

**IN THE NATIONAL COMPANY LAW TRIBUNAL
“CHANDIGARH BENCH, CHANDIGARH”**

**(Exercising powers of Adjudicating Authority
under the Insolvency and Bankruptcy Code, 2016)**

CP (IB) No.160/Chd/Pb/2018

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

In the matter of:

Mahavir Traders, through Partner: Mr. Gulshan Kumar Jain, B-XXIV-2585/1A,
Jagat Nagar, Basti Jodhewal, Ludhiana, Punjab – 141001.

...Petitioner/Operational Creditor

Versus

Gian Chand and Sons Private Limited, Registered Office at Village Bazra,
Rahon Road, Ludhiana, Punjab – 141007.

...Respondent/Corporate Debtor

Judgment delivered on 30.10.2018

**Coram: Hon’ble Mr.Justice R.P.Nagrath, Member (Judicial)
Hon’ble Mr.Pradeep R.Sethi, Member (Technical)**

For the petitioner : Mr. Nahush Jain, Advocate

For the Respondent : Mr. Ravinder Kumar Goel, registered Resolution
Professional for Mr. Ravinder Joshi, Chartered
Accountant.

Per: Justice R.P.Nagrath, Member (Judicial)

Judgment

The petitioner/operational creditor Mahavir Traders a partnership firm has filed this petition under Section 9 of the Insolvency and Bankruptcy Code, 2016 (for short to be referred hereinafter as the 'Code') for initiating Insolvency Process against the corporate debtor. Annexure A-7 is the copy of fresh partnership deed executed on 01.04.2008 in respect of the petitioner firm and there are two partners Mr. Gulshan Kumar Jain and Mr. Ajit Kumar. It is averred in the document that earlier the partnership deed dated 01.04.2002 was executed between the previous partners of the firm. The amended partnership deed with the same partners was also executed on 01.04.2010 which is at page 45 of the paper book. The firm is registered with the Registrar of Firms, Punjab vide Certificate of Registration in Form C, Annexure A-8 dated 11.11.1976 and Form D is at page 49 of the paper book. Form A under Section 59 of the Indian Partnership Act, 1932 is at Page 50 of the paper book showing the present partners to be only Mr. Gulshan Kumar Jain and Mr. Ajit Kumar, rest of the partners having ceased to be partners of the firm.

2. The application has been filed by the petitioner firm, in Form 5 as prescribed in Rule 6(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority), Rules 2016 (for brevity the 'Rules'). Mr. Gulshan Kumar Jain partner of the petitioner has been authorized by the partnership firm to file the petition under the Code in respect of the respondent-corporate debtor. The Authority Letter signed by both the partners is dated 09.04.2018 Annexure A-6. By another Authority Letter dated 09.04.2018 at page 41 of the paper book. CS Bhupesh Gupta, Practicing Company Secretary and Mr. Nahush Jain, Advocate have been authorized to represent the partnership firm in respect of the instant

proceedings and to do all the necessary acts in progress of the case. There is affidavit Annexure A-4 of Mr. Gulshan Kumar Jain, partner of the petitioner firm in support of the contents of the application.

3. Respondent was incorporated as a company on 11.04.1988 with CIN: U18100PB1988PTC008266 having authorized share capital of ₹6,00,00,000/- (Rupees Six Crores only) and paid up capital of ₹5,28,95,450/- (Rupees Five Crore Twenty Eight Lacs Ninety Five Thousand Four Hundred and Fifty Only). The registered office of the corporate debtor is at Ludhiana in the State of Punjab and therefore, the matter falls within the territorial jurisdiction of this Tribunal.

4. The facts of the case, briefly stated, are that the petitioner supplied the cotton yarn to the corporate debtor for the period from 05.03.2015 to 05.10.2017 (Annexure A-5) (colly) from pages 30 to 38 of the paper book. There is still an outstanding amount of ₹34,18,702/- against these bills which the corporate debtor has failed to pay by stipulated time as agreed between the parties. In support of this allegation, the petitioner has also filed its ledger account Annexure A-9 for the years 2015-16, 2016-17 and 2017-18 in which the aforesaid amount is shown as outstanding balances as last payment as per the ledger account was made by the respondent-corporate debtor on 18.05.2017 to the tune of ₹ 2 lac. Thereafter, there are two entries dated 28.09.2017 and 29.09.2017 with regard to purchase of goods by the petitioner from the respondent.

