

**IN THE NATIONAL COMPANY LAW TRIBUNAL,
DIVISION BENCH – I, CHENNAI**

CP/1269/IB/2018 filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 r/w Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016

In the matter of **M/s. Store N Move Private Limited**

M/s. Sagaya Annal Associates

#SA Complex, 1/68, Bangalore High Road,
(Opposite to Saint – Gobain),
Mambakkam, Kanchipuram – 602 105

... Operational Creditor

-Vs-

M/s. Store N Move Private Limited,

Plot No.62, Anadhavalli Nagar,
Soundar Complex, Bangalore High Road,
Opposite to Saint Gobain, Mambakkam,
Kancheepuram – 602 105.

...Corporate Debtor

Order Pronounced on 20th January, 2020

CORAM :

R. VARADHARAJAN, MEMBER (JUDICIAL)

ANIL KUMAR B, MEMBER (TECHNICAL)

*For Operational Creditor : H. Karthik Seshadri, Advocate
C. Suraj, Advocate
P. Rajaji, Advocate
For M/s. Iyer and Thomas*

*For Corporate Debtor : E. Om Prakash, Senior Advocate
P. Elaya Rajkumar, Advocate
For M/s. Ramalingam & Associates*



ORDER

Per: R. VARADHARAJAN, MEMBER (JUDICIAL)

1. Under Adjudication is an Application that has been filed by **M/s. Sagaya Annai Associates** (hereinafter referred to as '*Operational Creditor*') under Section 9 of the Insolvency & Bankruptcy Code 2016 (in short, 'I&B Code, 2016') r/w Rule 6 of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 against **M/s. Stores N Move Private Limited** (hereinafter referred to as '*Corporate Debtor*'). The prayer made is to admit the Application, to initiate the Corporate Insolvency Resolution Process against the Corporate Debtor, declare moratorium and appoint Interim Resolution Professional.

2. Part-I of the Application sets out about the Operational Creditor from which, it is evident that the Operational Creditor is a Registered Partnership Firm, with Registered Document No. 39 of 2015 maintained by the Registrar of Firms, Chengalpattu. Part-II of the Application gives all the particulars of the Corporate Debtor from which it is evident that the Corporate Debtor is a Private Limited Company with CIN:U63090TN2014PTC097388 which was incorporated on 17.09.2014 and that its Authorized Share capital and paid up capital is ₹1,20,00,000 and ₹68,40,000 respectively. The



Registered Office of the Corporate Debtor as per the Application is stated to be situated at Plot No. 62, Anadhavalli Nagar, Soundar Complex, Bangalore High Road, Opposite to Saint Gobain, Mambakkam, Kancheepuram, Tamil Nadu – 602 105. Part-III of the Application shows that the Operational Creditor has not proposed any “Interim Resolution Professional” (IRP) and left it to the discretion of this Tribunal to appoint the IRP.

3. From Part-IV of the Application, it is seen that a sum of Rs.32,94,237.72/- is due and payable by the Corporate Debtor as on 01.09.2018. The details of transactions is stated to be on account of providing Man Power supply and other services to the Corporate Debtor.

4. Part V of the Application describes the particulars of the documents records and evidence of default of the Operational debt which are as follows;

- a) E-mail correspondence by the Operational Creditor to the Corporate Debtor
- b) Statement of Accounts for the period May 16 to September 18.
- c) Copy of Form III notice dated 09.09.2019
- d) Reply to the Demand notice by the Operational Creditor.



5. The Operational Creditor has issued Demand Notice as mandated under Sec. 8 of the I&B Code, 2016 to the Corporate Debtor on 09.09.2018, demanding the Corporate Debtor to repay a sum of Rs.32,94,237.72/- within 10 days from the receipt of the notice, to which the Corporate Debtor has sent a reply on 17.09.2018.

6. The Learned Counsel for the Operational Creditor submitted that the Corporate Debtor is involved in the business of Warehousing and Logistics service provider in procurement, warehousing, transportation, distribution, process outsourcing and process consultancy. It was submitted that the Corporate Debtor in the month of September 2014 approached the Operational Creditor to provide its various clients with Manpower service and in accordance with the same, the Operational Creditor thereby duly provided Man Power Supply and other services to the Corporate Debtor's client on behalf of the Corporate Debtor. The invoices were raised by the Operational Creditor from time to time to the Corporate Debtor for the services rendered and the payment were also made by the Corporate Debtor.

