

NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH-V

(IB) 1906 (ND)/2019

In the matter of:

Tech India Engineers Pvt Ltd, Mumbai
D-49, Solaris I,
Saki Vihar Road,
Powai,
Mumbai-400072

.....Operational Creditor

V/s

Triumph Realty Pvt. Ltd.
C/O- Hotel the Grand, Plot No. 2,
Vasant Kunj, Phase- II,
Nelson Mandela Road,
New Delhi-110070

Also at:-

Triumph Realty Pvt. Ltd.,
336/1A, Village Calwaddo,
Benaulim, Goa- 403716

.....Corporate Debtor

SECTION: U/S 9 of IBC, 2016

Order delivered on: 04.06.2020

CORAM:

MR. ABNI RANJAN KUMAR SINHA, MEMBER (JUDICIAL)

MR. K.K. VOHRA, MEMBER (TECHNICAL)



For the Petitioner: Mr. Devendra Kr. Tiwari

For the Respondent: Mr. Yogesh, Mr. Gaurav, Mr. Rajesh and Ms. Alisha Chopra

ORDER

Per Mr. Abni Ranjan Kumar Sinha (Member Judicial)

1. The Applicant/Operational Creditor is filing the present application against the Respondent/Corporate Debtor under Section 9 of the Insolvency & Bankruptcy Code, 2016, (hereinafter referred to as the "Code") read with Rule 6 of the IBC, 2016 initiate corporate insolvency resolution process in respect of Corporate Debtor.
2. The Corporate Debtor approached the Operational Creditor and represented that it is in requirement of electrical works. The Corporate Debtor in course of the business approached to the Operational Creditor and gave work order, for electrical works for Hotel Triumph Resort, Goa, value stage I of Rs. 71,00,000/- , vide LOI, dated 20th May, 2016, and thereafter revised order value at stage II of Rs. 3,54,21,862/- vide subsequent agreement, dated 07th June, 2016 and Revised Change Order-1 dated 14.09.2016 for electrical works at site M/S Triumph Resort, 336/1-A, Village-Calwaddo, Benaullim, Goa-403716. Pursuant to said order, the operational Creditor from 24.06.2016 to 29.12.2018 had executed the works for Hotel Triumph Resort, Goa and on the such execution, vide their Fourteen Invoices-TIGO/SI/00001/1617 dated 11.07.2016 for Rs. 509,893/-,

TIGO/SI/00002/1617 dated 20.08.2016 for Rs. 6,71,410/-,
TIGO/SI/00003/1617 dated 08.09.2016 for Rs. 7,87,284/-,
TIGO/SI/00004/1617 dated 06.10.2016 for Rs. 13,35,112/-,
TIGO/SI/00005/1617 dated 25.11.2016 for Rs. 45,36,282/-,
TIGO/SI/00006/1617 dated 11.01.2017 for Rs. 7,72,779/-,
TIGO/SI/00007/1617 dated 14.02.2017 for Rs. 25,90,510/-,
TIGO/SI/00008/1617 dated 24.03.2017 for Rs. 31,96,138/-,
TIGO/SI/00009/1617 dated 01.05.2017 for Rs. 32,32,495/-,
TIGO/SI/000010/1617 dated 20.06.2017 for Rs. 52,50,4355.77/-,
TIGOSI003/1718 dated 01.09.2017 for Rs. 29,92,633/-,
TIGOSI003/1718 dated 20.09.2017 for Rs. 20,96,294.03/-,
TIGOSI004/1718 dated 29.03.2018 for Rs. 17,06,308.39/-,
TIGOSI004/1718 dated 11.06.2018 for Rs. 620,584.91/- and final
DLP TIGOPI005/1819 dated 29.12.2018 for Rs. 1,287,690.00/-, these
were duly accepted, acknowledged by the Corporate Debtor. In due
course of time, the Corporate Debtor made part payment of Rs.
2,36,91,544/- to Operational Creditor and TDS of Rs. 5,08,840/-
directly to Income Tax Authorities and a total a sum of Rs.
46,51,634/- is due against the Corporate Debtor. The Operational
Creditor on first week of April, 2018 handed over significant part of
the hotel after completion for commercial usage of Corporate Debtor
are as follows:

- a. Hotel Suite-22 Rooms (One Balance due to Incomplete work
from Corporate Debtor),
- b. ADD Building (Compromising of restaurant, kitchen and Bar),

