

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

IBA/73/2020

*(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. Sical Logistics Limited**

M/s. MOL TOYOFUJI Automotive Logistics (India) Private Limited

(Formerly known as Ennore Automotive Logistics Private Limited)

Reg. Off:-

Sudha Centre, 3rd Floor,
New No. 31, Dr. Radhakrishnan Salai,
Mylapore, Chennai – 600 004

... Operational Creditor

-Vs-

M/s. Sical Logistics Limited

Reg. Off:-

South India House, No.73,
Armenian Street,
Chennai – 600 001

...Corporate Debtor

Order Pronounced on 10th March 2021

CORAM :

R. VARADHARAJAN, MEMBER (JUDICIAL)

ANIL KUMAR B, MEMBER (TECHNICAL)

For Operational Creditor : Lilly Francis, Advocate

*For Corporate Debtor : Arvinth Pandia, Senior Advocate
For Anand Sashidharan, Advocate*

ORDER

Per: R. VARADHARAJAN, MEMBER (JUDICIAL)

1. Under Adjudication is an Application that has been filed on
09.12.2019, by **M/s. MOL TOYOFUJI Automotive Logistics**

(India) Private Limited (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. Sical Logistics 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 Private Limited Company. Part-II of the Application gives all the particulars of the Corporate Debtor and it is stated that the Corporate Debtor is a Private Limited Company, however in the reply and in the rejoinder being filed by the parties, it has been brought to the notice of this Tribunal that the Corporate Debtor is a Public Limited Company and also a listed Company. Further, it is seen that the Corporate Debtor is having the Corporate Identification Number as L51909TN1955PLC002431 which was incorporated on 06.05.1955 and that its Authorized Share capital is Rs.220,00,00,000/- and its paid up capital is Rs.58,52,02,620/-. The Registered Office of the Corporate Debtor as per the Application is stated to be situated at South India House, No.73,

Armenian Street, Chennai – 600 001. Part-III of the Application shows that the Operational Creditor has not proposed the name of the “Interim Resolution Professional” (IRP) and left it to the discretion of this Tribunal to appoint the same.

3. From Part-IV of the Application, it is seen that a sum of Rs.62,59,818/- is being claimed by the Operational Creditor as Operational Debt, including interest. Part – V of the Application sets out about the list of documents which is filed by the Operational Creditor in order to prove the operational debt and the Operational Creditor has filed the Invoices raised by them and the email correspondence exchanged between the parties.

4. The Learned Counsel for the Operational Creditor submitted that the Corporate Debtor had availed yard handling and stevedoring operations at Ennore, Kandla, Cochin and New Mangalore ports and other related services for coastal shipping of cars within India and the scope of work and the rates were exchanged and agreed between the parties, pursuant to which the services were rendered by the Operational Creditor from October 2016 till May 2017.

5. It was submitted that the Operational Creditor has raised Invoices for the services being rendered by them to the tune of

Rs.1,52,74,792/- out of which the Corporate Debtor has defaulted in paying a sum of Rs.42,56,675/- and the same still continues to be unpaid till date although the said amount is admitted by the Corporate Debtor. It was further submitted that the Corporate Debtor having enjoyed the services provided under the Invoices have neglected the request of the Operational Creditor for payments and it only found excuses to evade the payments.

6. The Learned Counsel for the Operational Creditor submitted that the last payment was made by the Corporate Debtor on 19.01.2019 and thereafter, despite repeated request, payments were not forthcoming and therefore the Operational Creditor issued Demand Notice in Form 4 as mandated under Section 8 of IBC, 2016 on 13.11.2019 to the Corporate Debtor, which was received by the Corporate Debtor on 15.11.2019. It was further submitted that on receipt of the Demand Notice, the Corporate Debtor approached the Operational Creditor for settlement of the admitted dues, however the settlement negotiations did not fructify although Corporate Debtor acknowledged the dues payable along with interest. Hence, it was submitted that the present Application has been filed under Section 9 of IBC, 2016 seeking thereof to initiate the Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor.

