

NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH-V

(IB) 1249(ND)/2019

In the matter of:

M/s. Netmeds Marketplace Limited,
No. 1 Lalithapuram Street,
Royapettah, Chennai — 600014,
Tamil Nadu, India

Corporate Office:

5th Floor, EA Chambers (Express Avenue)
No 49 & 50 L, Whites Road,
Royapettah, Chennai — 600014
Through its Authorized Signatory
Mr. Thiyagarajan

...Operational Creditor

Versus

M/s. Madhatters Voyage Private Limited.,
Office at: 301, South Ex Plaza 1,
South Extension Part-II,
New Delhi - 110049

...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. A. Ramesh Kumar and Me. G. Ananda Selvam

For the Respondent: Mr. Abhijeet Swaroop and Mr. Tabrez Alawat

ORDER

Per Mr. Abni Ranjan Kumar Sinha (Member Judicial)

1. The present application is being preferred by Netmeds Marketplace Limited (hereinafter referred to as “Operational Creditor”) against Madhatters Voyage 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 follows:
 - i. The Netmeds Marketplace Limited, the Operational Creditor operates as an online marketplace on the website located at the URL www.netmeds.com and on the Netmeds app mobile application (collectively referred to as the “Marketplace”). The Marketplace acts as an online platform facilitating different sellers the opportunity to sell their products and/or services and enabling interested buyers to purchase the products and/or services offered by the sellers on the Marketplace.
 - ii. The Operational Creditor is a Company incorporated under the Companies Act, 1956. Thiyagarajan son of Mallikeswaran Vice President (Finance) of the Applicant Company and is duly



authorized by virtue of Board of Directors resolution dated 26.03.2019 in his favour of institute, file, verify and present this petition before the Tribunal on behalf of the operational creditor. True copy of the Board Resolution dated 26.03.2019 in favour of Shri. Thiyaarajan and certificate of incorporation is annexed herewith as Annexure-P/1 & P/2 respectively.

iii. Respondent/Corporate Debtor M/s. Madhatters Voyage Private Limited registered under the Indian Companies Act, 2013. The copy of the Company incorporation certificate is annexed hereto and marked as Annexure-P3.

iv. The Applicant/Operational Creditor has engaged for courier service of the Respondent/Corporate Debtor M/s. Madhatters Voyage Private Limited vide the agreement dated 06.03.2018 with the service description as follows:-

“Netmeds shall give the packed and properly sealed shipments, to be delivered to end customers who place their order online. During the Term of this Agreement, the service provider shall provide the Services more particularly described hereto under Clause 3.”

v. The Clause 3 of the above mentioned agreement reads as follows;

“i) Service Provider shall deliver all the shipments to end customer (hereinafter referred to as “Shipment/s”) as per Netmeds’s instructions informed from time to time along with each Shipment handed over by Netmeds to the Service Provider.



- ii) *The Service Provider shall be responsible to return the undelivered Shipments to Netmeds in the same conditions as provided to the Service Provider for delivery. In the event Service Provider fails to deliver the Shipments in the same condition then the Service Provider shall be liable to pay Netmeds on actual MRP of shipment/s.*
- iii) *Service Provider shall provide services for all the shipment in the following types for Netmeds like Shipment Delivery, Prepaid, Cash on Delivery (COD). Pick-up and Exchange as per Netmeds instructions.*
- iv) *Service Provider shall settle cash collections of Cash on Delivery (COD) shipments with Netmeds officials as per the agreed time lines.*
- v) *The Service Provider shall engage requisite number of staff for rendering of services in an efficient and timely manner and shall ensure necessary, due diligence is done for its entire staff at the time of appointment of such staff. Shall not engage any person with criminal record/conviction and any such person shall be barred from participation directly or indirectly in providing the Services under this Agreement.*
- vi) *The Service Provider shall not assign the agreement and or any of its obligations under this agreement to any third party without prior written consent of Netmeds”.*
- vii) *The Service Provider shall not make any representations or statements on behalf of Netmeds.*
- viii) *The Service Provider shall be responsible for the Shipments and shall give utmost care and consciousness while dealing with the Shipments.*
- ix) *If Netmeds’s customer is not available to receive the Shipment then the Service Provider shall return the shipments back to the hub.*



x) *Service Provider shall update the final status of each shipment to Netmeds at the end of the day which is showing under Service Provider account.*

xi) *The Service Provider shall conduct a background verification of personnel deployed to perform services for Netmeds hereunder at its sole cost and shall ensure that such personnel have cleared such background verification checks before deploying them for performance of Services hereunder. Further, such information should be available on demand to Netmeds."*

