
(2020) 02 NCLT CK 0069

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

Case No : (IB) No. 2970/ND Of 2019

Neha Jain

APPELLANT

Vs

Venessa Metals And Alloys Pvt. Ltd

RESPONDENT

Date of Decision : 19-02-2020

Acts Referred:

Insolvency And Bankruptcy Code, 2016 — Section 8, 8(1), 8(2), 9, 9(1), 9(3)(b), 9(3)(c), 9(5)(i), 14, 31(1), 33

Citation : (2020) 02 NCLT CK 0069

Hon'ble Judges : Abni Ranjan Kumar Sinha, J;Kapal Kumar Vohra, Member (Technical)

Bench : Division Bench

Advocate : Anuradha, Gajanand, Harshit

Judgement

Abni Ranjan Kumar Sinha, J

The present application has been filed on behalf of the Applicant/Operational Creditor ("hereinafter referred as OC") under Section 9 of the IBC for the initiation of proceeding against the Corporate Debtor ("hereinafter referred as CD") for a default of Rs. 4,22,882/-. The facts of the case are that the OC was engaged by the CD in the business of trading of non-ferrous metals such as lead and aluminum, and CD is into wholesale trade of pure lead, lead alloys, lead scraps, aluminum scraps and other secondary products of non-ferrous metals.

We have heard the Ld. Counsel for the OC as well as CD. Ld. Counsel for the OC submitted that OC has rendered his services as he was engaged by the CD in the business of trading of non-ferrous metals such as lead and aluminum and in terms of the agreement she raised the invoice at page 25 of the main application. She further submitted that when the OC has not received the amount, then she has delivered a Demand Notice by hand, which was duly received by the CD on 05.09.2019. She further submitted that it has also been admitted by the CD in his reply in paras 8, 9 & 10 at page 4 but no reply of

Demand Notice has been sent by the CD when no dispute is raised within 10 days after the delivery of the Demand Notice then she filed the present application under Section 9 of IBC. She further submitted that she has also complied with the provisions under Section 9(3)(b) and 9(3)(c) and also filed the written consent of the RP, Sh. Ashish Singh having Registration No. IBBI/IPA-002/IP-N00416/2017-2018/11230 and E-mail ID: ashishsingcs@gmail.com. She further submitted that since there is a default, so the proceeding under Section 9 of IBC may be initiated against the CD.

On the other hand, Ld. Counsel for the CD admits this fact that CD has not sent any reply to the Demand Notice but he also submitted that in his reply at page 4, he mentioned that the CD after receiving the Demand Notice dated 31.10.2019 made a request to provide complete service or he will not clear any invoice or dues but in support of this contention, the CD has not produced any document.

Now in the light of the submissions made on behalf of both the parties, we shall consider the case in hand and at this juncture we would like to refer Sections 8 & 9 of IBC and the same are quoted below:

"Section -8.

(1) An operational creditor may, on the occurrence of a default, deliver a demand notice of unpaid operational debtor copy of an invoice demanding payment of the amount involved in the default to the corporate debtor in such form and manner as may be prescribed.

(2) The corporate debtor shall, within a period of ten days of the receipt of the demand notice or copy of the invoice mentioned in sub-section (1) bring to the notice of the operational creditor--

(a) existence of a dispute, 1 [if any, or] record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoice in relation to such dispute;

(b) the 2[payment] of unpaid operational debt--

(i) by sending an attested copy of the record of electronic transfer of the unpaid amount from the bank account of the corporate debtor; or

(ii) by sending an attested copy of record that the operational creditor has encashed a cheque issued by the corporate debtor.

Explanation.--For the purposes of this section, a "demand notice" means a notice served by an operational creditor to the corporate debtor demanding 3[payment] of the operational debt in respect of which the default has occurred.

Section-9

(1) After the expiry of the period often days from the date of delivery of the notice or invoice demanding payment under sub-section (1) of section 8, if the operational creditor does not receive payment from the corporate debtor or

notice of the dispute under sub-section (2) of section 8, the operational creditor may file an application before the Adjudicating Authority for initiating a corporate insolvency resolution process.

