
(2018) 08 NCLT CK 0001

In the National Company Law Appellate Tribunal, Principal Bench, New Delhi

Case No : Company Petition No. (IB)-301(ND) Of 2018

M/s Mandhana Industries Limited

APPELLANT

Vs

M/s Instyle Exports Private Limited

RESPONDENT

Date of Decision : 30-08-2018

Acts Referred:

Insolvency And Bankruptcy (Application To Adjudicating Authority) Rules, 2016 — Rule 6

Insolvency And Bankruptcy Code, 2016 — Section 4, 3(8), 5(5), 5(6), 5(20), 6, 7, 8, 9, 9(3)(b), 9(3)(c), 9(5), 9(5)(ii), 10, 11, 11(a), 17, 25, 25(1), 28, 29, 60(2), 35, 52, 53

Citation : (2018) 08 NCLT CK 0001

Hon'ble Judges : Dr. Deepti Mukesh, J

Bench : Single Bench

Advocate : Pooja Mahajan, Nakul Mohta

Final Decision : Allowed

Judgement

1. This is a unique application is filed under section 9 of Insolvency and Bankruptcy Code, 2016 (for brevity â??IBC, 2016â??) read with Rule 6 of

the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (for brevity â??the Rulesâ??) by the Resolution Professional, Ms.

Charu Desai, of M/s Mandhana Industries limited (for brevity â??Companyâ??) with a prayer for initiation of Corporate Insolvency process against

M/s Instyle Exports Private Limited (for brevity â??Corporate Debtorâ??).

2. The M/s Mandhana Industries limited, which is currently undergoing corporate insolvency resolution process (CIRP) with effect from 29.09.2017

passed by Honâ??ble National Company Law Tribunal, Mumbai Bench in C.P. No. 1399/I&BP/2017 and is represented by the Resolution

Professional, Ms. Charu Desai, is a private limited company incorporated under the provisions of the Companies Act, 1956 having CIN

L17120MH1984PLC033553

3. The Company is having registered office at plot no. C-3, MIDC, Tarapur Industrial Area, Boisar, Thane-401506.

4. The Applicant Company is engaged in the manufacturing and sales of textiles and garments.

5. It is further submitted that from 29.09.2017. Mrs. Charu Desai (for brevity the Applicant) initially appointed as the Interim Resolution Professional

and subsequently confirmed as the Resolution Professional of the Operational Creditor, M/s Mandhana Industries limited, in conducting the affairs and

management of the Company and has filed the present application.

6. The corporate debtor, M/s Instyle Exports Private Limited, is private limited company incorporated under the provisions of the Companies Act, 1956

on 01.04.1981 having CIN U18109DL1981PTC011531 as per Master Data at Annexure II(B).

7. The Corporate Debtor is having its registered office at D-6/8, Okhla Industrial Area, Phase-II, New Dlehi-110020.

8. The Corporate Debtor is engaged in the manufacturing and sales of garments.

9. The Nominal share capital of the Corporate Debtor is Rs. 13,00,00,000/- and Issued, Subscribed and Paid up share capital of the company is Rs.

12,98,03,300/-.

10. The Corporate Debtor has duly authorized Mr. Ashok Logani to file the reply of present application by the resolution passed in the meeting of

Board of Directors dated 30.06.2018 of the company.

11. It is stated by the Applicant that an agreement was entered into between the parties, for supply of fabric by the Operational Creditor as per the

orders received from the Corporate Debtor. Pursuant thereto, from time to time, the respondent-corporate debtor placed specific orders for supply of

fabric by the company. Against the Goods supplied, the company raised invoices for the payment by the Corporate Debtor and requested for the

payment. The Corporate Debtor failed to pay the outstanding amounts in respect of supplies of fabric to it by the company giving rise to the

operational debt from the date of invoices raised during the period from November 2015 to December 2016.