5. It is the version of the petitioner as evident from the demand notice Annexure A-1 dated 10.04.2018 that the respondent-corporate issued cheques towards the discharge of liability which were presented in the Bank and the same

were dishonoured with the remarks that "Payment stopped by the Drawer". The issuance of the cheques is stated to be an admission of the debt by the respondent. It is further alleged that since a large amount of money was still payable, the petitioner stopped supplying the goods further to the respondent but despite the repeated requests the outstanding amount was not paid. The demand notice, Annexure A-1 sent in Form 3 with which the copy of the ledger statements of the corporate debtor were also attached. Alongwith this, the notice in Form 4 of the even date was also sent. The notices in Forms 3 and 4 with the above documents is at Annexure A-1 (Pages 12 to 20) of the paper book.

6. The demand notice was sent by Speed Post. Copy of the Postal Receipt is at Page 22 of the paper book showing that postal article was sent on 11.04.2018 and the same was delivered to the respondent-corporate debtor as per tracking report dated 12.04.2018 at page 23 of the paper book.

7. Another affidavit of Mr. Gulshan Kumar Jain, Partner of the petitioner is at Annexure A-2 stating therein that the petitioner has not received any notice from the corporate debtor relating to a dispute of unpaid operational debt nor it has received any payment against the outstanding amount and therefore, there is the compliance of Section 9(3)(b) of the Code.

8. The petitioner has also obtained the certificate from HDFC Bank where it is maintaining its current account. The certificate issued by the bank is dated 19.04.2018 to the effect that no amount has been received from the corporate debtor in the current account of the petitioner maintained by the bank since 24.08.2016 except one cheque No. 001427 for an amount of ₹2 lacs credited in favour of the petitioner. Entry of the credit of ₹2 lac in respect of the

aforesaid cheque has been duly acknowledged in the ledger account of the petitioner on 18.05.2017 at Page 53 of the paper book. Apart from this certificate of the bank, the petitioner has also filed the copy of the bank statement in respect to the current account maintained with HDFC Bank for the period from 01.09.2017 to 23.04.2018 (Annexure A-12), which is from Pages 71 to 238 of the paper book.

9. On filing of this petition, copy of the application with the entire paper book was dispatched to the respondent-corporate debtor on 01.05.2018 by Speed Post as per the Postal receipt at Page 241 of the paper book in order to comply with the requirement of Rule 6(2) of the Rules.

10. Notice of this petition was issued to the respondent-corporate debtor to show cause as to why this petition be not admitted. The appearance was put in on behalf of the respondent-corporate debtor on 30.07.2018.

11. In the reply filed by the respondent, it was admitted that the petitioner had been supplying yarn to the corporate debtor since the year 2010. It is however, alleged that mandatory notice in Form 3 and Form 4 of the Code has not been served upon the respondent. According to the respondent, the dispute between the parties was settled in the year 2015 precisely regarding the supplies from 12.02.2015 to 19.05.2015. It was for these transactions that the corporate debtor had given 14 security cheques to the petitioner drawn on Punjab National Bank. The dispute continued for more than six months and in the meantime the petitioner presented four cheques for payment which were not honoured as payment of all the cheques was stopped by the corporate debtor. The main plank of contest by the respondent is that the matter was resolved between both the

parties and an amount of ₹28 lacs was paid through RTGS as per the details given below:-

- a. ₹21 lakh on 12.11.2015
- b. ₹5 lakh on 15.01.2016
- c. ₹2 lakh on 18.05.2017

12. In addition to the above payment, it was settled between the parties that the respondent-corporate debtor shall supply yarn to the petitioner for the balance amount outstanding. Accordingly, the tabulated information and the supplies of yarn made to the petitioner is at Page 10 of the paper book which is part of document Annexure R-1 for the period from 02.05.2016 to 31.03.2018. The copies of the invoices of the supplies of the purchase by the petitioner from the respondent are enclosed with Annexure R-1. The respondent has also stated that the taxes in respect of all the supplies to the petitioner as applicable were also paid by the respondent-corporate debtor and the tax returns are Annexure R-2 (colly) with the reply.