- c. Villa Nos. 6, 7, 8, 9 & 10 (Total 35 Rooms)
 - d. Cabana Building (Compromising of Coffee Shop & Gym)
 - e. General Works as external lighting, HVAC & plumbing plant room, engineering area, BOH Area.
 - f. Beach Bar Area,
 - g. All major electrical system components such as transformer, HT Panel & metering Kiosk & UPS have been commissioned successfully to enable to Corporate Debtor to make beneficial usage of the faculty.
3. Four Tax Invoices i.e. TIGPSI003/17-18 dated 20.09.2017 for Rs. 20,96,294.03/- in part i.e. Rs. 10,37,050/-, TIGOSI004/17-18 dated 29.03.2018 for Rs. 17,06,309/- in part i.e. Rs. 17,06,309/-, TIGOSI004/17-18 dated 11.06.2018 for Rs. 6,20,585/- in part i.e. Rs. 6,20,585/-, TIGOPI005/18-19 dated 29.12.2018 for Rs. 12,87,690/- in part i.e. Rs. 12,87,690/- which are still due and payable. It is clarified that Rs. 46,51,634/- is due. The Operational Creditor worked as per demand and up to complete satisfaction of the Corporate Debtor and raised invoices from time to time. However, despite assurances, promises and part payments various invoices are still due and pending. The details of invoices have been mentioned above and copies have already been annexed as Annexure P-8 in company petition/application.
4. The Operational Creditor company also issued a statutory notice dated 11.04.2019, despite service of notice the same ~~it~~^{is} failed to make payment of debt. It is stated that no notice has been given by the

Corporate Debtor relating to any dispute of the unpaid operational debt.

5. Pursuant to the Court notice issued to the Corporate Debtor, reply was filed and it was submitted by Corporate Debtor that:-

- i. That there is "existence of dispute" about the quality and quantity of work executed by petitioner under award of contract on 20.05.2016, 07.06.2019 and 14.09.2016 so much so that Corporate Debtor was forced to appoint a third party to undertake the work. The existence of dispute is very much evident from the emails placed on record by the petitioner dated 05.11.2018, 01.11.2018 and 04.10.2019 written by the representative of Corporate Debtor.
- ii. That existence of dispute due to non completion of work awarded is evident from the report of the experts appointed by the Corporate Debtor, IM Cost Management Pvt Ltd., dated 05.03.2019 copy of which was shared and discussed with petitioner by email dated 29.04.2019 but petitioner preferred to abandon the process and rushed to file instant petition to exert pressure on the Corporate Debtor.
- iii. The petitioner intentionally has not placed on record the entire trail of emails exchanged between the petitioner and the corporate debtor substantiating existence of dispute and the entire agreement executed between the parties and the same are being placed on record by the Corporate Debtor.



- iv. That the petitioner in the demand notice issued claimed outstanding amount of Rs. 46,64,878/- whereas in the instant petition filed the petitioner claimed outstanding amount of Rs. 46,51,634/- which once again demonstrate existence of dispute even in the quantum of debt claimed.
- v. That the corporate debtor made payment in part as adhoc payment in terms of work order against running bill, which cannot be construed as acceptance of bills issued and same stand fortified by mail dated 05.11.2018.
6. We have heard the Learned Counsels appearing for the Applicant and Respondent. Learned Counsel appearing for the applicant, in course of his arguments, submitted that the respondent / Corporate Debtor has failed to give reply to the demand notice as required under Section 8 (2) of IBC, 2016. Therefore, he is not permitted to raise the dispute at the later stage. He further submitted that as per the agreement the Operational Creditor has handed over the hotel after completion of the work. He further submitted that Operational Creditor has raised 4 invoices of total Rs. 46,51,634/- and also proposed the name of IRP since no disputes has been raised, therefore, the application may be admitted.
7. On the other hand ld. Counsel appearing for Corporate Debtor submitted that the Corporate debtor has raised the disputes regarding the quality and quantity of the work executed by the Petitioner and he sent the email on 01.11.2018 and 04.12.2018 but the petitioner has



concealed the true material facts, having received the reply to the notice of 11.04.2019 by emailed dated 29.11.2019. Therefore, the affidavit filed by the petitioner under Section 9 (3) (b) of the IBC, 2016, is false. He further submitted that the present application is not maintainable, On the ground of the demand notice sent on 11.04.2019 which shows that outstanding debt of Rs. 46, 64, 878 out of 15 invoices, whereas the present application is filed for the outstanding amount of Rs. 46,64.624 against the 4 invoices only. He further submitted that since there is pre-existing dispute, therefore the present application is not maintainable.