12. The applicant has stated that as per record total debt due and payable by the Corporate Debtor to the applicant is Rs. 24,34,054/-, where Rs.

17,91,612/- is the Principal amount and interest at the rate 18 % per annum is Rs. 6,42,442/-, as on 30.11.2017.

13. The Applicant states that as per record the default occurred when the Corporate Debtor failed to pay the outstanding amounts in respect of

supplies of goods to it by the company giving rise to the operational debt in question with respect to invoices dated between 05.12.2015 to 19.01.2016

amounting to total of Rs. 24,34,054/- including interest at the rate of 18 %. Further, it was stated that towards the said payments for supply of goods,

that is, fabric, the corporate debtor issued four cheques in favour of the Operational Creditor of total amount of Rs. 24,34,054/- which is inclusive of

interest calculated at the rate of 18%, those are:

a. Cheque No. 012737 dated 06.12.2015 for Rs.4,54,025/-

b. Cheque No. 012736 dated 06.12.2015 for Rs.10,54,625/-

c. Cheque No. 055382 dated 07.12.2015 for Rs.1,13,712/-

d. Cheque No. 013016 dated 06.12.2016 for Rs.1,69,250/-

Further it was stated that all the above cheques were returned unpaid and repeated commitments made by corporate debtor of transferring the said

payment through RTGS payments were also not fulfilled.

14. The corporate debtor has submitted that debt is disputed and not payable as the goods delivered by the Applicant were defective but has not

substantially proved or placed any supportive documents with regard to the defect in the goods as stated to show the existence of pre-existing dispute.

However, there is strict onus placed on the Corporate Debtor in present case while raising the plea of dispute and that it must be genuine and

bona fide and not sham in order to avoid the debt, which is claimed by the Operational Creditor as due from the Corporate Debtor

which is an admitted amount. However, in the instant case there is no merit in the contention of the Corporate Debtor and hence it is not

palatable to accede to the claim of the Corporate Debtor that there is a pre-existing dispute as between the Operational Creditor and

the Corporate Debtor as contemplated under the provisions of Code, 2016.

15. Considering the submission of both parties, the defense of the Corporate

Debtor to stave off the Insolvency Resolution Process as sought

to be unleashed by the Applicant, which primarily rests on the ground of a pre-existing dispute prior to the filing of the application and in the

circumstances the application should be dismissed as not maintainable. In view of the above contention, it is necessary to ascertain the definition of

dispute. In relation to Code, 2016, dispute has been defined in Section 5(6) as follows:

dispute" includes a suit or arbitration proceedings relating to (a) the existence of the amount of debt; (b) the quality of goods or service; or (c) the

breach of a representation or warranty.

16. As per the reply filed by the Corporate Debtor, it can be inferred & concluded that the dispute raised by the corporate debtor does not fall within

the definition of dispute as reproduced above, and the plea of dispute is nothing but moonshine defense, created by Corporate Debtor against the

applicant without any merit, which is clear after thought to defeat the claim of applicant even though the claim was admitted by him including interest

and cheques were issued to the said amount as is claimed under this application.

17. It is submitted by the Applicant that the Applicant is currently undergoing corporate insolvency resolution process (CIRP) with effect from

29.09.2017. Mrs. Charu Desai was initially appointed as the Interim Resolution Professional and subsequently confirmed as the Resolution

Professional of the applicant. The corporate debtor has averred that no specific power is provided under the provisions of the IBC, 2016 to Resolution

Professional to file the present Application. However, applicant have submitted that the resolution professional derives such authority in terms of

section 17 and section 25 of IBC, 2016 which is reproduced as below:

Section 17- Management of affairs of corporate debtor by interim resolution professional- (1) From the date of appointment of the interim

resolution professional, (a)

(a) the management of the affairs of the corporate debtor shall vest in the interim resolution professional;

(b) the powers of the board of directors or the partners of the corporate debtor, as the case may be, shall stand suspended and be exercised

by the interim resolution professional;

(c) the officers and managers of the corporate debtor shall report to the interim resolution professional and provide access to such

documents and records of the corporate debtor as may be required by the interim resolution professional;

(d) the financial institutions maintaining accounts of the corporate debtor shall act on the instructions of the interim resolution professional

in relation to such accounts and furnish all information relating to the corporate debtor available with them to the interim resolution

professional.