13. It is also stated that the aforesaid amounts of the purchases from 01.03.2018 to 31.03.2018 which have not been reflected in the statement of account of the respondent maintained by the petitioner are however, duly entered into the books of accounts of the respondent and copy of the ledger account of the respondent is at Annexure R-3. It is alleged that as per the books of the accounts maintained by the respondent an amount of ₹2,60,520/- only is payable to the operational creditor which he is it is ready to pay. The petitioner has already taken coercive step against the respondent-corporate debtor by filing

criminal complaints against them under Section 138 of the Negotiable Instruments Act. The respondent-corporate debtor is a running manufacturing unit with capital utilization of more than 70% and has employed more than 200 persons with a turnover of ₹100 Crores.

14. The other allegation taken in the reply is that the postal receipt under which the demand notice was allegedly sent shows the same to have been posted by one Blue Apple Trad. Ludhiana and not by Mahavir Traders. The tracking report, therefore, refers to the delivery of the aforesaid documents from Blue Apple Trad. Ludhiana and not from the petitioner. Prayer was made to reject the application.

15. The contention that there was a dispute between the parties that arose in the year 2015 has been controverted in the rejoinder on the ground that upto the financial year 2016-17, the respondent-corporate debtor itself confirmed the outstanding balance as on 31.03.2017 as reflected in the ledger account of the respondent being maintained by the petitioner which is evident from Pages 51 and 52 of the paper book. The respondent-corporate debtor has confirmed the then outstanding balance of ₹40,59,409/- under its stamp and signatures of the Director.

16. With regard to the invoices relied upon by the respondent from the period 01.03.2018 to 31.03.2018 it is stated that the respondent-corporate debtor fraudulently filed the tax returns to show the purported supply of yarn to the operational creditor. As on 31.03.2018 the balance outstanding against the corporate debtor was ₹34,18,702/- and interest due was calculated to the tune of ₹38,26,022/- and after repeated requests, the respondent-corporate debtor issued

various cheques dated 07.04.2018 for a total sum of ₹54,39,956/-, which were dishonoured when presented with the bank with the remarks “that the payment stopped by the drawer”. It is only after the said dishonour of the cheques that the respondent has prepared fake and frivolous invoices on back date. In fact, there was no supply of the yarn by the respondent-corporate debtor to the petitioner w.e.f. 01.03.2018 onwards. The respondent has mainly submitted the tax returns on the basis of the fake/bogus invoices in a fraudulent manner. The factum of fraud committed by the respondent has also been brought to the notice of the GST Commissioner, Directorate of Income Tax and the other concerned authorities. Copy of the complaint with the said authority is at Annexure RR-2 (colly).

17. In order to further substantiate the case of the petitioner, the petitioner has also attached the affidavit of tempo driver whose name is mentioned in the disputed invoices to have been deputed to deliver the goods who has stated that goods shown to be supplied under those invoices through Davinder, Driver in tempo Registration No. PB-10-ES-3760 that this tempo was not used at all to deliver those goods from the corporate debtor to the petitioner under these invoices. The reliance has also been placed on certain Whatsapp messages downloaded from the Whatsapp Messenger as Annexure RR-4 but we are not going into such an evidence placed in the file with the rejoinder for discussion. The allegations contained in the petition are reiterated and the defence raised by the respondent has been denied.

18. Alongwith the reply, the authorization by the Managing Director of the respondent-corporate debtor has been filed on page 75 of the reply

authorizing CA Mr. Ravinder Joshi, Practicing Chartered Accountant to be Authorized Representative/Attorney for the proceedings against the corporate debtor under the Code. Mr. Joshi aforesaid has filed Memo of Appearance at page 76 of the reply.

