

306

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

C.P. (IB) No. 668/KB/2019

IN THE MATTER OF:

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

-And-

In the matter of:

Mr. Prasun Sengupta, residing at 52, Le Jardin, Kashibai Navrange Road, Gamdevi, Mumbai 400007.

Operational Creditor /Applicant

-Versus-

New Kolkata International Development Private Limited having its registered office at "Vichitra" Kolkata West International City, salap Junction, Howrah Amta Road & Bombay Road Crossing, Howrah, West Bengal 711403.

Corporate Debtor / Respondent

Date of hearing 12 March 2020

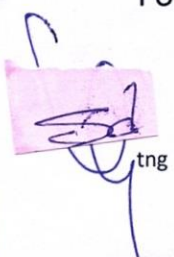
Order Delivered on 16 March, 2020

Coram :

Madan B. Gosavi, Member (Judicial)

Virendra Kumar Gupta, Member (Technical)

For the Operational Creditor : Mr. K. Thaker Advocate
: Mr. Anurag Bagaria, Advocate


tng

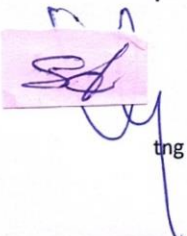


For Corporate Debtor : Mr. Anirban Roy, Advocate
: Mr. Arindam Guha, Advocate
: Mr. Nirmalya Dasgupta, Advocate
: Ms. Richa Goyal, Advocate

Per Shri Virendra Kumar Gupta, Member (T)

1. The facts, in brief, are that the operational creditor was CEO of the corporate debtor. As per terms of employment, the operational creditor was entitled for basic salary, bonus, medical benefits etc. The employee remained in employment from March 2010 till 20.07.2015 and left the company after completion of 5 year term. It is claimed that as per the agreement the employee was eligible for retention bonus, LTA, leave encashment, bonus, gratuity etc. On 7.8.2015, corporate debtor determined the dues of the operational creditor as on that day and sent mail to the operational creditor to that effect. The operational creditor pursued with the corporate debtor through various emails thereafter. However, ultimately, the dues have not been paid.

2. The Ld. Counsel for the operational creditor appeared and narrated the facts. He also drew our attention to the relevant clause of the employment agreement to substantiate its claim regarding dues of the operational creditor. Our attention was also drawn to various emails. On query from the Bench regarding the maintainability of this application on the grounds of limitation, our attention was drawn to page 33 of the paper book which contained the email from the corporate debtor narrating the fact of financial constraints and in the said mail it was also mentioned that a schedule of payment would be given as early as possible. Our attention was also drawn to page 51 of the paper book to


tng




show that on 18.1.2019 one Sudip Pramanik had also admitted the delay. As regards to the claims of the operational creditor it was submitted that all the claims were valid as per terms and conditions agreed by between the parties.

3. Ld. Counsel for the corporate debtor challenged the validity and maintainability of the petition for the reason that it was barred by limitation and the person who signed the application did not have proper authority. As regards to limitation, it was claimed that the person with whom the operational creditor communicated was not an authorised person, hence, communications between 2015 and 2019 had no significance. As regards to the mail dated 18.1.2019, it was written after expiry of the limitation period in terms of the provisions of Section 18 of the Limitations Act, 1963, hence, such mail could not extend the limitation. It was further claimed that the Power of Attorney given by father to son was not in proper format. It was also claimed that the amount claimed as due were in fact not due in terms of the employment agreement.

4. In the rejoinder, the Ld. Counsel for the operational creditor submitted that mail id of the company had not been denied and such argument had been taken as an after-thought to avoid its liability. As regards to Power of Attorney, it was claimed that due to serious illness, proper Power of Attorney had been made.


