

[2019] 107 taxmann.com 101 (NCLT - Ahd.)/[2019] 154 SCL 691 (NCLT - Ahd.)[07-06-2019]

IBC: Where applicant supplied seeds and jute bags to respondent and on account of non-payment of goods supplied, instant application was filed under section 9, since respondent neither appeared in course of proceedings nor raised any dispute in respect of amount payable, it could be concluded that there existed an operational debt which respondent failed to discharge and, thus, instant application was to be admitted

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**[2019] 107 taxmann.com 101 (NCLT - Ahd.)
NATIONAL COMPANY LAW TRIBUNAL, AHMEDABAD BENCH**

Shah Kiritkumar Babulal Ni Company

v.

H.M. Industrial (P.) Ltd.

MS. MANORAMA KUMARI, JUDICIAL MEMBER

C.P. (IB) NO. 81/9/NCLT/AHM/2019

JUNE 7, 2019

Section 5(21), read with section 9, of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Operational debt - Applicant was engaged in business of supply of castor seeds and jute bags - It sold seeds and jute bags to respondent and raised invoices against goods supplied - Against said invoices respondent issued cheques in favour of applicant - However, said cheques were dishonoured by bank on presentation for encashment - Despite service of notice, respondent did not make payment of amount due - Thus, applicant filed instant application under section 9 - Whether in view of fact that respondent neither appeared in course of proceedings nor raised any dispute in respect of amount payable, it could be concluded that there existed an operational debt which respondent failed to discharge - Held, yes - Whether, therefore, instant application was to be admitted - Held, yes [Paras 11 and 15]

FACTS

- The applicant was engaged in the business of supply of castor seeds and jute bags. It sold seeds and jute bags to respondent and raised invoices against the goods supplied.
- Against said invoices, the respondent issued cheques in favour of applicant. However, the said cheques were dishonoured by bank on presentation for encashment.
- Despite service of notice, the respondent did not make the payment of amount due. Thus, applicant filed instant application under section 9.

HELD

- On perusal of the material available on record it is found that, the notice issued through the Registry has been duly served upon respondent. Therefore, the service of notice is complete. Since no representation is received from the side of the corporate debtor/respondent, the matter is heard in absence of the respondent. [Para 8]

- While examining an application under section 9, it is necessary to determine the following:
 - (i) Whether there is an 'operational debt' as defined exceeding Rs. 1 lakh.
 - (ii) Whether the documentary evidence furnished with the application shows that the aforesaid debt is due and payable and has not yet been paid
and
 - (iii) Whether there is existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before the receipt of the demand notice of the unpaid operational debt in relation to such dispute? [Para 9]
- In view of the aforesaid discussions and before rejecting and/or admitting the application, one must refer to the legislation guide on Insolvency Law of United Nations Commission on International Trade Law. One of the things the Legislative Guide spoke about was whether the debt is subject to a legitimate dispute or set off, in an amount equal to or greater than the amount of the debt. [Para 10]
- Thus, under the facts and circumstances and the provisions thereof as enshrined in the Code, the adjudicating Authority is of the considered view that operational debt is due to the applicant and in support of that operational creditor has placed copy of the invoices on record. That, service is complete and no dispute has been raised by the respondent. That, applicant is an operational creditor within the meaning of sub-section (20) of section 5. From the aforesaid material on record, petitioner is able to establish that there exists debt as well as occurrence of default. [Para 11]
- From the above stated discussion and on the basis of material available on record it is a fit case to initiate Insolvency Resolution Process by admitting the application under section 9(5)(1). [Para 15]

Pratik Thakkar for the Applicant.

ORDER

1. That, the instant application is filed by Mr. Kiritkumar Shah, sole proprietor of applicant/operational creditor M/s. Shah Kiritkumar Babulal Ni Company, under Section 9 of the Insolvency and Bankruptcy Code, 2016 [hereinafter referred to as "the Code"] read with Rule 6 of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 to trigger Insolvency Resolution Process against M/s. H.M. Industrial Private Limited (hereinafter called as respondent/corporate debtor).

2. That, the applicant/operational creditor M/s. Shah Kiritkumar Babulal Ni Company is a sole proprietorship company, having its registered office at Plot No. 16, Sardar Krushi Ganj Thara, Taluka Kankrej, Bansakantha District, Gujarat and engaged in the business of supply of castor seeds and Bardan (gunny/jute bags).

3. That, M/s. H.M. Industrial Private Limited is a company incorporated under the Companies Act, 1956 on 16.06.2016 and having its registered office at RS No. 1035/1+2+3, Modasa Road, Kapadwanj, Kheda, Gujarat State, having identification No. U27205GJ2016PTC092510. That, authorised share capital of the corporate debtor is Rs. 54,54,00,000/- and paid up share capital is Rs. 54,54,00,000/-.

