

IN THE NATIONAL COMPANY LAW TRIBUNAL MUMBAI BENCH-VI

CP (IB) No.523/MB/2022

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

IN THE MATTER OF:

QUESS CORP LIMITED

[CIN: L74140KA2007PLC043909]

Registered Office: Quess House
3/3/2, Bellandur Gate, Marathahalli
Sarjapur Road Bengaluru-560103
Karnataka.

...Applicant/Operational Creditor

Vs.

WARDWIZ (INDIA) SOLUTIONS PRIVATE LIMITED

[CIN: U74900PN2015PTC154519]

Registered Office: Office No. 101, 1st Floor
Pride Purple Accord, Baner
Pune- 411045
Maharashtra.

...Respondent/Corporate Debtor

Pronounced: 16.07.2024

CORAM:

HON'BLE SHRI K. R. SAJI KUMAR, MEMBER (JUDICIAL)

HON'BLE SHRI SANJIV DUTT, MEMBER (TECHNICAL)

Appearances : Hybrid

Operational Creditor: Adv. Aviral Dhirendra

Corporate Debtor : None

ORDER***[Per: SANJIV DUTT, MEMBER (TECHNICAL)]*****1. BACKGROUND**

- 1.1 This Application bearing C.P.(IB) No.523/MB/2022 was filed by Qness Corp Limited, the Operational Creditor on 14.04.2022 under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as “the Code”) read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (hereinafter referred to as “the AAA Rules”) through its Group Head Legal, Mr. Madhu Damodaran, for initiating Corporate Insolvency Resolution Process (hereinafter referred to as “CIRP”) in respect of Wardwiz (India) Solutions Private Limited, the Corporate Debtor.
- 1.2 The Operational Creditor is engaged in the business of providing manpower services. The Corporate Debtor is engaged in the business of marketing and distribution of anti-virus software and security solutions for personal computers under the brand name “WardWiz”.
- 1.3 The Corporate Debtor approached the Operational Creditor for providing manpower services at the Corporate Debtor's premises/ locations across India. Accordingly, the parties entered into a Service Agreement dated 25.06.2018 and the Operational Creditor provided its services as per the Agreement and several invoices were raised from time to time. However, some of the invoices remain unpaid till date. The total amount of debt due

and payable by the Corporate Debtor to the Operational Creditor in lieu of the provision of manpower services between March, 2019 and August, 2019 is stated to be Rs.8,94,65,473/- (Eight Crore Ninety-Four Lakhs Sixty-Five Thousand Four Hundred and Seventy-Three Rupees).

- 1.4 The Operational Creditor issued Demand Notice dated 10.12.2021 to the Corporate Debtor, as required under Section 8 of the Code, which is claimed to have been delivered to the Corporate Debtor on 14.12.2021. However, the Corporate Debtor failed to make any payment within 10 days of receipt of the said Notice. The Operational Creditor, thus, has preferred the present Application seeking commencement of CIRP in respect of the Corporate Debtor.

2. AVERMENTS OF THE OPERATIONAL CREDITOR

- 2.1 According to the Service Agreement dated 25.06.2018 for supply of manpower, the Operational Creditor agreed to provide services by deploying manpower resources as required by the Corporate Debtor for a period of one year. Clause 3.6(iv) of the Agreement obligated the Corporate Debtor to remit payment against invoices raised by the Operational Creditor within 30 working days from the invoice submission date. Several invoices were raised for services provided by the Operational Creditor. Some invoices were paid by the Corporate Debtor while others remained unpaid. Since the invoices raised on 29.03.2019 remained unpaid, the said date is the first date of default.

