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**IN THE NATIONAL COMPANY LAW TRIBUNAL,
DIVISION BENCH – I, CHENNAI**

IBA/1232/2019

(filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 r/w Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016)

In the matter of **M/s. Nizam Coal Private Limited**

M/s. IMR Metallurgical Resources AG,

Dammstrasse 19,
CH-6300 Zug, Switzerland.
C/o. Mr. Satish Kumar,
706-708, Baani, The Address 1,
Golf Course Ext. Road,
Sector 56, Gurgaon,
Haryana – 122 011, India.

... Operational Creditor

-Vs-

M/s. Nizam Coal Private Limited,

7th Floor, Seethakathi Business Centre, 684-690,
Anna Salai, Chennai – 600 006.

... Corporate Debtor

Order Pronounced on 2nd September 2021

CORAM:

**R. SUCHARITHA, MEMBER (JUDICIAL)
ANIL KUMAR B, MEMBER (TECHNICAL)**

For Operational Creditor : Anirudh Krishnan, Advocate

For Corporate Debtor : Jesus Moris Ravi, Advocate

ORDER

Per: R. SUCHARITHA, MEMBER (JUDICIAL)

The present Application is filed by the Applicant namely, **M/s. IMR Metallurgical Resources AG** (hereinafter referred to as "Operational Creditor") under Section 9 of the Insolvency & Bankruptcy Code, 2016 (**IBC, 2016**), seeking to initiate the

Corporate Insolvency Resolution Process (CIRP) as against the Respondent viz, **M/s. Nizam Coal Private Limited** (*hereinafter referred to as "Corporate Debtor"*).

2. From Part-I of the Application, it is seen that the Operational Creditor is a Company incorporated in Switzerland. From Part-II of the Application, it is seen that the Corporate Debtor is a Company incorporated on 21.11.2002 bearing CIN:U51909TN2002PTC049900 and the registered office of the Corporate Debtor as per the Application is stated to be situated at 7th Floor, Seethakathi Business Centre, 684-690, Anna Salai, Chennai-600 006. From Part-III of the Application, it is seen that the Operational Creditor has not proposed the name of an Interim Resolution Professional and left to the discretion of the Adjudicating Authority to appoint the same. From Part-IV of the Application, it is seen that the Operational Creditor has claimed a sum of USD 587,060 (or) INR 4,20,94,139/-.

3. Before venturing into the merits of the present case, it emerges from the arguments made by the parties that there is an issue with regard to the maintainability of the present Application in view of the fact that the Operational Creditor has failed to serve



the Demand Notice as stipulated under Section 8(1) of IBC, 2016 on the Corporate Debtor.

4. It was submitted by the Learned Counsel for the Corporate Debtor that according to Section 9 of IBC, 2016, an Application for initiation of CIRP can be filed by the Operational Creditor only after the Demand Notice is served upon the Corporate Debtor and the said requirement is *sine qua non* for filing an Application under Section 9 of IBC, 2016. It was further submitted that originally the Demand Notice was served on the Corporate Debtor vide Form-3 in Annexure-1 dated 20.03.2017 and thereafter the Operational Creditor has served another Form-3 dated 20.03.2018. However, it was submitted that the Operational Creditor has miserably failed to do send the Form-3 notice to the Registered Office address of the Corporate Debtor which is situated at 7th Floor, Seethakathi Business Centre, 684-690, Anna Salai, Chennai-600 006.

5. Further, it was submitted that the Operational Creditor has not enclosed any proof to show that the said Form-3 notice has been delivered to the Corporate Debtor. It was submitted that the postal tracking receipt filed by the Operational Creditor reveals the fact that there is no delivery of Demand Notice which is sent to the Corporate Debtor. Under such circumstances, it was submitted



that since the Corporate Debtor has not received any notice of demand in Form-3 as mandated under Section 8(1) of the IBC, 2016, the present Application filed under Section 9 of the IBC, 2016 is not maintainable.

