

**THE NATIONAL COMPANY LAW TRIBUNAL  
NEW DELHI BENCH  
AT NEW DELHI**

**Company Petition no. (IB)-334(ND)/2017**

**Under Section 9 of the Insolvency and Bankruptcy Code, 2016**

In the matter of:

Nitin Gupta

.....Operational Creditor

Versus

M/s Applied Electro-Magnetic Pvt. Ltd.

...Corporate Debtor

**CORAM:**

**MS. INA MALHOTRA, MEMBER (JUDICIAL)**

**MR. S.K. MOHAPATRA, MEMBER (TECHNICAL)**

For Operational Creditor: Mr. R.K. Gupta, Advocate

Mr. M.P. Sahay, Advocate

For corporate debtor: Mr. Ashwaraya Sinha, Advocate

Mr. GirikBhalla, Advocate



**Judgment delivered on: 26/10/2017**

**Per: S. K. Mohapatra, Member (Technical)**

**ORDER**

(Reserved on 09.10.2017)

1. This is an application filed under section 9 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'the Code') read with rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (for brevity 'the Rules') with a prayer for initiation of Corporate Insolvency Resolution Process in respect of respondent corporate debtor.
2. It is the case of the applicant that he was appointed by respondent company M/s. Applied Electro Magnetics Pvt. Ltd. vide letter No. 2008/3871 dated 7th May, 2008 as Manager R&D (Railway Projects) and placed in M-2, Grade with effect from 7th May, 2008 at the basic salary of Rs.17000/- per month along with House Rent 55% of basic salary per month, with PF, Gratuity, LTA etc. The appointment letter dated 7<sup>th</sup> May 2008 issued by the respondent company has been placed on record.



3. It is submitted that the operational creditor, was appreciated for his work by the respondent Corporate Debtor and the respondent company has revised/increased the salary package of applicant operational creditor continuously and consecutively in year 2009, 2010 and 2013 respectively. It is stated that in 2013 the salary package of operational creditor was enhanced from Rs.11 lac to Rs.14 lac(approx) per annum.
4. It is contended that since beginning the payment of salary was not systematic, unpunctual and the respondent was paying the salaries with some delays, as a result of which salaries got accumulated and ultimately debtor denied to pay the same to creditor. In other words the respondent was not paying the full salaries since 2008 and use to pay partial salaries to operational creditor. It is stated that a total sum of Rs. 46,77,124/- towards unpaid salaries has not been paid and is due from the respondent company. The applicant has also claimed interest @ 18% per annum over the outstanding salary dues.
5. The respondent is a company incorporated under the provisions of the Companies Act, 1956, having its registered office at M-120, First Floor, Greater Kailash-II, New Delhi-48. Since the registered office of the respondent corporate debtor is in Delhi, this Tribunal having territorial jurisdiction over the place is the Adjudicating Authority in relation to the prayer for initiation of Corporate Insolvency Resolution



Process in respect of respondent corporate debtor under sub-section (1) of Section 60 of the Code.

6. It is seen that applicant has sent a demand notice to the respondent company under Section 8 of the Code read with Rule 5 of the Rules, in Form 3 on 17.08.2017 enclosing therewith the details of the salaries dues, appointment letter, appraisal letters, latest salary slip, copy of EPFO passbook including certified bank statements of Bank of India and Deutsche Bank pertaining to the bank accounts in which the salary of applicant was stated to be deposited.
7. The present application has been filed under Section 9 of the Code in Form-5 as required under sub-rule (1) of Rule 6 of the Rules, after expiry of the stipulated period of 10 days from the date of delivery of aforesaid demand notice. As the requisite Bank Certificate was not enclosed with the application opportunity was afforded to the applicant on 14.09.2017 to remove the defect.
8. In compliance of order dated 14.09.2017 and in terms of Section 9 (3) (c) of the Code, the applicant has filed an affidavit dated 20.09.2017 alongwith a certificate dated 16.09.2017 issued by the Bank of India confirming that no amount has been deposited in the bank account of the applicant by the respondent company since 1<sup>st</sup> January 2017 till the date of the certificate. Another certificate dated 19.09.2017 from Deutsche Bank has also been enclosed confirming





that no amount has been credited from the respondent company between 17/08/2017 to 18/09/2017 in the account of the applicant operational creditor.