7. The Learned Counsel for the Operational Creditor submitted that for the services rendered in relation to twelve



invoices from 01.06.2016 to 04.09.2016 which were raised by the Operational Creditor, the payments against these invoices were due and payable by the Corporate Debtor within 30 days from the date of issue of each invoice. It was further submitted by the Learned Counsel for the Operational Creditor that despite availing the services of the Operational Creditor, the Corporate Debtor had failed to repay the dues to the Operational Creditor and as a consequence several emails and reminders with detail break-up of the outstanding amount were sent to the Corporate Debtor and most of the e-mails did not evince any reply from the Corporate Debtor.

8. The Learned Counsel for the Operational Creditor submitted that the Corporate Debtor has acknowledged their liability to pay the Operational Creditor by their emails dated 01.06.2017, 07.08.2017 and also from a mere perusal of the Balance sheet of the Corporate Debtor as on 31.03.2019, reflects the Long – term borrowing and Trade payable that the Corporate Debtor owes to the Operational Creditor. It was further submitted that the Corporate Debtor has remitted a sum of Rs. 10 Lakhs on 05.01.2018 to the account of the Operational Creditor and thereafter, no payments have been made till date.



9. The Learned Counsel for the Operational Creditor submitted that Demand Notice was issued by the Operational Creditor to the Corporate Debtor on 09.09.2018 which was duly received by the Corporate Debtor on 12.09.2018 and upon receiving the said notice, the Corporate Debtor gave evasive replies and has not raised any bonafide disputes. Thus, under these circumstances, the Operational Creditor has filed the present petition for initiation of the CIRP against the Corporate Debtor.

10. The Learned Senior Counsel appearing on behalf of the Corporate Debtor at the first instance, without going into the merits of the contentions raised by the Operational Creditor placed on record certain facts. It was submitted that the Operational Creditor is a partnership firm represented by its partners (a) Mr. YSP Balraj – 95% and (b) MR. YB Selvaraj – 3% and (c) Mrs. Fathima Mary – 2% and the present application is filed and signed by Mr. YSP Balraj who is holding 95% stake in the Operational Creditor's firm. Further, the Corporate Debtor was originally constituted as a Limited Liability Partnership in the year 2012 under the name of V Store N Move consisting of Mr. YSP Balraj, Mr. Deveraj Vasanth Immanuel and one Mr. Velu. Later the said partnership firm V Store N Move excluding the partner Mr.



Velu was incorporated as a Company in the name and style of M/s. Store N Move Pvt. Ltd. on 17.09.2014.

11. It was submitted by the Learned Senior Counsel appearing on behalf of the Corporate Debtor that at the time of Incorporation, the promoters / Directors of the Corporate Debtor are Mr. YSP Balraj, Mr. Devaraj Vasanth Immanuel and one Mr. Pannerselvam Jayendran (who joined lately) and later Mr. Devaraj Vasanth Immanuel and Mr. Jayendran resigned from the Directorship of the Corporate Debtor Company in the year 2016 and as on today Mr. YSP Balraj is holding 36.84% of stake in the Corporate Debtor who has filed a Company Petition before this Tribunal, alleging oppression and mismanagement against the Respondent / Corporate Debtor and others under Section 241 and 242 of the Companies Act, 2013 and has also sought various relief and the said Company petition is pending on the file of this Tribunal vide CP. No. 4 of 2016. It was also submitted that Mr. YSP Balraj who is the shareholder in the Corporate Debtor has filed the present petition in the capacity of the Managing Partner of the Operational Creditor.

12. The Learned Senior Counsel for the Corporate Debtor submitted that the present petition filed under Section 9 of



IBC is devoid of merits as the Petitioner does not and cannot have any claim against the Corporate Debtor and even prior to the issuance of the Demand Notice under Section 8 of the IBC, 2016 there was lot of correspondence between the Operational Creditor and the Corporate Debtor touching upon the dispute. The Learned Senior Counsel also relied upon various emails dated 02.08.2016, 05.08.2016, 07.08.2016, 11.08.2016, 12.08.2016, 13.08.2016 and 20.01.2017 and contended that a perusal of the said emails will reveal that there was a pre-existing dispute between the Operational Creditor and the Corporate Debtor and suppressing the same, the Operational Creditor has filed the present petition.