8. In the light of the submissions raised on behalf of the parties, we have gone through the application, reply, rejoinder and the documents filed with the application as well as reply and on the perusal of the same, we find, in the reply nowhere the Corporate Debtor claimed that the Corporate Debtor sent the reply to the demand notice dated 11.04.2019 but by filing written synopsis at page 9 of the written synopsis, he claimed that he sent the reply to the notice dated 11.04.2019 by email dated 29.04.2019, which he has annexed at page 261 of Volume – II of the reply, whereas the claim of the applicant is that in response to the demand notice, the Corporate Debtor has not sent the reply, therefore, we have gone through the email dated 29.04.2019, which Corporate Debtor has annexed at page 261 of Volume-II of the reply and on perusal of the same, we find that nowhere it is mentioned that this email is in response to the demand notice delivered by the applicant upon the respondent.



9. At this juncture, we would also like to refer demand notice dated 11.04.2019, which was sent by the applicant on the registered address of the Corporate Debtor on 12.04.2019 and the same was duly delivered on 16.04.2019, which would be evident from the tracking report enclosed by the applicant at page 83 of Paper book. When we shall read the tracking report of the Indian Post, which is at page 83, alongwith the averments made by the respondent in the written synopsis at page 9 then we are of the considered view that the applicant has delivered the demand notice dated 11.04.2019 on 16.04.2019 and as per Section 8 (2) of the IBC, 2016, the Corporate Debtor is required to give reply within 10 days of the receipt of the demand notice or the copy of the invoice mentioned in Sub-Section (1) of Section 8 of the IBC, 2016, but admittedly, the respondent has failed to convince us that he sent the reply within the statutory period. Of Course, in course of his argument, he claimed that he sent an email dated 29.04.2019, in response to the demand notice issued by the applicant under Section 8 (1) of the IBC, 2016. As we have already discussed the aforesaid email and we find that it is not the reply in response to the demand notice under Section 8 (1) of the IBC, 2016, therefore, the contention of the respondent that the affidavit filed by the applicant under Section 9 (3) (b) is false, is not liable to be accepted, rather we are of the considered view that the respondent has not complied with the statutory provision of Section 8 (2) of the IBC, 2016. Therefore, at this juncture, we would like to refer Section 8 and 9 of the IBC, 2016, and the same are quoted below: -



“Section: 8. Insolvency resolution by operational creditor

(1) An operational creditor may, on the occurrence of a default, deliver a demand notice of unpaid operational debt or copy of an invoice demanding payment of the amount involved in the default to the corporate debtor in such form and manner as may be prescribed.

(2) The corporate debtor shall, within a period of ten days of the receipt of the demand notice or copy of the invoice mentioned in sub-section (1) bring to the notice of the operational creditor -

a) Existence of a dispute, 1[if any, or] record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoice in relation to such dispute;

(b) The [payment] of unpaid operational debt-

(i) By sending an attested copy of the record of electronic transfer of the unpaid amount from the bank account of the corporate debtor; or

(ii) By sending an attested copy of record that the operational creditor has encashed a cheque issued by the corporate debtor.

Explanation. – For the purposes of this section, a “demand notice” means a notice served by an operational creditor to the corporate debtor demanding 3[payment] operational debt in respect of which the default has occurred.”

“Section 9: Application for initiation of corporate insolvency resolution process by operational creditor. –



- (1) After the expiry of the period of ten days from the date of delivery of the notice or invoice demanding payment under sub-section (1) of section 8, if the operational creditor does not receive payment from the corporate debtor or notice of the dispute under sub-section (2) of section 8, the operational creditor may file an application before the Adjudicating Authority for initiating a corporate insolvency resolution process.
- (2) The application under sub-section (1) shall be filed in such form and manner and accompanied with such fee as may be prescribed.
- (3) The operational creditor shall, along with the application furnish-
- (a) A copy of the invoice demanding payment or demand notice delivered by the operational creditor to the corporate debtor;
- (b) An affidavit to the effect that there is no notice given by the corporate debtor relating to a dispute of the unpaid operational debt;
- (c) a copy of the certificate from the financial institutions maintaining accounts of the operational creditor confirming that there is no payment of an unpaid operational debt [by the corporate debtor, if available;]
- 2[(d) a copy of any record with information utility confirming that there is no payment of an unpaid operational debt by the corporate debtor, if available; and
- (e) Any other proof confirming that there is no payment of any unpaid operational debt by the corporate debtor or such other information, as may be prescribed.]



