

**THE NATIONAL COMPANY LAW TRIBUNAL
KOCHI BENCH, KOCHI**

**TIBA/11/KOB/2019
(IBA/677/2019 of NCLT Chennai)**

Connected with

IBA/28/KOB/2019

Under Section 9 of IBC, 2016
read with Rule 6 of IB(AAA)Rules, 2016

Order delivered on 16th October 2019

Coram: 1. Hon'ble Shri Ashok Kumar Borah, Member (Judicial)
2. Hon'ble Shri Veera Brahma Rao Arekapudi, Member (Technical)

In the matter of

**TIBA/11/KOB/2019
(IBA/677/2019 of NCLT Chennai)**

Dr. N.P.Kamalesh,
A Block 7A1, Kent Hail Garden,
Stadium Link Road,
Palarivattom, Kerala 682 025.

]
]
] Petitioner
]

Vs.

PVS Memorial Hospital Private Ltd.,
No.XXIV/1484, Kaloor,
Ernakulam, Kerala 682 017

]
] Respondents
]

IBA/28/KOB/2019

M/s. OCS Group (India) Private Ltd.
Regd Office: A-501, 5th Floor, Thane one
DIL Complex, Ghodbunder Road
Majiwade, Thane West, Thane,
MH - 400610.

]
]
] Petitioner
]

Vs.

PVS Memorial Hospital Private Ltd.,
No XXIV/1484, Kaloor,
Ernakulam, Kerala 682 017

]
] Respondents
]



Parties/Counsels Present:

Petitioner : Shri Asish Mohan, Advocate
(TIBA/11/KOB/2019)
Shri Sojan James, Advocate
(IBA/28/KOB/2019)

Respondent : Shri Millu Dandapani, Advocate

ORDER

TIBA/11/KOB/2019 (arising out of IBA/677/2019 Of NCLT Chennai Bench) and IBA/28/KOB contained identical claims, by Operational Creditors against the same Corporate Debtor. As such both the cases are clubbed together and passed the following common orders. These applications were filed by, **Dr. N. P. Kamalesh** (TIBA/11/KOB/2019) and **M/s OCS Group (India) Private Limited** (IBA/28/KOB/2019), Operational Creditors under Section 9 of the Insolvency and Bankruptcy Code, 2016 (for short to be referred hereinafter as the Code) for initiating Insolvency Resolution Process against the same Corporate Debtor. The corporate debtor was incorporated on 25.06.1992 under the Companies Act, 1956 in the name of 'PVS MEMORIAL HOSPITAL PRIVATE LIMITED' with CIN No. U85110KL1992PTC006573. It has its registered office at No. XXIV/1484, Kaloor, Ernakulam- 682 017, in the State of Kerala as per the Master data taken from Ministry of Corporate Affairs' website and therefore, the matter falls within the territorial jurisdiction of this Tribunal.



Submissions by Operational Creditors

TIBA/11/KOB/2019 - Dr. N. P. Kamalesh

1. Dr. N. P. Kamalesh, Operational Creditor, residing at a Block 7A1, Kent Hail Garden, Stadium Link Road, Palarivattom, Kerala, was appointed as 'Junior Consultant- GI Surgery' with the corporate debtor. The management had revised his remuneration with effect from 01.01.2016 as Rs. 3,50,000/- (Rupees three lakh fifty thousand only) along with the departmental incentives at the rate of 60%.
2. The counsel for the petitioner claimed that the corporate debtor was paying all monthly professional fees till the month of April, 2018. From May, 2018 onwards it was pending until November, 2018. He further stated that the department incentives for a period of 32 months were also pending (April 2016-November, 2018).
3. The counsel through his petition stated that the Corporate Debtor has failed to discharge his liability and defaulted in paying a sum of Rs. 41,04,301/-. The counsel for operational creditor stated that the letters from the corporate debtor confirmed the professional fee and incentives from 01/04/2016 to 30/08/2018. Even though the same was shown as paid and TDS has been deducted, the professional fee from May 2018 until November, 2018 as well as department incentives from April 2016 to August 2018 are not received.



