

**NATIONAL COMPANY LAW TRIBUNAL  
NEW DELHI BENCH-V**

(IB) 1093(ND)/2018

**In the matter of:**

**G Trans Logistics (India) Private Limited**  
Flat No. 1201, Arihant Altura,  
Plot No. GH-3, Abhay Khand-II,  
Indirapuram, Ghaziabad, Uttar Pradesh-201010.....Operational Creditor

V/s

**Emtex Engineering Private Limited**  
Khasra No. 401 & 402, 1<sup>st</sup> Floor,  
Ghitorni, New Delhi-110030. ....Corporate Debtor

**SECTION: U/S 9 of IBC, 2016**

**Order delivered on: 02.06.2020**

**CORAM:**

**MR. ABNI RANJAN KUMAR SINHA, MEMBER (JUDICIAL)**

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

For the Petitioner: Mr. Deva Vrat Anand

For the Respondent: Mr. Manoj Kumar

**ORDER**

**Per Mr. Abni Ranjan Kumar Sinha (Member Judicial)**

1. The present application is being preferred by G Trans Logistics (India) Private Limited (hereinafter referred to as "Operational Creditor")



against Emtex Engineering India Private Limited (hereinafter referred to as 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 to initiate corporate insolvency resolution process in respect of Corporate Debtor.

2. The brief facts leading to filing of the instant application are as under:
  - i. A Letter of Intent (“LOI”) dated May 3, 2017 was entered into between the Operational Creditor and the Corporate Debtor, which operates an e-commerce service under the name of Industrybuying.com. In accordance with the above LOI, the Operational Creditor was providing manpower to the Corporate Debtor for order processing and operation services with respect to the Corporate Debtor’s warehouse at Plot No. 113, Village Bamnoli, New Delhi-110077.
  - ii. The Corporate Debtor started defaulting in making payments against the invoices raised by the Operational Creditor, in lieu of the aforementioned services rendered by it, starting from the June, 2017. That between the month of May, 2017 to November, 2017 total amount for which invoices were raised by the Operational Creditor amounts to Rs. 1,02,69,753/-, out of which payment of a total amount of Rs. 46,00,000/- was made by the Corporate Debtor against few of those invoices, without mentioning the corresponding invoices. The net payable amount to the Operational Creditor, as on date after all adjustments, is Rs. 74,10,533/- only, along with interest of 18% p.a. .



iii. A demand notice as per Form 3 under Section 8 (1) read with Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, was issued by the Operational Creditor on 04.06.2018, demanding payment of Rs. 74,10,533/- (Rupees Seventy-Four Lacs, Ten Thousand, Five Hundred and Thirty-Three) only, along with interest of 18% p.a. in respect of unpaid operational debt due from the Corporate Debtor. The Corporate Debtor failed to bring to the notice of the Operational Creditor, the existence of a dispute with regard to the unpaid operational debt or the repayment of the same even after ten days from the date of receipt of demand notice, as per requirement of Section 8 (2) of the Insolvency and Bankruptcy Code

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

i. that first the Applicant herein sent a civil recovery notice dated 05.01.2018 in that notice the Applicant mentioned about some annexures but those annexures were not attached with the notice. In his reply dated 01.02.2018, respondent herein asked to Applicant to provide those annexures, but instead of providing them the Applicant filed this application which is barred from any merit.

ii. Orally, it was agreed that Applicant will work on the basis of Applicants Actual Cost and over that 10 % Applicant fee/profit.

It was further agreed between Applicant and Respondent that

Applicant will get the contract drafted and will get it signed within fifteen days but till date Applicant avoided and the contract was not signed despite several requests and reminders of Respondent. Even without the consent of Respondent Applicant out sourced the security to one outside vendor "People Tree" and jeopardized the security of Respondent.