9. Besides in compliance of Section 9 (3) (b) of the Code, an affidavit dated 13.09.2017 has also been filed by the applicant operational creditor affirming that no notice is given by the corporate debtor relating to the dispute of the unpaid operational debt.
10. The Respondent Company has filed its reply on 14.09.2017 and raised objection against the application. It is submitted that as the amount claimed by the operational creditor is from May 2008, the claim of the operational creditor is barred by limitation. The other main objection raised is that there is an existence of dispute, as prior dispute is pending before Deputy Labour Commissioner, Gautam Budh Nagar. It is further alleged that the applicant is indulging in forum shopping. It is also the case of the respondent that the certificate furnished from bank is not in compliance as required under Section 9 (3) (c) of the Code. Respondent further contended that the application is liable to be rejected as the respondent company is a serious solvent company committed to its cause and that different claims have been made by the applicant at different forums.



11. Heard the parties and we have perused the case records.
12. Applicant has furnished statement details showing salary dues, payments made by the respondent company and net amount due, year wise from 7<sup>th</sup> May 2008 to 31<sup>st</sup> July 2017 supported by appointment letter, pay slips/salary slips, statement of bank accounts showing salary deposits etc. Respondent company in its affidavit in reply filed on 14.09.2017 at Paragraph 15 (a) submitted that:

*“(a) The claim of the applicant as made out in Annexure A of the Form 5 Application that respondent has not been paying full salary since 2008 is categorically denied and it is stated that as per records of the Respondents Company the salary due to be paid is Rs. 28,84,160/-. There is no outstanding amount pending except for the amount reflected above and the calculations of the applicant are untrue and baseless. A copy of the statement of the amount due to be paid thereto is annexed herewith and marked as Annexure R5”.(emphasis given).*

13. The respondent has also enclosed Annexure 5 at page 27 of the reply disclosing year wise statement of amount payable, amount to be deducted for late coming, amount actually paid, TDS deposited, net amount due to the applicant etc. As per the respondent company as



enumerated at annexure R5 the net amount due to the applicant are as follows.

<b>Year</b>	<b>Net Amount</b>
2008	79416
2009	97130
2010	78041
2011	272000
2012	473618
2013	180540
2014	294998
2015	704016
2016	344872
2017	359529
<b>Total</b>	<b>2884160</b>

14. A perusal of the admission made in the reply as quoted above reveals that as per the records of the respondent company the salary due to be paid to the applicant is Rs. 28,84,160. It has also been mentioned at para 15 (a) of the reply as quoted above that there is no outstanding amount pending except Rs. 28,84,160/-. This is clearly an admission by Respondent that a sum of Rs. 28,84,160/- is due to be paid to the applicant.

15. "Operational debt" has been defined under Section 5 (21) of the Code 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 creditor has also been defined at section 5(20) as follows:

*“Operation Creditor” means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred”.*

16. From the definition of “Operational creditor” and “Operational Debt”, it can be seen that the applicant being in employment in the respondent company and having provided service to the respondent company clearly comes within the definition of Operational Creditor. Similarly the claim of outstanding salary due to him comes within the definition of Operational Debt. Respondent company having admitted that Rs. 28,84,160/- is outstanding towards salary to be paid to the applicant clearly falls within the definition of Corporate Debtor. Since the respondent Corporate Debtor has admitted that Operation Debt to the tune of Rs. 28,84,160/- is outstanding to the applicant operational creditor, and there being default in payment of such amount, the application deserves to be admitted on that score alone for triggering Corporate Insolvency Resolution Process against the respondent Corporate debtor.





17. However before parting with, the objections raised by the respondent are discussed below:
18. In relation to the objection raised by respondent that the claim of applicant is barred by limitation, it is seen that the claim pertains to the period from 7<sup>th</sup> May 2008 to 31<sup>st</sup> July 2017. Therefore the entire claim cannot be termed as barred by limitation. As discussed at para 12 above the respondent has admitted that Rs. 3,59,529/- is due for the year 2017, Rs. 3,44,872/- is due for the year 2016 and Rs. 7,04,016/- is due for the year 2015. These claims at least are clearly not barred by limitation. Under the provisions of the Code even if the claim of applicant is only rupees one lac and default has been committed by the respondent in payment of such amount, the application is to be admitted. It is pertinent to mention here that the respondent Corporate Debtor has admitted that Operation Debt to the tune of Rs. 28,84,160/- is outstanding to the applicant operational creditor, which is much above the ceiling limit of one lac. .
19. The second objection raised by the respondent company is that the operational creditor has already filed a complaint to the Deputy Labour Commissioner, Gautam Budh Nagar alleging that the respondent has not paid salary to the operational creditor. It is alleged that since the complaint of operational creditor is pending before the Deputy Labour



Commissioner, there exists a dispute and the application of operational creditor is liable to be rejected.