The copy of the Agreement dated 06.03.2018 between the parties is being filed as Annexure-P4.

vi. Even after making many demands the Respondent/Corporate Debtor has not paid the amount as demanded through telephone and e-mail communications on 23.10.2018, 13.11.2018, 14.11.2018, 19.11.2018, 20.11.2018, 26.11.2018, 07.12.2018, 31.01.2019, 04.02.2019, 09.02.2019, 11.02.2019, 12.02.2019, 18.02.2019, and 20.02.2019 by the Applicant/Operational Creditor nor have they disputed the amount demanded.

vii. The Respondent/Corporate Debtor has not paid the amount of Rs. 50,19,042/-, the amount due to this Applicant/Operational Creditor and forcing this Applicant/Operational Creditor to take legal recourse by sending a demand notice (Form-3) dated 06.03.2019 under IBC, 2016 demanding the amount of Rs. 50,19,042/-. True copy of the demand notice dated 06.03.2019



sent by the Applicant/Operational Creditor is being filed as Annexure-P6.

viii. When the respondent/Corporate Debtor had not paid the amount of Rs. 50,90,042 only, then the Operational Creditor sent a demand notice dated 06.03.2019 and the respondent/Corporate Debtor vide its reply dated 12.03.2019 made a false allegation to their legal discharge of the outstanding due. Further, the contention of the Corporate Debtor, the applicant does not come under the purview of the Operational Creditor as defined under Section 5(20) of the IBC and the amount claimed by the applicant is not the operational debt under Section 5(21) of the IBC.

3. In response to the notice, the respondent/Corporate Debtor appeared and filed the reply and contended as follows:

i. That the applicant is not the Operational Creditor and amount claimed by the applicant is not the operational debt. Further, admittedly in the present case, services were being provided by the Corporate Debtor to the Petitioner and not vice versa, as is sought to be suggested. As per the Courier Services Agreement dated 06.03.2018 ("Agreement"), the Petitioner had hired the delivery services of the Corporate Debtor. It is a matter of record that no goods or services have been provided by the Petitioner to the Corporate Debtor under the Agreement. The Agreement elaborately recorded the transaction between the parties. Therefore, the alleged claim of the Petitioner does not qualify as



an 'Operational Debt' in terms of Section 5(21) of IBC. Consequently the Petitioner does not qualify as an Operational Creditor under Section 2(20) of the IBC.

- ii. The Petitioner is wrongly contending that claim amount arise out of an obligation under the Agreement and therefore, constitutes a 'debt'. Even assuming that the amount allegedly payable by the Corporate Debtor qualifies to be a debt, however the said debt cannot be treated as an operational debt for the reasons stated above. Petition under Section 9 can be made only with respect to an 'operational debt' and not any 'debt' in general. Thus the Petitioner cannot take recourse to IBC for recovery of the said amount and the proper remedy for the Petitioner would be to institute a civil suit before the court of competent jurisdiction.
- iii. In view of the aforesaid, Petitioner being the recipient of services therefore, does not qualify as an 'Operational Creditor' and consequently no recourse can be taken under IBC.
- iv. It is a matter of record that the parties were under communication on the issue of reconciliation of any pending COD payments that forms the subject matter of present proceedings. Though the same is evident from the documents placed on record by the petitioner itself, however, the communication issued by the Corporate Debtor in this context has been conveniently ignored by the Operational Creditor.