19. The record of the case shows that Mr. Ravinder Joshi was present on 30.07.2018 and filed the reply. Mr. Nakul Sharma, Advocate appeared for him on the adjourned hearing i.e. 12.09.2018, and the matter was adjourned to 22.10.2018. Mr. Ravinder Joshi, Chartered Accountant for the respondent was again not present and therefore, the adjournment requested by Mr. Ravinder Kumar Goel, registered Resolution Professional, who was representing Mr. Ravinder Joshi on the ground that Mr. Joshi was unable to attend the case for some personal difficulty. We however, declined the request for further adjournment for arguments. The arguments were advanced by the learned counsel for the petitioner and in the meanwhile the respondent was granted time to file written arguments. The written submissions have been filed on behalf of the respondent dated 25.10.2018.

20. We have heard learned counsel for the petitioner and perused the written submissions made on behalf of the respondent.

21. There is reiteration of the evidence in the written submissions. It is contended that the summoning order passed in the criminal complaint under Section 138 of the Negotiable Instruments Act, is subject matter of challenge before the Hon'ble High Court in CRM-M No.39693 of 2018 which is fixed for hearing before the Hon'ble Punjab and Haryana High Court, Chandigarh for 28.11.2018. It is also alleged that the department of GST has surveyed the

corporate debtor on the complaint filed by the petitioner. They inspected all the records including the invoices and found no irregularity in the same. They verified the tax paid by the corporate debtor and based on investigation, closed the complaint made by the operational creditor.

22. We have also carefully perused the records. Following three issues require discussion in the instant case:-

- (i) *Whether the petitioner served the demand notice to the respondent under Section 8 of the Code before filing the petition?*
- (ii) *Whether there is existence of dispute between the parties? and*
- (iii) *Whether the petition is barred by limitation?*

23. On the first issue, the challenge to the evidence of the petitioner is over the name of sender on the postal receipt of Page 22 of the paper book. It is addressed to the respondent-corporate debtor but the same purports to be sent by Blue Apple Trad. The respondent cannot take advantage of the aforesaid discrepancy because the tracking report of the delivery of the postal article to the respondent on 12.04.2018 carries the presumption of correctness. The demand notice is addressed by the operational creditor to respondent-corporate debtor as is evident from the document Annexure A-1 (colly) and there is no reason to doubt the aforesaid contention of the petitioner. It is pertinent to mention that the documents which the respondent received as per tracking report at Page 23 of the paper book has not been placed on record by the respondent to controvert the allegation of the petitioner and to say that it contained different notice than what is relied upon by the petitioner. The notice in Form 3 and Form 4 clearly states that

the amount as per the invoices and the ledger account be paid within 10 days from the receipt of the letter which as per the record was delivered on 12.04.2018. The instant petition has been filed on 01.05.2018 i.e. after the expiry of 10 days period. Therefore, the above issue is decided in favour of the petitioner and against the respondent-corporate debtor.

24. The controversy is basically relating to the existence of the dispute. This aspect is to be considered in the light of judgment of Hon'ble Supreme Court in **MobiloX Innovations Private Limited Versus Kirusa Software Private Limited (2018), 1 SCC 353** and the principle laid down by the Hon'ble Supreme Court on the subject is as under:-

“51. It is clear, therefore, that once the operational creditor has filed an application, which is otherwise complete, the adjudicating authority must reject the application under Section 9(5)(2)(d) if notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility. It is clear that such notice must bring to the notice of the operational creditor the “existence” of a dispute or the fact that a suit or arbitration proceeding relating to a dispute is pending between the parties. Therefore, all that the adjudicating authority is to see at this stage is whether there is a plausible contention which requires further investigation and that the “dispute” is not a patently feeble legal argument or an assertion of fact unsupported by evidence. It is important to separate the grain from the chaff and to reject a spurious defence which is mere bluster. However, in doing so, the Court does not need to be satisfied that the defence is likely to succeed. The Court does not at this stage examine the merits of the dispute except to the extent indicated above. So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application.”

