 238 A of IB Code)** to triggered the CIRP in respect of corporate debtor.

10. Therefore, the Petitioner succeeded in proving its debt and the Corporate Debtor failed to discharge its payment liability towards supply of services to corporate debtor as per its invoices. The

Corporate Debtor has not paid the outstanding debt owed to operational creditor despite demand notice delivered upon him under Sec 8 of the Code. Therefore, the amount and default on the side of the Operational Creditor stand proved in the present case. Therefore, petitioner is found entitled to initiate corporate insolvency resolution process as against the Corporate Debtor.

11. The Petitioner, in the present IB petition, has complied with Section 9 (3) (b) and 9(3) (c) by filing supporting affidavit. As the petitioner fulfils the requirement for invoking CIRP in terms of Section 9 of the Code, the present application is found complete and the default of debts is established. Hence, the present petition deserves admission.

12. Further, the present case was heard and reserved much before the notification issued of the Central Government On 24.03.2020 through Ministry of Corporate Affairs can only have prospective effect and hence the enhanced pecuniary jurisdiction of Rs.1 Crore is not applicable in the present petition.

13. Considering the facts and circumstances of the case, this adjudicating Authority is inclined to admit this petition and initiate CIRP of the Respondent Company. Accordingly, this petition is admitted. A moratorium in terms of Section 14 of the Insolvency & Bankruptcy Code, 2016 shall come into effect forthwith stating:

(1) Subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely:

(a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgement, decree or order in any court of law, tribunal, arbitration panel or other authority;

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- (b) transferring, encumbering, alienating or disposing off 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 Securitisation 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.*

Explanation.-For the purposes of this sub-section, it is hereby clarified that notwithstanding anything contained in any other law for the time being in force, a licence, permit, registration, quota, concession, clearance 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, shall not be suspended or terminated 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 or a similar grant or right during moratorium period.]

2) The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.

(2A) Where the interim resolution professional or resolution professional, as the case may be, considers the supply of goods or services critical to protect and preserve the value of the corporate debtor and manage the operations of such corporate debtor as a going concern, then the supply of such goods or services shall not be terminated, suspended or interrupted during the period of moratorium, except where such corporate debtor has not paid dues arising from such supply during the moratorium period or in such circumstances as may be specified.]

(3) The provisions of sub-section (1) shall not apply to —

- (a) such transactions, agreements or other arrangement as may be notified by the Central Government in consultation with any financial sector regulator or any other authority;*
- (b) a surety in a contract of guarantee to a corporate debtor.*

(4) The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process:

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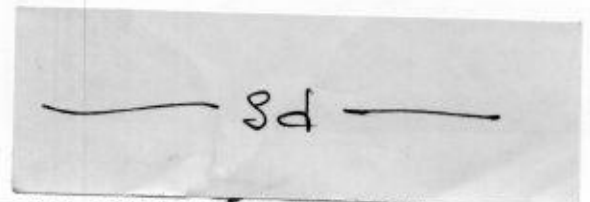
Provided that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be.

14. Since in the present matter the applicant did not propose the name of the IRP. Hence, this Adjudicating Authority hereby appoint **Mr. Abhiman Singh, Registration Number IBBI/IPA-001/IP-P01871/2019-20/12894** as Interim resolution Professional and he is further directed to cause public announcement of CIRP immediately as provided in Section 15 of the Code.

15. The registry is directed to communicate this order to Operational Creditor, as well as to Corporate Debtor and to IRP.

16. Urgent Photostat certified copies of this order, if applied for, be supplied to parties upon compliance of requisite formalities.

17. List on **07.07.2020** for the filing of the progress report.



JUSTICE RAJESH DAYAL KHARE
MEMBER (J)

Date: 10.06.2020

Swati Gupta
(LRA)

NATIONAL COMPANY LAW TRIBUNAL
ALLAHABAD BENCH

ITEM NO :4

CP NO.(IB)290/ALD/2019

ATTENDENCE - CUM-ORDER SHEET OF THE HEARING OF ALLAHABAD BENCH OF THE NATIONAL COMPANY LAW TRIBUNAL ON 10.06.2020 at 11:00 AM THROUGH VIDEO CONFERENCING.

NAME OF THE COMPANY : MANOJ KUMAR DAS, V/S HORIZON DWELLING PVT. LTD.

SECTION OF IBC : 9 OF IBC

PRESENT : HON'BLE MR. JUSTICE (RETD.) RAJESH DAYAL KHARE, MEMBER (J)

COUNSEL FOR PETITIONER : SH. NIRNAY GUPTA, ADVOCATE

COUNSEL FOR RESPONDENT : SH. ABHIJEET MUKHERJI ALONG WITH MS. SUSHMITA MUKHERJEE, ADVOCATES

CP NO.(IB)290/ALD/2019

The matter was taken up today through Video Conferencing at 11:25AM.

Order pronounced through Video Conferencing. Petition admitted. Moratorium granted. IRP appointed, vide separate ordersheet.

Put up on 7th July, 2020 for filing progress report before Regular Court/ through Video Conferencing.

Dated : 10.06.2020


JUSTICE RAJESH DAYAL KHARE
(MEMBER JUDICIAL)

Typed by :
Kavya Prakash Srivastava
(Stenographer)