- v. Furthermore, having failed to disclose such material information by itself, the Petitioner has also malafidely filed incomplete copy of the Corporate Debtor's Reply dated 16.03.2019 to the Demand Notice dated 06.03.2019. The Petitioner has deliberately and conveniently concealed that the communications exchanged between the parties on the issue of reconciliation and proof of payments already remitted by the Corporate Debtor in respect of COD deliveries. A complete copy of Corporate Debtor's Reply dated 16.03.2019 to the Demand Notice dated 06.03.2019 is annexed herewith and marked as ANNEXURE-R2.
- vi. It is submitted that while the Corporate Debtor had been performing its obligations under the Agreement, certain disputes had arisen between the parties in relation to reconciliation of accounts, particularly in respect of cash collected against COD deliveries. In fact, such disputes had arisen prior to the issuance of Demand Notice. Accordingly, the Corporate Debtor had duly communicated existence of such disputes to the Petitioner, in its Reply to the Demand Notice.
- vii. As detailed in the Reply the parties are not ad idem on the amount payable on account of COD deliveries effected under the Agreement. Admittedly, there is a need for reconciliation of accounts and no amount has been confirmed by the Corporate Debtor as payable to the Petitioner, as alleged or at all. The necessity for reconciliation has been adequately detailed by the



Corporate Debtor at Paragraph 6 of the Reply to the Demand Notice, which contents are not repeated herein for the sake of brevity.

- viii. That any amount allegedly payable can only be arrived at after such reconciliation has been done post rendition of accounts. Admittedly, the Petitioner has shared adhoc excel sheets containing details of the alleged outstanding sum due on account of COD deliveries. Such excel sheets are not supported by any customer invoice, which shall prove the exact volume of orders placed and/or any proof of payment, which shall prove the total amount deposited by the Corporate Debtor in respect of COD deliveries. Clearly, parties will have to produce documents, examine witnesses, lead evidence to prove such issues and the same cannot be gone into in the present proceedings.
- ix. Thus, it is evident that the facts in the present case are disputed. It is settled law that where disputed questions/issues of facts are involved, for proving which facts parties may have to lead evidence, recourse to IBC proceedings cannot be taken. Clearly if evidence is required to prove facts, the appropriate remedy is a Civil Suit before the court of competent jurisdiction. The Petitioner is therefore clearly abusing the process of law by taking recourse to IBC for arm twisting our Client to succumb to its otherwise unreasonable demand.

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x. In this regard he placed reliance upon Hon'ble Supreme Court judgement in the case of ***Mobilox Innovations Private Limited Vs. Kirusa Software Private Limited***, and NCLT Mumbai Bench's decision in ***Vijay Rochlani v. Shantai Exim Limited***.

4. The petitioner also filed the rejoinder to the reply and raised the following averments:

i. the Applicant/Operational Creditor entered into an agreement dated 06.03.2018 with M/s. Madhatters Voyage Private Limited, Respondent/Corporate Debtor herein for the courier services. Clause 3 of the said Agreement enumerates the Obligations of M/s. Madhatters Voyage Private Limited, the service provider herein. In the said clause, the 3(iii) and 3 (iv) reads as follows;

“iii. Service Provider shall provide services for all the Shipments in the following types for Netmeds like Shipment Delivery, Prepaid, Cash on Delivery (COD), Pick-up and Exchange as per Netmeds instructions.

iv. Service Provider shall settle cash collections of Cash on Delivery (COD) shipments with Netmeds officials as per the agreed time lines.”

ii. returning the COD amount is a liability and obligation on the part of Respondent/Corporate Debtor and the claim by Applicant/Operational Creditor is with regard to the said obligation. Thus, the amount payable by the Respondent/Corporate Debtor falls squarely within the definition of debt and the contention made by the



Respondent/Corporate Debtor in this regard is legally not binding and is vehemently denied.

