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IN THE NATIONAL COMPANY LAW TRIBUNAL, NEW DELHI
COURT-II

CP. No.- IB-55(ND)/2018

IN THE MATTER OF:

Mr Hari Kishan Sharma
vs.

.....Operational Creditor

M/s AKME Projects Ltd.

.....Corporate Debtor

SECTION: Under Section 9 of the IBC, 2016.

Judgment delivered on : 18.04.2018

Coram:

Smt. Ina Malhotra
Hon'ble Member (J)

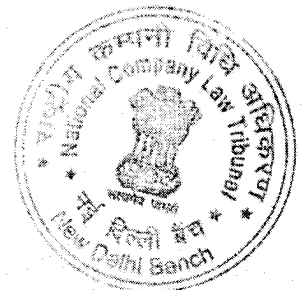
Deepa Krishan
Hon'ble Member (T)

For the Applicant / Petitioner : Mr. Neeraj Malhotra(Sr.Adv.), Mr.
Arjun Syal (Adv.), Ms. Shreya Das
(Adv.)

For the Respondent : None

JUDGMENT

Ms. Deepa Krishan, Member (Technical)



The "Operational Creditor", Mr. Hari Kishan Sharma has filed the instant application under Section 9 of the Insolvency and Bankruptcy Code, 2016 (for

orevity 'the Code') with a prayer for initiating the Corporate Insolvency Resolution Process against the "Corporate Debtor", M/s AKME Projects Ltd. (for brevity the 'Corporate Debtor'). It is appropriate to mention that the 'Operational Creditor' is an Individual who has given his correspondence address in the application para 5 as Achal Gupta Annie Rais, Chamber No. 166, Block 1, Lawyers Chambers, Delhi High Court, New Delhi.

2. The 'Corporate Debtor' is a Limited Company with CIN No. U45201DL2003PLC23512. It was incorporated on 15.12.2003. Its authorised share capital is Rs. 2 Crores (Rupees Two Crores Only) and the paid-up share capital is also Rs. 67,46,350 Lakh (Rupees Only). The registered office is located at 53 Krishna Market, First Floor, Kalkaji, New Delhi-110019.

3. The Operational Creditor has not proposed any name of Insolvency Professional for appointment as Interim Resolution Professional.

4. It is stated in Part-IV of the application in Form-5 that a total amount of Rs. 12,22,146/- (Rupees Twelve Lakh Twenty-Two Thousand One Hundred Forty-Six Only) is due towards "outstanding salary for the period November 2014 till June 2015 including LTA allowance, medical reimbursement / petrol expenses, leave encashment, imprested". It is also stated that interest at the rate of 18% per annum is due from the due date till the date of payment. The date of default is stated to have occurred on 1st June, 2015 when the Operational Creditor was released from service. It is further stated that the Operational Creditor was

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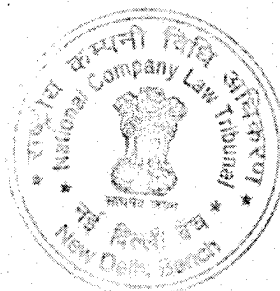
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working as Head Projects w.e.f. August 2013 with the Corporate Debtor as per the letter of appointment dated 19th August 2013 at a monthly cost to the company of Rs. 1,70,050/- (One Lakh Seventy Thousand and Fifty Only).

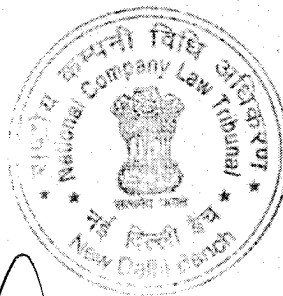
5. The following documents have been attached to prove existence of operational debt and the amount in default: -

- A) Letter of Appointment (Annexure-1)
- B) Correspondence exchanged between the Operational Creditor and the company during the employment when the dues were not being paid. (Annexure-2)
- C) Discharge Letter (Annexure-3)
- D) Statement of Full and Final Settlement (Annexure-4)
- E) Correspondence exchanged between the Operational Creditor and the company after Full and Final Settlement dated 2nd July 2015. (Annexure-5)
- F) Notice under Form-3 of the Code dated 4th November, 2017 along with postal receipts and proof of service. (Annexure-6)

6. A statement of Bank Account where deposits have been made normally by the Operational Creditor in respect of the debt of the Corporate Debtor reflecting non-payment of dues has been attached with the petition.



