

**BEFORE THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH
COURT- III**

IB-312(ND)/2021

In the matter of

An application under Section 9 of Insolvency & Bankruptcy Code, 2016 read with Rule 6 of the Insolvency & Bankruptcy (Application to Adjudicating Authority Rules, 2016)

And

In the matter of:

M/S Shri Sai Enterprises

Having Registered Office at:

Plot No. 365, Loha Mandi,

Ghaziabad, Uttar Pradesh-201009

.....Operational Creditor

Versus

Iceberg Developers Pvt. Ltd.

Having Registered Office at :

Basement 1, Elegance Tower,

Plot No.8, District Centre Jasola,

New Delhi-110025

.....Corporate Debtor

Order reserved on 08.04.2022
Order pronounced on :20.04.2022

Coram :

Sh. Bachu Venkat Balaram Das : Member (Judicial)

Sh. Virendra Kumar Gupta : Member (Technical)

Appearances (via Video Conference)

For Operational Creditor : *Sh. Aaryan Sharma, Sh. Saurabh Kalia, Advs.*

For Corporate Debtor : *Sh. Aditya Rathi, Ms Astha Nigam, Sh. Shivam Rajpal, Advs*

ORDER

Per : V. K. Gupta., Member (Technical)

Brief Facts Of The Case

1. The present application has been filed by the Operational Creditor, namely **M/S Shri Sai Enterprises** under Section 9 of Insolvency & Bankruptcy Code, 2016 (hereinafter referred to as "IBC, 2016") for initiation of the Corporate Insolvency Resolution Process (hereinafter referred to as "CIRP") against the Corporate Debtor, namely



Iceberg Developers Pvt. Ltd.

2. In support of his claim, the operational creditor has placed on record the **facility agreement** for financing 3 crores @12 % interest p.a. dated **01.03.2017** as **Annexure 1** on **Page 34** of the application which was made after the Corporate Debtor had requested funds from the operational creditor. The date of repayment of full debt was fixed to be 15.03.2019. In spite of requests for payment when the amount due was not paid, the operational creditor sent a **demand notice** dated **19th March, 2021 (marked as Annexure 12 on page 82)** which was duly received by the corporate debtor but the same was not replied to by the corporate debtor. Affidavit in compliance with Section 9(3)(b) and Section 9(3)(c) of IBC, 2016 has also been placed on record.

Arguments on behalf of the Operational Creditor

1. Ld. Counsel appearing on behalf of the Operational Creditor submitted that there was no dispute ever raised by the corporate debtor regarding the amount payable by the corporate debtor prior to the sending of the **demand notice** under **Sec 8 IBC**.
2. The learned counsel for the petitioner further submitted that a lot of correspondence took place between the operational creditor and corporate debtor demanding the outstanding dues amounting to Rs.1,81,74,191/- along with interest @ 12% per annum but all efforts by the operational creditor went in vain.
3. The learned counsel for the operational creditor submitted that the operational creditor finally resorted to arbitration which was provided for in the facility agreement. The corporate debtor accepted the decision of the operational creditor to pursue arbitration for resolving this dispute. The arbitrator decided in favour of the operational creditor and ordered an amount of Rs.2,17,18,157 inclusive of the outstanding principal amount and 9% interest on it, to be paid by the corporate debtor to the operational creditor. The **Arbitral Award** dated **04.03.2020** is marked as **Annexure 11** on **page 59** of the application.
4. The operational creditor has also filed an **interlocutory application** under **Section 60(5)** of the **I & B Code, 2016** r/w **Rule 32 and 11** of the **National Company Law Tribunal Rules, 2016** to ensure that the debtor does not create a third party interest in respect of his movable as well as immoveable assets till appointment of the interim resolution professional.



Arguments On Behalf Of Corporate Debtor

5. The learned counsel for the corporate debtor submits that the applicant is not the operational creditor of the corporate debtor/respondent and hence application under section 9 is not maintainable and needs to be dismissed. The applicant/ alleged operational creditor seeks execution of an arbitral award against the respondent and should approach a civil court under Section 36 of the Arbitration and Conciliation Act, 1996 for the same. There is no locus standi for filing an application under Section 9 before this Hon'ble Tribunal.
6. The learned counsel for the corporate debtor also submits that there is no amount payable by the corporate debtor to the applicant and this application is a fraudulent attempt by the applicant to extort money from the respondent.

Findings & Conclusion

7. We have heard the Ld. Counsel for the parties. From the perusal of the records, it is evident that the Corporate Debtor has paid part payment of the total amount. The last payment of Rs.64,00,000 was made on 21.12.2017 which was more than the threshold limit at the relevant point in time. Thus, the debt is due and payable both in fact and in law.
8. It is seen from the records that notice of default under Section 8 has been delivered and an affidavit under Section 9(3)(b) of IBC has also been filed. Having heard the submissions and perused the records, we are of the view that a clear case of the default has been made out by the Applicant and the present application under Section 9 IBC needs to be admitted.
9. It is noted that the application filed U/s 9 is complete and complies with the requirements of the relevant provisions of IBC, 2016 read with Rules and Regulations made thereunder. The outstanding amount is more than the threshold limit of Rs.1,00,00,000/- (Rupees One Crore). There does not exist any dispute within the meaning of provisions of Section 8 & 9 of IBC, 2016.
10. Thus, the application, on the face of it, is liable to be admitted.
11. The operational creditor has proposed the name of IRP. Accordingly, we appoint Vijendra Sharma from the list of IBBI which is currently in operation for the jurisdiction of this Adjudicating Authority.



ORDER

12. Accordingly, this application is admitted on the following terms and conditions:-

- i) The application filed by the Operational Creditor under Section 9 of the Insolvency & Bankruptcy Code, 2016 for initiating Corporate Insolvency Resolution Process against the Corporate Debtor *Iceberg Developers Private Limited* is hereby **admitted**.
- ii) We hereby declare a moratorium and public announcement in accordance with Sections 13 and 15 of the I & B Code, 2016.
- iii) This Adjudicating Authority hereby appoint Vijendra Sharma[Reg No.IBBI/IPA-003/IP-N00003/2016-2017/10022], having address at Building No.11, 3rd Floor, Hargovind Enclave, Vikas Marg, Delhi-110092 [email: vijendra@vsa.net.in] to act as the IRP under Section 13(1)(c) of the Code.
- iv) The IRP shall cause a public announcement of the initiation of Corporate 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.
- v) 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 judgment, 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.
- vi) The supply of essential goods or services rendered to the corporate debtor as may be specified shall not be terminated, suspended, or interrupted during the moratorium period.
- vii) 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.



- viii) The order of moratorium shall have effect from the date of admission till the completion of the corporate insolvency resolution process.
- ix) 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 the 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.
- x) The Interim Resolution Professional should convene a meeting of the Committee of Creditors and submit the resolution passed by the Committee of Creditors and shall identify the prospective Resolution Applicant within 105 days from the insolvency commencement date.
- xi) The Operational Creditor/Applicant is directed to deposit Rs.2,00,000/- (Rupees Two lakh only) with the IRP appointed hereinabove within two weeks from this order. IRP can claim the preliminary expenses and fees subject to the approval by the CoC and after constitution of CoC.
- xii) Registry is hereby directed to communicate the order to the Operational Creditor, the Corporate Debtor, the IRP and the jurisdictional Registrar of Companies by Speed Post as well as through email.
- xiii) 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 (Technical)



Bachu Venkat Balaram Das
Member (Judicial)