

IN THE NATIONAL COMPANY LAW TRIBUNAL

NEW DELHI BENCH

Company Petition
IB No. 1758/ND/2019

In the matter of:

The Insolvency and Bankruptcy Code, 2016

AND

In the matter of:

Section 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016

AND

In the matter of:

United enterprises

A proprietorship concern

Duly represented through its executive employee

Manish Gupta, through Special Power of Attorney

Having Address: N-7&8, Sector-5, Bawana Industrial Area, Delhi

...Petitioner/ Operational Creditor

VERSUS

1. Mridula Healthcare Private limited

Flat No. 212, Plot No. 10, New Ashiana Apartment,

Sector-6, Dwarka, New Delhi-110075 IN

... Respondent / Corporate Debtor

2. Manoj Kumar Singh, Director

Mridula Healthcare Private limited

Flat No. 212, Plot No. 10, New Ashiana Apartment,

Sector-6, Dwarka, New Delhi-110075 IN

3. Gaurav Gupta, Director
Mridula Healthcare Private limited
Flat No. 212, Plot No. 10, New Ashiana Apartment,
Sector-6, Dwarka, New Delhi-110075 IN

Order delivered on: 25.11.2019

CORAM:

MR. ABNI RANJAN KUMAR SINHA, MEMBER (JUDICIAL)

MS. SUMITA PURKAYASTHA, MEMBER (TECHNICAL)

For the Petitioner/Operational Creditor: Adv. Rajesh Rai

For the Respondent/ Corporate Debtor:

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, i.e. United Enterprises for initiation of Corporate Insolvency Resolution Process against the Respondent/ Corporate Debtor Company Mridula Healthcare Private Limited.
2. The financial Creditor is the manufacturer of hospital, operation theater and medical equipment etc.



3. The Respondent/ Corporate debtor is a Company Incorporated on 14.02.2011 under the provision of Companies Act, 1956, bearing CIN No. U85110DL2011PTC214033. It is a private limited company and its total obligation of contribution is Rs. 4,40,00,000/-.

4. Brief Facts of the petition are:

i. the learned counsel for the petitioner stated that an order dated 21.03.2016 for purchase of supply hospital goods aggregating to Rs. 33,89,489/- was made by the Respondent, Mridula Healthacre Private limited to the Petitioner, United Enterprises. The terms of payment been agreed between the parties to make immediately at the time of delivery.

ii. Further stated that invoices were raised for the successful supply of the hospital goods. The delivery of hospital goods were accepted by the Corporate Debtor. The Operational Creditor supplied the hospital goods to the Corporate Debtor on 16.12.2016 and 24.06.2016. An invoice was generated after the successful supply vide bearing Invoice No. 0322 dated 16.12.2016, 103 dated 24.06.2016 and 103 dated 24.06.2016, invoice no. 1026 for value of Rs. 13,44,114/-.

iii. Further stated that form XXXVII was issued by the corporatedebtor dated 28.05.2016 in reference to supply of hospital goods.



iv. Further stated that the corporate debtor issued the cheque dated 30.04.2017 in reference of hospital goods supplied for Rs. 7, 18,344/-. The aforesaid cheque bearing no. 280412 dated 30.04.2017 has been dishonored on 27.07.2016 on account of funds insufficient. The aforesaid matter of dishonoring of cheque is pending for notice in Rohini Court.

v. Demand Notice dated 08.03.2019 was issued under Section 8 of the Insolvency and Bankruptcy Code to the corporate debtor demanding payment to the financial creditor within 10 days, through email and no reply was received from the corporate debtor. Further stated that till date the corporate debtor has not paid the total outstanding amount of Rs. 7,18,344/- along with interest @18% per annum (Rs. 3,88,000/-) and further interest @ 24% per annum till realization.

5. We have heard the learned counsel appearing for the Applicant/ Operational Creditor.

6. 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 the email, which is enclosed at page no. 52 (Annexure-J).



7. The Learned counsel further submitted that the said statutory demand notice was sent by registered post on 08.03.2019.
8. 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, 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.

9. 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.

10. 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.

11. In the light of aforesaid discussion, when we shall consider the case of the applicant, then this Tribunal is 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 has 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, whereas in the present case, the applicant has not sent the demand notice through the registered post or speed post or by hand, so, Rule 5(2)(a) has not been complied with. As far as Rule 5(2) (b) is



concerned, the applicant has sent the demand notice through electronic mail but the corporate debtor has nowhere mention 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.

12. So, under such circumstances, in our opinion, the applicant has not complied the provision contained under Rule 5 of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016, therefore, this Tribunal is of 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)1758/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) 1758/ND/2019 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.


SUMITA PURKAYASTHA
Member (T)


A.R.K. SINHA
Member (J)