7. In compliance of Section 9 (3)(b) an affidavit has been filed by the applicant stating that the applicant has served demand notice in Form-3 on the Corporate Debtor and has not received any letter of dispute.
8. It is stated in the application that the Corporate Debtor was the employer of the Operational Creditor. A copy of the appointment letter dated 19.08.2013 has been annexed as Annexure-I along with the petition. The said letter is on the Letter Head of the Corporate Debtor and is signed by Mr. Akhilesh Gupta, Chief Executive Officer.
9. From the details of Correspondence, being copies of emails filed along with the petition, it is seen that on 30th December 2014, Shri Jitendra Pandey of the Corporate Debtor company wrote to the applicant that "Management is currently not in a position to continue his employment with the company (AKME) after 31st December 2014". However, subsequently, vide email dated 24 February 2015, the same person wrote to the applicant "based on discussion management has extended your services till 31st march 2015". Subsequently vide email dated 1st April 2015 sent by the same person to the Applicant, it is stated "as decided by the management your services has extended till 31st May 2015. There is also a copy of the email dated 9th June, 2015 wherein the applicant has been asked to hand over all his responsibilities to Mr. S.S. Gurudev.



10. The applicant has also filed a copy of the letter dated 10th June 2015 signed by Vijay Sinha, Director, with the subject "Acceptance of Resignation". The relevant portions of the letter are as follows: -

"Dear Mr. Sharma,

With reference to our email dated 1st April 2015 regarding your service extension, this is to inform you that your services will not be extended after 31st May 2015 and you are relieved of your duties from the close of business hours with effect from 1st June 2015.

The statement of accounts towards your full and final settlement is being prepared by the Finance Department, New Delhi. You may collect your dues in full & final settlement of your accounts, after producing necessary clearance form duly completed.

Further, you are also, requested to co-operate with the Company in future when we needed & you are requested to handover all properties / Assets of the Company to Admin department.

Please sign the duplicate copy of this letter in token of your having received the original.

Thanking you,
For Akme Projects Limited

Vijay Sinha
Director"

11. Annexure-3 filed with the petition is a receipt dated 12.06.2015 confirming handing over of the following assets Laptop HP 431 (SN-5CB2246MZT), Laptop Adapter, Blackberry Curve 9220 Mobile Phone to one Mr. Bhanu Verma, AKME, IT Support. Another letter dated 10th June 2015 addressed by the applicant to the manager of the Corporate Debtor has been filed regarding return of company car allotted to him for official use on the face of the same letter, the following notations has been made: -

1. Received Car Registration Card (RC) original.

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2. Insurance copy valid till 13/10/2015.
3. Pollution copy valid till 24th June 2015.
4. Car Booklet.
12. Annexure-4 filed with the application is on the letter head of the Corporate Debtor with the heading "full and final settlement statement" showing net amount receivable and payable as Rs, 12,22,169/- (Twelve Lakh Twenty-Two Thousand One Hundred Sixty-Nine Only).
13. Annexure -5 filed with the petition is a copy of the email dated 8th July 2015 addressed to Mr. Vijay Kumar Sinha, Director of the CD by the applicant, the same is being reproduced, however, no copy of the attachment is filed.

"Mr. Vijay Kumar Sinha
Dated-08-07-2015
(Director)
M/s AKME Projects Ltd.
A-26/3 Mohan Co-operative Industrial Estate
Mathura Road, New Delhi-110044

Dear Sir,

I have received your letter. The settlement amount is right. I have already submitted all the assets of the company and I hereby attached document of the submitted assets.

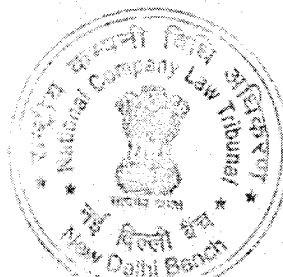
I request you to send the signed copy of settlement and Please at least update my provident fund amount with in this week

At last as you mentioned in your letter I will take my full and final payment from account department now so let me know when I will come to collect my final payment.