4. The operational creditor submitted that all the verbal and email requests to settle the professional bills were left unheard and unanswered. Aggrieved by this the operational creditor filed this application.
5. A demand Notice as in Form 3 under Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules 2016 was sent on 12.12.2018, demanding payment of Rs. 48,39,301/- (Rupees Forty-Eight Lakh Thirty-Nine Thousand Three Hundred and One Only) to the Corporate Debtor at its registered office. The corporate debtor has acknowledged the pending dues and paid only 2 months salary, i.e., of April & May, 2018. But, the remaining dues (i.e., Salary from June, 2018 until November, 2018 as well as Department incentives from April, 2016 to November, 2018) are still pending (i.e., Rs. 41,04,301/-). The operational creditor stated that there is a non-payment by the corporate debtor which amounts to 'default' under the Code and the same may be admitted.

IBA/28/KOB/2019 - M/s OCS Group (India) Private Limited

6. This application has been filed by M/s OCS Group (India) Private Limited through its authorized representative Mr. Shailender Pandey. The registered office of the operational creditor is situated at 501, 5th Floor, Thane One, DIL Complex Ghodbunder Road, Majiwade, thane West thane, MH- 400 610, and branch office is located at Sahara Mall, MG Road, DM-10, 1st Floor, Dakshin Marg, Gurgaon, Haryana- 122 002.



7. The operational creditor herein is engaged and/or specialized in the business of providing house-keeping bundled services and other incidental services to all over India. The application filed on behalf of the operational creditor stated that on 26.03.2018 they have entered into a business transaction with corporate debtor for mechanized cleaning of Old Block, G+6th floor and New Block 4th Floor to 10th Floor, 12B and 14th Floor of the PVS Memorial Hospital for a period of one year from 26.03.2018 to 25.03.2019.
8. The operational creditor submitted that the corporate debtor has initially made payments against the invoices raised after providing the services to the corporate debtor, thereafter, defaulted in paying the subsequent amount. Even cheques received from corporate debtor were dishonoured stating "insufficient fund".
9. The operational creditor further addressed an email dated 17th December, 2018 mentioned that they are withdrawing the services from 21st December, 2018. In response to which the corporate debtor entered into a Memorandum of Understanding with the operational creditor on 20th December, 2018, in which corporate debtor agreed to pay off the due and/or outstanding amount within 9 months in 9 instalments as per the 'Schedule of Payments' stated in Annex-II-E.
10. The operational creditor claimed that after making 1st and 2nd instalment, the corporate debtor fails to fulfil his promise and failed to make payment of 3rd instalment and balance.



11. The counsel for operational creditor further stated that payments made thereafter by way of cheque no 892313 and 892332 dated 20.03.2019 and 25.03.2019 respectively for Rs. 18,29,004/- each were dishonoured for the reason 'insufficient fund'. Thereafter, the operational creditor sent a legal notice under Section 138 of the Negotiable Instruments Act, 1881 on 15.04.2019.
12. The operational creditor stated that the last payment was received on 13th March, 2019 and had an outstanding amount of Rs. 1,63,45,120/- and a legal notice for repayment of the same amount was also sent on 04.05.2019 to the corporate debtor but failed to release the payment.
13. Aggrieved by this the operational creditor send a demand notice as per Section 8 of the Insolvency and Bankruptcy Code, 2016 to the Corporate Debtor for the payment of Rs. 1,63,45,120/- plus interest at 24% from the date of default at their registered office and was duly delivered on 02.07.2019.

