IN THE NATIONAL COMPANY LAW TRIBUNAL, DIVISION BENCH – I, CHENNAI

IBA/140/2020

(filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 r/w Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016)

In the matter of ***M/s. Ad Mart Private Limited***

M/s. ACI Wonderwood Products
19, 10th Street,
A.V. Nagar, Madanandapuram,
Porur,
Chennai – 600 116.

... Operational Creditor

-Vs-

M/s. Ad Mart Pvt Ltd
No.41, Thiruvenkadam Street,
Mandaveli,
Chennai – 600 028.

... Corporate Debtor

Order Pronounced on 18th January 2021

CORAM :

R. VARADHARAJAN, MEMBER (JUDICIAL)
ANIL KUMAR B, MEMBER (TECHNICAL)

For Operational Creditor : K.K. Muralitharan, Counsel

For Corporate Debtor : None appeared

O R D E R

Per: **R. VARADHARAJAN, MEMBER (JUDICIAL)**

1. This is an application filed by M/s. ACI Wonderwood Products (hereinafter referred as **"Operational Creditor"**) under section 9

of the Insolvency and Bankruptcy Code 2016 seeking to initiate Corporate Insolvency Resolution Process against the Company, namely, M/s. Ad Mart Private Limited (hereinafter referred as **"Corporate Debtor"**).

2. From Part-I of the Application, it is seen that the Operational Creditor is a partnership firm represented by its partner Mr. M. Raghuraman. From Part – II of the Application, it is seen that the Corporate Debtor is a Private Limited Company incorporated on 12.05.1998 and as per the Application, the registered office address of the Corporate Debtor is stated to be situated at No. 41, Thiruvenkadam Street, Mandaveli, Chennai – 600 028. From Part – III of the Application, it is seen that the Operational Creditor has not proposed the name of any Insolvency Resolution Professional and left it to the discretion of this Tribunal to appoint the same.

3. Part – IV of the Application, discloses the details of the Operational Debt, from which, it is seen that the Operational Creditor has claimed a sum of Rs.48,06,837/- as due and payable by the Corporate Debtor.

4. Part – V of the Application sets out the details of the documents which are being filed in order to prove the existence of an Operational Debt, which are as follows:

(i) Purchase Order

(ii) Invoices

(iii) Mail/Letter Correspondences including Form-I.

(iv) Debit notes/journal voucher from Operational Creditor

(v) Statement of account showing the value of payments and the outstanding dues

(vi) Form 3 with acknowledgement

(vii) Bank Certificate

(viii) No Dispute Affidavit.

5. The Learned Counsel for the Operational Creditor submitted that they are engaged in the business of trading in teakwood and plywood products and during the usual course of business in the month of December 2012, the Corporate Debtor has approached the Operational Creditor for the supply of Plywood materials and the Operational Creditor supplied material to the Corporate Debtor for the period from November 2012 till March 2014 and accordingly the Operational Creditor has raised invoices to this effect. It is also stated that the invoices has been duly received by the Corporate

Debtor and also acknowledged and endorsed by the Corporate Debtor in the consignment delivery note.

6. The Learned Counsel for the Operational Creditor submitted that there has been credit period of 20 days as per the invoice and if the Corporate Debtor has failed to make the payment within the said period, it is clearly mentioned in the invoice that the interest at the rate of 24% per annum will be charged by the Operational Creditor.

7. It is submitted by the Learned Counsel for the Operational Creditor that the Corporate Debtor use to make only part payment in respect of the bills raised by the Operational Creditor and the Operational Creditor has sent repeated reminders to make payment for the balance amount. It was submitted that on 23.03.2014 the Operational Creditor has sent a statement of account for the outstanding dues payable by the Corporate Debtor, to which, the Corporate Debtor has replied by admitting the liability and also assured to the Operational Creditor that he will liquidate some of his properties and will settle the outstanding dues to the Operational Creditor.

8. It is submitted by the Learned Counsel for Operational Creditor that the Corporate Debtor had issued cheque for a sum of Rs.10,00,000/- towards partial discharge of his liability and the same has been presented in his bank for clearance and in turn banker returned the said instrument with an endorsement as *"dishonoured"*.