(2) The interim resolution professional vested with the management of the corporate debtor shallâ?

(a) act and execute in the name and on behalf of the corporate debtor all deeds, receipts, and other documents, if any;

(b) take such actions, in the manner and subject to such restrictions, as may be specified by the Board;

(c) have the authority to access the electronic records of corporate debtor from information utility having financial information of the

corporate debtor;

(d) have the authority to access the books of account, records and other relevant documents of corporate debtor available with government

authorities, statutory auditors, accountants and such other persons as may be specified.

Section 25. Duties of resolution professional

(1) It shall be the duty of the resolution professional to preserve and protect the assets of the corporate debtor, including the continued

business operations of the corporate debtor.

(2) For the purposes of sub-section (1), the resolution professional shall undertake the following actions, namely:â?

(a) take immediate custody and control of all the assets of the corporate debtor, including the business records of the corporate debtor;

(b) represent and act on behalf of the corporate debtor with third parties, exercise rights for the benefit of the corporate debtor in judicial,

quasi-judicial or arbitration proceedings;

(c) raise interim finances subject to the approval of the committee of creditors under section 28;

- (d) appoint accountants, legal or other professionals in the manner as specified by Board;
- (e) maintain an updated list of claims;
- (f) convene and attend all meetings of the committee of creditors;
- (g) prepare the information memorandum in accordance with section 29;
- (h) invite prospective lenders, investors, and any other persons to put forward resolution plans;
- (i) present all resolution plans at the meetings of the committee of creditors;
- (j) file application for avoidance of transactions in accordance with Chapter III, if any; and
- (k) such other actions as may be specified by the Board

Further, it is contended by the Applicant that the primary duty of resolution professional as prescribed under section 25(1) IBC, 2016 is to protect and

preserve the assets of the company and further submits that "to protect and preserve" is inclusive of such acts which are required to be done to

protect the asset which is receivables and debts and owed from the parties. While learned counsel of corporate debtor argued that there is no specific

power to initiate the present application in aforementioned provision. However, on perusal of aforementioned provision it is pertinent to mention that

recovery of debt due to the company is a key economic function to keep the company as going concern but the powers conferred under section 17

and 25 is of representation in legal proceeding already initiated against the company and it is not clear that whether legislature intended to enshrine

powers to IRP/RP to initiate legal proceedings on behalf of management like the liquidator.

18. In the present case there is debate as to whether the Applicant has filed this application in the capacity of "Operational Creditor" under

section 5(20) of IBC, 2016 or "Corporate Applicant" under section 5(5) of IBC, 2016 which are reproduced as under:

Section 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;

Section 5(5) "corporate applicant" means

- (a) corporate debtor; or

(b) a member or partner of the corporate debtor who is authorized to make an application for the corporate insolvency resolution process

under the constitutional document of the corporate debtor; or

(c) an individual who is in charge of managing the operations and resources of the corporate debtor; or

(d) a person who has the control and supervision over the financial affairs of the corporate debtor;

Further as per section 6 of IBC, 2016 following persons may initiate corporate insolvency resolution process, where any corporate debtor commits a

default, a "financial creditor", an "operational creditor" or the "corporate debtor" itself may initiate corporate insolvency resolution

process in respect of such corporate debtor in the manner as provided under this Chapter.