- 2.2 The last payment made by the Corporate Debtor was on 10.07.2019 against the invoices raised on 29.03.2019 with amounts remitted being Rs.60,00,000/- and Rs.42,00,000/-. Despite continuous provision of services as per the Agreement, the Corporate Debtor failed to make any payment after 10.07.2019. The Operational Creditor continuously followed up with the Corporate Debtor to release payment. However, no payments were received, prompting the Operational Creditor to issue a Demand Notice on 10.12.2021 seeking outstanding dues amounting to Rs.8,97,18,253/-.
- 2.3 The Corporate Debtor admitted its liability in a letter dated 05.03.2020 issuing a post-dated cheque for Rs.4,67,45,562/- and promising full payment by Electronic Transfer by 30.03.2020. However, no payment was made. In a letter dated 24.04.2020, the Corporate Debtor again admitted its liability to pay the outstanding dues, attributing the delay to financial distress caused by the COVID-19 pandemic. Despite assurances, the outstanding dues of the Operational Creditor remained unpaid, resulting in the dishonour of the cheque and subsequent legal action.
- 2.4 Since the Corporate Debtor failed to pay the outstanding dues despite assurances, the Operational Creditor had no choice but to deposit Cheque No.000394 in its bank account with the HDFC Bank on 16.06.2020. However, the cheque was dishonoured due to insufficient funds. The Operational Creditor was informed through a Return Memo

dated 16.06.2020 issued by the HDFC Bank. Consequently, the Operational Creditor served a Legal Notice under Section 138 of the Negotiable Instruments Act, 1881 to the Corporate Debtor on 10.07.2020 claiming the outstanding amount. The Court issued summons to the Directors of the Corporate Debtor on 04.01.2021 in the Criminal Complaint later filed by the Operational Creditor.

- 2.5 Despite multiple commitments made by the Corporate Debtor, the outstanding dues remained unpaid. A meeting between representatives of both parties was held, wherein the Corporate Debtor once again admitted its liability to pay the outstanding amount by 25.05.2021. This understanding was recorded and signed by both parties in the Minutes of Meeting dated 24.03.2021. However, the Corporate Debtor failed to release any amount by the agreed-upon date.
- 2.6 Subsequently, Demand Notice under section 8 of the Code was issued on 10.12.2021 seeking payment of the total amount of Rs.8,94,65,473/-. However, the Corporate Debtor failed to pay or demonstrate any dispute.
- 2.7 The default occurred against the invoices raised by the Operational Creditor from time to time and the default is still ongoing due to non-payment of the outstanding dues.
- 2.8 The Operational Creditor has furnished an Affidavit dated 31.03.2022 under Section 9(3)(b) of the Code, stating that apart from a frivolous reply to the Demand Notice that does not contest the debt and default, no other reply indicating the existence of any dispute regarding the transaction or

unpaid operational debt was received. The Operational Creditor has filed an Additional Affidavit on 13.05.2022 placing on record copy of postal receipt dated 10.12.2021 showing proof of despatch of the statutory Demand Notice dated 10.12.2021 to the Corporate Debtor by speed post and tracking report showing service of the same.

3. CONTENTIONS OF CORPORATE DEBTOR

- 3.1 It is noticed from the record that the Operational Creditor duly served notice of hearing to the Corporate Debtor through speed post/registered post on several occasions. Furthermore, this Bench, *vide* order dated 24.06.2022, directed the Registry to send the Court notice intimating the next date of hearing. Despite proper service of notices, the Corporate Debtor remained absent until 30.01.2023.
- 3.2 On 23.03.2023, Mr. Agam H. Maloo, Advocate, appeared for the Corporate Debtor and requested time for filing reply, which was granted with the directive that failure to do so would result in forfeiture of the right to file reply. However, no reply was filed by the Corporate Debtor, and consequently, the right to file reply was forfeited on 05.07.2023.

4. ANALYSIS AND FINDINGS

- 4.1 Upon due consideration of the pleadings along with the materials available on record and hearing the Ld. Counsel for the Operational Creditor, our findings in the matter are as under:-

- 4.2 Despite several opportunities provided by this Adjudicating Authority for the Corporate Debtor to file its reply, the Corporate Debtor failed to take any steps to furnish its reply or present any defence. Consequently, the right of the Corporate Debtor to file reply was forfeited on 05.07.2023. In the absence of any reply from the Corporate Debtor, the Application is disposed of based on the pleadings of the Operational Creditor, materials available on record and arguments presented by the Ld. Counsel for the Operational Creditor.
- 4.3 It is observed that the Operational Creditor provided manpower services to the Corporate Debtor under the Service Agreement dated 25.06.2018. In Part-IV of the Application, it is claimed that the operational debt of Rs.8,94,65,473/- arose against 230 invoices raised by the Operational Creditor on the Corporate Debtor during the period from April, 2019 to September, 2019. A certificate dated 28.01.2022 issued by Yes Bank, Bangalore, where Operational Creditor's account is maintained certifies the amounts received from the Corporate Debtor during the period from 04.04.2019 to 10.07.2019. Thus, it is seen that no payments were received from the Corporate Debtor after 10.07.2019. However, similar certificate in respect of the current account with the HDFC Bank has not been furnished. Due to non-payment of outstanding dues by the Corporate Debtor, the Operational Creditor issued a Demand Notice dated 10.12.2021.
- 4.4 Clause 2 of the Service Agreement dated 25.06.2018 states that the Agreement shall be valid for a period of one year from 25.06.2018, i.e. up to