7. The Respondent has filed counter and the defence as raised in the counter are set out herein below;

- a. The Operational Creditor in its application has arrayed the Respondent as “M/s. Sical Logistics Private Limited”, however the Respondent is “M/s. Sical Logistics Limited”, a public limited company, which is listed on the stock exchange and therefore, the present petition which has been initiated against a non-existent entity deserved to be dismissed *in limine*.
- b. The Amount claimed in the Application is less than Rs. 1 Crore, which was increased on and from 24.03.2020 by way of notification by the Central Government under Section 4 of IBC, 2016 and since the debt amount is less than Rs.1 Crore, this Tribunal does not have pecuniary jurisdiction to entertain the present Application.
- c. The Demand Notice was issued by one M/s. Ennore Automotive Logistics Private Limited, which was not in existence on the date of the issuance of the Demand Notice as the name of the Company was changed to M/s. MOL TOYOFUJI Automotive Logistics (India) Private Limited on 17.10.2019 itself and hence the Demand Notice dated 13.11.2019 has been made on behalf of a non-existent company and hence the Application is liable to be dismissed at the threshold.
- d. The Operational Creditor has filed a list of 32 Invoices in support of their claim and out of which atleast 13 of them are hopelessly barred by limitation as all these 13

Invoices relate to the Invoices which are more than 3 years before the date of filing of the present Application.

- e. The Operational Creditor has claimed interest to the tune of 18% p.a. which is exorbitant and it also stated that the Corporate Debtor has denied such high interest in their e-mail dated 03.12.2019.

8. Adverting to the contentions raised by the Corporate Debtor in their Counter, the Operational Creditor has filed a rejoinder and has stated as follows;

- a. The name of the Corporate Debtor was inadvertently indicated as "M/s. Sical Logistics Private Limited" instead of "M/s. Sical Logistics Limited", however the details of the Corporate Debtor such as Corporate Identification Number, incorporation details, nominal and paid-up share capital and the registered office address has been correctly indicated.
- b. In relation to the pecuniary jurisdiction, it is stated that the instant Application was filed on 09.12.2019 and notice of the first hearing was issued on 31.01.2020 and the matter was listed on 18.02.2020. However, in the meantime, due to Covid-19 pandemic this Tribunal reposted all the matters and hence the said matter was listed on 16.09.2020. It is stated that since the instant application was filed before the effective date of the bar contained in the Notification S.O.1205 (E) dated 24.03.2020 came into force, the said increase in the

threshold limit would not apply to the instant Application filed by the Operational Creditor.

- c. The Demand Notice dated 13.11.2019 was issued to the Corporate Debtor only after the name change and subsequent to the issuance of the Demand Notice, the Corporate Debtor acknowledged and wrote to the Operational Creditor vide its email on 22.11.2019 calling upon the Operational Creditor to discuss an amicable settlement of dues as demanded in the Demand Notice dated 13.11.2019. It is further stated that the Corporate Debtor has identified the Operational Creditor as the correct entity and acknowledged the receipt of the valid notice, subsequent to which discussions were held for repayment, the Operational Creditor is now estopped from contending that the Demand Notice is bad in law and as such the objections in this regard should be ignored as it is a feeble attempt on hyper-technical grounds rather than the merits of the matter.
- d. It is stated that the accounts of the Corporate Debtor were maintained as running account from the very inception of the transactions and the e-mail correspondences between the Operational Creditor and the Corporate Debtor would reveal that the aggregate invoice value is set off against the amounts received. It is further stated that the number of part payments have been made in the year 2016, 2017, 2018 and the recent of its being on 19.01.2019. The e-mail communication from the Corporate Debtor on 25.11.2019 admits the dues of the Operational Creditor

and seeks accommodation of the Operational Creditor to pay in 90 days time. It is therefore, submitted that in view of the part payments and the written acknowledgment of the dues by the Corporate Debtor, the claims are well within the limitation.

- e. It is stated that the Operational Creditor is entitled to claim interest as prayed for in the Application since the Corporate Debtor had been unreasonably delaying the payment of rightful dues and hence it is reasonable to claim 18% interest p.a. for the delayed payments of the Corporate Debtor. It is further stated that even in reply during the post-negotiations the Corporate Debtor never denied or disputed the interest rate, rather sought a waiver which the Operational Creditor did not agree.

9. Heard the submissions made by the Learned Counsel for the Operational Creditor and Learned Senior Counsel for the Corporate Debtor. In so far as the issue of the name of the company being wrongly mentioned in Part – II of the Application as “M/s. Sical Logistics Private Limited”, instead of “M/s. Sical Logistics Limited”, it is to be noted that the same to be an inadvertent typographical error being committed on the part of the Operational Creditor; however it is seen that the other details regarding the Corporate Debtor, viz. Corporate Identification Number, incorporation details, nominal and paid-up share capital and the registered office

address, are found to be correct and hence, the said objection does not warrant any interference.

