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**BEFORE THE ADJUDICATING AUTHORITY
NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD BENCH
AHMEDABAD
Court 2**

CP(IB) 686 of 2019

**Coram: HON'BLE Ms. MANORAMA KUMARI, MEMBER JUDICIAL
HON'BLE Mr. CHOCKALINGAM THIRUNAVUKKARASU, MEMBER TECHNICAL**

**ATTENDANCE-CUM-ORDER SHEET OF THE HEARING OF AHMEDABAD BENCH
OF THE NATIONAL COMPANY LAW TRIBUNAL ON 12.03.2021**

Name of the Company: Mohit Minerals Ltd.
V/s
Nidhi Impotrade Pvt. Ltd

Section 9 IBC,2016

<u>S.NO.</u>	<u>NAME (CAPITAL LETTERS)</u>	<u>DESIGNATION</u>	<u>REPRESENTATION</u>	<u>SIGNATURE</u>
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1.
2.

ORDER

None appeared on behalf of the parties.

The order is pronounced in the open court vide separate sheet.


**CHOCKALINGAM THIRUNAVUKKARASU
MEMBER TECHNICAL**

Dated this the 12th day of March, 2021


**MANORAMA KUMARI
MEMBER JUDICIAL**

**BEFORE ADJUDICATING AUTHORITY (NCLT)
AHMEDABAD BENCH
AHMEDABAD**

C.P. No. (IB) 686/9/NCLT/AHM/2019

In the matter of:

M/s. Mohit Minerals Limited

(Earlier known as Mohit Minerals Private Limited)

19-20, First Floor,

TDI Mall, Moti Nagar

New Delhi 110 015

:

Petitioner

Operational Creditor

Versus

M/s. Nidhi Impotrade Private Limited

Office No. 2, 11th Floor

Icon Business Center

Opp. Central Mall, Piplod

SURAT 395 007

GUJARAT STATE

:

Respondent

[Corporate Debtor]

Order delivered on 12th March, 2021

Coram: Hon'ble Ms. Manorama Kumari, Member (J)

Hon'ble Mr. Chockalingam Thirunavukkarasu, Member (T)

Appearance:

Petitioner : Mr. Mrityunjay Tiwari, Advocate with
Mr. Bhash Mankad, Advocate
Respondent : Mr. Pavan Godiawala, Advocate with
Mr. Naishal Mody, Advocate

ORDER

Per se : Ms. Manorama Kumari, Member (Judicial)

1. Mr. Kishore Ramchandani, authorised signatory of **M/s. Mohit Minerals Limited** filed this Petition under Section 9 of The Insolvency and Bankruptcy Code, 2016 [hereinafter referred to as "the Code"] read with Rule 6 of The Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 [hereinafter referred to as "the Rules"], as operational creditor/applicant.



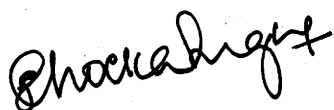


2. The applicant/operational creditor is a limited company registered on 29th July, 2004 under the provisions of Companies Act, 1956 having identification No. U14292DL2004PLC127951 and having its registered office at Moti Nagar, New Delhi and engaged in the business of trading and supply of coal to various countries.
3. The respondent/corporate debtor is a private limited company registered under the provisions Companies Act, 1956 on 17th June, 2009 and having identification No. U51900GJ2009PTC057285 and having registered office at Surat, Gujarat State. Authorised share capital of the respondent company is Rs. 10,00,000/- and paid up share capital is Rs. 2,00,000/-
4. The applicant during the course of its business, was contacted by the corporate debtor for long term business relation and specifically for the purchase and import of coal of Indonesian Origin. That, believed upon credence and assurance, the operational creditor entered into a sale-purchase arrangement with the corporate debtor and subsequently, corporate debtor started to place purchase orders for supply of material at its designated site. Accordingly, supply of material had taken place and various invoices were raised against each successful supply of materials and such material were duly accepted by the corporate debtor without any complaint. That, in the initial period of sale agreement, payment of the invoices was made by the corporate debtor by issuing cheque of the same amount as reflected in the invoices.
5. The applicant has further stated that the business between the parties grew, but, the corporate debtor started delaying payments and the difference between the amounts of invoices raised and payments received started to grow.