25. Since the delivery of demand notice is proved and the respondent has not given any response to the notice, any contention raised with regard to the supply of further yarn to the petitioner as per the ledger account of the respondent

and the invoices relied upon cannot be said to be a pre-existing dispute and further, there is no record of any communication between the parties prior to the sending of the demand notice, for the respondent to contend that the petitioner was ever communicated about the settlement of the dispute between the parties or that the post-dated cheques were issued in the year 2015. What was the occasion to issue the post-dated cheques in the year 2015 and that too for an amount of ₹54,39,956/- has not been explained. According to the respondent, the parties are having the transactions since the year 2010. The cheques in question which have been dishonoured are all dated 07.04.2018 of different amounts. There could be some force in the contention that these are post-dated cheques, had the respondent placed on record the cheques issued by it in the year 2015 to tally it with the serial numbers of the cheques Annexure A-11 (colly). These cheques bear Nos. 310961, 310962, 310967, 310964, 310968, 310966, 310969, 310952, 310963 and 310965. The respondent could also produce the record of the cheques which it had issued in the month of January, 2018 to March, 2018 to show that there was no question of issuing the above cheques in April, 2018. On doing so the respondent could possibly show that these cheques were issued from an old cheque book and not the current cheque book. Admittedly, the cheques were dishonoured with the endorsement that the payment was stopped by the drawer. The dishonoured memos of the bank are from pages 61 to 70.

26. Coming to the entries in the ledger book of the parties, there is no question of doubting the authenticity of the ledger account which the petitioner has placed on record for three years and the last entry in the account in the year 2017-18 is on 05.10.2017 with last payment made by the respondent to the tune of ₹2 lacs on 18.05.2017.

27. With regard to the invoices and the GST Returns relied upon by the respondent, the petitioner has rebutted the contention that these were delivered through the driver Davinder in the vehicle mentioned in the some of the invoices of the month of March, 2018 by filing of the affidavit of Davinder, Driver. In any case, the GST Return in Form GSTR-3B is at Pages 41 to 43 and 53 to 55 of the reply and the amended credit/debit notes in Form are pages 59 to 60. There is no evidence led by the respondent as to on which date these returns were filed with the Tax Department and whether these returns were filed on time or delayed which still remains a moot point. The fact that the GST Department has verified the genuineness of the invoices and GST Returns, would not come to the help of the respondent because the Department is concerned only with the matching of the GST returns with the record of the corporate-debtor. In any case the petitioner-operational creditor has filed the copy of its ledger account being regularly maintained for three years and there is no reason to say why the subsequent transactions upto 31.03.2018 as claimed by the respondent-corporate debtor should not have been entered.

28. In the circumstances discussed above, there was no reason for the respondent-corporate debtor to issue the cheques of the different amounts for the sum total of which comes to a figure by adding the interest @24% per annum, which was stipulated in the invoices relied upon by the petitioner. At the footnote of the each invoice it is mentioned that if there is a delay of 11 days, the interest will be charged @24% per annum.

29. However, being a commercial transaction we permit the interest @ 12% per annum on the outstanding principal amount till the payment is made. If

the petitioner is still aggrieved and seeks to claim the higher rate of interest he may have the remedy before the Civil Court. For the dishonour of the cheques the respondent-corporate debtor and its responsible persons are already facing the case in the criminal complaint under Section 138 of the Negotiable Instruments Act. The present thus, is a case in which there is no hesitation for us to hold that it is a case of non-existence of any dispute between the parties at the time the demand notice was issued. The subsequent record relied upon by the respondent cannot give rise to the 'existence of dispute' between the parties to oust the petitioner for an order of admission.

30. Since on the third issue, the last payment made by the petitioner was admittedly for an amount of ₹2 lacs on 18.05.2017. the instant petition filed on 01.05.2018 is clearly within time. Thus, this issue is also held against the respondent.