Submissions by the Corporate Debtor in TIBA/11/KOB/2019



14. The Corporate debtor in the counter affidavit, as preliminary objection stated that the 'debt' for which the instant petition is instituted is not a 'debt' under the tenets

of the Code, whereas the claim herein is not crystallized and is disputed. The proceedings under section 9 can be instituted when there is an admitted debt, which is defaulted, but here the monies claimed in the Form 3 Notice remain disputed. It was further stated that in Code, 'dispute' includes a suit or arbitration proceedings relating to the existence of the amount of debt. Here, the existence of the amount of debt in application is disputed and also since the applicant has not disclosed the payment received by him in the notice, the application, therefore, has to be dismissed.

15. The corporate debtor, further stated that the monies alleged as debt is not correct. It was submitted that the total salary and incentive receivable by the applicant from 01.04.2016 to 30.11.2018, as stated in Annexures II (2) and Annexure II (5) of the application is Rs. 1,16,56,205/-. But the total remuneration receivable by the petitioner after deducting the TDS is Rs. 1,15,59,987/- and the bank statement of the applicant as per Annex. II (3) stated that he has received a total amount of Rs. 91,77,685/-.
16. The corporate debtor submitted that in addition to the above payments, Rs. 3,04,437/- has also been made to the applicant on 24.01.2019. Therefore, the total amount paid to the applicant is Rs.94,82,122/- and a difference of Rs. 20,77,865/- is only payable. The amount due, as claimed by the applicant in Form 5 application, i.e., 41,04,201/- was clearly denied by the corporate debtor. The claim for incentive made by the applicant was also denied stating that the incentives were already paid



to the applicant and the interest has been calculated from the alleged date of default for the incentive of each month.

Rejoinder submitted by the Operational creditor- Dr. N.P. Kamalesh

17. The operational creditor stated that the claim raised falls within the terminology of 'Debt' and 'Dispute' as per the Code and further claimed that the corporate debtor has merely denied the existence of the claim without any sufficient materials proving any pre-existing dispute for the claims.
18. The operational creditor submitted that the corporate debtor had neither disputed the amount nor settled the amount fully, even after receiving the demand notice which itself is a ground for the invocation of Corporate Insolvency Resolution Process. The corporate debtor's averment on Annexure II (2) was clearly denied by stating that the salary statement and incentive statement annexed with the application was issued by the corporate debtor itself and thereby the debt was crystallised.
19. It was further submitted that the claim of the corporate debtor that they had paid two months salary was admitted by the operational creditor. The email communication received from the corporate debtor has stated that the amount of salary payable to the operational creditor was Rs. 24,59,883/- (excluding incentives) and the counter affidavit stated a different figure as Rs. 20,77,865/-.



20. The averments made by the corporate debtor that the incentives are paid to the applicant was denied by the operational creditor and stated that the FORM 26 AS from the Income Tax Department for the financial year 2018-19 clearly reflected that no TDS was collected and paid to the Department.

21. The operational creditor further submitted that the corporate debtor had issued a letter dated 13.10.2018 addressing to all Doctors including the operational creditor to co-operate with the management and that they would pay all the pending TDS by 25.10.2018 and pending salaries by 31.10.2018. It was further claimed that after issuing the demand notice, corporate debtor had informally discussed to settle the dues by the end of February 2019 and accordingly assured the District Collector the same by the letter dated 16.01.2019.

Submissions by Corporate Debtor in IBA/28/KOB/2019

The preliminary statement in the counter filed by the corporate debtor against the operational creditor in IBA/28/KOB/2019 was same as that of TIBA/11/KOB/2019 regarding the maintainability of the application.

22. The corporate debtor stated that there is suppression of material facts regarding partial payment made and dispute regarding the extent of financial debt owed by



the operational creditor for availing the services for which invoices of the year 2019 were raised and therefore the applicant is barred from filing this application.

23. The counsel for the corporate debtor further claimed that they could not reply to Notices issued by the operational creditor within the prescribed time, as there was a strike going on during the said period by the staff and the management's entry to the area was restricted. Even though the notices were delivered in the complex of the Corporate Debtor, the same was not made available personally to the concerned department due to the strike.

