# IN THE NATIONAL COMPANY LAW TRIBUNAL
# NEW DELHI
# COURT-III

**IB-385/ND/2019** filed under **Section 9** of the IBC, 2016 r/w Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

*In the Matter Of* ***M/s. Imperial Fastners Private Limited***

**M/s. Property Solutions (India) Private Limited**

...Operational Creditor

Versus

**M/s. Imperial Fastners Private Limited**

.... Corporate Debtor

*Order delivered on 29th July, 2020*

**CORAM:**

CH. MOHD. SHARIEF TARIQ
Member (Judicial)
Mr. NARENDER KUMAR BHOLA
Member (Technical)

*For Operational Creditor: Ms. Sindhu Kotian, Ms. Ankita Shankar, Advocates*

*For Corporate Debtor: Mr. Deepak Kapoor, Ms. Neha Gola, Advocates*

## ORDER

## (Through Virtual Mode)

Per: CH. MOHD. SHARIEF TARIQ, Member (Judicial).

1. Under consideration is an Application bearing No. IB-385/ND/2019, that has been filed under Section 9 of Insolvency and Bankruptcy Code, 2016 (hereinafter referred as "IBC, 2016") with the prayers to initiate the Corporate

Insolvency Resolution Process (hereinafter referred as "CIRP") against the Corporate Debtor viz., *M/s. Imperial Fastners Private Limited*, declare moratorium, appoint Interim Resolution Professional (hereinafter referred as "IRP"). The Operational Creditor has claimed an amount of Rs. 73,49,192/-, along with interest of Rs 7,00,260/- @ 21% per annum payable till 31st December, 2018 total amounting to Rs. 80,49,453/-.

2. Heard the Ld. Counsels for the Operational Creditor, the Corporate Debtor and perused the pleadings along with the documents placed on the case file.

**Brief Facts:**

3. It is stated that the Operational Creditor viz., *M/s. Property Solutions (India) Private Limited* is in the business of providing specialised services relating to facility management, pay roll payment and contracting services to its clients including companies, developers, societies, etc.

4. The Corporate Debtor approached the Operational Creditor for providing certain payroll management services. In this regard a letter of intent dated 25.04.2018 was issued by the Corporate Debtor to the Operational Creditor, wherein it was agreed that monthly fees would be paid towards the actual cost plus 7% management fees and the approximate monthly billing of Rs. 51.38 Lakhs exclusive of all applicable taxes and levies. Further, the Operational Creditor was required to raise separate invoices for the innovations and value-added services, if it could bring in cost efficiencies. On 26.04.2018 the Operational Creditor and the Corporate Debtor entered into a Facility Management Services Agreement (hereinafter referred as "Agreement") for a period of three (3) years, commencing from 01.04.2018 to 31.03.2021, on the condition that the amount would fluctuate depending upon the number of head counts of the workforce designated in the premises of the Corporate Debtor. It was further agreed that the Corporate Debtor would make payments within 5 days from the date of invoice and for any delay the amount will be charged with an interest of 2% per Annum. The copy of the letter of intent and Agreement is placed on the record.

5. The Operational Creditor performed its contractual obligation by processing pay-outs and transferred salaries into the individual bank accounts of employees of the Corporate Debtor. The Corporate Debtor had issued a letter dated 05.04.2018, wherein the Operational Creditor was asked to disburse ex-gratia amount of Rs. 32,10,107/-for the employees working for the Corporate Debtor before 27.04.2018. Further, the Corporate Debtor agreed to pay 10% management fee to the Operational Creditor on the said value and the payment was to be made as per the terms of the Agreement. The Operational Creditor received the individual bank account details of employees on 25.04.2018 and the Operational Creditor disbursed the ex-gratia amount. Thereafter, a Tax Invoice in the name of the Corporate Debtor, bearing number 0618C19001000006 for an amount of Rs. 35,88,900/-, inclusive of taxes dated 05.05.2018 was raised towards the same, and the due date was mentioned as 19.06.2018.

6. The Ld. Counsel for the Operational Creditor has submitted that the Corporate Debtor despite acknowledging the services provided and the tax invoices raised did not disburse payments. Therefore, the Operational Creditor on 17.09.2018 and 12.10.2018 has sent demand letter to the Corporate Debtor for paying the outstanding to the tune of Rs. 73,49,192. On 22.11.2018, the Operational Creditor has sent Demand notice under Section 8 of the IBC, 2016 as prescribed under clause (a) of sub-rule (1) of Rule 5 of the Insolvency & Bankruptcy (Application to the Adjudicating Authority) Rules, 2016. The Corporate Debtor replied to the notice on 04.12.2018 and raised certain issues with regard to the Agreement.