Section 3(8) of the IBC, 2016, provides that "corporate debtor" means a corporate person who owes a debt to any person;

19. The learned Counsel for the Corporate Debtor has contended that the Applicant who is Resolution Professional for the Company is debarred from

filing the present application as the Applicant herein is undergoing corporate insolvency resolution process pursuant to order dated 29.09.2017 passed

by the NCLT, Mumbai Bench in CP No. 1399/I&BP/2017 and the present application under Section 9 of IBC, 2016 is filed by Ms. Charu Sandeep

Desai who is "Resolution Professional" of the Operational Creditor as per the provisions provided under section 11(a) of IBC, 2016, is not eligible

to file the present application which is reproduced as under:

Section 11: Persons not entitled to make application-- The following persons shall not be entitled to make an application to initiate

corporate insolvency resolution process under this Chapter, namely: "a

(a) a corporate debtor undergoing a corporate insolvency resolution process; or

(b) a corporate debtor having completed corporate insolvency resolution process twelve months preceding the date of making of the

application; or

(c) a corporate debtor or a financial creditor who has violated any of the terms of resolution plan which was approved twelve months

before the date of making of an application under this Chapter; or

(d) a corporate debtor in respect of whom a liquidation order has been made. Initiation of corporate insolvency resolution process by corporate applicant.

Further, explanation to section 11 provides that "For the purposes of this section, a corporate debtor includes a corporate applicant in respect of such corporate debtor."

Further according to the explanation of section 11 of the IBC, 2016 corporate debtor includes corporate applicant and corporate applicant includes an individual who is managing the affairs of the company. It is further submitted that the present Application is being filed by the resolution professional who is managing the affairs of operational creditor. Therefore, it is averred by the corporate debtor the present Application is not maintainable as per section 11 of IBC, 2016.

In *Unigreen Global (P.) Ltd. vs. Punjab National Bank and Ors.*, Hon'ble NCLAT in para 20 and 21 observed that, "Whether in an application under section 10, the financial creditor or operational creditor may dispute that there is no default or that debt is not due and is not payable in law or in fact. Although, they may oppose admission on the ground that the corporate applicant is not eligible to make application in view of ineligibility under section 11."

20. The corporate debtor has submitted that the prohibition enshrined in Section 11 of IBC, 2016 is clear and unambiguous and does not warrant any clarification. It is a trite law that when the language of statute is clear, the plain words should be strictly relied. The applicant has relied on the order of

NCLT, Mumbai in the case of *Jai Ambe Enterprise vs. S. N. Plumbing Private Limited* wherein it is expressed prima facie that "para 4. The

action of the resolution professional against on of the Debtor of the SN plumbing appears to be a correct legal action. It is one of the duties

of resolution professional to recover the outstanding debts of a corporate debtor against whom already CIRP is in progress. Further, in

para 5. it is opined that, the language of section 60(2) and other allied provisions under the Code has no ambiguity that no two parallel

insolvency proceedings must run against the same corporate debtor. Hence a clarification is needed in this case that SN plumbing has not

submitted the impugned petition before the respected NCLT Bench, Hyderabad in

the capacity of a corporate debtor but undisputedly, the said petition is filed in the capacity of an operational creditor. It further held that the action of resolution professional on behalf of SN Plumbing is a right recourse of action for managing the affairs of the financially stressed company. The proceedings initiated against the Debtors of SN plumbing is there fore a justifiable action of the insolvency Resolution Professional hence duly approved by us.â??

21. The learned counsel for the Applicant further stated that corporate debtor taking the defense under section 11 of IBC, 2016 to have unjust enrichment at the expense of the Applicant which is against the key economic question in the bankruptcy process, objects and design of the IBC, 2016 as observed by Honâ??ble Supreme Court of India in Innoventive Industries Limited vs ICICI Bank and others which is reproduced as below:

The key economic question in the bankruptcy process- When a firm (referred to as the corporate debtor in the draft law) defaults, the question arises about what is to be done. Many possibilities can be envisioned. One possibility is to take the firm into liquidation. Another possibility is to negotiate a debt restructuring, where the creditors accept a reduction of debt on an NPV basis, and hope that the negotiated value exceeds the liquidation value. Another possibility is to sell the firm as a going concern and use the proceeds to pay creditors. Many hybrid structures of these broad categories can be envisioned.