9. It is submitted by the Learned Counsel for Operational Creditor that subsequently the Corporate Debtor has issued a cheque dated 26.07.2017 drawn on Oriental Bank of Commerce (OBC), Dr. Radhakrishnan Salai, Mylapore, Chennai – 600 004 for a sum of Rs.48,06,837/- in favour of the Operational Creditor and when the aforesaid cheque was presented by the Operational Creditor for clearance in their bank, namely, Kotak Mahindra Bank Limited, the same was returned with an endorsement *"payment stopped by the drawer"*. Thereafter, it is submitted that on 23.08.2017 a statutory notice was issued to the Corporate Debtor calling upon them to pay the said dishonoured cheque amount within a period of 15 days, to which, it was submitted that, the Corporate Debtor has sent a reply on 12.09.2017 and being unsatisfied with the said reply, the Operational Creditor filed a

Criminal Complaint in CC No.498/2017 before the Fast Track Court, Poonamalle against the Corporate Debtor and its Directors.

10. It is submitted by the Learned Counsel for Operational Creditor that a Demand Notice as mandated under Section 8 of the Insolvency and Bankruptcy Code (IBC) 2016 was sent to the Corporate Debtor on 26.11.2019 and the said notice was duly received by the Corporate Debtor on 28.11.20219. The Operational Creditor has also filed an Affidavit Under section 9(3)(b) of IBC, 2016 stating therein that there is no dispute raised by the Corporate Debtor nor any payments were being made by the Corporate Debtor after the issuance of the demand notice by the Operational Creditor.

11. In the said circumstances, it is submitted by the Learned Counsel for the Operational Creditor that the 'debt' and 'default' on the part of the Corporate Debtor being proved and hence prayed for initiation of CIRP in relation to the Corporate Debtor.

12. In relation to the Corporate Debtor, it is seen from the record that this Tribunal vide Order dated 16.10.2020 directed to issue notice to the Registered Office address of the Corporate Debtor returnable by one week. In compliance of the said order, the

Learned Counsel for the Operational Creditor submitted that the same was duly complied however the notice was returned with an endorsement *"unclaimed"* and an Affidavit of Service vide Diary No. 3671 dated 04.12.2020 was filed before this Tribunal in relation to the same. In the said circumstances of the refusal of the notice by the Corporate Debtor, this Tribunal was constrained to proceed in this matter in the absence of the Corporate Debtor.

13. Heard the submissions made by the Learned Counsel for the Operational Creditor and perused the record including the pleadings placed on file.

14. Upon perusing the invoices raised by the Operational Creditor, it is seen that the last date of invoice was raised on 12.03.2014 and the present Application is being filed before this Tribunal on 02.01.2020. A question was posed to the Learned Counsel of the Operational Creditor as to how the present Application is maintainable on the aspect of Limitation since the debt which is claimed by the Operational Creditor falls beyond the prescribed period of three years. In order to address the said query, the Learned Counsel for the Operational Creditor has submitted that the Corporate Debtor has issued a cheque and the

said cheque was issued before the expiry of the three years period of limitation and as such the same is saved by the Limitation as per Section 18 and 19 of the Limitation Act 1963.

15. Thus, in order to better address the issue of the present case it becomes imperative for this Tribunal to decide as to whether a cheque which is dishonoured amounts to acknowledgement of debt and thereby consequently whether it would be saved by limitation as envisaged under section 18 of the Limitation Act.

16. The Hon'ble High Court of Gujarat at Ahmedabad in the matter of **Hindustan Apparel Industries Vs. Fair Deal Corporation** as reported in *MANU/GJ/0177/2000*, wherein a question was framed as to whether the payment by cheque which is dishonoured amounts to acknowledgement of a debt and a liability?, the same is being answered in para 7 & 8 of the said judgment, which is as follows:

> (7) What is important to be noticed from the above noted decisions of the Hon'ble Supreme Court is that in the first place a cheque is undoubtedly an acknowledgement of right or debt or liability and when the same is not issued as a post dated cheque, date of issuance of cheque would assume importance, whether subsequently it is honoured or dishonoured. It is thus at the stage of issuance of the cheque