H.K. Sharma"

14. The applicant has also drawn our attention to email dated 8th August 2015 in response to his email of same date wherein it is stated "*As you know very well company in big problem for funding. We are working on this to arrange some*

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funds to give everyone comfort with F&F too". Email of the applicant dated 22th September 2015 addressed by the applicant to Mr. Anil Nanda (CMD) of the Corporate Debtor has also been attached wherein the amount claimed to be in default has mentioned. Further, emails dated 05th October, 2015, 9th January 2016 addressed to Mr. Vijay Kumar Sinha, Director again requesting for payment of the outstanding amount have been attached. Our attention has been specifically drawn to email of Jitendra Pandey of AKME Projects Ltd. dated 13th January 2016, addressed to the applicant. This is reproduced below: -

"On JAN 13, 2016 4:37 PM, "Jitender Pandey Jitender.pandey@tang.co.in wrote:

Dear Mr. Sharma,

You are very well aware about Company financial position despite on that you are writing mails like this. You were holding key position in the company and involved in all big decision in past cases on your tenure. Despite of that you are writing mails, Management has never denied of making payment to you but right now Company doesn't have fund.

You are requested to please cooperate. We will get back to you soon.

Please note that Company will definitely clear your final settlement once funds received from anywhere.

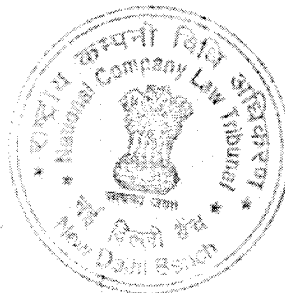
Thanks, With Regards,

Jitendra Pandey
AKME Projects Limited."

15. Copy of notice u/s 8 of IBC, 2016 dated 4th November 2017 has also been filed along with postal receipts and tracking report. It is seen that this notice was sent to

1. M/s AKME Projects Ltd.

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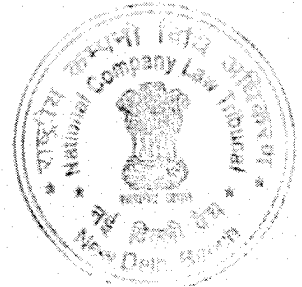
Through Its Chief Managing Director (CMD)
Mr. Anil Nanda
Regd. Office: - 53 Krishna Market,
First Floor, Kalkaji,
New Delhi-110019

2. Mr. Anil Nanda
Chief Managing Director (CMD),
Office at: - 12C,
Friends Colony West,
New Delhi

3. Mr. Vijay Kumar Sinha
Director
Office at: - 12C,
Friends Colony West,
New Delhi

4. Mr. Helmut Corndius Nanz
Director
Lenzhalde 81
Stuttgart 70192
Germany
E-mail Id: H.nanz@nanz-gruppe.de

5. Mr. Helmut Theodor Nanz
Director
Lenzhalde 81
Stuttgart 70192
Germany
E-mail Id: hn@nanz-gruppe.de



16. In order to show transactions between the applicant and the respondent company a copy of the bank account of the applicant maintained with ICICI Bank has also been filed along with the petition.

17. In reply dated 06.02.2018 filed before this Tribunal by the Corporate debtor, following issues have been mentioned: -

a) It is stated that the respondent company underwent a serious financial crisis because of fraud played by ex-employees i.e. Mr. Arun Anand, Mr. Sonal Anand etc. This resulted in an FIR bearing 746/2014 dated 02.11.2014

was filed against primarily ex-employees of the company. A copy of the FIR has been filed along with the reply. However, it is seen that the applicant in the present petition is not a party in the said FIR.

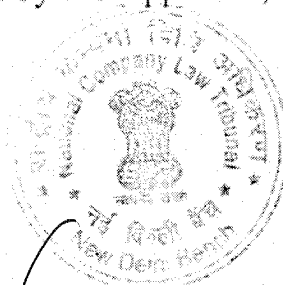
It is further stated that the Operational Creditor was employed at the behest of Mr. Sonal Anand. It is also stated that "it is believed that several employees such as the applicant, one Sudhir Sood, Mr. Jitendra Pandey have been hand in glove with the aforesaid accused ex-employees".

b) It is stated that the acknowledgment for the notice stated to have been issued u/s 8 of IBC does not bear the signature or sign on receipt by any person or employee at the registered office of the Respondent company. It is also stated that the applicant who is admittedly an ex-employee of the respondent company seems to have abused his position in getting the clerical staff to suppress the demand notice.

c) It is stated that the purported full and final settlement statement dated 02.07.2015 is unsigned and hence fabricated and false.

