

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
KOLKATA**

Before Shri Madan B. Gosavi, Hon'ble Member (J)

CP (IB) No. 90/KB/2018

In the matter of:

An application for initiation of Corporate Insolvency Resolution Process under Section 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 6(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016;

-And-

In the matter of:

M/s. T.P. Roy Chowdhury & Co. Private Ltd., having its address for correspondence at 53/B, Mirza Ghalib Street, 1st floor, Kolkata- 700 016, West Bengal;

... Operational Creditor

-Versus-

In the matter of:

V. R. Infralogistics Private Ltd., having its registered office at 9, AJC Bose Road, Ideal Centre, 3rd floor, Kolkata- 700 017 West Bengal, CIN : U63010WB2010PTC152273;

.... Corporate Debtor

Counsel appeared:

- | | |
|-----------------------------------|------------------------|
| 1. Mr. Shaunak Ghosh, Advocate |] Operational Creditor |
| 2. Ms. Shabnam Khatoon, Advocate |] |
| 1. Mr. Kaushik Banerjee, Advocate |] Corporate Debtor |
| 2. Mr. Subranil Dey, Advocate |] |

Date of Pronouncement of Order: 18.07.2019

ORDER

M/s. T.P. Roy Chowdhury & Co. Private Ltd. - the Operational Creditor, filed this application under section 9 of the Insolvency & Bankruptcy Code, 2016 (in short, I&B Code) against **V. R. Infralogistics Private Ltd.**- Corporate Debtor to start Corporate Insolvency Resolution Process (in short, "CIRP") of the Corporate Debtor because the Corporate Debtor committed default in paying the operational debt of Rs.37,80,534/-.

2. The following facts are not in dispute:-

3. The Operational Creditor is engaged in business of undertaking infrastructural activities at various Ports in India in 2010. Corporate Debtor approached the Operational Creditor with a request to provide shore handling activities. The corporate debtor availed the services provided by the operational creditor. During course of the business, the operational creditor raised the bills, the details of the bills are provided in the chart produced at page 59 for payment of operational debt. The corporate debtor issued in favour of the operational creditor number of cheques drawn on ICICI bank, AJC Bose Road branch on their account bearing no.129305000103 (cheques are produced at page nos. 119 to 124). All cheques were dishonoured by the Banker of the Operational Creditor. Hence, on 24.09.2015, the operational creditor sent the corporate debtor demand notice under section 138 of the Negotiable Instruments Act (in short, N.I. Act). It was replied by the corporate debtor vide letter dated 08.10.2015.

4. It was contended by the Corporate Debtor in that reply that due to weak financial position, they were unable to pay the amount. Thereafter, number of demand notices were sent to the corporate debtor. Upon dishonour of each cheque, separate proceedings under section 138 of N.I. Act are also filed against the corporate debtor.

5. Upon coming in operation the I & B Act, 2016, the operational creditor sent the corporate debtor notice dated 26.05.2017 under section 8 of I&B Code, 2016. According to the operational creditor, in spite of receipt of the demand notice, the corporate debtor did not reply the same pointing out the pendency of pre-existing dispute. The corporate debtor did not make payment of the operational debts within 10 days. Hence, this proceeding is filed to start CIRP of the corporate debtor.

6. Upon service of notice of this proceeding, the corporate debtor appeared in this matter through Managing Director, Mr. Aman Khemka. He filed affidavit-in-reply. He contended there is a serious dispute pending in between the operational creditor and the corporate debtor about the contract in question. He also contended that there were serious infirmities in service rendered by the operational creditor. They have brought to the notice of the corporate debtor of infirmities from time to time and requested them to make good of them. Number of emails as well as letters were sent to the operational creditor requesting to improve the services. All of them are produced at Annexure -B (page 39 to 82). In spite of receipt of those letters sent through emails, operational creditor did not improve the services and raised invoices against them of exorbitant amount.

7. He further contended that operational creditor has monopoly to provide ground services at the Port. There was no alternative but to avail services of the

operational creditor. Due to mis-handling of the cargo and due to non-supply of trailers and other equipments by the operational creditor, they suffered loss. Their client, M/s. Reliance Infrastructural Ltd. has lodged complaint against them regarding claim for damages. They also produced that claim at Annexure-C (page 59 to 78). He contended that the cheques were issued in favour of the operational creditor as a security because operational creditor had monopoly to provide services at the Port. They are compelled to issue such cheques in advance as a security.

8. He further contended that they did not receive notice under section 8 of I&B Code. Hence, they could not reply pointing out the existence of dispute. According to them, since there is pre-existing dispute about the service provided by the operational creditor, this proceeding is not maintainable unless that dispute is settled.

9. Operational Creditor filed rejoinder and reiterated his claim.

10. I heard the Ld. Counsel, Mr. Shaunak Ghosh for the operational creditor and Ld. Counsel, Mr. Kaushik Banerjee for the Corporate Debtor at length. Both of them referred to in their argument the ruling of the Hon'ble Apex Court in the case of Mobilox Innovations Pvt.Ltd.-vs-Kirusa Software Pvt. Ltd. (2018) 1 Supreme Court Cases 353 on the point of pre-existing dispute.

11. I have gone through that ruling. It has been held by the Hon'ble Apex Court in para 56 that, ***“Going by the aforesaid test of “existence of a dispute”, it is clear that without going into the merits of the dispute, the appellant has raised a plausible contention requiring further investigation which is not a patently feeble legal argument or an assertion of facts***

unsupported by evidence. The defence is not spurious, mere bluster, plainly frivolous or vexatious. A dispute does truly exist in fact between the parties, which may or may not ultimately succeed, and the Appellate Tribunal was wholly incorrect in characterising the defence as vague, got up and motivated to evade liability.

