

IN THE NATIONAL COMPANY LAW TRIBUNAL

NEW DELHI BENCH- V

IB No. 495/ND/2020

IN THE MATTER OF:

JYOTI STRIPS PRIVATE LIMITED
HAVING ITS REGISTERED OFFICE AT:
THROUGH ITS DIRECTOR
B-103, MITHAPUR EXTENSION,
BADARPUR, NEW DELHI 110044

HAVING ITS CORPORATE OFFICE AT:
PLOT-100 – 106 HUDA SECTOR 59 PHASE II,
BALLABGARH FARIDABAD 121004

...PETITIONER/ OPERATIONAL CREDITOR

VERSUS

JSC ISPAT PRIVATE LIMITED,
Y14/1 LOHA MANDI,
NARAINA,
NEW DELHI - 110028

... RESPONDENT / CORPORATE DEBTOR

Order delivered on: 18.06.2020

CORAM:

MR. ABNI RANJAN KUMAR SINHA, MEMBER (JUDICIAL)

MR. K.K. VOHRA, MEMBER (TECHNICAL)

For the Operational Creditor: Ms. Prachi Johri

For the Corporate Debtor: None Present



ORDER

AS PER MR. ABNI RANJAN KUMAR SINHA, MEMBER (JUDICIAL)

1. The present petition is filed under Section 9 of Insolvency and Bankruptcy Code, 2016 read with Rule 6 of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 by the Petitioner/ Operational Creditor, Jyoti Strips Private Limited for initiation of Corporate Insolvency Resolution Process against the Respondent/ Corporate Debtor Company JSC Ispat Private Limited.

2. As per averments made in the petition, the parties transacting business and from 2017 onwards goods were supplied to the Corporate Debtor by the Operational Creditor. According to the payment received and the amount, the Operational Creditor used to adjust the amount received against the old outstanding invoice on first in first out basis. However, in 2019, the Corporate Debtor started making smaller tranches of payments and the outstanding amounts piling up. On 07.06.2019, cheque for Rs. 10,00,000/- given by the Corporate Debtor to the Operational Creditor against part payment of the outstanding dues was returned dishonoured and the Corporate Debtor only made NEFT of Rs. 50,000/- on 19.06.2019 which was adjusted against the older invoices. In utmost good faith, the Operational Creditor continued to supply goods to the Corporate Debtor but the payments have not been cleared and remain outstanding. As per the ledger maintained by the Operational Creditor, full payment against 3 invoices remains due and outstanding as on date. These invoices are dated 14.03.2019,

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15.03.2019 and 16.08.2019. Part payment against invoice dated 14.03.2019 has been received. The Operational Creditor was further in receipt of cheque dated 07.09.2019 drawn on Kotak Mahindra Bank issued by the Corporate Debtor for Rs. 57,60,728/- which constitutes acknowledgement of liability on part of the Corporate Debtor. This cheque on being presented to the bank for payment was returned dishonoured with the noting "payment stopped by drawer". The Operational Creditor has on 09.09.2019 raised a debit note for interest due on delayed payment for Rs. 1,71,337/- and has booked the interest in its books.

3. The Operational Creditor issued the demand notice dated 23.10.2019 as required under Section 8 of the Code, demanding a total sum of Rs. 57,70,849/-.
4. We have heard the learned counsel appearing for the Petitioner/ Operational Creditor.
5. The present case has been filed on behalf of the Operational Creditor against the Corporate Debtor under Section 9 of the Insolvency and Bankruptcy Code and before filing the present petition, the operational creditor has sent the demand notice as required under section 8 of IBC, through speed post as well as by email, which is enclosed at Annexure-G.
6. Before considering the submissions of the learned counsel for the applicant, we would like to refer the provision under which the notice is



required to be sent. Rule 5 of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016, lays down that provision of how the notice would be delivered U/s 8 of the IBC. Rule 5 of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 is quoted below :-

5.(1) An operational creditor shall deliver to the corporate debtor, the following documents, namely.-

(a) a demand notice in Form 3; or

(b) a copy of an invoice attached with a notice in Form 4.

(2) The demand notice or the copy of the invoice demanding payment referred to in subsection (2) of section 8 of the Code, may be delivered to the corporate debtor,

(a) at the registered office by hand, registered post or speed post with acknowledgement due; or

(b) by electronic mail service to a whole time director or designated partner or key managerial personnel, if any, of the corporate debtor.