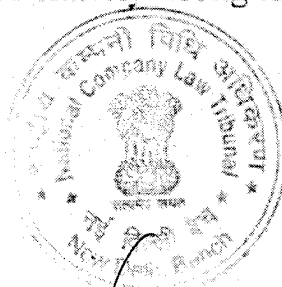
d) It is stated that there was existence of bona fide disputes as a copy of the full and final settlement statement dated 02.07.2015 signed only by the corporate debtor and given on 08.01.2016 for Rs. 6,10,209/- (Six Lakh Ten Thousand Seven Hundred and Nine Only) has been filed along with the reply.

e) It is also stated that certain company assets such as laptop, cell phone and adaptor which were being handled/ used by the Applicant, in a reckless and



irresponsible manner, were returned to the Respondent Company on a much later date, pursuant to several oral requests made in this regard. Further despite several requests, the vehicle given by the Respondent Company to the Applicant was returned only 4 days before the date on which the Full and Final Settlement Statement was issued (as claimed by the Respondent Company herein) and it is denied that the car was received on 12.06.2015. Further, the Respondent Company had to incur substantial expenses for the repair of the car as it was returned in a severely damaged condition. However, on being communicated about the corresponding deductions in the Full and Final Settlement on account of the damages, the Applicant refused to acknowledge the same and kept on insisting to release the entire amount whereas the Respondent Company's liability, if at all any, is limited to the said Full and Final Settlement Statement after making all concerned adjustments i.e. Rs. 6,10,209/-. It would not be out of place to mention that the document relied upon by the Applicant seem to be signed, back dated, in connivance with Mr. Jitender Pandey, who has subsequently resigned and was found to be working against the interest of Respondent Company. Further, Mr. Jitender Pandey has also recently issued a purported demand notice under the Code, which is unlikely to be a coincident. The original copy of the same has been annexed with the Reply.

f) The CD has denied receiving emails dated 22.09.2015 and 05.10.2015 and has stated that it would not be entirely wrong to say that the said

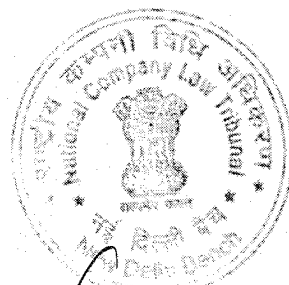


mails have been fabricated by the Applicant to substantiate his purported claims. Even otherwise, the said mails or any other electronic records annexed by the Applicant cannot be relied upon by this Hon'ble tribunal while adjudicating upon the present Application as it is settled law that any electronic record in the form of secondary evidence cannot be admitted in evidence unless a certificate under 65B(4) of the Indian Evidence Act, 1872 is produced along with the said electronic records. The said certificate not having been produced by the Applicant, the electronic records annexed with the Application cannot be relied upon by him.

18. The record have been perused and argument have been heard. The onus to prove the existence of the alleged existence of bonafide dispute lies upon the respondent. When a person is bound to prove the existence of any fact, the burden of proof lies on that person. It is pertinent to note here that the applicant has placed on record a copy of full and final settlement letter issued by corporate debtor by stating that the respondent itself had settled the account of the applicant and acknowledged the outstanding salary dues amount of Rs. 12,34,169/-payable to applicant. Besides there is no documentary evidence on record to show that any dispute was ever raised by the respondent regarding deficiency in services of applicant and defects in the said assets of the company such as Laptop Adapter, Blackberry Curve 9220 and car. When serious allegation of fraud have been raised by the respondent, heavy onus lies upon the respondent to show sufficient

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particulars which prima facie prove the allegations. Therefore, without any specific details, material particulars and evidence the fact of existence of a dispute cannot be sustained.

19. Respondent has taken the stand that there is existence of dispute with respect to the debt and demand in question. There has been no communication of dispute to the applicant about deficiency in employment services. No damage/counter claim has been lodged. No arbitration and/or legal proceedings in the matter are pending. When there is absolutely no document or particulars to support the claim of existence of dispute, the mere claim of dispute that rose in the reply given belatedly after issue of notice u/s 8 of IBC and in the pleadings in defence can be termed as afterthought and motivated to evade the liability and thus, dismissed.