**Reply of the Corporate Debtor:**

7. The Corporate Debtor has filed reply on 18.04.2019, and submitted that in the month of October/November 2017, a Memorandum of Understanding (hereinafter referred as "MoU") was executed on 02.12.2017 between *M/s. Solven Power Private Limited* and the Corporate Debtor. The recitals of the

MoU indicate that M/s. Solven Power Systems Private Limited (herein after referred as "Operator") was appointed as the Operator on 01.12.2017, for supervision, operation, and maintenance of the project- "***Captive Power Plant***" situated at Karhara, District Bokaro, Jharkhand -16 for a period of nine years.

8. The Ld. counsel for Corporate Debtor has submitted that the Memorandum of Association (hereinafter referred as "MOA") of the Applicant does not provide for the object as is stated by the Operational Creditor in its application, therefore, it is clear that the purported Agreement is an invalid and untenable agreement, as the same is not in consonance with the Memorandum of Association of the Operational Creditor/Applicant. Further, it is submitted that there is no ***privity of contract*** between the Operational Creditor and the corporate debtor. As per Clause 1 & 2 of the MoU the operational receipts were split between the CD and the Operator viz., M/s. Solven Power Private Limited. The Operator was responsible for expenditures which includes payment of salaries of the employees of the Corporate Debtor. The Corporate Debtor further submits that as there was no consent given by the Board of Directors i.e., through a Board resolution of the Corporate Debtor for signing the Agreement with the Operational Creditor. The Signature of Mr. Jugal Kishore (authorized signatory of the Corporate Debtor, who expired on 14th August, 2018) on Page No. 2 of the agreement dated 25.04.2018 is forged. The Address of the plant in the said Agreement is, *Lepetkatta, Dibrugarh, Assam, India*, but as matter of fact, there is no power plant located at that address. It is contended by the Corporate Debtor that the Operational Creditor has not placed on file any proof of rendering services and none of the invoices dated 05.05.2018, 04.07.2018 and 26.06.2018, have been accepted/acknowledged by the Corporate Debtor or any of its authorized signatory. It is also contended that the Operational Creditor has mentioned Rs. 73,49,192/- whereas, the approximate monthly billing amount as per the Letter of Intent should have been Rs. 51.38 Lakhs. The Corporate Debtor has submitted that there could not be a second agreement with the Operational Creditor for outsourcing payroll services post signing of the MoU with the Operator and the Operational Creditor has exchanged e-mails with the

Operator and was working for and on behalf of the Operator but the power plant was shut down w.e.f. April, 2018 and no work is being carried at the power plant, therefore there was no need for payroll services at the said premises.

9. The Corporate Debtor has referred to the bank statement which is filed by the Operational Creditor, which seems to be incomplete as certain transactions as stated in the reply are missing.

10. In *reply arguments* the Ld. Counsel for the Operational Creditor has submitted as follows:

a) First, communication through e-mail was sent on 14.09.2018 for the correction of address of the plant mentioned on the page 2 of Agreement. A reply was received from the Corporate Debtor through Mr. Puneet Sagar, wherein a request was made to send the complete Agreement. Thereafter, on 13.09.2018, the Agreement, Letter of Intent and the Statement indicating Rs. 80,49,453/- with interest as outstanding was sent to the Corporate Debtor.

b) Second, the balance confirmation E-mail/letter dated 04.07.2019 also shows that the Corporate Debtor has accepted the liability and therefore the grounds of challenge to the Application stand vitiated.

c) Third, the Agreement was signed by the Corporate Debtor by agreeing to pay for the services rendered by the Operational Creditor. Therefore, the Corporate Debtor is liable to pay in the terms of the Agreement.

d) Fourth, the Corporate Debtor for the first time raised so called dispute in the reply to the demand notice dated 04.12.2018, which as per the provisions of IBC, 2016 does not constitute a "dispute". The counsel for Operational Creditor has relied upon the observation made by ***the Apex Court*** in ***Mobilox Innovations (P) Ltd. V/s Kirusa Software (P) Ltd. reported in 2018 (1) SCC 353***, wherein it is clarified that a reply to

Demand Notice should bring an "existence" of dispute and the authority is to see if the dispute is a patently feeble argument or an assertion of facts unsupported by evidence. Therefore, if the Corporate Debtor did not give such notice or raise any dispute with regard to the Operational Debt, prior to the notice of Demand. Then such a defense cannot be projected by replying to the statutory notice.