(2) The application under sub-section (1) shall be filed in such form and manner and accompanied with such fee as may be prescribed.

(3) The operational creditor shall, along with the application furnish--

(a) a copy of the invoice demanding payment or demand notice delivered by the operational creditor to the corporate debtor;

(b) an affidavit to the effect that there is no notice given by the corporate debtor relating to a dispute of the unpaid operational debt;

(c) a copy of the certificate from the financial institutions maintaining accounts of the operational creditor confirming that there is no payment of an unpaid operational debt I[by the corporate debtor, if available;]

[(d) a copy of any record with information utility confirming that there is no payment of an unpaid operational debt by the corporate debtor, if available; and

(e) any other proof confirming that there is no payment of any unpaid operational debt by the corporate debtor or such other information, as may be prescribed.]

(4) An operational creditor initiating a corporate insolvency resolution process under this section, may propose a resolution professional to act as an interim resolution professional.

(5) The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), by an order--

(i) admit the application and communicate such decision to the operational creditor and the corporate debtor if,--

(a) the application made under sub-section (2) is complete;

(b) there is no 3[payment] of the unpaid operational debt;

(c) the invoice or notice for payment to the corporate debtor has been delivered by the operational creditor;

(d) no notice of dispute has been received by the operational creditor or there is no record of dispute in the information utility; and

(e) there is no disciplinary proceeding pending against any resolution professional proposed under sub-section (4), if any.

(ii) reject the application and communicate such decision to the operational creditor and the corporate debtor, if--

(a) the application made under sub-section (2) is incomplete;

- (b) there has been 4[payment] of the unpaid operational debt;
- (c) the creditor has not delivered the invoice or notice for payment to the corporate debtor;
- (d) notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility; or
- (e) any disciplinary proceeding is pending against any proposed resolution professional:

Provided that Adjudicating Authority, shall before rejecting an application under sub-clause (a) of clause (ii) give a notice to the applicant to rectify the defect in his application within seven days of the date of receipt of such notice from the adjudicating Authority.

(6) The corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (5) of this section".

From the perusal of the provisions referred above, we find that in case of Operational Debt, the OC is required to deliver a Demand Notice to the CD or copy of the invoices demanding payment from the CD and in view of Section 8(2), within 10 days of the receipt of the Demand Notice, the CD has to raise existence of the dispute or produce records showing that the payment has been made and if the OC fails to receive the reply within 10 days, then in view of Section 9(1), the OC is entitled to file an application under Section 9 of the IBC for initiation of proceedings against the CD.

In view of the aforesaid provision, when we shall consider the case in hand, we find that it is an admitted fact that after the delivery of Demand Notice, the CD has not raised any dispute nor made any payment, therefore, at this juncture we would like to consider Section 9(5)(i) which we have already quoted in the aforementioned para.

When we shall consider the case of the OC in the light of the aforesaid provision, then we find that the application made under Sub-Section 2 is complete, no debt is paid to the OC and after receiving the Demand Notice no dispute has been raised by the CD and the name of the IRP submitted by the OC, the record shows that there is no disciplinary proceedings pending against this IRP and the defaulted amount is more than Rs. 1,00,000/- is being the minimum threshold limit fixed under IBC, 2016. Under such circumstances this Adjudicating Authority is inclined to admit this petition and initiate CIRP against the respondent. Accordingly, this petition is admitted. A moratorium in terms of Section 14 of the IBC, 2016 shall come into effect forthwith staying:-

1. effect forthwith staying:-

- (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 debt or 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 Securitisation 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 corporate debtor.

Further:

(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.

(3) 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.

(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.

Accordingly, Sh. Ashish Singh having Registration No. IBBI/IPA-002/IP-N00416/2017-2018/11230 and E-mail ID:-ashishsingcs@gmail.com is hereby appointed as IRP.

Operational Creditor is directed to deposit the fee of Rs. 2,00,000/- to meet the immediate expenses of the IRP within two weeks. The same shall be fully accountable by the IRP and shall be reimbursed by the CoC, to the Operational Creditor to be recovered as CIR costs.

Registry is directed to communicate the order with the IRP as well both the parties.