- iii. The Claim made by Applicant/Operational Creditor against Respondent/Corporate Debtor is based on their services rendered and as a part of their services they ought to have pay the cash collections of COD to Applicant/Operational Creditor which was not done by them. Thus, the claim made by Applicant/Operational Creditor is fully within the scope of Operational Debt and that Applicant/Operational Creditor is the operational creditor with regard to the amount payable by Respondent/Corporate Debtor to Applicant/Operational Creditor.
- iv. The debt became due on April, 2018 when the outstanding amount was confirmed by the Corporate Debtor. The aforesaid sum is payable by the corporate debtor without any excuse along with an interest at the rate of 24% per annum from the due date i.e. April, 2018 till its actual realization.
- v. That, despite due service of Demand Notice/Invoice demanding payment of the operational debt from the Corporate Debtor, the outstanding amount of operational debt was not paid to the Operational Creditor by the Corporate Debtor within the prescribed period of 10 days as provided under the Code. Further, the Corporate Debtor failed to paid operational debt as claimed by the applicant/operational creditor.



- vi. Petitioner claimed that vide e-mail dated 06.03.2019, Corporate Debtor admitted his liability as per the data provided and agreed to pay Rs. 10 to 12 lakhs at the earliest before 15.03.2019 and remaining amount before the end of March 2019, which would be evident from Annexure 2 of the rejoinder.
- vii. Further, in reply to the contention of the respondent that there is no reconciliation with the pending amount as CoD between the parties. The contention of the Operational Creditor is that repeatedly the Operational Creditor had send the reminders with updated pending CoD amount from the Corporate Debtor vide e-mail dated Page 4 of the rejoinder.
5. We have heard the Ld. Counsel appearing for the applicant as well as the respondent/Corporate Debtor and perused the averment made in the application, reply and rejoinder as well as the documents enclosed with the applications, reply and rejoinder.
6. Ld. Counsel appearing for the applicant in course of argument submitted that the applicant has engaged the respondent /Corporate Debtor for courier service vide agreement dated 06.03.2018 and as per clause 3 of the agreement, the service provider shall provide services for all the shipment in the following types for Netmeds like Shipment Delivery, Prepaid, Cash on Delivery (COD), Pick-up and Exchange as per Netmeds instructions and collect the cash on delivery shipment with enactment of officials as per the agreed time line. He further submitted that even after making the several demands Corporate Debtor has not made the amount nor they have disputed the demand



and as the amount started accumulating for each month and when new amounts were added the amended and updated amount was sent to the Corporate Debtor. He further submitted that total Rs. 50,19,042 is the outstanding due, which the Corporate Debtor is liable to pay. He further submitted that returning the CoD amount is liability and obligation on the part of the respondent/Corporate Debtor and claimed by applicant/Operational Creditor is with regard to the said obligations. Thus, the amount payable by the respondent/Corporate Debtor falls within the definition of debt. He further submitted that the Operational Creditor has repeatedly shared the working for the CoD pending and even respondent/Corporate Debtor has communicated through e-mail dated 26.11.2018, that they are reconciling the CoD pending data from their hand but the applicant/Operational Creditor have not received any reconciliation or confirmations from their end. He further submitted vide e-mail dated 06.03.2019, the Corporate Debtor admitted and agreed to pay sum of Rs. 10 to 12 lakhs at earliest before 15.03.2019 and the remaining before the end of March 2019, but no payment has been made, which shows there is a default in payment of the outstanding due.

7. On the other hand Ld. Counsel appearing for the Corporate Debtor, in course of his argument submitted that the petitioner is not the Operational Creditor as defined under Section 5(20) and the debt is not operational debt as defined under Section 5(21). He further submitted that as per the courier service agreement dated 06.03.2018, the petitioner had hired the delivery service of the



Corporate Debtor. Pursuant to which the Corporate debtor used to collect parcel of medicines for delivery from the petitioner and cause delivery of the same to customer payment in respect of such deliveries where either remitted online or through cash. The Corporate Debtor has remitted/deposited the entire amount collected by it from the end of customer with the petitioner, which the petitioner is disputing and it is the differential amount which the petitioner is seeking to recover by way of present petition. He further submitted that it is a case of specific performance of contract and not a breach of contract. He further submitted since the alleged differential amount is not on account of any good supply or services rendered by the petitioner, therefore same does not qualify as the operational debt. He further submitted since the petitioner being discipliner of the services, therefore, does not qualify as an Operational Creditor. He further submitted that Operational debt is disputed therefore, the petitioner cannot claim it under Section 9 by filing an application under Section 9 of the IBC.