13. It was further contended by the Learned Senior Counsel for the Corporate Debtor that the Operational Creditor has made a demand for the subject matter of invoices as early as in the year of 2016 in relation to which there is series of exchanges of emails till January 2017 pointing out the dispute existing between the Operational Creditor and the Corporate Debtor and the Operational Creditor having kept quiet till the month of August 2018 all of a sudden issued the statutory demand notice dated 09.09.2018 for which the Corporate Debtor has sent a reply on 17.09.2018 and as such there is a pre - existing dispute touching upon the existence of the debt



and there is no question of any default in payment of the alleged debt and only after the exchange of email, the demand notice was issued on 09.09.2018, which was also duly replied, referring to the earlier correspondences and hence the above petition is not maintainable.

14. The Learned Senior Counsel appearing on behalf of the Corporate Debtor submitted that there is no proper authority in filing the petition and all the required documents have not been filed to maintain the petition and further submitted that the present petition is fraudulent and malicious as Invoices attached with the present petition are fabricated and not acknowledged by the Corporate Debtor and the said Invoices were never served on the Corporate Debtor and hence it cannot be relied upon and under these circumstances prayed to dismiss the petition with exemplary costs.

15. Heard both sides, perused the pleadings including the documents placed on file. As to the facts of the case, it is becomes necessary for this Authority to ascertain whether there is a debt and default on the part of the Corporate Debtor and whether there exist any dispute between the parties before the issuance of the Demand Notice.



16. It is evident from the record that there exist no Agreement as between the Operational Creditor and the Corporate Debtor for supply of services as contemplated between the parties. The Operational Creditor has placed on record only the Invoices as raised by them against the Corporate Debtor.

17. The Operational Creditor has filed an additional typed set of papers on 14.11.2019 wherein the Financial Statements for the year ending 2019 is being filed and a perusal of the same postulates the fact that there exists a dispute between the parties. The relevant extract from the Financial Statements is reproduced hereunder;

"Mr. Y.S.P. Balraj (removed Director) has filed a CP No.4 of 2016 against all the Directors (including Previous Director) for oppression and mismanagement for reasons as disclosed by the directors in the Board Report. The outcome of the case is yet to be decided and may or may not be in favour of the Company and its Directors.

...It is communicated to us that the financial statements are been prepared and finalized without the consent and knowledge of one of the Director Shri Y.S.P. balraj who had conveyed his dissent towards non - acceptance of the financial statements and accounts of the company particularly the loans and advances relating to LLP and other matters. It is further reported by the board that company has outstanding liabilities as on 31st March 2019 to Y.S.P. Balraj Rs.40,00,000, Sagaya Annai Associates under Creditors having a balance of Rs.30,98,105/- (during the year Rs.3,61,789 is reduced from the payable account for which no document is produced). Confirmation of balances from the respective parties are



not available. Hence the same has been obtained from the management via management representation."

18. It is an undisputed fact that the Managing Partner of the Operational Creditor whom through the present petition has been filed is holding 36.84% stake of the shareholding in the Corporate Debtor. Further, the filing of C.P. No.4 of 2016, by the Managing Partner against the Corporate Debtor, which is pending on the file of this Tribunal, is a fact borne on record and the same goes on to show that there exists a pre-existing dispute between the parties.

19. The Learned Senior Counsel for the Corporate Debtor contended that Section 188 of the Companies Act, 2013, which deals with the Related party transaction postulates that any related party transactions which are being carried out should be with the consent of the Board of Directors given by way of a Resolution and in the instant case no such resolution has been passed to that effect. For the sake of convenience, the same is extracted hereunder;

188. Related party transactions.—

(1) Except with the consent of the Board of Directors given by a resolution at a meeting of the Board and subject to such conditions as may be prescribed, no company shall enter into any contract or arrangement with a related party with respect to—

(a) sale, purchase or supply of any goods or materials;



(b) selling or otherwise disposing of, or buying, property of any kind;

(c) leasing of property of any kind;

(d) availing or rendering of any services;

(e) appointment of any agent for purchase or sale of goods, materials, services or property;

(f) such related party's appointment to any office or place of profit in the company, its subsidiary company or associate company; and

(g) underwriting the subscription of any securities or derivatives thereof, of the company:

Provided that no contract or arrangement, in the case of a company having a paid-up share capital of not less than such amount, or transactions exceeding such sums, as may be prescribed, shall be entered into except with the prior approval of the company by a resolution:

Provided further that no member of the company shall vote on such resolution, to approve any contract or arrangement which may be entered into by the company, if such member is a related party:

Provided also that nothing in this sub-section shall apply to any transactions entered into by the company in its ordinary course of business other than transactions which are not on an arm's length basis:

Provided also that the requirement of passing the resolution under first proviso shall not be applicable for transactions entered into between a holding company and its wholly owned subsidiary whose accounts are consolidated with such holding company and placed before the shareholders at the general meeting for approval.]