11. It is worthwhile to mention that after filing the reply the Operational Creditor filed two applications bearing number CA-349/C-III/ND/2019, CA-486/C-III/ND/2019 and prayed for bringing on record the Annexure relevant to the documents filed with the Main Petition. The Operational Creditor referred to E-mail dated 03.07.2019, whereby the Balance Confirmation was sought as on 31.03.2019 from the Corporate Debtor. The Corporate Debtor vide E-mail dated 14th July, 2019 has given balance confirmation for an amount of Rs. 67,08,502/- as on 31.03.2019. The details of Annexure are as follows: -

*(a) e-mail dated 04.07.2019 from the Corporate Debtor through Mr. Puneet Sagar along with copy of Ledger signed by the Director of the Corporate Debtor viz., Mr. Nairal Kishore, confirming the outstanding balance of Rs. 67,08,502 as on 31.03.2019 for the Financial Year 2018-19;*

*(b) Ex-Gratia Sheet for the month of March 2018;*

*(c) Disbursal Sheet for the month of March 2018;*

*(d) E-mail dated 14.09.2018 to the Corporate Debtor through Mr. Puneet Sagar, reply for the same along with outstanding statement, Page 2 of the Agreement and Letter of Intent;*

*(e) Documents filed with RoC – Form No. DIR 12, resignation letter dated 27.012.2016 of Mr. Varun Sagar and Puneet Sagar.*

*(f) NEFT transfer form dated 26.04.2018, for an amount of Rs. 8,24,917/-, Rs. 11,26,228/- and 12,58,962/- along with details of employees of the Corporate Debtor;*

*(g) NEFT transfer form dated 23.05.2018, for an amount of Rs.7,25,997/-, 16,66,280/- and 10,81,114/- along with details of employees of the Corporate Debtor.*

12. The documents mentioned above, are the part of the Communications made between the parties, of which the Corporate Debtor is aware. In view of it, no prejudice is caused to the Corporate Debtor for bringing on record the additional documents filed by the Operational Creditor. Therefore, the CA-349/C-III/ND/2019, and CA-486/C-III/ND/2019 are ***allowed*** and the documents filed are taken on record.

13. The ***first issue*** raised by the Corporate Debtor is that there is no ***privity of contract*** between the Operational Creditor and Corporate Debtor, as there is no consent of the Board of Directors of the Corporate Director for signing the said Agreement with the Operational Creditor. It is noted that the authorized signatory viz., Mr. Jugal Kishore (now expired) has signed the agreement dated 25.04.2018, entered with the Operational Creditor on behalf of the Corporate Debtor and the same person has also signed the MoU on 02.12.2017 with *M/s. Solven Power Private Limited (Operator)* on behalf of the Corporate Debtor, which is being relied upon by the Corporate Debtor. If the authority of Mr. Jugal Kishore is admitted about signing of the MoU dated, 02.12.2017 then same cannot be denied in relation to the agreement dated 25.04.2018.

14. Further, the signature of Mr. Jugal Kishore on Page No. 2 of the, agreement dated 25.04.2018 is disputed by the Ld. Counsel of the Corporate Debtor but the Signature on other pages is admitted. The reason given by the Ld. Counsel for the Corporate Debtor is that there is no signature of authorized signatory on Page No. 2 of the Agreement which was sent through E-mail communication dated 14.09.2018 by the Operational Creditor for the correction of the address of the project- "***Captive Power Plant***" situated at Karhara, District Bokaro, Jharkhand -16, which was wrongly mentioned as *Lepetkatta, Dibrugarh, Assan, India* in the Agreement. But the correction with regard to address was not made by the Corporate Debtor, as the page sent for correction did not bear the signature of the CD. Therefore, there is no question of forgery, the arguments of the counsel for the CD are misleading. However, the original Page No. 2 of the Agreement dated 25.04.2018 bears

the signature of Mr. Jugal Kishore, which is not denied. As a matter of fact, there is no power plant located at that address *Lepetkatta, Dibrugarh, Assam, India,* but it is situated at Karhara, District Bokaro, Jharkhand -16. Therefore, there appears to be mere typographical error in relation to the address of the Plant in the Original Page No. 2 of the Agreement dated 25.04.2018 which bears the signature of Mr. Jugal Kishore, who was the authorized signatory of the CD.