that there surfaces an intention on the part of the debtor to acknowledge this liability/right/debt owing to the person in whose favour the cheque is issued. In case the cheque is honoured it would undoubtedly amount to part payment in writing and the same would fall under Section 19 of the Act (Section 20 of the previous Act). While dealing with such part payment in the context of date of such part payment, facts of each case will assume importance in the light of the aforesaid two decisions of the Hon'ble Supreme Court. In this view of the position of law reflecting upon issuance of a cheque, it has to be stated that a cheque would prima facie amount to an admission of debt unless a contrary intention has been expressed by the person issuing the cheque. Such an admission of payment of debt is to be determined with reference to the point of time at which the purported admission was made, that is to say, when the cheque was issued. Merely, because subsequently such a cheque is dishonoured and the admission is retracted the admission or the acknowledgement can hardly be said to cease as an admission/acknowledgement of liability. To hold otherwise would be contrary to the Bench in Chintaman's case MANU/MH/0273/1956 : AIR1956Bom553 (supra), we are unable to endorse the view expressed on the question in the said decision. MANU/BH/0046/1981:AIR1981Pat187 (supra), which is recent in point of time in so far as decisions referred to on behalf of the plaintiff are concerned. The view expressed by the learned single Judge in the referring judgment also merits acceptance.

(8) In the result, we answer the question as under:-

"The payment by cheque which is dishonoured would amount to acknowledgement of a debt and a liability.

By necessary consequence there will be saving of limitation as envisaged by Section 18 of the Act.

17. Further, the High Court of Patna in the matter of **Rajpati Prasad Vs. Kaushalya Kuer and Ors,** which is reported in *MANU/BH/0046/1981* in para 13 & 14 as held as follows:

> (13) Now, can it be said that merely because the cheque is subsequently dishonoured, there is no admission of the liability of the debt in satisfaction of which the cheque purports to have been issued? In my opinion, it is impossible to accept the proposition that in no circumstances, issuing of a cheque which is subsequently dishonoured in settlement of certain debt can amount to an admission or acknowledgement of that debt. Whether there is an admission of the debt has to be determined with reference to the point of time at which the purported admission was made, that is to say, when the cheque was issued. An admission does not cease to be an admission merely because it is subsequently retracted. It may well be presumed that by issuing the post dated cheque which was subsequently dishonoured towards the payment of a debt, the drawer intended to make that payment and on account of certain supervening circumstances, the cheque was dishonoured. It may be that the drawer had not the necessary balance in the account even though at the time of issuing the cheque he had expected that the would have the necessary balance at the time the cheque would be presented for encashment. Or it may be that though he initially admitted the liability and intended to discharge that liability by making the payment by means of the cheque in the drawer subsequently decided not to make the payment and as in this case stopped payment of the cheque.

At least, in those case, where he did not have at the time of issuing the cheque an intention to deceive the person in whose favour the cheque was issued the issue of a cheque towards the payment of a debt operates as admission of the liability to pay that debt even though the cheque is dishonoured subsequently. The case in which even at the time of issuing the cheque, the drawer had no intention to make the payment presents more difficulty. In such a case, it may be argued that by issuing the cheque he was not making an admission of liability to pay the debt but was resorting to a subterfuge to get rid of an inconvenient creditor. But even in such a case, by issuing the cheque which he had no intention should be honoured, the drawer represented to the person to whom the cheque was issued that the cheque would be honoured on presentation and thus, intimated to him his admission of his liability to pay the debt in satisfaction of which the cheque was issued. That a person who was issuing the cheque in satisfaction of a debt was admitting his liability to pay the cheque is a reasonable, indeed the necessary inference to be drawn from the issue of the cheque. An admission according to Section 17 Evidence Act is a "statement, oral or documentary, which suggests any inference as to any fact in issue a relevant fact." Whether a statement constitutes an admission has, therefore, to be determined with reference to the inference to be drawn from the statement and not with reference to the mental processes underlying or accompanying that statement. And, therefore, it may well be said even in such a case that the drawer of the cheque acknowledged or admitted his liability to pay the debt in satisfaction or part satisfaction of which he had issued the cheque. Such a conclusion is in accord with justice and equity.

By issuing a cheque which is dishonoured subsequently to the words of Krishnan, J., in Gori Lal v. Ramjeelal MANU/MP/0108/

1961 the debtor has intended, and at all events represented to the creditor that the negotiable instrument is good, and thereby the creditor has for his part, been given a feeling of security with a fresh term of limitation. If one looks to the equity side of it a payment which the debtor means as a sheer pretence, but he creditor accepts as genuine, cannot certainly deprive the latter of what Section 18 has already given him (Section 18 of the Act has been substituted for Section 20). At any rate, it cannot be held that in no event a cheque which has been subsequently dishonoured may amount to an acknowledgment of a liability within the meaning of the expression as used in Section 18 of the Act.