8. Since the Corporate Debtor has raised the point that petitioner is not the Operational Creditor and the amount claim is not the operational debt. therefore, at first, We would like to consider this. At this juncture, we would like to refer the definition of Operational Creditor, Operational Debt, Claim and Debt and the same are quoted below:-

*“5. (20) **“operational creditor”** means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred;”*



*“5. (21) "**operational debt**" means a claim in respect of the provision of goods or services including employment or a debt in respect of the repayment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority;”*

*“3.(6) "**claim**" means—*

(a) a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured or unsecured;

(b) right to remedy for breach of contract under any law for the time being in force, if such breach gives rise to a right to payment, whether or not such right is reduced to judgment, fixed, matured, unmatured, disputed, undisputed, secured or unsecured;”

*“3. (11) "**debt**" means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt;”*

9. Mere plain reading of the aforesaid provision shows that operational debt means a claim, in respect of the provision of goods or services including employment or a debt in respect of the payment of dues arising under any law for the time being enforce and payable to the Central Government, any State Government or any Local Authority and debt as a defined under Section 3(11) means a liability or obligation in respect of a claim which is due from any person and includes a financial debt or the operational debt and the claim is defined under Section 3(6) which shows that it means a right to payment whether or not such right is reduced to judgment fix, disputed, undisputed, legal, equitable, secured or unsecured or right to remedy for breach of contract under any law for the time being enforce, If such breach give rise to right to payment. If we shall read



all these definition together then it can be said that a debt is a liability or obligation in respect of the claim that is a right to payment or right to remedy and right to remedy for breach of contract under any law for the time being enforce and it includes a financial debt as well as the operational debt and if there is a default of payment financial debt, then a person is entitled to trigger Section 7 of the IBC and if there is a default of payment of operational debt, then a person is entitled to trigger Section 9 of the IBC. Here, in the case in hand, the applicant filed an application under Section 9 of the IBC which relates to the operational debt which is defined under Section 5(21) of the IBC and it is a claim in respect of provision of goods or services including employment or a debt in respect of the payment of dues arising under any law for the time being enforce. Therefore, only those claim in respect of which the provisions of goods or services including employment are provided comes under the definition of operational debt or if it is a debt in respect of the payment of dues arising under any law for the time being enforce and payable to the Central Government, any State Government or any Local Authority.

10. In view of the aforesaid provision of the law, when we shall considered the submissions of Ld. Counsel appearing for the Corporate Debtor that the claim of the applicant does not come under the definition of operational debt, then we find the applicant has enclosed the courier service agreement and on the basis of that he claimed that he is the Operational Creditor. Therefore, at this juncture, we have gone through the courier service agreement, which is at page 36 of the



paper book filed by the petitioners and on careful consideration of the same, we find that Corporate Debtor Madhatters Voyage Private Limited entered into a Courier Service Agreement with Netmeds Marketplace Limited (applicant) for providing the courier service and as per the agreement, the respondent was interested to provide the service. Relevant provision of the courier service agreement is quoted below:-

“1.Service description:

Netmeds shall give the packed and properly sealed Shipments, to be delivered to end customers who place their order online. During the Term of this Agreement, the Service Provider shall provide the Services more particularly described hereto under Clause 3.

2. Term:

The Term of this Agreement shall be valid for One (1) year starting from 1st March, 2018, (“Term”) Netmeds at its sole discretion reserves the right to extend the period of this Agreement for a further period of One year by serving a letter in writing on the Service Provider on the same terms and conditions of this Agreement.