4. The applicant submitted that it had sold seeds and jute bags to corporate debtor from 02.04.2018 to 21.05.2018 and raised bills against the goods supplied. That, against those bills cheques were issued by the corporate debtor in favour of the applicant. That, said cheques were replaced by the corporate debtor before its due dates with fresh cheque. That, last cheque was issued on 17.08.2018 for an amount of Rs. 5,47,69,909/-, however, the said cheque bearing No. 010960 dated 17.08.2018 drawn on Bank of Baroda, Kapadwanj Branch was dishonoured. That, the operational creditor sold jute bags (sacks in which the castor seeds were sold) to corporate debtor separately and raised credit note when said were received back by the operational creditor and such transactions were billed separately. According to the applicant the following debt has fallen due on 02.04.2018:

Total debt	Rs. 13,64,79,812/-
Less: Adjustment of payment	Rs. 8,02,83,580/-
Total amount due	Rs. 5,57,67,690/-

(Rupees five crores fifty-seven lacs sixty-seven thousand six hundred ninety only)

5. The applicant has submitted copies of the following documents in support of the claim:—

Sl. No.	Particulars	Annexure No.	Page No.
01	Affidavit verifying application		10-11
02	GST certificate of provisional registration issued by GOI and GOG	A	12
03	Computation of outstanding amount	B	13
04	Certified statement of bank account No. 49520200000348	C	19-58
05	Copies of translated invoices for castor seed, invoices for sacks and debit memo	D	59 - 559
06	Copies of invoices of sacks issued by corporate debtor to operational creditor	E	560-571
07	Copy of cheque dated 17.08.2018 bearing No. 010960 drawn on Bank of Baroda, Kapadwanj Branch, for Rs. 5,47,69,909/- issued by corporate debtor in favour of operational creditor along with the memo received from bank	F	572
08	Copy of form 3 dated 20.10.2018 issued to corporate debtor	G	573-579
09	Copy of proof of service of form 3 upon the corporate debtor	H	580
10	Proof of payment of requisite fees	I	581

6. That, despite service of notice, the respondent neither in person nor through lawyer did appear before the Adjudicating Authority. Therefore, the matter is heard ex-parte.

7. Heard the arguments of the learned counsels appearing for the operational creditor.

Findings:

8. On perusal of the material available on record it is found that, the notice issued through the Registry has been served upon respondent on 11.02.2019 and notice issued by the petitioner to the respondent is served on 23.02.2019. Therefore, the service of notice is complete. Since no representation is received from the side of the corporate debtor/respondent, the matter is heard in absence of the respondent.

9. While examining an application under Section 9 of the Act, will have to determine the following: —

- (i) Whether there is an "operational debt" as defined exceeding Rs. 1.00 lakh (See Section 4 of the Act)
- (ii) Whether the documentary evidence furnished with the application shows that the aforesaid debt is due and payable and has not yet been paid and
- (iii) Whether there is existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before the receipt of the demand notice of the unpaid operational debt in relation to such dispute?

10. In view of the aforesaid discussions and before rejecting and/or admitting the application, we must refer to the legislation guide on Insolvency Law of United Nations Commission on International Trade Law. One of the things the Legislative Guide spoke about was whether the debt is subject to a legitimate dispute or set off, in an amount equal to or greater than the amount of the debt.

11. Thus, under the facts and circumstances and as discussed above, in the light of the Hon'ble Supreme Court Judgment and the provisions thereof as enshrined in Insolvency & Bankruptcy Code, this adjudicating authority is of the considered view that operational debt is due to the Applicant and in support of that

operational creditor has placed copy of the invoices at page Nos. 59 to 571 to the application. That, service is complete and no dispute has been raised by the respondent. That, Applicant is an Operational Creditor within the meaning of sub-section (5) of Section 20 of the Code. From the aforesaid material on record, petitioner is able to establish that there exists debt as well as occurrence of default.

12. That, the Application filed by the Applicant is complete in all respects.

13. The applicant/operational creditor has not proposed the name of Interim Insolvency Professional. This Adjudicating Authority hereby appoint Shri Sunil Kumar Agarwal, Tower 6/603 Devnandan Heights, Nar Poddar School, New C.G. Road, Chandkheda, Ahmedabad 382 424 (anil91111@hotmail.com) having registration No. IBBI/IPA-001/IP-P01390/2018-19/12178 to act as an interim resolution professional under Section 13(1)(c) of the Code.

14. Section 13 of the Code enjoins upon the Adjudicating Authority to exercise its discretion to pass an order to declare a moratorium for the purposes referred to in Section 14, to cause a public announcement of the initiation of corporate insolvency resolution and call for submission of claims as provided under Section 15 of the Code. Sub-section (2) of Section 13 says that public announcement shall be made immediately after the appointment of Interim Insolvency Resolution Professional. This Adjudicating Authority directs the Insolvency Resolution Professional to make public announcement of initiation of Corporate Insolvency Process and calls for submission of claims under Section 15 as required by Section 13(1)(b) of the Code.

15. From the above stated discussion and on the basis of material available on record it is a fit case to initiate Insolvency Resolution Process by admitting the Application under Section 9(5)(1) of the Code.

16. The petition is, therefore, admitted and the moratorium is declared for prohibiting all of the following in terms of sub-section (1) of Section 14 of the Code: —

- (i) 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;
- (ii) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;
- (iii) 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 Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);
- (iv) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

17. It is further directed that the supply of goods and essential services to the Corporate Debtor, if continuing, shall not be terminated or suspended or interrupted during moratorium period. The provisions of sub-section (1) shall, however, not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

18. The order of moratorium shall have effect from the date of receipt of authenticated copy of this order till the completion of the corporate insolvency resolution process or until this Bench approves the resolution plan under sub-section (1) of Section 31 or passes an order for liquidation of corporate debtor under Section 33 as the case may be.

19. This Petition stands disposed of accordingly with no order as to costs.

20. Communicate a copy of this order to the Applicant, Financial Creditor, Corporate Debtor and to the Interim Insolvency Resolution Professional.