20. In this context it is seen that the alleged complaint was made to the Deputy Labour Commissioner by the applicant *inter-alia* for non-payment of salary of employees and to restrain from disposing off the assets of the company. Deputy Labour Commissioner in its letter dated 19.09.2017 declined to entertain the complaint on the ground that the applicant does not come under the purview of "Labourer", as he was appointed as Manager having salary of Rs. 105450/- per month. The letter dated 19.09.2017 issued by Deputy Labour Commissioner has been placed on record. There is thus no dispute that no case is pending before the Deputy Labour Commissioner. It was only a complaint by the applicant. Further there is no document on record which can show that the respondent corporate debtor had raised any dispute regarding the salary dues of applicant before the Deputy Labour Commissioner. The Respondent has failed to place any document/correspondence disputing the claim of salary dues, prior to the demand notice issued under section 8 of the Code. Mere repudiating the claim in the reply without material particulars can be termed as vague, got up and to evade the liability. On the contrary there has been admission of pending salary dues to the tune of Rs 28,84,160/- by respondent.



Accordingly, the objection regarding existence of dispute is not sustainable.

21. The other objection raised by respondent corporate debtor is regarding forum shopping. There is no law that an unpaid employee who has made a complaint before the Labour department cannot move application under the Code for initiation of Corporate Insolvency Resolution Process against its employer. Once the respondent has committed a default in payment of applicant's dues and it exceeds rupees one lac and such default continues, he qualifies the requirement under Section 6 of the Code to lodge an application under the Code.
22. With regard to the objection on the quantum of claim made by the applicant it is pertinent to state here that this is not the forum to examine and adjudicate as to which portion of the claims are admissible as due and recoverable. This forum is not here to adjudicate as to how much is "due". In any case the respondent corporate debtor would be entitled to raise objection of any mismatching of claim before the committee of creditors/ resolution professional. The material issue for consideration before this forum is that the amount of debt should be at least one lac and a default in payment of such amount has been committed by the respondent corporate debtor.
23. As far as the objection regarding non-compliance of Section 9 (3) (c) of the Code, it is seen that the applicant has attached the relevant





certified bank account statements along with certificate issued by Bank of India that Since January 2017 no amount has been paid by Respondent Corporate Debtor to the applicant. Further from the certificate issued by the Deutsche Bank it is clear that no amount has been paid by the respondent Corporate debtor between 17/08/2017 to 18/09/2017 in the account of the applicant operational creditor. This shows that the provisions of Section 9 (3) (c) of the Code has been satisfactorily complied with by the applicant.

24. Further the respondent has contended that under instruction from the Company Management the applicant has developed software SHOCK/CONE ACTUATOR (Tested for Mirage 2000 Aircraft of the Indian Air Force) and the applicant is arm-twisting the respondent company and is not releasing the software so developed. This conduct of the applicant will cause irreparable loss to the company and will amount to violation of terms of employment. On this allegation also absolutely no documentary proof has been placed on record by the respondent. When a person is bound to prove the existence of any fact, the burden of proof lies on that person. Mere submission without any corroborative evidence would not help the respondent. Respondent has failed to establish his contention.





25. In the aforesaid background we are satisfied that the present application is complete and there has been part admission of salary dues and non-payment of the same has caused default by respondent. Therefore, on fulfilment of the requirements of section 9 (5) (i) (a) to (d) of the Code, the present application is admitted.

26. 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.*

27. 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.*

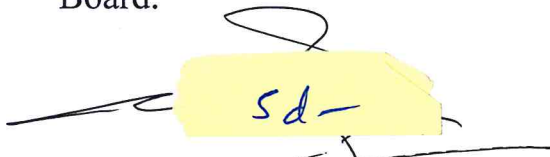
(b) *The provisions of sub-section (1) of section 14 of the Code shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.*

28. As no proposal for an interim resolution professional has been made in the application, a reference under section 16(3)(a) of the Code be made to the Insolvency and Bankruptcy Board of India for recommending the name of a registered Interim Resolution Professional to be appointed in this case.

29. 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 the

Board.

  
(S. K. Mohapatra)

**Member Technical**

  
(Ina Malhotra)

**Member Judicial**

DEEPAK KUMAR