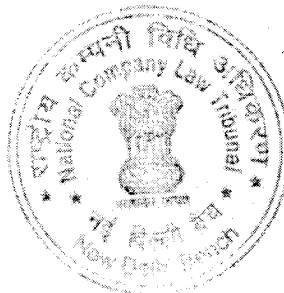
20. "Operational debt" has been defined under section 5 (21) of the code which envisages as follows.

"Operational Debt" means a claim in respect of the provision of goods or services including employment or a debt in respect of the repayment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority;

Operational creditors have been defined at section 5(20) as follows:

"Operation Creditors" means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred".

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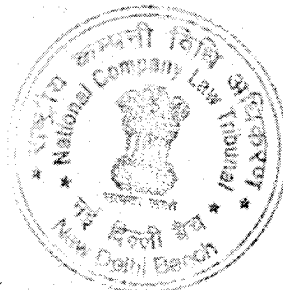
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21. From the definition of "Operational creditor" and "Operations Debt" it can be seen that the applicant being in employment in respondent company and having provided service to the respondent company comes within the definition of Operational Creditors. Similarly, the claim of outstanding salary due to him comes within the definition of Operational Debt. Respondent has itself filed along with their reply before us a letter of full and final settlement to the applicant admitting their liability to pay Rs. 6,10,209/- towards unpaid salaries of the applicant and there being default in payment of such amount the application deserves to be admitted for triggering the Corporate Insolvency Resolution Process against respondent Corporate Debtor.

22. In view of the above, we are satisfied that the present application is complete and the Operational Creditor is entitled to claim his dues towards the outstanding salary and dues from the corporate debtor and there has been a default in payment of the operational debt. Therefore, on fulfilment of the requirements of section 9 (5) (i) (a) to (c) of the Code, the present application is admitted.

23. A moratorium in terms of section 14 of the Code is being issued prohibiting the following:

- 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;

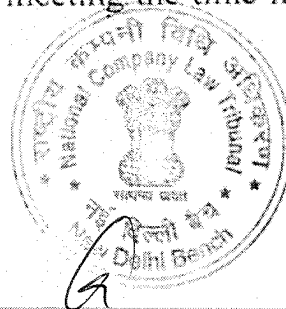


- transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;
- any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;
- recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

24. It is further directed that:

- (a) 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.
- (b) The provisions of sub-section (1) of section 14 of the Code shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

25. The Insolvency and Bankruptcy Board of India vide its letter dated 01.01.2018 has recommended a panel of Insolvency Professionals for appointment as Insolvency Resolution Professional in compliance with Section 16 (3) (a) of the Code in order to cut delay. The list of recommended Insolvency Professionals provides instant solution to the Adjudicating Authority to pick up the name and make appointment. It helps in meeting the time line given in the



Code and the unnecessary time wasted firstly in asking the Insolvency and Bankruptcy Board of India to recommend the name and then to appoint such Interim Resolution Professional by Adjudicating Authority. Accordingly, we appoint Mr. Anurag Sharma (anurag.s.irp@gmail.com) as an Interim Resolution Professional. His registration number is IBBI/IPA-002/IP-N00209/2017-18/10728. The aforesaid Interim Resolution Professional has no disciplinary proceeding pending against him nor anything else has been pointed out with regard to his antecedents. The Interim Resolution Professional has filed necessary declaration in accordance with the IBBI Regulations and the provisions of the Code.


26. The applicant is directed to pay a sum of Rupees two lakhs to the Interim Resolution Professional to meet out the expenses to perform the function assigned to him/her in accordance to Regulation 6 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for corporate person) Regulations, 2016.

27. The order of moratorium shall have effect from the date of this order till the completion of the corporate insolvency resolution process as per Sub-Section (4) of section 14 of the Code.

Let the copy of the order be supplied to the parties including IRP.

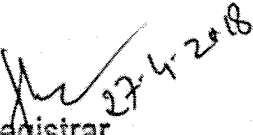

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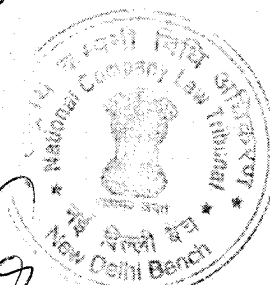
MEMBER (T)


INA MALHOTRA,

MEMBER (J)

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