The Committee believes that there is only one correct forum for evaluating such possibilities, and making a decision: a creditors committee, where all financial creditors have votes in proportion to the magnitude of debt that they hold. In the past, laws in India have brought arms of the government (legislature, executive or judiciary) into this question. This has been strictly avoided by the Committee. The appropriate disposition of a defaulting firm is a business decision, and only the creditors should make it.

Speed is of essence: Speed is of essence for the working of the bankruptcy code, for two reasons. First, while the â??calm periodâ?? can help keep an organization afloat, without the full clarity of ownership and control, significant decisions cannot be made. Without effective leadership, the firm will tend to atrophy and fail. The longer the delay, the more

likely it is that liquidation will be the only answer. Second, the liquidation value tends to go down with time as many assets suffer from a high economic rate of depreciation.

From the viewpoint of creditors, a good realization can generally be obtained if the firm is sold as a going concern. Hence, when delays

induce liquidation, there is value destruction. Further, even in liquidation, the realization is lower when there are delays. Hence, delays

cause value destruction. Thus, achieving a high recovery rate is primarily about identifying and combating the sources of delay.

The role that insolvency and bankruptcy plays in debt financing Creditors put money into debt investments today in return for the promise

of fixed future cash flows. But the returns expected on these investments are still uncertain because at the time of repayment, the seller

(debtor) may make repayments as promised, or he may default and does not make the payment. When this happens, the debtor is considered

insolvent. Other than cases of outright fraud, the debtor may be insolvent because of

â?¢ Financial failure â?¢" a persistent mismatch between payments by the enterprise and receivables into the enterprise, even though the

business model is generating revenues, or

â?¢ Business failure â?¢" which is a breakdown in the business model of the enterprise, and it is unable to generate sufficient revenues to

meet payments.

Objectives the Committee set the following as objectives desired from implementing a new Code to resolve insolvency and bankruptcy:

1. Low time to resolution.
2. Low loss in recovery.
3. Higher levels of debt financing across a wide variety of debt instruments.

The performance of the new Code in implementation will be based on measures of the above outcomes.

Principles driving the design- The Committee chose the following principles to design the new insolvency and bankruptcy resolution

framework:

- I. The Code will facilitate the assessment of viability of the enterprise at a very

early stage.

1. The law must explicitly state that the viability of the enterprise is a matter of business, and that matters of business can only be negotiated

between creditors and debtor. While viability is assessed as a negotiation between creditors and debtor, the final decision has to be an

agreement among creditors who are the financiers willing to bear the loss in the insolvency.

2. The legislature and the courts must control the process of resolution, but not be burdened to make business decisions.

3. The law must set up a calm period for insolvency resolution where the debtor can negotiate in the assessment of viability without fear of

debt recovery enforcement by creditors.

4. The law must appoint a resolution professional as the manager of the resolution period, so that the creditors can negotiate the assessment

of viability with the confidence that the debtors will not take any action to erode the value of the enterprise. The professional will have the

power and responsibility to monitor and manage the operations and assets of the enterprise. The professional will manage the resolution

process of negotiation to ensure balance of power between the creditors and debtor, and protect the rights of all creditors. The professional

will ensure the reduction of asymmetry of information between creditors and debtor in the resolution process.

II. The Code will enable symmetry of information between creditors and debtors.

5. The law must ensure that information that is essential for the insolvency and the bankruptcy resolution process is created and available

when it is required.

6. The law must ensure that access to this information is made available to all creditors to the enterprise, either directly or through the

regulated professional.

7. The law must enable access to this information to third parties who can participate in the resolution process, through the regulated

professional.

III. The Code will ensure a time-bound process to better preserve economic value.

8. The law must ensure that time value of money is preserved, and that delaying tactics in these negotiations will not extend the time set for negotiations at the start.