12. According to the Ld. Defence Counsel, corporate debtor did not receive demand notice under section 8 of I&B Code. Evidence on record certainly indicates that the notice was despatched by the operational creditor at the registered address of the corporate debtor. However, envelope in which the notice was sent came back with postal remark "Left". As abundant precaution, the operational creditor published the demand notice in daily English newspaper "Telegraph" dated 20th June, 2017 having wide circulation in the area where registered office of the corporate debtor is situated. It is also seen from the record that at earlier point of time, operational creditor had sent number of notices under section 138 of N.I. Act to the corporate debtor at the same address and all were received by the corporate debtor. In view of this, I hold that demand notice under section 8 of I&B Code was deemed to have been received by the corporate debtor. They did not reply the same within 10 days pointing out pre-existing dispute as raised in their affidavit-in-reply.

13. It is not in dispute that the corporate debtor issued number cheques in favour of operational creditor. All cheques were dishonoured. It is also seen from the record that all cheques were issued after so-called dispute about the services of the operational creditor is raised by the corporate debtor. If the corporate debtor had any reservation about the services rendered by the operational creditor, the question remains as to why they issued so many cheques in their favour.

14. Ld. Counsel for the corporate debtor submitted that cheques were given as a security. The corporate debtor was compelled to give such cheques because the operational creditor had monopoly at the port. I am not impressed by such argument. The corporate debtor could have stopped the payment of cheques. The cheques appeared to have been issued, despite the fact that the corporate debtor was not satisfied with the services of the operational creditor. The corporate debtor replied notice under section 138 of N.I. Act issued by the operational creditor admitting the debt but they did not reply notice under section 8 of I&B Code. It appears to me that the corporate debtor took a defence about the existence of dispute relating to services rendered by the operational creditor only to avoid this proceedings. In view of the material on record and law relating to existence of dispute as explained by the Hon'ble Apex Court in case of Mobilox Innovations Pvt.Ltd.-vs-Kirusa Software Pvt. Ltd., I hold that the dispute as raised by the corporate debtor is not genuine. The Operational Creditor has complied with the provisions of section 9(3)(b) and 9(3)(c) of the I&B Act. Be that as it may, the fact remains on record is that the amount of more than Rs.1 lakh is due and payable by the Corporate Debtor to the Operational Creditor towards services rendered by them and hence in view of section 4 of the I&B Code, this application has to be admitted. In view of the facts and evidence on record, I hold that this application to start CIRP of the Corporate Debtor has to be admitted because they made a default in payment of operational debt of more than Rs.1 lakh of the Corporate Debtor.

15. The Operational Creditor has not proposed the name of the I.R.P. However, from the Panel of Insolvency Professions (IPs) for appointment as IRP as forwarded by IBBI dated 24.06.2019, Mr. Pankaj Kumar Tibrewal (Mobile No.9836929297) having Email id: tibrewalpankaj@yahoo.com Registration no.IBBI/IPA-001/IP-P01577/2018-19/12410.

16. The Operational Creditor also complied the provisions of sections 9(3)(b) and 9(3)(c) of the I&B Code. In view of the facts and evidence on record, I hold that the application requires to be admitted. I pass the following order:

ORDER

- (i) The application filed by the Operational Creditor under Section 9 of the Insolvency & Bankruptcy Code, 2016 is hereby admitted for initiating the Corporate Resolution Process in respect of **V. R. Infralogistics Private Ltd.** Moratorium order is passed for a public announcement as stated in Sec.13 of the IBC, 2016.
- (ii) The moratorium is declared for the purposes referred to in Section 14 of the Insolvency & Bankruptcy Code, 2016. The IRP shall cause a public announcement of the initiation of Corporate Insolvency Resolution Process and call for the submission of claims under Sec.15. The public announcement referred to in clause (b) of sub-section (1) of Insolvency & Bankruptcy Code, 2016 shall be made immediately.
- (iii) Moratorium under Sec.14 of the Insolvency & Bankruptcy Code, 2016 prohibits the following:
 - 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 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 Securitization 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 possession of the corporate debtor.
- iv) The supply of essential goods or services to the Corporate Debtor as may be specified shall not be terminated or suspended or interrupted during the moratorium period.
- v) 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.
- vi) The order of moratorium shall affect the date of admission till the completion of the Corporate Insolvency Resolution Process.
- vii) 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 Sec.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.

viii) Necessary public announcement as per Sec.15 of the IBC, 2016 may be made by the resolution professional upon receipt of the copy of this order.

(ix) As the Operational Creditor has not proposed any name for the appointment of Interim Resolution Professional (IRP), Mr. Pankaj Kumar Tibrewal (Mobile No.9836929297) having Email id: tibrewalpankaj@yahoo.com Registration no.IBBI/IPA-001/IP-P01577/2018-19/12410 is appointed as the Interim Resolution Professional from the panel of Insolvency Professionals recommended by IBBI for appointment as IRP/Liquidator for Corporate Debtor for ascertaining the particulars of creditors and convening a Committee of Creditors for evolving a resolution plan. IRP is directed to submit his consent along with written Communication in Form-2 within two weeks of the order.

x) The Operational Creditor to pay to IRP a sum of Rs.50,000/- as advance fees, which amount shall be adjusted at the time of final payment.

xi) As per the amended provision of the I&B Code, he has to finalise the Resolution Plan on or before 105 days from the date of admission of CIRP.

xii) Registry is hereby directed to communicate the order to the Operational Creditor, Corporate Debtor and to the Interim Resolution Professional by Speed Post and also by email.

Let the certified copy of the order be issued upon compliance with requisite formalities

List the matter on **26.08.2019** for filing progress report.

Sd/-
(Madan B. Gosavi)
Member (J)

Signed on this, the 18th day of July, 2019.