24. It was stated that while sending the legal notice under section 138 of the Negotiable Instruments Act, 1881 and lawyer's notice dated 04.05.2019, the operational creditor categorically stated that in compliance with the MoU dated 20.12.2018, the Corporate Debtor has diligently cleared three months cheques. But in the application, the operation creditor mentioned that the corporate debtor failed to pay the third instalment. It is contrary to facts and lead to material suppression.

25. The corporate debtor further claimed that the terms and conditions of the MoU was *"...it was understood between the parties that the whole transaction will be completed within 9 months and in case the same could not be completed then the said OCS shall be at liberty to file appropriate proceedings."*



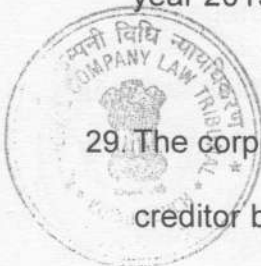
The application was filed before the completion of 9 months and amounts to breach of the said MoU as the time granted for repayment of the amount was not expired.

26. It was further submitted that there was no debt to the extent of Rs. 1,10,68,822/- claimed as on the date of filing the application. The canteen expenses owed by the operational creditor to the corporate debtor was not excluded from the due amount claimed. Therefore, corporate debtor claimed that the debt amount claimed is a non-crystallized amount.

27. The corporate debtor further pointed out that there were discrepancies in the invoice dates in the application. It does not tally with the actual records of the invoice details, made it ambiguous and therefore, defective in nature.

28. The corporate debtor submitted that the invoices raised in the year 2019 are much beyond the value of the service rendered and also reflect the remuneration of the staff which was sought to be disengaged by the operational creditor. The claim amount to the extent of Rs. 52,77,298/-, cumulative of the invoices pertaining to the year 2019, was disputed and not admitted.

29. The corporate debtor submitted that a settlement was proposed by the operational creditor by a notice dated 05.06.2019, wherein the corporate debtor was asked to



propose a timeline within which the pending payment will be made. It was further claimed that even though the corporate debtor tried to hold discussion for settling the matter, the same could not be materialized.

Findings

30. We heard the parties in both the applications and also perused the whole case records including counter, re-joinder and photocopies appended with the case records. It appeared from the records that both the claim have never been disputed by the Corporate Debtor within the timelines as mentioned in the Code nor the Corporate Debtor could show a pre-existing dispute in this matter.

31. We have examined the relevant provisions of the Code insofar as "Operational creditors", "Operational Debt", "Default" and "Dispute", to determine the eligibility for admission of these applications.

Section 5, sub-section 20:

"operational 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;

Section 5 Sub-Section 21:

"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;

Section 3 Sub-Section 12:

"default" means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not repaid by the debtor or the corporate debtor, as the case may be;

Section 5 Sub-section 6 :

"dispute" includes a suit or arbitration proceedings relating to—

(a) the existence of the amount of debt;

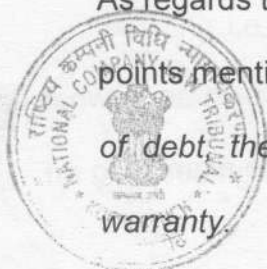
(b) the quality of goods or service; or

(c) the breach of a representation or warranty.

From the above definitions, both the applications have qualified to become Operational Creditors as the Corporate Debtor have owed them debt which is considered as an "Operational Debt". As the applicants have provided services in this case, their dues are qualified to classify as "Operational Debt".

As regards the "Default", the Corporate Debtor through their Memorandum of Understanding and various email communications had acknowledged the due. Even in the counter filed by Corporate Debtor has only disputed the amount of due and not the dues *per se*. As such there is a default that has caused by the Corporate Debtor in both the applications.