5. We have considered the submissions made by both parties and have also perused the material on record. Notice under section 8 has been duly served, hence, the first primary condition is met. It is noted that


tng



rendering of service by operational creditor as per the terms and conditions of employment agreement is not in dispute. The amount claimed are based upon the terms and conditions of such agreement. It is further noted that a series of emails have been written by the operational creditor to the person belonging to the corporate debtor who has also responded from time to time. The authority of the person who has written the mail in January 2019 has not been challenged. Further, no material has been brought on record to show that operational creditor who was CEO of the company was in fact communicating with unauthorised person. In the case of Mobilox, the Hon'ble Supreme Court had clearly held that feeble contentions regarding pre existing dispute or other aspect cannot be given undue weightage so as to thwart the process of CIRP. In the present case, as stated earlier, a series of mails have been exchanged from the valid mail of the corporate debtor. The retention bonus has become due only on completion of the term, hence, it appears to be a case where such payment is not made merely for the reason that services have already been obtained which is quite commonly observed in real business situations when intention becomes not to pay. We however, make it clear that our decision is based on appreciation of material on record having regard to the nature of this proceedings establish the case of the operational creditor irrespective of our such observations.

6. As far as technical objection regarding validity of the Power of Attorney is concerned, we are of the considered opinion that there is no merit in the contention of the corporate debtor for the reason that no specific format has been provided in the IBC or regulations made


tng



thereunder. In our view such Power of Attorney has been properly executed as per general practice. We are further of the view that the "Doctrine of Substance over Form" is to be applied in case of economic legislation like IBC 2016 so that its objectives to promote entrepreneurship and economic growth coupled with balancing of interest of all stake holders are achieved.

9. Name of IRP has not been proposed which is not mandatory for application made under Section 9 of IBC. Hence, we will appoint the IRP from the approved list maintained by IBBI. In case such person does not accept the assignment, then another person would be appointed.

10. Thus, considering the overall facts and above discussions, we are of the view that this application is liable to be admitted. The application is otherwise complete in all respects. We admit the same and order as under :

ORDER

- i. The application filed by the Operational Creditor under section 8 and 9 of the Insolvency & Bankruptcy Code, 2016 for initiating Corporate Insolvency Resolution Process against the Corporate Debtor, namely New Kolkata International Development Private Limited, is hereby admitted.
- ii. We declare a moratorium and public announcement in accordance with Sections 13 and 15 of the IBC, 2016.
- iii. 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


tng



Insolvency Resolution Process and call for the submission of claims under Section 15. The public announcement referred to in clause (b) of sub-section (1) of Section 15 of Insolvency & Bankruptcy Code, 2016 shall be made immediately.

iv. Moratorium under Section 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 the possession of the corporate debtor.

v. The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated, suspended, or interrupted during moratorium period.

vi. 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.

Sd/

tng

Sd/

- vii. The order of moratorium shall have effect from the date of admission till the completion of the corporate insolvency resolution process.
- viii. 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.
- ix. Necessary public announcement as per Section 15 of the IBC, 2016 may be made.
- x. **Mr. Santanu Bhattacharjee**, IBBI Regn. No. IBBI / IPA--001 / IP- P01141/ 2018-19/ 11868 email - neeljanai@gmail.com is appointed as Interim Resolution Professional for ascertaining the particulars of creditors and convening a Committee of Creditors for evolving a resolution plan.
- xi) The Operational Creditor to pay a sum of Rs. 50,000/- (Rs. Fifty thousand) to IRP as advance fee as per Regulation 33(2) of IBBI (Insolvency Resolution Process for Corporate Persons) Regulation 2016 which shall be adjusted from final bill. In case further funds are required during Corporate Insolvency Resolution Process and if not provided by Committee of Creditors then IRP/RP can approach this Tribunal for that purpose.
- xii) The Resolution Professional shall conduct CIRP in time bound manner as per Regulation 40A of IBBI (Insolvency Resolution Process for Corporate Persons) Regulation, 2016.



tng

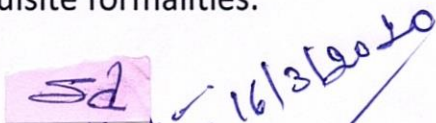


xiii)Registry is hereby directed under section 7(7) of the I.B.Code, 2016 to communicate the order to the Operational Creditor the Corporate Debtor and to the I.R.P. by Speed Post as well as through e-mail.

11. List the matter on 30th April, 2020 for the filing of the **progress report**.

12. Certified copy of the order may be issued to all the concerned parties, if applied for, upon compliance with all requisite formalities.


(Virendra Kumar Gupta)
Member (T)


(Madan B. Gosavi)
Member (J)

Signed on 16 March, 2020