25.06.2019 and that either party shall have the right to renew the Agreement on issuing notices of renewal to the other party at least 60 days prior to the expiry of the term. Further, as per the Service Agreement, payment for the invoices raised by the Operational Creditor was to be made within 30 days from the date of submission of invoice. It is noticed from perusal of Column 2 of Part-IV of the Application that the Operational Creditor has claimed to be in default the amount of invoices raised by it on the Corporate Debtor even for the months of July and August, 2019 falling due on 08.08.2019 (69 invoices) and 13.09.2019 (51 Invoices) respectively, without offering any justification. The Operational Creditor has not placed on record any notice of renewal received from the Corporate Debtor or any correspondence exchanged between the parties for extension of term of the Agreement for the months of July and August, 2019. Thus, it is found that out of 230 invoices claimed to be in default, the Operational Creditor has failed to furnish any explanation for claiming amounts under the aforesaid 120 (51+69) invoices pertaining to the months of July and August, 2019 which are beyond the agreed term of the Service Agreement.

- 4.5 It is noticed from the record that the Operational Creditor has not furnished any documentary evidences to prove its case, though these documents and correspondences find mention in the "list of dates" annexed to the Application. For example, the Operational Creditor has not submitted copies of its own letters dated 22.04.2020 and 20.05.2020 addressed to the Corporate Debtor regarding non-payment of outstanding dues and letters

dated 05.03.2020, 24.04.2020 and 25.05.2020 addressed by the Corporate Debtor to the Operational Creditor *inter alia* admitting its liability. The Operational Creditor has also not placed on record copy of legal notice dated 10.07.2020 under Section 138 of the Negotiable Instruments Act, 1881 served on the Corporate Debtor claiming the outstanding amount. Further, the Operational Creditor has failed to furnish copy of the minutes of meeting dated 24.03.2021, claimed to have held between the representatives of the Corporate Debtor and Operational Creditor. Last but not the least, the Operational Creditor has failed to place on record copy of Ledger Account of the Corporate Debtor appearing in its books of account.

4.6 Further, it is noticed that the affidavit dated 31.03.2022, furnished by the Operational Creditor under Section 9(3)(b) of the Code, contains contrary or self-contradictory averments and is thus not worthy of credence. For instance, in Para 2 of the Affidavit, the Deponent affirms and states that "*the Corporate Debtor has not replied to the Demand Notice and thus has failed to point out existence of any dispute with respect to the transaction*". However, in Para 4 of the Affidavit, it is stated that "... *As on the date of this application, the Applicant... has only received a frivolous reply to the Demand Notice which does not make out any dispute to the debt and default*". Thus, it is hard to ascertain whether the averments in Para 2 or those of Para 4 are to be taken as true and correct. However, it is clear that the averments in both paras 2 and 4 cannot be true and correct at one and the same time. Further, it is noticed from the record that no reply, howsoever

'frivolous', purportedly received from the Corporate Debtor in response to the Demand Notice has been annexed to the Application. It is for the Adjudicating Authority to determine whether the reply, if any, submitted by the Corporate Debtor to the Demand Notice is 'frivolous' or not. The Operational Creditor cannot arrogate to itself the power or authority to decide the merits of the Corporate Debtor's reply, if at all any such reply was received in the present case.