(4) An operational creditor initiating a corporate insolvency resolution process under this section may propose a resolution professional to act as an interim resolution professional.

(5) The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), by an order—

(i) Admit the application and communicate such decision to the operational creditor and the corporate debtor if, -

(a) The application made under sub-section (2) is complete;

(b) There is no 3[payment] of the unpaid operational debt;

(c) The invoice or notice for payment to the corporate debtor has been delivered by the operational creditor;

(d) No notice of dispute has been received by the operational creditor or there is no record of dispute in the information utility; and

(e) There is no disciplinary proceeding pending against any resolution professional proposed under sub-section (4), if any.

(ii) Reject the application and communicate such decision to the operational creditor and the corporate debtor, if -

(a) The application made under sub-section (2) is incomplete;

(b) There has been 1[payment] of the unpaid operational debt;

(c) The creditor has not delivered the invoice or notice for payment to the corporate debtor;



(d) Notice of dispute has been received by the operational creditor or.

There is a record of dispute in the information utility; or

(e) Any disciplinary proceeding is pending against any proposed resolution professional:

Provided that Adjudicating Authority, shall before rejecting an application under sub-clause (a) of clause (ii) give a notice to the applicant to rectify the defect in his application within seven days of the date of receipt of such notice from the Adjudicating Authority.

(6) The corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (5) of this section.”

10. Mere plain reading of the provisions contained under Section 8 & 9 of the Code shows that on the occurrence of a default, the operational-creditor is required to deliver a demand notice of unpaid operational debt or copy of the invoice demanding payment of the amount involved in the default to the Corporate Debtor in such form and manner as may be prescribed and the Corporate Debtor after the receipt of the demand notice or copy of the invoice mentioned in Section 8(1) of the Code, within ten days of the receipts of the notice bring to the notice of the operational-creditor the existence of disputes or show the documents that the payment of unpaid operational-debt has been made. Section 9 makes it clear that after the expiry of period of ten days, from the date of delivery of the notice or invoice demanding payment, if the Operational Creditor does not receive

payment from the Corporate Debtor or notice of the dispute under Section 8(2) of the Code, only in that case the Operational Creditor may file an application for initiation of the CIRP. If we shall read these two provisions together then we find, before initiating a proceeding under Section 9, the operational-creditor is required to fulfil the conditions mentioned under Section 8(1), if he has not sent the demand notice as required under Section 8(1) of the Code, then he cannot invoke the provision under Section 9, rather he can invoke the provision of Section 9 only, when Corporate Debtor fails to raise the existing of disputes or produce the document to show that unpaid operational debt has been paid within ten days of the receipt of the demand notice. Therefore, on the basis of aforesaid provisions, we are of the considered view that Section 8 and 9 cast a duty upon the operational-creditor as well as Corporate Debtor to act as per Section 8 and if they fail to fulfil the conditions of Section 8 and 9 then in that case neither the application filed by the operational-creditor is maintainable nor the plea of existing of disputes or the payment of debt subsequently taken by the Corporate Debtor can be taken into consideration.

11. At this juncture, we would also like to refer the decision of the Apex Court reported in the case of ***Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software (P) Limited- 2017 1 SCC OnLine SC 353*** and the relevant portion of the judgment is quoted below: -

“33. The scheme under Sections 8 and 9 of the Code, appears to be that an operational creditor, as defined, may,



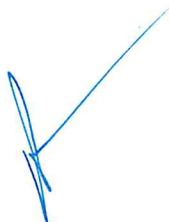
on the occurrence of a default (i.e., on non-payment of a debt, any part whereof has become due and payable and has not been repaid), deliver a demand notice of such unpaid operational debt or deliver the copy of an invoice demanding payment of such amount to the corporate debtor in the form set out in Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 read with Form 3 or 4, as the case may be (Section 8(1)). **Within a period of 10 days of the receipt of such demand notice or copy of invoice, the corporate debtor must bring to the notice of the operational creditor the existence of a dispute and/or the record of the pendency of a suit or arbitration proceeding filed before the receipt of such notice or invoice in relation to such dispute (Section 8(2)(a)). What is important is that the existence of the dispute and/or the suit or arbitration proceeding must be pre-existing – i.e. it must exist before the receipt of the demand notice or invoice, as the case may be.”**

“34. Therefore, the adjudicating authority, when examining an application under Section 9 of the Act will have to determine:

(i) Whether there is an “operational debt” as defined exceeding Rs.1 lakh? (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?



