

BEFORE THE NATIONAL COMPANY LAW TRIBUNAL, SPECIAL BENCH
NEW DELHI

Company Application No. (I.B.)45(PB)/2017

Present: SHRI R.VARADHARAJAN, MEMBER (JUDICIAL)

& Ms. DEEPA KRISHAN, MEMBER (TECHNICAL)

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

In the matter of:

1. M/s NOWFLOATS TECHNOLOGIES PVT. LTD.
3RD FLOOR, PLOT NO.1269,
ROAD NO.36, JUBILEE HILLS CHECK POST,
HYDERABAD- 500033, TELANGANA,

.....Operational Creditor/Applicant

- 2 M/s GETIT INFOSERVICES PVT. LTD.
1205, 12TH FLOOR, NEW DELHI HOUSE,
BARAKHAMBA ROAD,
NEW DELHI -110 001

..... Corporate Debtor

Counsel for the Petitioners: (i) Ms. Apoorva Bhumesh, Advocate
(ii) Ms. Madhavi Khare, Advocate

ORDER

1. The Applicant Company has moved the application under the provisions 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 (for brevity referred to as Adjudicating Authority Rules) seeking that the Corporate Insolvency Resolution Process be set in motion against the respondent company. The facts giving rise to such a prayer is that the respondent company and the applicant had entered into a service agreement wherein the applicant company had agreed to render certain IT related services to the respondent company and that from time to time for the services rendered invoices since the year 2014 had been raised for the payment of service fee. However the respondent company had been defaulting in the payment of dues and that presently a sum of Rs.1,93,37,105/- is due excluding interest payable by the respondent company to the applicant.

2. In view of the same and also taking into consideration that certain internal disputes were going on between the management and its shareholders, the applicant had issued a notice dated 07.10.2016 under the provisions of Section 433(e) and Section 434 of Companies Act, 1956 for winding up the respondent company on the ground of inability to pay its debts and in relation to the notice no reply has been received even though served. Upon coming into force of the Insolvency & Bankruptcy Code, 2016 (for brevity referred to as IBC) the applicant in the capacity of an Operational Creditor as defined under IBC issued a Notice of Demand as contemplated under Rule 5 of the Adjudicating Authority Rules at the registered office of the respondent company which notice of demand has been returned unserved with the endorsement 'left'. Subsequent notices of demand on 14.02.2017 have also been returned with similar endorsements. In addition it is claimed by the applicant that copies of the notice of demand have also been sent to the key managerial personnel as well as the directors of the respondent company on 22.02.2017 through e-mail. The amount due to the applicant by the respondent company remains unpaid and hence taking into consideration the circumstances it is just, fair and equitable and in the interest of justice that the corporate insolvency process be initiated against the respondent company as contemplated under the provisions of IBC.

3. During the course of hearing on 10.04.2017 we were made to understand by the representative of the Official Liquidator's office that in relation to the respondent company the Hon'ble High Court of Delhi has appointed the Official Liquidator as the provisional Liquidator in proceeding for winding up initiated before it in terms of Section 450 of the

Companies Act, 1956. When confronted with the above said fact, the counsel for the petitioner sought to distinguish the winding up proceedings pending before the Hon'ble High Court of Delhi and the Insolvency Resolution Process pending before this Tribunal as initiated by the petitioner, both proceedings however in relation to the same company, namely the respondent. This Tribunal however apprised the counsel for the petitioner about Section 434 of the Companies Act, 2013 relating to transfer of proceedings as well the recent changes brought about by way of insertions by the Central Government by virtue of S.O.3676(E) dated 07.12.2016 made effective from 15.12.2016.

4. Based on request of the Counsel for the Applicant the matter was adjourned by a day to give an opportunity to the counsel to peruse the above said notification as well as to make submissions in relation to legal position as may be applicable under the circumstances. When the matter was again taken up on 11.04.2017, the counsel for the applicant filed written submissions in relation to maintainability of the petition under the provisions of IBC. Going through the written submissions as filed by the counsel for the applicant it is seen that an attempt is sought to be made that the provisions of IBC 2016 will prevail notwithstanding anything inconsistent therewith contained in any other law for the time being in force and further in the absence of any enabling provision to approach Hon'ble High Court in a pending winding up proceedings the application as filed by the applicant under Section 9 of IBC has to be admitted if conditions laid down under Section 9(5) are complied with and further the object of IBC is materially different from the winding up proceedings before Company Court.
5. Before proceeding to deal with the above submissions on merits it will be in order to consider the Notification issued by the Central Government as noted in para (3) supra the relevant portions of which are extracted below:-

S.O. 3676 (E) -

- (1) This Order may be called the Companies (Removal of Difficulties) Fourth Order, 2016.
- (2) It shall come into force with effect from the 15th December, 2016.

2. In the Companies Act, 2013, in Section 434, in sub-section (1), in clause (c), after the proviso, the following provisos shall be inserted, namely :

"Provided further that only such proceedings relating to cases other than winding-up, for which orders for allowing or otherwise of the proceedings are not reserved by the High Courts shall be transferred to the Tribunal :

Provided further that –

- (i) all proceedings under the Companies Act, 1956 other than the cases relating to winding up of companies that are reserved for orders for allowing or otherwise such proceedings; or
- (ii) the proceedings relating to winding up of companies which have not been transferred from the High Courts ;

shall be dealt with in accordance with provisions of the Companies Act, 1956 and the Companies (Court) Rules, 1959".