6. It is seen that the Operational Creditor has first served Demand Notice in Form-3 under Section 8 of the IBC, 2016 to the Corporate Debtor on 20.04.2017 vide an e-mail from its counsel to the following e-mail address;

- (i) nlzamutheen@nizamcoal.com;
- (ii) inbacs@gmail.com;
- (iii) finance@nizamcoal.com;
- (iv) rejeehameed@nizamcoal.com;
- (v) sathish@nizamcoal.com;
- (vi) sameem@nizamcoal.com;
- (vii) saket.shukla@phoenixlegal.in;
- (viii) mrinal.ojha@phoenixlegal.in;
- (ix) debarshi.dutta@phoenixlegal.in;
- (x) garima.tiwari@phoenixlegal.in;

7. Further, it was submitted by the Learned Counsel for the Operational Creditor that the second Demand Notice in Form-3 was served upon the Corporate Debtor on 29.03.2018 and proof of the same has been annexed at page Nos. 47 & 48 of the typed set filed along with the Application. It was submitted by the Learned

Counsel for the Operational Creditor that the Corporate Debtor has raised frivolous grounds that the Demand Notice was not served upon them.

8. Heard the submissions made by the Learned Counsel for both the parties. From the typed set filed along with the Application, it is seen that the Operational Creditor has enclosed two Demand notices which have been sent to the Corporate Debtor. The first Demand Notice is dated 20.04.2017, however, no proof of the same being dispatched and delivery to the Corporate Debtor has been attached along with the said demand notice. The second demand notice is dated 23.03.2018 from which it is seen that the same has not been delivered to the Corporate Debtor. However, the postal acknowledgement receipt discloses the fact that the same has been 'received' and not 'delivered'. Thus, from the submissions made by the Learned Counsel for the parties this Adjudicating Authority comes to the conclusion that the Operational Creditor has miserably failed to establish that they have served the Demand Notice upon the Corporate Debtor before filing of this Application under Section 9 of the IBC, 2016.

9. Further, in the affidavit filed under Section 9(3)(b) of the IBC, 2016, it is only stated that the Operational Creditor has



addressed a notice to the Respondent/Corporate Debtor on 23.03.2018. Also there is no averment made under Section 9(3)(b) Affidavit as to whether the said notice was served / delivered upon the Corporate Debtor.

10. The Hon'ble NCLAT while dealing with the similar issue in the matter of **'Mr. Shailendra Sharma Director of R&M International Pvt. Ltd.' V/s. 'Ercon Composites & Ors.'** *Company Appeal (AT) (Ins) No. 159 of 2020* has held as follows;

"45. It is to be pointed out that an 'Operational Creditor' shall deliver to the 'Corporate Debtor' a Demand Notice in Form-3 or a copy of an invoice attached with a notice in Form-4 as per Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. The Demand Notice or the copy of the invoice demanding payment referred to in sub-section 2 of section 8 of the code may be delivered to the 'Corporate Debtor' at the registered office by hand, registered post or speed post with acknowledgement due or by electronic mail service to a whole time Director or designated partner or key managerial personnel, if any, of the 'Corporate Debtor'. Besides these, a copy of Demand Notice of invoice demanding payment shall also be filed with an information utility.

46. Be it noted, that only if a 'Demand Notice' / Invoice demanding payment under the code is issued, the 'Corporate Debtor' will appreciate in right earnest the consequences flowing on account of failure to pay the 'operational debt'. Also, that, after transfer of the case from Hon'ble High Court to the Tribunal (in respect of the winding up petition) an 'Operational Creditor' is required to submit all information including the details of the proposed Insolvency professional.

47. An application filed u/s 9 of the 'I&B' Code, 2016 without serving notice u/s 8 of the code is not maintainable. Indeed, a mere failure to serve the 'Demand Notice' is not a curable



defect. A 'Bankruptcy' notice sets in motion the entire process leading to 'Bankruptcy' and it is to be rigidly and narrowly construed."

11. Taking into consideration all the aforesaid facts, we are of the view that since the Operational Creditor has failed to comply with the mandate of serving a Demand Notice under the provisions of Section 8 of the IBC, 2016, the filing of the present Application under Section 9 of the IBC, 2016 is not maintainable. Under the said circumstances, the Application as filed by the Operational Creditor under Section 9 of IBC, 2016 is liable to be dismissed. Accordingly, the present Application stands **dismissed**, without costs.

-sd-
(ANIL KUMAR B)
MEMBER (TECHNICAL)

-sd-
(R. SUCHARITHA)
MEMBER (JUDICIAL)

Raymond