(14) The conclusion that even a cheque which has been dishonoured may operate as acknowledgement of the debt to satisfy which it was issued finds support from the following passage in Banning on the Limitation of Actions, Edn. 3P. 51:

> *"when a debtor gave a bill on account of the debt and the bill proved ultimately worthless, the bill (being a conditional payment) operated as an acknowledgement of the debt." (quoted with approval by S.K. Ghose in prafulla Chandra v. Jatindra Nath (MANU/WB/0063/1938 : AIR 1938 Cal 538) (supra) at Pp.539-540 of the report)*

18. Further, the Hon'ble High Court of Madras, in the matter of **M. Balaji –Vs- Perim Janardhana Rao & 3 Ors** in *C.S. No. 941 of 2010*, rendered on 08.01.2020, while dealing with the issue as to whether a dishonoured cheque would amount to acknowledgment of debt, after discussing the Judgments cited above by the Hon'ble High Court of Gujarat and Patna, has held as follows;

"63. However, the cheque being dishonoured, one of the issue framed in this case is 'whether a dishonoured cheque will save the limitation of time barred debt, in the absence of promise'. This issue is a significant question of law, though may not have serious bearing on the case in hand, even if held either way.

64. Cheque is defined under section 4 of the Negotiable Instruments Act as a 'bill of exchange drawn on a specified banker and not expressed to be payable otherwise than on demand'. Cheque is therefore a negotiable instrument carrying the promise implicitly, unlike a pro-note where the promise is explicit and mandatory. Therefore, limitation has to be reckoned from the date the cheque and not on the fact 'whether the cheque was honoured or dishonoured'. Under the Negotiable Instruments Act, the issuance of cheque is to be presumed to be issued for discharge of debt. The consequence event 'whether the said cheque on presentation honoured or not,' is immaterial.

65. In the opinion of this Court, even if the said cheque is not presented in time and become stale, but it is proved that the cheque was issued with intention to discharge the debt or part of the debt then, the limitation has to be reckoned from the date of the cheque considering the cheque as acknowledgment of debt."

19. Further, under Section 139 of the Negotiable Instruments Act, 1881 the presumption is that the holder of the cheque received the cheque for the discharge, in whole or in part, of any debt or other liability. However, the said presumption is rebuttable under Section 139 of the Negotiable Instruments Act, 1881 and the onus

of proving that the cheque was issued not in discharge of any debt or other liability is upon the drawer of the cheque. In the present case, inspite of notice being issued, the Respondent has not preferred to cause appearance before this Tribunal, so as to rebut the presumption that the said cheque was not issued in discharge of his liability. The Hon'ble Supreme Court in the matter of **Bir Singh –Vs- Mukesh Kumar** *2019(4) SCC 197,* while dealing with the presumption as stated in Section 139 of the Negotiable Instruments Act, 1881 has held as follows;

> 40. Even a blank cheque leaf, voluntarily signed and handed over by the accused, which is towards some payment, would attract presumption under Section 139 of the Negotiable Instruments Act, in the absence of any cogent evidence to show that the cheque was not issued in discharge of a debt.

20. Thus, from the decisions rendered by the various High Courts as cited above, the issue as to whether the payment by cheque whether it is honoured or not, amounts to acknowledgement of a debt is answered in the affirmative and as such this Tribunal, in such a circumstances comes to an irresistible conclusion that the payment by cheque itself would amount to acknowledgement of a debt and a liability and by necessary consequence there will be saving of limitation as envisaged by section 18 of the Act. Further,

we are also of the considered view that issuance of a cheque would amount to acknowledgment as per Section 18 and 19 of the Limitation Act, 1963. It is to be noted here that the said cheque which is dishonoured, was issued by the Corporate Debtor before the expiry of three years from the last date of invoice and thereby the limitation period is being extended for a further period of three years from the date of issuance of a cheque and in all respects the Application as filed by the Operational Creditor is well within the period of limitation.