6. In view of the above notification, winding up petitions pending against the respondent company has not been transferred by the Hon'ble High Court of Delhi to this Tribunal and it is seized of the same. Further a careful reading of the order passed by the Hon'ble High Court of Delhi on 03.02.2017 the material portion of which is reproduced hereunder:

Under these circumstances, I am satisfied that the present batch of petitions needs to be admitted forthwith. Consequently, the petitions are admitted and the Official Liquidator attached to this Court is appointed as the Provisional Liquidator. He is directed to take over all the assets, books of accounts and records of the said Company forthwith. The citations be published in the Delhi editions of the newspapers 'Statesman' (English) and 'Veer Arjun' (Hindi), as well as in the Delhi Gazette, at least 14 days prior to the next date of hearing. The cost of publication is to be borne by the petitioners collectively who shall tentatively deposit a sum of Rs.75,000/- with the Official Liquidator within 2 weeks, subject to any further amounts that may be called for by the liquidator for this purpose, if required. The Official Liquidator shall also endeavor to prepare a complete inventory of all the assets of the said Company when the same are taken over; and the premises in which they are kept shall be sealed by him. At the same time, he may also seek the assistance of a valuer to value all assets to facilitate the process of winding up. It will also be open to the Official Liquidator to seek police help in the discharge of his duties, if he considers it appropriate to do so. The Official Liquidator to take all further steps that may be necessary in this regard to protect the premises and assets of the said Company.

In addition, the directors of the said Company shall file their statement of affairs within 21 days from today before the Provisional Liquidator. It is made clear that in the event the said statement of affairs is not so filed within the specified time, the concerned Directors, including the Managing Director of the said Company shall remain personally present in Court on the next date of hearing, in order to enable this Court to examine them, if required, on that date.

The said Company, as well its directors, are restrained from alienating, encumbering, or otherwise parting with possession of the assets of the said Company without the leave of this Court.

A copy of the petition along with annexures be supplied to the Official Liquidator.

The Official Liquidator shall file a compliance report before the next date of hearing.

Renotify on 27.04.2017.

In view of the nature of allegations and counter allegations made by the two groups of promoters and shareholders of the said Company in relation to the defalcation of money and assets belonging to the said Company, it is further considered necessary, in my opinion, to direct the Serious Fraud Investigation Office to investigate into the affairs of the said Company and file a report in that behalf within two months from today. Ordered accordingly.

A copy of this order be sent to the Serious Fraud Investigation Office forthwith.

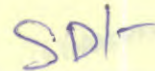
The above order leaves no doubt as to the present status of the respondent company.

7. Taking into consideration the above order passed by the Hon'ble High Court of Delhi as well as the Notification issued by the Central Government and as extracted above it is clear that the provisions of Companies Act, 1956 will govern in relation to the proceedings pending before the Hon'ble High Court of Delhi and not the Companies Act, 2013 as contended by the counsel for the applicant. If that be so, no suit or other legal proceeding shall be proceeded with, against the company, except by leave of the Court which is seized of the winding up proceedings. In the present instance no leave has been obtained by the applicant to proceed with present proceedings initiated by the applicant company before this Tribunal and obviously this Tribunal is therefore handicapped in proceeding further in relation to the above company petition.

8. Viewed from another angle also, assuming that this Tribunal proceeds further as canvassed by the petitioner in admitting the petition de-horse of the winding up proceedings, on such admission this Tribunal is enjoined to appoint an Interim Resolution Professional who is required to perform under the provisions of IBC including duties enjoined under Section 18 of IBC, more particularly so of sub section (e) of Section 18 of that of taking control and custody of any asset which the corporate debtor has ownership rights as well as those envisaged under Section 17 of IBC of taking control of the management of affairs of corporate debtor. Obviously the above actions of the Interim Resolution Professional will result in a collusive course of action with that of the functioning of the provisional liquidator as directed by the Hon'ble High Court of Delhi. It is to be borne in mind that both winding up proceedings under the erstwhile Companies Act of 1956 as well as the Insolvency Resolution Process is initiated for the benefit of the general body of creditors and is a representative action and not for the recovery of money of the individual creditor for which necessarily claims are required to be submitted to the Official Liquidator or the Interim Resolution Professional as the case may be. In the instant case in view of the matter pending before the Hon'ble High Court of Delhi which has also thought it fit to appoint the Official Liquidator as the Provisional Liquidator of the respondent company, the Interim Resolution Professional, if appointed will again be put on a collusive course with the Official Liquidator even in accepting the claims as may be filed as envisaged under Section 21 of IBC.
9. Taking into consideration the above aspects and legal position we are not inclined to accept the submissions put forth by the Counsel for the Applicant and we are constrained to reject the application. Before parting we make it clear that any observations made in this order shall not be construed as an expression of opinion on the merit of controversy as we have refrained from entertaining the application at the initial stage itself. Therefore the right of the applicants before any other forum shall not be prejudiced on account of dismissal of instant application.



(DEÉPA KRISHAN)
MEMBER (TECHNICAL)



(R.VARADHARAJAN)
MEMBER (JUDICIAL)