22. The learned counsel for the Applicant submitted that legislative intent and rationale under section 11 in relation to the present application as per

Committee report on the Insolvency and Bankruptcy Bill, 2015 which is enumerated as follows:

- a. To prevent the misuse of the provisions of the Code by corporate debtors who have already availed the benefits of the Code;
- b. To prevent misuse by corporate debtors and financial debtors who have violated the resolution plans made for the corporate debtor;
- c. To prevent multiple proceedings in respect of corporate debtor and to avoid duplication and multiplicity.

23. Thus, it is contended by the learned counsel for the Applicant that, in light of abovementioned rationale, the corporate debtor is already undergoing

CIRP/ Liquidation, the creditors cannot start another proceeding against such corporate debtor as it will lead to multiplicity of proceedings and present

application is filed in the capacity of Operational Creditor to initiate CIRP against another Corporate Debtor, that is, M/s Instyle Exports Private

Limited (for brevity Corporate Debtor).

The learned counsel for the Applicant has stated that the Honorable Supreme Court in the case of Macquari Bank Limited Vs. Shilpi Cable

Technologies Limited (2 SCC 674/2017) departed from the literal interpretation of words in section 9(3)(c) of the IBC, 2016 and chose to give it a

meaning, keeping in mind the intention of the legislature. In this case the Honorable Supreme court relied on the case of State of U.P. v. Babu Ram

Upadhyaya, 1961 2 SCR 679 where the principle of Contemporanea exposito that is interpreting a statute or any other document by reference to the

exposition it has received from contemporary authority can also be invoked though the same will not always be decisive of the question of

construction.

In the Case of Fuerst Day Lawson Limited v. Jindal exports limited, 2011 8 SCC 333 ,it is observed that the plain language of the statute should be

interpreted without any external aid as has been observed by the Honorable Supreme court in Harbhajan Singh v. Press council of India 2002 3 SCC

24. The learned Counsel for corporate debtor relied on the order of Honâ??ble NCLT, Principal Bench, New Delhi in the case of Tecpro Systems

Limited vs. Bajaj Infrastructure Company Limited (2017) SCC Online NCLT 9998 which is as follows-

â??This is an application filed under section 9 of the Insolvency and Bankruptcy Code, 2016 with a prayer for triggering the insolvency

process against the respondent. The Petitioner company is already undergoing insolvency process as is evident from the order passed by

the Principal Bench, NCLT on 07.08.2018 in IB-358 (PB)/2017. A petition by such an entity is barred by Section 11 of IBC, 2016.â??

However, the abovementioned order does reveal any reason as to whether the Applicant has filed the present application in the capacity of

â??operational creditorâ?? or as â??corporate debtorâ??.

The learned Counsel for corporate debtor further relied on the order of Honâ??ble NCLT, Allahabad Bench under section 7 of IBC, 2016 wherein it

was held that-

â??This petition has been filed under section 7 of IBC, 2016, by JEKPL Pvt. Ltd. To initiate CIRP under this Code. The same Applicant has

earlier filed a petition under section 10 of IBC, 2016 disentitles the corporate debtor to move a fresh application under this Code if it has

been subject to corporate insolvency process within 12 months.

Given the specific bar of section 11 of the IBC, 2016 present petition filed under section 7 of IBC, 2016 is not maintainable and deserves to

be dismissed at the very-threshold.

Further the Honâ??ble Supreme of India in Mobilox Innovations Private Limited vs. Kirusa Software Private limited has observed that-

â??The adjudicating authority, when examining an application under Section 9 of the Act will have to determine:

(i) Whether there is an â??operational debtâ?? as defined exceeding Rs.1 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?

If any one of the aforesaid conditions is lacking, the application would have to be rejected.