- iii. Further, the Applicant raised several bogus bills to Respondent and did not supply the due compliance documents to Respondent. Further, Applicants never sent a proper bill, after several chase of Respondent Applicant used to send a letter in Excel sheets over email, which is not at par with business law.
- iv. On many occasions, Respondent asked Applicant to furnish the details of head count (How many workers are placed) and details of ESI and PF but those were also not supplied to Respondent till date.
- v. Respondent asked Applicant on number of occasions for the month to month bill but Applicant never followed this. Due to Applicants mismanagement there were number of strikes by Applicants employees at Respondents work place which caused a great loss of business to Respondents. Further, due to Applicants mismanagement and lack of proper security there was theft at godown of Respondent which caused to Respondent a loss of about Rs 92,00,000/-.





vi. The Respondent always insisted to the Operational Creditor that the Respondent shall pay all their legitimate due only after the Operational Creditor will submit:

1. Proper bills
2. Subject to warehouse compliance
3. Signature and Agreement on terms of engagement between Emtex & Gtrans
4. Proof of deposit of ESI / PF to employees.
5. Proof of cost

However, such documents were never given by G-tans, when Respondent insisted on these before payment they would call a strike and shut down the warehouse until Respondent paid what they demanded.

vii. That the petition is not maintainable and has been filed with ulterior motives. The Operational Creditor by means of this petition, trying to bypass the civil remedies available to them and wants to recover the alleged amount from the Corporate Debtor without establishing the dues.

4. The Operational Creditor has filed rejoinder and asserted the following contentions:

- i. That the submissions made by the Respondent stating that since the Letter of Intent was never signed by them, the same was not valid, is without any legal standing. The concept of implied contract is recognized under Section 9 of the Indian



Contract Act, 1872, as on in which there are actual proposal and acceptance though made otherwise than in words. Even though the Letter of Intent was not signed, the same was acted upon for a long time and hence, the same fulfill the requirements of an implied contract and hence, cannot be said to be invalid now.

- ii. That the denial of the amount under claim is fraudulent and deceitful as the claim is supported by the invoices as raised by the Applicant from to time. Copies of the invoices have duly been annexed alongwith the main Application.
- iii. That the submission made by the Respondent stating that the demand notice was not received by them, only aims to mislead the Tribunal. Proof of delivery of the demand notice to the Respondent, as received from the postal department, has already been placed on record before the Tribunal vide diary number 8573 dated November1, 2018.
- iv. Further e-mail dated September 1, 2017 issued by the Applicant to the Respondent (annexed at page 15 of the Reply), wherein it has clearly been stated that, "On the basis of our past experience and discussions, we have come to the conclusions that existing team may not be able to handle complex warehouse like yours. Hence there is urgent need to deploy better qualified personnel to run the warehouse so that TAT is in line with your customer's expectation." Further, vide e-mail dated August 26, 2017, annexed at page 16 of the Reply, the



Applicant informed the Respondent that, "While we have expertise to run warehouse as per established systems but creating and establishing new systems us very difficult task for which we will have to hire experts who are capable to do so. The budget and manpower indicated by you is not sufficient to establish this type of warehouse from scratch." Further, the supply of manpower was also on the basis of the requirement as communicated to the Applicant by the Respondent. Hence, given the budget and manpower made available to the Applicant, the Applicant tried to channelize the resources in the most efficient way possible and to provide the best possible services to the Respondent.

- v. That delay in the performance of work, if any, cannot be solely attributed to the Applicant as the job of the Applicant was only to pack the material supplied by the Respondent and handover the same to the concerned logistic company. As such, on several occasions, the work got delayed as a result of late supply of packaging material to the Applicant or late supply of material to be packed and handed over to the logistic company. Further, vide e-mail dated November 1, 2017, the Respondent wrote an appreciation e-mail to the Applicant praising its achievement for the month of October, 2017.
- vi. Further the action of the Respondent directly paying salaries to workers, who were employees of the Applicant, was to tactfully avoid paying the Applicant, its legitimate dues, which further



shows that the invoice raised by Applicant were due and payable.

vii. Further, the malafide intention of the Respondent is clear from its statement that it availed services of the Applicant only for a month. The said allegation can be falsified on its face by the e-mail of the Respondent to the Applicant issued in the month of September, 2017, with respect to the manpower requirement in the warehouse for the month of September, 2017.