10. In so far the issue raised by the Operational Creditor that the Amount claimed in the Application is less than Rs. 1 Crore, which was increased on and from 24.03.2020 by way of Notification S.O.1205 (E) issued by the Central Government under Section 4 of IBC, 2016, it is significant to refer to the decision rendered by this Tribunal in the matter of **Arrowline Organic Products Pvt. Ltd. –Vs– Rockwell** dated 02.06.2020 in para 39 has held that the Notification issued by the Central Government through Ministry of Corporate Affairs dated 24.03.2020 bearing S.O.1205 (E) can be considered only as prospective (i.e.) applicable from 24.03.2020 onwards and the matters which were filed before 24.03.2020 is required to be heard and disposed of by the Tribunal by taking into consideration the pecuniary limit of Rs.1 Lakh for maintaining an Application under Section 9 of IBC, 2016.

11. Further, the Hon'ble NCLAT in the matter of **Madhusudan Tania –Vs- Amit Choraria & Anr.** in *Company Appeal (AT) (Insolvency) No. 557 of 2020 dated 12.10.2020*, while dealing with the Notification S.O.1205 (E) dated 24.03.2020 issued by the Central Government in increasing the pecuniary jurisdiction of the Tribunal, has held in para 56 as follows;

“56. As far as the present case is concerned, this Tribunal, after carefully and with great circumspection, ongoing through the contents of the notification dated 24.03.2020 issued by the Ministry of Corporate Affairs, Government of India, whereby and whereunder the minimum amount of default limit was specified as Rs. one crore (obviously raising the minimum amount from Rs. one lakh to one crore) unerringly comes to a definite conclusion that the said notification is only ‘Prospective in nature’ and not a ‘retrospective’ one because of the simple reason the said notification does not in express term speaks about the applicability of ‘retrospective’ or ‘retroactive’ operation. Suffice it for this Tribunal to point out that from the tenor, spirit and the plain words employed in the notification dated 24.03.2020 of the Ministry of Corporate Affairs, Government of India, one cannot infer an intention to take or make it retrospective as in this regard, the relevant words are conspicuously absent and besides there being no implicit inference to be drawn for such a construction in the context in issue. That apart, if the notification dated 24.03.2020 of the Ministry of Corporate Affairs, Government of India, is made applicable to the pending applications of IBC (filed earlier to the notification in issue) it will create absurd results of wider implications / complications.

12. Thus, it is now trite, that the Notification issued by the Central Government vide S.O.1205 (E) dated 24.03.2020 by increasing the pecuniary jurisdiction of this Tribunal from Rs.1 Lakh to Rs.1 Crore would operate *prospectively*, that is to say the said notification would be applicable to the matters which are filed before this Tribunal on and from 24.03.2020 and in relation to matter which are already filed before 24.03.2020, such matters are required to be heard and disposed of by taking into consideration the pecuniary limit as Rs.1 Lakh. Hence the defence as set out by the Corporate Debtor in this regard is not sustainable.

13. In so far as the issue regarding the issuance of Demand Notice by the Operational Creditor is concerned that the same has been issued in the name of M/s. Ennore Automotive Logistics Private Limited, however the name of the Company was changed to M/s. MOL TOYOFUJI Automotive Logistics (India) Private Limited on 17.10.2019 itself, it is to be noted here that all the Invoices were raised by the Operational Creditor in the name of M/s. Ennore Automotive Logistics Private Limited and the Corporate Debtor has also paid the amount to the Operational Creditor in lieu of such Invoices being raised. It is also seen from the records, that after the issuance of the Demand Notice, the Corporate Debtor vide its email dated 22.11.2019 was in negotiation talks with the Operational Creditor and it seems to be only an 'irregularity' and not 'illegality' and as such the defence as raised by the Corporate Debtor in relation to the change of name in the Demand Notice is not sustainable.

14. In so far as the issue as raised by the Corporate Debtor that out of 32 Invoices which the Operational Creditor has filed in support of their claim, out of which atleast 13 of them are hopelessly barred by limitation, it is to be noted that the Operational Creditor has been maintaining running account with the Corporate Debtor and the Corporate Debtor has not made

payments as against each and every Invoices as soon as the same becomes due and payable, however the same is being paid only at a later stage by clubbing the payments in the Invoices and thereby making a lump sum payment. If the Corporate Debtor has made the payment as against each and every invoice as and when the same becomes due and payable, then the plea of the Corporate Debtor that the 13 Invoices have become barred by limitation may be sustainable, however the Corporate Debtor has made the payments only at a later stage by way of a lump sum payment. Hence, the plea of the Corporate Debtor that the 13 Invoices are barred by limitation is not sustainable in view of the discussions made *supra*.