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Attorney

6. The applicant has further stated that in the month January, 2018, the operational creditor contacted the representatives of the corporate debtor and expressed its apprehensions and difficulty due to delay in payments of the invoices. The Corporate debtor, while admitting its liability for the payment of huge outstanding amount of Rs. 1,58,12,174/- against the outstanding invoices, issued 22 cheques, all drawn on ICICI Bank, Bhatar Branch, Surat to discharge its partial liability against the aforesaid outstanding amount, with assurance that, in case the corporate debtor could not pay the outstanding invoices within the period mutually agreed, then the operational creditor is at discretion to deposit the cheques for encashment.
7. The applicant has further stated that in order to gain confidence of the operational creditor, corporate debtor started to make payments against the pending invoices, however, subsequently stopped making payments. Therefore, operational creditor deposited one cheque dated 19.03.2018 for Rs. 8,97,081/-, however, the said cheque returned by bank with remark "account blocked". Operational creditor immediately requested the corporate debtor to make payment of complete outstanding or to issue fresh cheque from the operational bank account. Corporate debtor issued 19 cheques in the month April 2018, all drawn on ICICI Bank for different amounts.
8. The applicant has further stated that the corporate debtor while issuing 19 cheques, again requested the operational creditor to present the said cheques only after intimation from the corporate debtor to do so and it was accepted by the operational creditor as the corporate debtor was making the payments in time and agreed the schedule.



9. The applicant has further stated that during the period from February 2018 to April, 2018, the corporate debtor made total payment of Rs. 76,34,833/- against the total outstanding of Rs. 1,63,63,663/-, but, thereafter, no amount is paid towards the outstanding. That, the corporate debtor even failed to respond to numerable requests of the operational creditor. After much persuasion, upon consent from the corporate debtor, operational creditor deposited cheque worth Rs. 13,70,198/-, but, the said cheque also returned by the bank with remarks that "drawer signature not as per mandate". After continuous requests and pressure from the operational creditor, the corporate debtor in the month of August, 2018, after the gap of four months from the date of last payment, made payment of Rs. 10,00,000/- against the total outstanding.
10. The applicant has further stated that the cheques issued by the corporate debtor to discharge its liability, were in the name of "Mohit Minerals Private Limited", however, in the month February, 2018, name of the applicant company was changed from "Mohit Minerals Private Limited" to "Mohit Minerals Limited" and done the legal formalities like informing the bank etc. Therefore, the petitioner vide email dated 08.02.2019 requested the corporate debtor to re-issue fresh cheques against its outstanding and admitted liability in the existing name of operational creditor i.e. "Mohit Minerals Limited", however, the corporate debtor did not give any reply.
11. The applicant has further stated that the corporate debtor on 24.02.2018 shared its account ledger for FY 2017-18, wherein, it is reflected that the cheques issued by the corporate debtor in order to discharge its liability were not honoured and the amount for the same was outstanding and payable by the corporate debtor.

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12. The applicant has further stated that it maintains running accounts wherein all invoices raised against the corporate debtor and the payments received from time to time are/were recorded. That, operational creditor's policies do not permit credit transactions, however, at times in order to accommodate clients' request, it allows the corporate debtor to pay the dues within the time period mutually agreed between the parties. According to the petitioner, in terms of the ledger statement an amount of Rs. 77,11,953/- is outstanding and payable by the corporate debtor. That, the last payment of Rs. 10,00,000/- was made by the corporate debtor on 24.08.2018 which was adjusted against invoice dated 10.01.2018. According to the applicant, an amount of Rs. 77,11,953/- (Rupees seventy-seven lacs eleven thousand nine hundred fifty-three only) is due and payable by the corporate debtor towards principal operational debt. Corporate debtor is also liable to pay the agreed interest thereon @ 18% per annum with effect from 18.01.2018 till the date of payment of the entire outstanding amount to the operational creditor. Thus the total amount due from the corporate debtor is **Rs. 98,68,784/- (Rupees ninety-eight lacs sixty-eight thousand seven hundred eighty-four only)**.
13. It is further stated by the applicant that, having failed to recover the overdue payments, the applicant was compelled to issue statutory demand notice dated 02.07.2019 under section 8 of the I & B Code calling upon the respondent to pay the principal outstanding along with interest.
14. The applicant in support of its claim has furnished copy of documents like delivery challan, invoice, ledger/account statement, computation chart, demand notice dated 02.07.2019, copy of reply to the demand notice etc.