5. We have heard the Learned Counsel appearing for the applicant as well as Corporate Debtor. The Learned Counsel appearing for the applicant, in course of his argument, submitted that the cause of action started from the month of June 2017, when there is a default of the Corporate Debtor in making payments towards the various invoices raised by Operational Creditor. He further submitted that the Operational Creditor has received the payment of Rs. 46 lakhs, out of Rs. 1,02,69,753/-and in support of that, he enclosed the bank statement to show that part payment was made by the Corporate Debtor, the relevant portion of the statement is at page 161 of the paper book. He further submitted that when the default occurred, the Operational Creditor has sent demand notice on 4th June, 2018 and the same was delivered. He further submitted that he has enclosed the postal receipt which is at page 171. He further submitted that although he has not enclosed the delivery report in the original application but by filing the supplementary application, he annexed





the report of post master regarding the delivery of the demand notice to the registered address of the Corporate Debtor and in this regard, he placed reliance upon the additional documents supported with affidavit filed on 1st November 2018 and referred page 5 and 6 of the supplementary affidavit dated 1st November, 2018.

6. He further submitted that the Learned Counsel of the applicant has written application to the post office General, Mehrauli Road, New Delhi regarding the delivery report of the demand notice and in response to that the true copy of the receipt has been enclosed by the post master which is at page 6 of the supplementary affidavit dated 1st November, 2018 which shows that demand notice was duly delivered and received by one Mr. Rattan Singh who has also mentioned his mobile number on the receipt and the address shown in the receipt is the registered address of the Corporate Debtor but even after receiving of the demand notice, he has not raised any disputes as required under Section 8 (2) of the IBC, 2016.
7. On the other hand, Learned Counsel for the Corporate Debtor submitted that the Corporate Debtor has not filed an application as required under Section 9 (3) (b). He further submitted that there is a pre-existing dispute as defined under Section 5 (6) of the IBC, 2016. He further submitted that LOI which the Operational Creditor has enclosed at page 24 to 27 was valid for only one month with the provision of entering into definitive agreement, within the said one month by the parties but no final agreement was entered. Therefore, there was no agreement with the Operational Creditor. He further



- submitted that as per the oral agreement between the parties, the Operational Creditor was entitled for cost + management fee / service charges of 10 % and the Operational Creditor was under contractual obligation to submit invoices with supporting document to substantiate actual cost. He further submitted that by filing rejoinder, the Operational Creditor admits that the Operational Creditor did not comply with the PF and ESI law. Therefore, the Corporate Debtor being the principal employer have every right to ask for proof of PF and EFIC compliance which the Operational was required to comply.
8. He further submitted that at page 7 of the reply, the Corporate Debtor has raised the dispute which is prior to the issuance of demand notice which would also been provided by email annexed with the reply.
9. In the light of the submissions raised on behalf of the parties, when we have gone through the application, reply and rejoinder to the reply as well as written submissions filed on behalf of both the parties then we find that it is admitted fact that the Corporate Debtor has not sent the reply as required under Section 8 (2) of the IBC, 2016, according to which the Corporate Debtor shall within a period of 10 days of the receipt of demand notice or copy of invoices mentioned in sub section (1) bring to the notice of the Operational Creditor, the existence of dispute or record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoice in relation to such disputes.
10. Whereas the Operational Creditor by filing the supplementary affidavit produce the postal document to show that the demand notice was



duly delivered on the registered address of the Corporate Debtor, therefore, before going into the merit of the case of the parties we would like to refer the provision contained under Section 8 and 9 of the IBC, 2016 and the same is 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 debtor 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."*

11. 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.



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. 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, 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. Therefore, we think it is proper to admit the application.

15. 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."*



16. The Operational Creditor has not proposed the name of any IRP.

Accordingly, we appoint, Mr. Hardev Singh, an Insolvency Professional, Registration No. IBBI/IPA-002/IP-N00177/2017-18/10499, email: singh\_hardev@rediffmail.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.

17. 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.

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

19. 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** 02.06.2020  
**Member (J)**