15. It is also contended by the Ld. Counsel for the Corporate Debtor that the Operational Creditor has not placed on file any proof of rendering services and none of the invoices dated 05.05.2018, 04.07.2018 and 26.06.2018, have been accepted/acknowledged by the Corporate Debtor or any of its authorized signatory. It is also contended that the Operational Creditor has mentioned Rs. 73,49,192/- whereas, the approximate monthly billing amount as per the Letter of Intent should have been Rs. 51.38 Lakhs but these submissions are contrary to the documentary evidence placed on record by the Operational Creditor e.g., *(a) e-mail dated 04.07.2019 from the Corporate Debtor through Mr. Puneet Sagar along with copy of Ledger signed by the Director of the Corporate Debtor viz., Mr. Nairal Kishore, confirming the outstanding balance of Rs. 67,08,502 as on 31.03.2019 for the Financial Year 2018-19; (b) Ex-Gratia Sheet for the month of March 2018; (c) Disbursal Sheet for the month of March 2018; (d) E-mail dated 14.09.2018 to the Corporate Debtor through Mr. Puneet Sagar, (e) reply for the same along with outstanding statement, Page 2 of the Agreement and Letter of Intent; (f) NEFT transfer form dated 26.04.2018, for an amount of Rs. 82,4,917/-, Rs. 1,126,228/- and 12,58,962/- along with details of employees of the Corporate Debtor; (g) NEFT transfer form dated 23.05.2018, for an amount of Rs.7,25,997/-, 16,66,280/- and 10,81,114/- along with details of employees of the Corporate Debtor.*

16. In the light of the above, the dispute projected by the Corporate Debtor is mere conjecture, surmise, and spurious in nature, the same stands rejected. On the basis of the documentary evidence, the Operational Creditor has clearly established that there is debt, which is due, payable and the Corporate Debtor has defaulted in making the payment. All the requirements are met by

the Operational Creditor including the compliance with Section 9 (3) (b) & (c) of the IBC, 2016. Therefore, Application is ***admitted*** in terms of Section 9 (5) of the IBC, 2016 and the commencement of the Corporate Insolvency Resolution Process is ordered, which ordinarily shall be completed within 180 days, reckoning from the day this order is passed.

17. The moratorium is declared which shall have effect from the date of this Order until the completion of CIRP, for the purposes referred to in Section 14 of the IBC, 2016. It is ordered to prohibit 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 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 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.

18. The supply of essential goods or services of the Corporate Debtor shall not be terminated or suspended or interrupted during moratorium period. The provisions of Sub-section (1) of Section 14 shall not apply to such transactions, as notified by the Central Government.

19. The Operational Creditor has proposed the name of Mr. Sanyam Goel, Insolvency Professional for appointment as IRP, Form-2 is filed which provides that he is currently serving as Resolution Professional in one proceeding and he is eligible to be appointed and that no disciplinary

proceedings are pending against the IRP. The IRP is directed to take charge of the Respondent Corporate Debtor's management immediately. He is directed to cause public announcement as prescribed under Section 15 of the IBC, 2016 within three days from the date the copy of this order is received, and call for submissions of claim in the manner as prescribed. The details of IRP are as under:

Name: Mr. Sanyam Goel
Registration number: IBBI/IPA-002/IP-N00138/2017-18/10397
E-mail: goelsanyam@gmail.com
Mobile: 9810868515
Address: Unit No. 110, First Floor, JMD Pacific Square,
Sector 15, Part II, Gurugram, Harayana-122001

20. The IRP shall comply with the provisions of Sections 13 (2), 15, 17 & 18 of IBC, 2016. The Directors of the Corporate Debtor, its Promoters or any person associated with the Management of the Corporate Debtor are/is directed to extend all assistance and cooperation to the IRP as stipulated under Section 19, so that he could discharge his functions under Section 20 of the IBC, 2016.

21. The Operational Creditor and the Registry are directed to send the copy of this Order to IRP, so that he could take charge of the Corporate Debtor's assets etc., and make compliance with this Order as per the provisions of IBC, 2016.

22. The Registry is directed to communicate this Order to the Operational Creditor and the Corporate Debtor with immediate effect.

23. Accordingly, IB No. 385/ND/2019 stands ***allowed***.

24. The Order is pronounced.

-Sd-

**(NARENDER KUMAR BHOLA)**
**Member (Technical)**

-S-d-

**(CH. MOHD. SHARIEF TARIQ)**
**Member (Judicial)**

This order of the Bench consisting of the above mentioned members was pronounced by one of the member on behalf of the Bench Rule 151 of NCLT Rules, 2016