Apart from the above, the adjudicating authority must follow the mandate of Section 9, as outlined above, and in particular the mandate of

Section 9(5) of the Act, and admit or reject the application, as the case may be, depending upon the factors mentioned in Section 9(5) of the

Act.â??

25. The corporate debtor has further contended that even if it is considered that the resolution professional has the power to institute legal proceedings

he/she is required to act upon the aid and advice of committee of creditors and such express consent of committee of creditors to initiate such legal

proceedings has to be approved by the Adjudicating Authority appointing resolution professional before initiating the present proceeding. Arguing that

the applicant has filed on record the minutes of meeting of committee of creditors of Applicant company held on 09.11.2017 wherein Agenda 1

contains para in relation to â??Account Receivablesâ?? where the Committee of Creditors members directed the IRP/RP to consider undertaking legal

proceedings against Munirabad Traders And other doubtful receivables totaling to INR 357.36 Crores which does not convey the express approval to

initiate the legal proceeding under the Code, 2016. The intent of Legislature is clearly manifested to give such powers to Liquidator under section 35 of

IBC,2016 which is reproduced as below:

â??Section 35. Powers and duties of liquidator:

(1) Subject to the directions of the Adjudicating Authority, the liquidator shall have the following powers and duties, namely:â?" (a) to

verify claims of all the creditors; (b) to take into his custody or control all the assets, property, effects and actionable claims of the

corporate debtor; (c) to evaluate the assets and property of the corporate debtor in the manner as may be specified by the Board and

prepare a report; (d) to take such measures to protect and preserve the assets and properties of the corporate debtor as he considers

necessary; considers necessary; (f) subject to section 52, to sell the immovable and movable property and actionable claims of the

corporate debtor in liquidation by public auction or private contract, with power to transfer such property to any person or body

corporate, or to sell the same in parcels in such manner as may be specified; (g) to draw, accept, make and endorse any negotiable

instruments including bill of exchange, hundi or promissory note in the name and on behalf of the corporate debtor, with the same effect

with respect to the liability as if such instruments were drawn, accepted, made or endorsed by or on behalf of the corporate debtor in the

ordinary course of its business; (h) to take out, in his official name, letter of administration to any deceased contributory and to do in his

official name any other act necessary for obtaining payment of any money due and payable from a contributory or his estate which cannot

be ordinarily done in the name of the corporate debtor, and in all such cases, the money due and payable shall, for the purpose of enabling

the liquidator to take out the letter of administration or recover the money, be deemed to be due to the liquidator himself; (i) to obtain any

professional assistance from any person or appoint any professional, in discharge of his duties, obligations and responsibilities; (j) to invite

and settle claims of creditors and claimants and distribute proceeds in accordance with the provisions of this Code; (k) to institute or defend

any suit, prosecution or other legal proceedings, civil or criminal, in the name of or on behalf of the corporate debtor; (l) to investigate the

financial affairs of the corporate debtor to determine undervalued or preferential transactions; (m) to take all such actions, steps, or to

sign, execute and verify any paper, deed, receipt document, application, petition, affidavit, bond or instrument and for such purpose to use

the common seal, if any, as may be necessary for liquidation, distribution of assets and in discharge of his duties and obligations and

functions as liquidator; (n) to apply to the Adjudicating Authority for such orders or directions as may be necessary for the liquidation of

the corporate debtor and to report the progress of the liquidation process in a manner as may be specified by the Board; and (o) to perform

such other functions as may be specified by the Board. (2) The liquidator shall have the power to consult any of the stakeholders entitled to

a distribution of proceeds under section 53: Provided that any such consultation shall not be binding on the liquidator: Provided further

that the records of any such consultation shall be made available to all other stakeholders not so consulted, in a manner specified by the

Board.â??

26. Further, the corporate debtor has neither paid the money nor raised any dispute towards the liability of Rs. 24,34,054/- as claimed by the Applicant

in demand notice, dated 28.12.2017, in form 3 as prescribed under under section 8 of IBC, 2016 at Annexure-I.