If any one of the aforesaid conditions is lacking, the application would have to be rejected. Apart from the above, the adjudicating authority must follow the mandate of Section 9, as outlined above, and in particular the mandate of Section 9(5) of the Act, and admit or reject the application, as the case may be, depending upon the factors mentioned in Section 9(5) of the Act.”

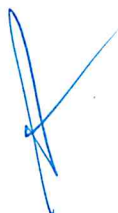
12. At this juncture, we would also like to refer the decision reported in the case of **Nathi Devi v. Radha Devi Gupta 2005 (2) SCC 271**, and we find that Hon’ble Supreme Court in Para 14 of the judgment held that:

“It is equally well settled that in interpreting a statute, effort should be made to give effect to each and every word used by the legislature. The courts always presume that the legislature inserted every part thereof for a purpose and the legislative intention is that every part of the statute should have effect. A construction which attributes redundancy to the legislature will not be accepted except for compelling reasons such as obvious drafting errors.”

13. In the light of that decision, when we shall consider the case in hand then we are of the considered view that since it is specifically mentioned in Section 8(2) of the Code that within ten days from the date of the receipt of the demand notice, the corporate-debtor is required to bring to the notice of the operational-creditor, the

existence of dispute or the documents regarding the payment of debt, therefore, we have no option, but to hold that since the corporate-debtor fails to give the reply of the demand notice and raised the disputes, hence after his appearance in response to the notice, he cannot raise it by filing the reply to the application, filed on behalf of the operational-creditor and this has also been held by another NCLT, Delhi Bench in the case of ***M/s Jai Laxmi Traders v M/s. Mayasheel Retail India Ltd. IB-2184/(ND)/2019.***

14. Since, no dispute has been raised in pursuance of the demand notice issued under Section 8 (1) of IBC, 2016, therefore, in our considered view, any dispute raised after the appearance of the respondent in pursuance to summons issued after filing the main application is not liable to be accepted.
15. For the reasons discussed above, we are of the considered view that in view of Section 9(5)(i)(a) since the application is complete, the invoice for notice of the payment to the Corporate Debtor has been delivered by the Operational Creditor, there is no payment of unpaid operational debt, which is more than Rs. 1 Lakh, which is the minimum threshold U/S 4 of the Code for initiating a proceeding U/S 9 of the Code and no notice of dispute as required U/S 8(2) of the Code is raised by Corporate Debtor and there are no disciplinary proceedings pending against the Resolution Professional. Therefore, we think it is proper to admit the application.



16. Accordingly, this petition is ADMITTED. A moratorium in terms of Section 14 of the IBC, 2016 shall come into effect forthwith staying:-

(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;*

(b) *transferring, encumbering, alienating or disposing of by the corporate debt or 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;*

(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.*

Further:

(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.*

(3) The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator. (4) The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process:

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.”

17. The Operational Creditor has not proposed the name of any IRP. Accordingly, we appoint, Mr. Sunil Kumar Gupta, an Insolvency Professional, Registration No. IBBI/IPA-001/IP-P00205/2017-18/10394, email: caskg82@gmail.com duly empanelled with the IBBI as the IRP. He is directed to take such steps as are mandated under the Code, more specifically under Sections 15, 17, 18, 20 and 21 and shall file his report before the Adjudicating Authority.

18. The Operational Creditor is directed to deposit a sum of Rs. 2 lakhs to meet the immediate expenses of IRP. The same shall be fully



accountable by the IRP and shall be reimbursed by the CoC, to the Operational Creditor to be recovered as CIR costs.

19. Copies of the order be sent to both the parties as well as to the IRP.

20. The office is directed to send a free copy of this order to both the parties.

Sd/-

K. K. VOHRA
Member (T)

Sd/-

ABNI RANJAN KUMAR SINHA
Member (J)