As regards the "Dispute", the Corporate Debtor could not establish any of the three points mentioned under the definition in the Code, i.e., *the existence of the amount of debt, the quality of goods or service, or the breach of a representation or warranty.*



32. In **“Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software (P) Limited – CIVIL APPEAL NO. 9405 OF 2017 dated September 21, 2017**, the Hon’ble Supreme Court held that the ‘existence of the dispute’ and/or the suit or arbitration proceeding must be pre-existing – i.e. it must exist before the receipt of the demand notice or invoice, as the case may be and observed:

“24. The scheme under Sections 8 and 9 of the Code, appears to be that an operational creditor, as defined, may, on the occurrence of a default (i.e., on non-payment of a debt, any part whereof has become due and payable and has not been repaid), deliver a demand notice of such unpaid operational debt or deliver the copy of an invoice demanding payment of such amount to the corporate debtor in the form set out in Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 read with Form 3 or 4, as the case may be (Section 8(1)). Within a period of 10 days of the receipt of such demand notice or copy of invoice, the corporate debtor must bring to the notice of the operational creditor the existence of a dispute and/or the record of the pendency of a suit or arbitration proceeding filed before the receipt of such notice or invoice in relation to such dispute (Section 8(2)(a)). What is important is that the existence of the dispute and/or the suit or arbitration proceeding must be pre-existing – i.e. it must exist before the receipt of the demand notice or invoice, as the case may be.....”

In the aforesaid case, the Hon’ble Supreme Court clearly laid down as to what are the facts to be examined by the Adjudicating Authority while examining an application under Section 9, which is as follows:



"25. Therefore, the adjudicating authority, when examining an application

under Section 9 of the Act will have to determine:

(i) Whether there is an "operational debt" as defined exceeding Rs.1 lakh? (See Section 4 of the Act)

(ii) Whether the documentary evidence furnished with the application shows that the aforesaid debt is due and payable and has not yet been paid? And

(iii) Whether there is existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before the receipt of the demand notice of the unpaid operational debt in relation to such dispute?

If any one of the aforesaid conditions is lacking, the application would have to be rejected. Apart from the above, the adjudicating authority must follow the mandate of Section 9, as outlined above, and in particular the mandate of Section 9(5) of the Act, and admit or reject the application, as the case may be, depending upon the factors mentioned in Section 9(5) of the Act."

33. From the aforesaid decision, it is clear that the existence of dispute must be pre-existing i.e. it must exist before the receipt of the demand notice or invoice. If it comes to the notice of the Adjudicating Authority that the 'operational debt' is exceeding Rs. 1 lakh and the application shows that the aforesaid debt is due and



payable and has not been paid, in such case, in the absence of any existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before the receipt of the demand notice of the unpaid 'operational debt', the application under Section 9 cannot be rejected and is required to be admitted.

34. It appears after perusal of the case records in the instant applications, it is established that:

- i. The operational debt due to pay exceeds Rs 1 Lakh
- ii. The documentary Evidence Furnished with appropriate source that the aforesaid debt is due and not paid till date.
- iii. There is no proof of existence of any earlier dispute between parties or arbitration proceedings filed before the Competent Authority.

35. It also appears that there is no lacking of any of aforesaid condition to reject the application. The apparent philosophy underlying the IBC is that Companies which are not able to function on commercial basis must be liquidated. In other words, Corporate Darwinism ensure survival of the fittest.

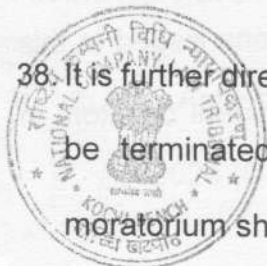
36. Since, all the aforesaid condition are fulfilled in the instant case, we find the applications submitted by Operational Creditors are Complete in all respects and there is no defect pointed out by Corporate Debtor.