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15. On issuance of notice, the respondent filed affidavit in reply inter alia raising objections like;
- that, the petitioner has not filed resolution passed authorising the advocate to issue demand notice;
 - that, no affidavit is filed as required under the mandatory law regarding "no dispute";
 - that, the goods supplied by the petitioner were of inferior quality;
 - that, there is no proof on the invoice that the same are/were received by the respondent;
 - that, the cheques issued by the respondent were towards security and such cheques were never ever to be deposited;
 - that, the petitioner has changed its name from Private Limited to Limited and the certificate of such change is produced and came into effect on 21.02.2018;
 - that, the person who has signed the petition is not authorised to initiate IB petition against the respondent.

Findings:

16. Heard the learned counsels appearing for both the sides and perused the documents annexed to the petition/reply.
17. On perusal of the records it is found that the instant petition filed on 04.09.2019 is well within limitation period. Copy of the track report clearly indicates that the demand notice dated 02.07.2019 (page 114-183) was delivered to the respondent. The petitioner has filed copy of invoices (130-147) raised on the respondent during the period between 11th January, 2018 and 3rd March, 2018. The petitioner by way of affidavit has filed copy of delivery challans (page 10-118) issued in favour of the corporate debtor which demonstrates that the petitioner had supplied material to the respondent. Ledger account for the period from 1st April, 2017 to 31st March, 201 (page 56) maintained by the petitioner show that the corporate debtor is indebted to the petitioner Rs. 1,63,63,663.00 as on 27.03.2018, the

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corporate debtor made part payments from time to time and the last payment of Rs. 10,00,000/- was made on 24.08.2018.

18. Further, with regard to the issue of demand notice issued through advocate is also not sustainable as it is already settled by the Hon'ble Supreme Court that the Advocate can issue demand notice on behalf of the client i.e. operational creditor. In **Macquaire Bank Limited v. Shilpi Cable Technologies Limited (2018) 2 SCC 674** Hon'ble Apex Court observed that a demand notice delivered by an advocate duly instructed by the operational creditor would be a valid demand notice for the purpose of initiation of CIRP. In view of the same, notice delivered could not be held to be bad in law.
19. In the instant case, the operational creditor has not filed an affidavit in compliance of Section 9 (3) (b) of the Code. This cannot be a ground of dismissal since the Hon'ble Supreme Court has clarified in **Macquaire Bank Limited v. Shilpi Cable Technologies Limited (2018) 2 SCC 674**, para 15 that such affidavit is not mandatory when the corporate debtor has responded to the demand notice which the respondent had in the present case. Moreover, it being a curable defect, as held in **Surendra Trading Company v. Juggilal Kamlatpat MANU/SC/1248/2017: (2017) 16 SCC 143**, the appellant/operational creditor was entitled to an opportunity to cure the defect and it would not have been a ground to dismiss the application.
20. In the case of **Macquaire Bank Limited v. Shilpi Cable Technologies Limited (2018) 2 SCC 674 : (2018) 2 SCC(Civ) 706 at page 696** Hon'ble Supreme Court has held that:

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"15. When we come to Section 9 (3) (b), it is obvious that an affidavit to the effect that there is no notice given by the corporate debtor relating to a dispute of the unpaid operational debt can only be in a situation where the corporate debtor has not, within the period of 10 days, sent the requisite notice by way of reply to the operational creditor. In a case where such notice has, in fact, been sent in reply by the corporate debtor, obviously an affidavit to that effect cannot be given".

21. In the instant case, after receiving the demand notice the corporate debtor within ten days of receipt of the demand notice raised the dispute of the unpaid operational debt. Therefore, affidavit in compliance of Section 9 (3)(b) could not be submitted. Thus, it is apparent that there is no default in not providing the affidavit in compliance of Section 9 (3) (b) of the Code.
22. As regards the contentions raised by the corporate debtor like; the goods supplied by the petitioner were of inferior quality, there is no proof on the invoice that the same are/were received by the respondent and the cheques issued by the respondent were towards security and such cheques were never ever to be deposited; appears to be moonshine defence as no proof in support of such claim is filed by the corporate debtor.
23. From the above it is clear that the petitioner has supplied goods to the respondent and the aforesaid chain of events clearly establish that the petitioner is operational creditor. Therefore, in the instant case, the petitioner very well falls within the definition of operational creditor and the amount outstanding is operational debt.