Explanation.— In this sub-section,—

(a) the expression —office or place of profit|| means any office or place—

(i) where such office or place is held by a director, if the director holding it receives from the company anything by way of remuneration over and above the remuneration to which he is entitled as director, by

way of salary, fee, commission, perquisites, any rent-free accommodation, or otherwise;

(ii) where such office or place is held by an individual other than a director or by any firm, private company or other body corporate, if the individual, firm, private company or body corporate holding it receives from the company anything by way of remuneration, salary, fee, commission, perquisites, any rent-free accommodation, or otherwise;

(b) the expression —arm's length transaction|| means a transaction between two related parties that is conducted as if they were unrelated, so that there is no conflict of interest.

(2) Every contract or arrangement entered into under sub-section (1) shall be referred to in the Board's report to the shareholders along with the justification for entering into such contract or arrangement.

(3) Where any contract or arrangement is entered into by a director or any other employee, without obtaining the consent of the Board or approval by a resolution in the general meeting under sub-section (1) and if it is not ratified by the Board or, as the case may be, by the shareholders at a meeting within three months from the date on which such contract or arrangement was entered into, such contract or arrangement shall be voidable at the option of the Board and if the contract or arrangement is with a related party to any director, or is authorised by any other director, the directors concerned shall indemnify the company against any loss incurred by it.

(4) Without prejudice to anything contained in sub-section (3), it shall be open to the company to proceed against a director or any other employee who had entered into such contract or arrangement in contravention of the provisions of this section for recovery of any loss sustained by it as a result of such contract or arrangement.

(5) Any director or any other employee of a company, who had entered into or authorised the contract or arrangement in violation of the provisions of this section shall,—

(i) in case of listed company, be punishable with imprisonment for a term which may extend to one year or with fine which shall not be less than twenty-five



thousand rupees but which may extend to five lakh rupees, or with both; and

(ii) in case of any other company, be punishable with fine which shall not be less than twenty-five thousand rupees but which may extend to five lakh rupees.

20. *Per Contra* it was contended by the Learned Counsel for the Operational Creditor that they are exempted under third provision to sub – section (1) of Section 188 of the Companies Act, 2013 wherein all the transactions were made during the ordinary course of business and as such they cannot be brought under the realm of Related party. However, we are unable to accede to the submissions made by the Learned Counsel for the Operational Creditor, in view of the fact that in the Financial Statement and Auditor's Report of the Corporate Debtor, the transactions in relation to the Operational Creditor is being shown as "Related Party Transactions" and it is a fact which is borne on record which cannot be brushed aside and as such the contention raised by the Learned Counsel for the Operational Creditor that these transactions were made during ordinary course of business is not sustainable.

21. From the facts narrated supra, it is made that there exist a dispute between the parties and the said dispute was in existence even before the issuance of the Demand Notice by the Operational Creditor. The factum of filing of a C.P. No.4



of 2016 by the Managing Partner of the Operational Creditor in his personal capacity against the Corporate Debtor and others also dealing with the transactions would show that there exist dispute between the parties.

22. The Hon'ble Supreme Court in **Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software (P) Limited; 2017 1 SCC Online SC 353** held that the 'existence of 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 and observed as follows;

"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.."

Further, at paragraph 51 it is held:

"51.Therefore, all that the adjudicating authority is to see at this stage is whether there is a plausible contention which requires further investigation and that the



“dispute” is not a patently feeble legal argument or an assertion of fact unsupported by evidence.”

Thus, it is evident that there is a genuine dispute between the parties and the defence raised by the Corporate Debtor on the grounds of existence of a dispute are real and not spurious, hypothetical, illusory or misconceived.

23. Thus, by taking into consideration the facts mentioned supra, we are constrained to **dismiss** this petition, however without costs.

-SD-

ANIL KUMAR B
MEMBER (TECHNICAL)

-SD-
R. VARADHARAJAN
MEMBER (JUDICIAL)

Raymond