37. In view of the above, **the instant petition deserves to be admitted. The petition, therefore, is admitted and the moratorium is declared for prohibiting all of the following in terms of Section 14(1) of the Code as amended: -**

- a) The 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;
- b) Transferring, encumbering, alienating or disposing off by the corporate debtor any of its assets or any legal right or beneficial interest therein;
- c) 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;
- d) The recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

38. It is further directed that the services to the corporate-debtor, if continuing, shall not be terminated or suspended or interrupted during moratorium period. The moratorium shall however not apply to such transactions as may be notified by the



Central Government in consultation with any financial regulator and to a surety in a contract of guarantee to a corporate debtor.

39. The order of moratorium shall have effect from the date of this order till the completion of the corporate insolvency resolution process or until this Bench approves the resolution plan under sub-section (1) of Section 31 or passes an order for liquidation of corporate debtor under Section 33 as the case may be.

40. That the public pronouncement of the corporate Insolvency Resolution process shall be made immediately as specified under Section 13 of IBC.

41. No Interim Resolution Professional was proposed in IBA/28/KOB/2019 filed by M/s OCS Group (India) Private Limited. However, both the applicants have approved for appointment of an IRP as proposed in TIBA/11/KOB/2019 by Dr. N. P. Kamalash. Accordingly, this Bench appoints **BIJOY PRABHAKARAN PULIPRA** (e_mail id : bijoy@artismc.com) having registration No. IBBI/IPA-002/IP-N00607/2018-2019/11864, JBP & Associates, Company Secretaries, TC 28/878, Thampanoor, Thiruvananthapuram – 695014, Kerala as Interim Resolution Professional to carry the functions as mentioned under IBC. The fee payable to IRP/RP shall comply with the IBBI Regulations/Circulars/Directions issued in this regard. The IRP herein appointed shall function for both operational creditors in TIBA/11/KOB/2019 and IBA/28/KOB/2019.



42. We direct the Operational Creditors to deposit a sum of Rs. 2 lakhs (in proportion to their dues) with the Interim Resolution Professional namely **Mr. BIJOY PRABHAKARAN PULIPRA** to meet out the expense to perform the functions assigned to him in accordance with regulation 6 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Person) Regulations, 2016. The needful shall be done within three days from the date of receipt of this order by the Operational Creditor. The amount however be subject to adjustment by the Committee of Creditors as accounted for by Interim Resolution Professional and shall be paid back to the Financial Creditor.

43. The registry is directed to immediately communicate this order to the Operational Creditor, the Corporate Debtor and the Interim Resolution Professional.

Dated this the 16th day of October 2019.

Sd/-

Veera Brahma Rao Arekapudi
Member (Technical)

Sd/-

Ashok Kumar Borah
Member (Judicial)

Certified to be True Copy


Deputy Registrar
National Company Law Tribunal
Kochi Bench

Memo No.TIBA/11/KOB/2019 & IBA/28/KOB/2019/.....

Date: 16.10.2019



Mr. Ashish Mohan,, Artis Law House, Behind QRS, Padivattom, Ernakulam-682024 (Counsel for applicant in TIBA/11/KOB/2019)

TIBA/11/KOB/2019
(IBA/677/2019)
Connected with
IBA/28/KOB/2019

2. Mr. Sojan James C/o Mr.Sarvesh Kashyap, Advocate, 101, Nipun Plaza, Near Max Hospital, Sector-1, Vaishali, Ghazhiabad, UP, (**Counsel for applicant in IBA/28/KOB/2019**)
3. Shri Millu Dandapani, Advocae, Dandpani Associates, Thrupthi, T.D.Road,Ernakulam, **Cochin. (Counsel for the respondents in both cases)**
4. Mr.Bijoy Prabhakaran Pulipra, (Reg.No.IBBI/IPA-002/IP-N00607/2018-2019/11864), JBP Associates, Company Secretaries, TC 28/878, Thampanoor, Thiruvananthapuram-695014 (**Interim Resolution Professional**).