4.7 All this clearly indicates suppression of relevant materials or misrepresentation of relevant facts on part of the Operational Creditor and thereby an attempt to deceive or mislead the Adjudicating Authority. Therefore, we hold that the affidavit under Section 9(3)(b) containing self-contradictory or inconsistent averments cannot be treated as valid in law. Moreover, we find that the Operational Creditor has not approached this forum with clean hands. The law is settled that it is the litigant's bounden duty to make a full and true disclosure of facts. It is a matter of trite law that suppression of material facts before a court amounts to abuse of the process of the court and deserves to be dealt with a heavy hand. Therefore, on this count alone, this Application is liable to be dismissed.

4.8 It is well-settled that delivery or service of the Demand Notice under Section 8 of the Code on the Corporate Debtor is one of the pre-requisites for initiation of CIRP under Section 9 of the Code. In the present matter, it is noticed that although the Operational Creditor had issued the statutory Demand Notice dated 10.12.2021 under Section 8 of the Code to the

Corporate Debtor, the said Demand Notice was sent and wrongly delivered to an address with Pin Code '411043' on 14.12.2021, as evident from perusal of the Speed Post receipt and the relevant tracking report furnished by the Operational Creditor, while the actual Pin Code as per the address of registered office of the Corporate Debtor is '411045'. The said Pin code is mentioned in the Application also. This clearly shows that the statutory Demand Notice was not served at the correct address of the Corporate Debtor. The Operational Creditor has not provided any explanation regarding this discrepancy. Thus, it is found that the Operational Creditor has not been able to demonstrate proper and actual service of the Demand Notice under Section 8 of the Code on the Corporate Debtor which is a mandatory requirement and a *sine qua non* of an Application under Section 9 of the Code.

4.9 At this juncture, it would also be relevant to consider the provisions of Rule 5 of the AAA Rules dealing with the service of the Demand Notice:-

“Demand Notice by Operational Creditor. – (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 sub-section (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”.

Thus, Rule 5 mandates that the statutory Demand Notice must be served on the Corporate Debtor at its registered office by hand or RPAD or Speed Post. In this case, it is seen that the Demand Notice was not sent to the registered address of the Corporate Debtor as per the Master Data of the Corporate Debtor available on the MCA website. The Operational Creditor was well aware of the registered office address of the Corporate Debtor and had been raising invoices at the above address from time to time. In these circumstances, it cannot be said that the Operational Creditor had made actual and proper delivery of the Demand Notice on the Corporate Debtor.

4.10 In this connection, it would not be out of place to refer to the judgment of Hon'ble NCLAT in the matter of **Shailendra Sharma Vs. Ercon Composites [2021 SCC OnLine NCLAT 3]** wherein it has been held that the service of Demand Notice to the corporate debtor as per Section 8 is a mandatory requirement:-

“47. An application filed u/s 9 of the 'I&B' Code, 2016 without serving notice u/s 8 of the Code is not maintainable. Indeed, a mere failure to serve the 'Demand Notice' is not a curable defect. A 'Bankruptcy' notice sets in motion the entire process leading to 'Bankruptcy' and it is to be rigidly and narrowly construed”.

Thus, it is settled that failure to serve the Demand Notice under Section 8 of the Code is not a mere technical or curable defect but a mandatory pre-condition for filing Application under Section 9 of the Code for initiating CIRP against the Corporate Debtor. In view of the aforesaid discussion and findings, it is evident that the Operational Creditor has failed to show that it had delivered the statutory Demand Notice dated 10.12.2021 under Section 8 of the Code read with Rule 5 of the AAA Rules to the Corporate Debtor for payment which is a pre-requisite for initiation of the CIRP against the Corporate Debtor. Consequently, the Application deserves to be dismissed under Section 9(5)(ii)(c) of the Code.

ORDER

In view of the aforesaid findings, this Application bearing C.P.(IB) No.523/MB/2022 filed under Section 9 of the Code by Quess Corp Limited, the Operational Creditor, for initiating CIRP in respect of Wardwiz (India) Solutions Private Limited, the Corporate Debtor is **rejected**.

However, the rejection of this Application shall not cause any prejudice to the right of the Applicant to pursue such other remedies as may be available in accordance with law.

Sd/-

**SANJIV DUTT
MEMBER (TECHNICAL)**

Deepa & JNK

Sd/-

**K. R. SAJI KUMAR
MEMBER (JUDICIAL)**