31. From perusal of the application in Form 5, we find that same to be complete in all respects. The operational creditor is not obliged to propose the name of the Resolution Professional to act as an Interim Resolution Professional but in the instant case the petitioner has propose the name of Mr. Anjum Goyal registered Resolution Professional with the IBBI to act as an Interim Resolution Professional. Mr. Anjum Goyal has also furnished his written communication in Form No.2 dated 21.04.2018 Annexure A-10 as prescribed under Rule 9 of the Rules giving the necessary particulars. It is certified that there are no disciplinary proceedings pending against him with the Board or ICSI Insolvency Professional Agency and that he is not serving as Interim Resolution Professional/Resolution Professional/Liquidator in any proceedings. We have perused Form No.2 and find

the same to be in order. No defect in the written communication has been pointed out by the respondent-corporate debtor.

32. All the ingredients of sub-section 5(i) of Section 9 of the Code have been fulfilled. The instant petition, therefore, is admitted.

33. In view of the above the instant petition is admitted and we declare the Moratorium in terms of sub-section (1) of Section 14 of the code as under:-

- (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 of 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 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 corporate debtor.

34. It is further directed that 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. The provisions of Section 14(3) shall however, not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator and to a surety in a contract of guarantee to a corporate debtor.

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

36. We further issue the following directions:-

- i) Appoint Mr. Anjum Goyal, Registration No. IBBI/IPA-002/IP-N00251/2017-18/10765, Address: 4, Near Chawla Cement Store, Banke Bihari Gali, Batala Road, Amritsar, Punjab, e-mail ID: agoyal4u@yahoo.com, M: 98152-03626 as an Interim Resolution Professional;
- ii) The term of appointment of Mr. Anjum Goyal, shall be in accordance with the provisions of Section 16(5) of the Code;
- iii) In terms of Section 17 of 'the Code', from the date of this appointment, the powers of the Board of Directors shall stand suspended and the management of the affairs shall vest with the Interim Resolution Professional and the officers and the managers of the 'Corporate Debtor' shall report to the

Interim Resolution Professional, who shall be enjoined to exercise all the powers as are vested with Interim Resolution Professional and strictly perform all the duties as are enjoined on the Interim Resolution Professional under Section 18 and other relevant provisions of the 'Code', including taking control and custody of the assets over which the 'Corporate Debtor' has ownership rights recorded in the balance sheet of the 'Corporate Debtor' etc. as provided in Section 18 (1) (f) of the 'Code'. The Interim Resolution Professional is directed to prepare a complete list of inventory of assets of the 'Corporate Debtor';

- iv) The Interim Resolution Professional shall strictly act in accordance with the 'Code', all the rules framed thereunder by the Board or the Central Government and in accordance with the 'Code of Conduct' governing his profession and as an Insolvency Professional with high standards of ethics and moral;
- v) The Interim Resolution Professional shall cause a public announcement within three days as contemplated under Regulation 6 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons)

Regulations, 2016 of the initiation of the Corporate Insolvency Resolution Process in terms of Section 13 (1) (b) of the 'Code' read with Section 15 calling for the submission of claims against 'Corporate Debtor';

- vi) It is hereby directed that the 'Corporate Debtor', its Directors, personnel and the persons associated with the management shall extend all cooperation to the Interim Resolution Professional in managing the affairs of the 'Corporate Debtor' as a going concern and extend all cooperation in accessing books and records as well as assets of the 'Corporate Debtor';
- vii) The Interim Resolution Professional shall after collation of all the claims received against the corporate debtor and the determination of the financial position of the corporate debtor constitute a committee of creditors and shall file a report, certifying constitution of the committee to this Tribunal on or before the expiry of thirty days from the date of his appointment, and shall convene first meeting of the committee within seven days of filing the report of constitution of the committee; and

- viii) The Interim Resolution Professional is directed to send regular progress report to this Tribunal every fortnight.

A copy of this judgment be communicated to both the parties and the Registry shall also send copy of this judgment to the Interim Resolution Professional at his e-mail address forthwith.

Pronounced in open court

Sd/-
(Pradeep R.Sethi)
Member (Technical)

Sd/-
(Justice R.P.Nagrath)
Member (Judicial)

October 30, 2018
Yashpal