(3) A copy of demand notice or invoice demanding payment served under this rule by an operational creditor shall also be filed with an information utility, if any.

7. It is a settled principle of law that there is a difference between the procedure for initiation of CIRP by the Financial Creditors U/s 7 of the IBC and the Operational Creditors U/s 9 of the IBC. So far as the Financial Creditor is concerned, as per Section 7 of the IBC, there is no need to deliver the notice before the initiation of CIRP and that has been decided by the Hon'ble Apex Court *in Innoventive Industries Ltd. v. ICICI Bank, (2017)205 Comp Cas 57(SC) held :*

“The scheme of Sec 7 stands in contrast with the scheme under Sec 8 where an operational creditor is, on the occurrence of a default, to first deliver a demand notice of the unpaid debt to the operational debtor in the

manner provided in sec 8(1) of the Code. Under Sec 8(2), the corporate debtor can, within a period of 10 days of receipt of the demand notice or copy of the invoice mentioned in Sub Section (1), bring to the notice of the operational creditor the existence of a dispute or the record of the pendency of a suit or arbitration proceedings, which is pre-existing -i.e., before such notice or invoice was received by the corporate debtor. The moment there is existence of such a dispute, the operational creditor goes out of the clutches of the Court.

8. Therefore for the initiation of CIRP U/s 9 of the IBC by the Operational Creditor, the Operational Creditor is required to deliver the demand notice upon the Corporate Debtor U/s 8 of the IBC. The main object of the inception of provision of Section 8 is, ***“This ensures that operational creditors, whose debt claims are usually smaller, are not able to put the corporate debtor into the insolvency resolution process prematurely or initiate the process for extraneous considerations. It may also facilitate informal negotiations between such creditors and the corporate debtor, which may result in a restructuring of the debt outside the formal proceedings”***, and that is the reason in Section 8 of the IBC, the word, **‘deliver a demand notice of unpaid operational creditor’** is mentioned.

9. In the light of aforesaid discussion, when we shall consider the case of the applicant, then We are of the considered view that under Rule 5 of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016, there are two modes for sending demand notice, one is,

either at the registered office by hand, registered post or speed post with acknowledgement due, or second one, by electronic mail service to a whole time director or designated partner or key managerial personnel, if any, of the corporate debtor, and on the basis of the facts stated in the application, we find, as per rule 5(2) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, the applicant had to send the demand notice either by hand, through registered post or speed post with acknowledgement due at the registered office of the Corporate Debtor or by electronic mail service to a whole time director, designated partner or key managerial personnel of the corporate debtor, and on the basis of the facts stated in the application, we find, the applicant had sent the demand notice on 23.10.2019 through the speed post, as well as through courier service but both have which returned as ***“Addressee left without instructions”***. Also, the applicant has sent the demand notice through electronic mail on 23.10.2019 but the Operational Creditor has nowhere mentioned in the application, whether it is sent on the email id of the whole time director, designated partner or key managerial personnel of the corporate debtor. Therefore, it can be said that the applicant has not delivered notice under Section 8 of Insolvency and Bankruptcy Code, 2016, in accordance with the provision of Rule 5 of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rule, 2016.



10. So, under such circumstances, in our opinion, the applicant has not complied with the provision contained under Rule 5 of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016, therefore, are of the the considered view that the applicant has not delivered the demand notice as required U/s 8 of the IBC, which is the mandatory provision of law and so on this ground in the absence of delivery of demand notice as required U/s 8 of IBC, the present CP No.(IB)3036/ND/2019 filed by the applicant/ operational creditor is not complete and not maintainable and liable to be dismissed.

Accordingly, it is therefore,

ORDERED

The present CP No. (IB) 495/ND/2020 is hereby dismissed, because the applicant has not complied the provision of Section 8 of Insolvency and Bankruptcy Code, 2016 read with rule 5 of Insolvency and Bankruptcy(Application to Adjudicating Authority) Rules, 2016. However, the applicant/ operational creditor is at liberty to file a fresh case in accordance with the provision of law after delivery of demand notice upon the corporate debtor as per Rule 5 of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

Sd/-

K. K. VOHRA

Member (T)

Sd/- 2020

ABNI RANJAN KUMAR SINHA

Member (J)