15. Thus from the Invoices filed by the Operational Creditor, it is seen that the same has been raised for the period from 14.10.2016 to 30.05.2017 and also it is seen that the Corporate Debtor has made its last payment on 19.01.2019 and that the present Application under Section 9 of IBC, 2016 has been filed by the Operational Creditor before this Tribunal on 09.12.2019 and as such it falls well within the period of limitation. The Operational Creditor has proved the 'operational debt' and the 'default' committed by the Corporate Debtor in payment of such 'operational debt'. Under the said circumstances, in view of the fact that the 'debt' and 'default' on the part of the Corporate Debtor is

proved by the Operational Creditor, this Tribunal is left with no other option than to proceed with the present case and initiate the Corporate Insolvency Resolution Process in relation to the Corporate Debtor.

16. Thus taking into consideration the facts and circumstances of the case as well as the position of Law, we are of the view that the Petition, as filed by the Operational Creditor, is required to be admitted under Section 9(5) of the IBC, 2016. Since the Operational Creditor has not named the Insolvency Resolution Professional, this Tribunal based on the latest list furnished by Insolvency and Bankruptcy Board of India applicable for the period January – June 2021 appoints **Mr. S. Lakshmisubramanian** with Registration No. *IBBI/IPA-003/IP-N00232/2019-2020/12697* (email id:- *slsip@slswin.com*) as the “Interim Resolution Professional” subject to the condition that no disciplinary proceedings are pending against such an Interim Resolution Professional named and disclosures as required under IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 are made within a period of one week from the date of this order. As a consequence of the Application being admitted in terms of Section 9 (5) of the Code, the moratorium as envisaged under the provisions of Section 14(1) and as extracted hereunder shall follow in relation to the Corporate Debtor:

- a. The institution of suits or continuation of pending suits or proceedings against the respondent 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 respondent 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 respondent in respect of its property including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;
- d. The recovery of any property by an owner or lessor where such property is occupied by or in the possession of the respondent.

Explanation.-For the purposes of this sub-section, it is hereby clarified that notwithstanding anything contained in any other law for the time being in force, a licence, permit, registration, quota, concession, clearance or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for

the use or continuation of the license or a similar grant or right during moratorium period;

17. However, during the pendency of the moratorium period in terms of Section 14(2) (2A) and 14(3) as extracted hereunder:

(2) The supply of essential goods or services to the Corporate Debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.

(2A) Where the interim resolution professional or resolution professional, as the case may be, considers the supply of goods or services critical to protect and preserve the value of the Corporate Debtor and manage the operations of such Corporate Debtor as a going concern, then the supply of such goods or services shall not be terminated, suspended or interrupted during the period of moratorium, except where such Corporate Debtor has not paid dues arising from such supply during the moratorium period or in such circumstances as may be specified.

(3) The provisions of sub-section (1) shall not apply to

(a) such transactions, agreements or other arrangement as may be notified by the Central Government in consultation with any financial sector regulator or any other authority;

(b) a surety in a contract of guarantee to a corporate debtor.

18. The duration of the period of moratorium shall be as provided in Section 14(4) of the Code and for ready reference reproduced as follows:

- (4) The order of moratorium shall have effect from the date of such order till the completion of the Corporate Insolvency Resolution Process:

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.

19. The Operational Creditor is directed to pay a sum of **Rs.2,00,000/-** (*Rupees Two Lakhs Only*) to the Interim Resolution Professional upon the Interim Resolution Professional filing the necessary declaration form as required under the provisions of the Code to meet out the expenses to perform the functions assigned to her in accordance to Regulation 6 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

20. Based on the above terms, the Application stands **admitted** in terms of Section 9(5) of IBC, 2016 and the moratorium shall come in to effect as of this date. A copy of the Order shall be communicated to the Operational Creditor as well as to the

Corporate Debtor above named by the Registry. In addition, a copy of the Order shall also be forwarded to IBBI for its records. Further, the Interim Resolution Professional above named who is figuring in the list of Resolution Professionals forwarded by IBBI be also furnished with copy of this Order forthwith by the Registry, who will also communicate the initiation of the CIRP in relation to the Corporate Debtor to the Registrar of Companies concerned.

-Sd-

ANIL KUMAR B
MEMBER (TECHNICAL)

-Sd-

R. VARADHARAJAN
MEMBER (JUDICIAL)

Raymond