3. Obligation of the Service Provider:

- i. Service Provider shall deliver all the shipments to end customer (hereinafter referred to as “Shipment/s”) as per Netmeds’s instructions informed from time to time along with each Shipment handed over by Netmeds to the Service Provider.*
- ii. The Service Provider shall be responsible to return the undelivered Shipments to Netmeds in the same condition as provided to the Service Provider for delivery. In the even Service Provider fails to deliver the Shipments in the same condition then the Service Provider shall be liable to pay Netmeds on actual MRP of shipment/s.*



iii. Service Provider shall provide services for all the Shipment in the following types for Netmeds like Shipment Delivery, Prepaid, Cash on Delivery (COD), Pick-up and Exchange as per Netmeds instructions.

iv. Service Provider shall settle cash collections of Cash on Delivery (COD) Shipments with Netmeds officials as per the agreed time lines.

v. The Service Provider shall engage requisite number of staff for rendering of the Services in an efficient and timely manner and shall ensure necessary due diligence is done for its entire staff at the time of appointment of such staff. Shall not engage any person with criminal record/conviction and any such person shall be barred from participating directly or indirectly in providing the Services under this Agreement.

vi. The Service Provider shall not assign the agreement and or any of its obligations under this agreement to any third party without the prior written consent of Netmeds.

vii. The Service Provider shall not make any representations or statements on behalf of Netmeds.

viii. The Service Provider shall be responsible for the Shipments and shall give utmost care and consciousness while dealing with the Shipments.

ix. If Netmeds's customer is not available to receive the Shipment then the Service Provider shall return the shipment back to the hub.

x. Service Provider shall update the final status of each shipment to Netmeds at the end of the day which is showing under Service Provider account.

xi. The Service Provider shall conduct a background verification of personnel deployed to perform Services for Netmeds hereunder at its sole cost and shall ensure that such personnel have cleared such background verification checks before



deploying them for performance of Services hereunder. Further, such information should be available on demand to Netmeds.

4. Billing:

i. Service Provider shall raise bills for the services rendered on monthly basis and the payment for same shall be made by Netmeds within 10 (Ten Days) days upon the receipt of the original hard copy of Invoice as mutually agreed schedule of rates (as per Annexure-1). No escalation in rates on any account will be permitted during the contractual period.

ii. Service Provider agrees to provide supporting documents for all invoices submitted for payments.

iii. Service Provider shall not claim any other charges and Netmeds shall be entitled to set off against/deduct/recover from the aforesaid charges and any other sums payable by Netmeds to Service Provider at any time in respect of any amount due or claimed by Netmeds or any statutory or regulatory bodies by the Service Provider for any action arising out of this Agreement.

iv. Rate revision is subject to Service Provider proposal and Netmeds acceptance as detailed in Annexure 1. Rates revision could be subject to mutual acceptance. Any sudden changes in rates shall invite for penalties.”

11. If we shall consider the terms and conditions of the courier service agreement along with the definitions, which we have referred in the aforementioned para, then we are of the considered view that on the basis of this courier service agreement, it is the respondent who renders their service and it was not the applicant who renders the service. Therefore, in view of Section 5(21) the amount which the applicant claim does not come under the definition of operational debt and since the amount claimed by the applicant does not come under the definition of operational debt. Therefore, the applicant cannot be



treated as Operational Creditor under Section 5(20) of the IBC because the Operational Creditor means a person to whom an operational debt is owed and include any person to whom such debt has been legally assigned or transferred.

12. For the reason discussed above, we are of the considered view that there is force in the contention raised on behalf of the Ld. Counsel appearing for the Corporate Debtor that the claim of the applicant does not come under the definition of Operational debt and the applicant is not the Operational Creditor. Of course the applicant has other remedy under the other provision of law but so far Section 9 of the IBC is concerned since the applicant is not the Operational Creditor and the amount which the applicant claim does not come under the definition of the operational debt, therefore, we are of the considered view the present application is not maintainable and liable to be dismissed.
13. Accordingly, the present application is hereby DISMISSED. Since we have dismissed the application on the ground that the claim of the applicant does not come under the definition of operational debt. Therefore, we are not inclined to decide other issues raised by the parties.

sd/-

K. K. VOHRA
Member (T)

sd/-

ABNI RANJAN KUMAR SINHA
Member (J)

06.2023