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24. The Adjudicating Authority is only required to consider whether there is any default and the debt is due and payable. In the instant case, the applicant has placed on record enough documents evidencing the default and hence, the present application deserves to be admitted.
25. On perusal of the record it is also found that the instant petition filed by the applicant is well within limitation and there is no pre-existing dispute regarding the operational debt from the side of the corporate debtor.
26. In the instant application, from the material placed on record by the Applicant, this Authority is satisfied that the application is complete in all respect and the Corporate Debtor committed default in paying the operational debt due and payable to the Applicant.
27. The documents produced by the operational creditor clearly establish the 'debt' and there is default on the part of the Corporate Debtor in payment of the 'operational debt'.
28. It has been observed in ***Mobilox Innovative Private Limited vs. Kirusa Software Private Limited [2017] 1 IBJ (JP) 2 SC*** that while examining an application under Section 9 of the Act, will have to determine the following: -
- (i) Whether there is an "operational debt" as defined exceeding Rs. 1.00 lac (See Section 4 of the Act)
 - (ii) Whether the documentary evidence furnished with the application shows that the aforesaid debt is due and payable and has not yet been paid?
- and**
- (iii) Whether there is existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before the receipt of the demand notice of the unpaid operational debt in relation to such dispute?

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If any of the aforesaid conditions is lacking, the application would have to be rejected.

29. Thus, under the facts and circumstances and as discussed herein above, in the light of the Hon'ble Supreme Court Judgement and the provisions thereof as enshrined in Insolvency & Bankruptcy Code, this adjudicating authority is of the considered view that operational debt is due to the Applicant and it fulfilled the requirement of I & B Code. No dispute has been raised by the respondent at any point of time. That, Applicant is an Operational Creditor within the meaning of Section 5 sub-section 20 of the Code. From the aforesaid material on record, petitioner is able to establish that there exists debt as well as occurrence of default and the amount claimed by operational creditor is payable in law by the corporate debtor as the same is not barred by any law of limitation and/or any other law for the time being in force.
30. Section 13 of the Code enjoins upon the Adjudicating Authority to exercise its discretion to pass an order to declare a moratorium for the purposes referred to in Section 14, to cause a public announcement of the initiation of corporate insolvency resolution and call for submission of claims as provided under Section 15 of the Code. Sub-section (2) of Section 13 says that public announcement shall be made immediately after the appointment of Interim Insolvency Resolution Professional. This Adjudicating Authority direct the Interim Resolution Professional to make public announcement of initiation of Corporate Insolvency Process and call for submission of claims under Section 15 as required by Section 13(1)(b) of the Code.
31. From the above stated discussion and on the basis of material available on record it is evident that the corporate debtor has committed default in payment of operational

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debt and, therefore, it is a fit case to initiate Insolvency Resolution Process by admitting the Application under Section 9(5)(1) of the Code.

32. The petition is, therefore, admitted and the moratorium is declared for prohibiting all of the following in terms of sub-section (1) of Section 14 of the Code: -

- (i) 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;
- (ii) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;
- (iii) 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);
- (iv) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

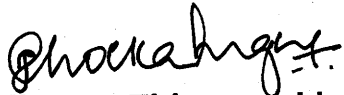
33. It is further directed that the supply of goods and essential services to the Corporate Debtor, if continuing, shall not be terminated or suspended or interrupted during moratorium period. The provisions of sub-section (1) shall, however, not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

34. The order of moratorium shall have effect from the date of receipt of authenticated copy 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 or passes an order for liquidation of corporate debtor under Section 33 as the case may be.

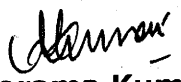
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35. The applicant/operational creditor has not proposed name of the Interim Resolution Professional. Therefore, this Adjudicating Authority hereby appoint Shri Saaurabh Jhaveri, 620, Jolly Plaza, 6th Floor, Athwagate, Surat 395 001 (saumeg@gmail.com) (Mobile: 9228427123) having registration No. IBBI/IPA-002/IP-N00068/2017-18/10146 to act as an interim resolution professional under Section 13(1)(c) of the Code.
36. This Petition is accordingly admitted.
37. Communicate a copy of this order to the applicant, Corporate Debtor, Registrar of Companies and to the Interim Resolution Professional.
38. Registry is directed to inform the office of Registrar of Companies that the respondent company is under corporate insolvency resolution process and, therefore, no proceedings for striking off name of the respondent company be initiated arising out of non-compliances of Sections 159 to 162 & 220 etc. of the Companies Act, 2013 as it would be detrimental to the process of the liquidation and sale of assets to realise the amount for all the stakeholders.


Chockalingam Thirunavukkarasu
Adjudicating Authority
Member (Technical)

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Ms. Manorama Kumari
Adjudicating Authority
Member (Judicial)