27. The Bank maintaining account of the applicant, Corporation Bank, has confirmed vide its certificate under 9(3)(c) of the Code dated 16.02.2018

that Rs. 24,34,054/-from Corporate Debtor has not been received from corporate debtor between 05.12.2015 to16.02.2018

28. The Applicant has filed an affidavit dated 30.07.2018 affirming that in respect of the amount claimed or any part thereof, the Applicant has not

received nor had any person, on its behalf had received in any manner the amount due to them under section 9(3)(b) of the Code, 2016.

29. Applicant has filed on record consent form of the Interim Resolution Professional (IRP), to be appointed by the order of Tribunal, of Mr. Vivek

Parti, having registration number IBBI/IPA-001/IP-P00813/2017-18/11376, duly registered with Insolvency and Bankruptcy Board of India, as the

Interim Resolution Professional subject to the condition that no disciplinary proceedings are pending against such an IRP named who may act as an

IRP in relation to the CIRP of the Corporate Debtor and specific consent is filed in Form 2 of Insolvency and Bankruptcy Board of India (Application

to Adjudicating Authority) Rule, 2016 in relation to specifically the Corporate Debtor and the Applicant herein and make disclosures as required under

IBBI (insolvency Resolution Process for Corporate Persons) Regulations, 2016 within a period of one week from the date of this order. Written

Communication, dated 11.05.2018, by Mr. Vivek Parti in Form 2 is annexed to the present application.

30. The registered office of corporate debtor is situated in New Delhi and therefore this Tribunal has jurisdiction to entertain and try this application.

31. The amount of default exceeds Rs. 1,00,000/- as per the requirement under section 4 of the Code, 2016. Hence, this application is within the

purview of section 9 of the IBC, 2016.

32. The default in payment of operational debt first became due and payable from the date of the invoice dated 05.12.2015 raised by the Applicant and further admission by corporate debtor when four cheques were issued in respect of the said debt alongwith the interest. Hence, the debt is not time barred.

33. On perusal of aforementioned judgements of the Honâ??ble Supreme Court of India, National Company Law Appellate Tribunal and National

Company Law Tribunal and Insolvency and Bankruptcy Code, 2016 read with corresponding Rules and Regulations therein, it is observed that

although there is clear debt and default in payment of debt which is due and payable under the Code, 2016 but due to literal interpretation of section 11

of the Code, 2016, the Applicant herein is treated as Corporate Applicant as per the proviso to section 11 of the Code, 2016, and there is much needed

clarification required as to whether corporate debtor undergoing corporate insolvency resolution process filing Application under section 9 of the Code,

2016 can file it in the capacity of â??Operational Creditorâ? or â??Corporate Debtor/ Corporate Applicant for Corporate Debtorâ? against the same

or another corporate debtor. Form the wordings of the Code it is not manifested whether the intent of legislature was to debar the company who is

undergoing CIRP, from enforcing its right to recover legal debt which is indispensable for the survival and revival of the company.

34. The point raised by the Ld. Counsel for the applicant that company who is a corporate debtor, if is not allowed to recover its debt & receivables

which was the cause of its undergoing ICRP, and recovery of its debt being the only hope of such corporate debtor to come out of CIRP.

Subsequently if not permitted can subtly lead to the fatal consequences of such corporate debtor. But in view of the clear bar as mentioned in Section

11 clarified with further explanation at the end of Section 11 and the inclusiveness Section 11 with respect to applicability of the said Section 11 to the entire Chapter II which includes corporate applicants under Section 7, 9 & 10.

35. Based on the above observation and discussion, inspite of application being complete, the Application is to be rejected in terms of Section 9(5) (ii)

& Section 11 of IBC, 2016. A copy of the order shall be communicated to the Applicant 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 consideration analysis and recommendation to remove the anomaly and invigorate the Code suitably to overcome the hurdle forced in present scenario.