21. Coming to the aspect of debt and default, which is to be proved by the Operational Creditor in the present case it is seen from the records that the Corporate Debtor has not preferred to reply to the Demand Notice issued by the Operational Creditor in spite of receiving the same. Further, by acknowledging the debt, the Corporate Debtor has issued a cheque, which was subsequently dishonoured and thus in all respects the Operational Creditor has proved beyond reasonable doubt the debt and default on the part of the Corporate Debtor.

22. Further in relation to the 'Pecuniary Jurisdiction' even though the 'Threshold Limit' has been raised to Rs.1 Crore as and from

24.03.2020 by virtue of a Notification issued under Section 4 of IBC, 2016, as regards the present Application, it is seen that the default has arisen well before the Notification effected in increasing the threshold limit from Rs.1 lakh to Rs.1 Crore as on and from 24.03.2020 and the claim made in the Petition exceeds a sum of Rs.1 lakh, this Tribunal has got the 'Pecuniary Jurisdiction' to entertain this Petition, as filed by the Operational Creditor.

23. Thus taking into consideration the facts and circumstances of the case as well as the position of Law, we are of the view that the Petition as filed by the Operational Creditor is required to be admitted under Section 9(5) of the IBC, 2016. Since the Operational Creditor has not named the Insolvency Resolution Professional, this Tribunal based on the latest list furnished by Insolvency and Bankruptcy Board of India applicable for the period between January – June 2021, appoints **Ms. Jayasree** with Registration Number **IBBI/IPA-001/IP-P00733/2017-2018/11236** (email id:- *jayashree_muralidharan@yahoo.co.uk*) as the "Interim Resolution Professional" subject to the condition that no disciplinary proceedings are pending against such an Interim Resolution Professional named and disclosures as required under IBBI (Insolvency Resolution Process for Corporate Persons)

Regulations, 2016 are made within a period of one week from the date of this order. As a consequence of the Application being admitted in terms of Section 9 (5) of the Code, the moratorium as envisaged under the provisions of Section 14(1) and as extracted hereunder shall follow in relation to the Corporate Debtor:

a. The institution of suits or continuation of pending suits or proceedings against the respondent 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 of by the respondent 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 respondent in respect of its property including any action under the Securitization 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 respondent.

24. However, during the pendency of the moratorium period in terms of Section 14(2) (2A) and 14(3) as extracted hereunder:

(2) 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.

(2A) Where the interim resolution professional or resolution professional, as the case may be, considers the supply of goods or serices critical to protect and preserve the value of the Corporate Debtor and mange the operations of such Corporate Debtor as a going concern, then the supply of such goods or services shall not be terminated, suspended or interrupted during the period of moratorium, except where such Corporate Debtor has not paid dues arising from such supply during the moratorium period or in such circumstances as may be specified.

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

25. The duration of the period of moratorium shall be as provided in Section 14(4) of the Code and for ready reference reproduced as follows:

(4) The order of moratorium shall have effect from the date of such order till the completion of the Corporate Insolvency Resolution Process:

Provided that where at any time during the Corporate Insolvency Resolution Process period, if the Adjudicating Authority approves the Resolution Plan under sub-Section (1) of Section 31 or passes an order for liquidation of Corporate Debtor under Section 33, the moratorium shall cease to have effect from the date of such approval or Liquidation Order, as the case may be.

26. The Operational Creditor is directed to pay a sum of **Rs.2,00,000/-** *(Rupees Two Lakhs Only)* to the Interim Resolution Professional upon the Interim Resolution Professional filing the necessary declaration form as required under the provisions of the Code to meet out the expenses to perform the functions assigned to her in accordance to Regulation 6 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

27. Based on the above terms, the Application stands **admitted** in terms of Section 9(5) of IBC, 2016 and the moratorium shall come in to effect as of this date. A copy of the Order shall be

communicated to the Operational Creditor as well as to the Corporate Debtor above named by the Registry. In addition, a copy of the Order shall also be forwarded to IBBI for its records. Further, the Interim Resolution Professional above named who is figuring in the list of Resolution Professionals forwarded by IBBI be also furnished with copy of this Order forthwith by the Registry, who will also communicate the initiation of the CIRP in relation to the Corporate Debtor to the Registrar of Companies concerned.

-SD-
(ANIL KUMAR B)
MEMBER (TECHNICAL)

-SD-
(R.VARADHARAJAN)
MEMBER (JUDICIAL)

Raymond