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29/07/19

BEFORE THE AJUDICATING AUTHORITY
(NATIONAL COMPANY LAW TRIBUNAL)
AHMEDABAD BENCH
AHMEDABAD

Free of Cost Copy

C.P. (I.B) No. 147/9/NCLT/AHM/2017

Coram: Hon'ble Mr. HARIHAR PRAKASH CHATURVEDI, MEMBER JUDICIAL
Hon'ble Ms. MANORAMA KUMARI, MEMBER JUDICIAL

ATTENDANCE-CUM-ORDER SHEET OF THE HEARING OF AHMEDABAD
BENCH OF THE NATIONAL COMPANY LAW TRIBUNAL ON 21.06.2019


Name of the Company: Gora Marine Pvt. Ltd.
V/s.
Big Power Glass India Pvt. Ltd.
Section of the Companies Act: Section-9 of the Insolvency and Bankruptcy Code

| S.NO. | NAME (CAPITAL LETTERS) | DESIGNATION | REPRESENTATION | SIGNATURE |
|-------|------------------------|-------------|----------------|-----------|
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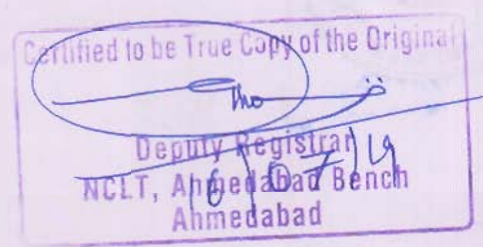
ORDER

None appeared for the parties.
The case is fixed for pronouncement of order.
The Order is pronounced in the open court, vide separate sheet.


MANORAMA KUMARI
MEMBER (JUDICIAL)


HARIHAR PRAKASH CHATURVEDI
MEMBER (JUDICIAL)

Dated this the 21st day of June, 2019.



BEFORE THE ADJUDICATING AUTHORITY
(NATIONAL COMPANY LAW TRIBUNAL)
AHMEDABAD BENCH
AHMEDABAD

C.P. (I.B.) No. 147/9/NCLT/AHM/2017

Coram: Hon'ble Mr. Harihar Prakash Chaturvedi, Member (Judicial)
Hon'ble Ms. Manorama Kumari, Member (Judicial)

In the matter of:

M/s. Gora Marine Pvt. Ltd.
Having its registered office at:
Survey No. 477,
Block No. 353 A,
Village Kanba,
Ta. Daskroi,
Ahmedabad.

..... Petitioner/ Operational Creditor

Versus

M/s. Big Power Glass India Pvt. Ltd.
Survey No. 459,
Por Gam,
Dist. Gandhinagar,
Gujarat - 342 421.

..... Respondent/ Corporate Debtor

Appearance:

Mr. Aditya Sharma, Advocate for the Petitioner/ Operational-Creditor.
Ms. Abha B. Makwana, Advocate for the Respondent/ Corporate-Debtor.



Order delivered on 21st June 2019

Aditya Sharma

Abha B. Makwana

ORDER**[Per: Shri Harihar Prakash Chaturvedi, Member (Judicial)]**

1. The present I.B. petition is filed by M/s. Gora Marine Private Limited, being an Operational-Creditor through its Authorised Representative Mr. Shekhar Bansal being Director of the company under Section 9 of The Insolvency and Bankruptcy Code, 2016 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (hereinafter referred to as "the Code" and "the Rules"). The Petitioner, in this Petition has prayed for initiation of the Corporate Insolvency Resolution Process in respect of the Corporate Debtor Company namely, M/s. Big Power Glass India Private Limited.
2. As per the Petitioner, M/s. Gora Marine Private Limited, it is a company registered under the Companies Act, 1956 having CIN: U35121GJ2011PTC064313 and appears to be engaged in the business of trading, import-export and supply of all kinds of Marine Machinery and metal scrap. The Director of the company is Mr. Shekhar Bansal (DIN 06604183). The registered office of the company is situated at: Survey No. 477, Block No. 353A, Village Kanbha, Tal. Daskroi, Dist. Ahmedabad, Gujarat State.
3. It is further stated that the Respondent/Corporate Debtor is M/s. Big Power Glass India Pvt. Ltd was incorporated on

*Shri Harihar Prakash Chaturvedi*

23.02.2012 with a CIN:U26100GJ2012PTC069137. The Directors of the company are Mr. Hareshbhai Parmar (DIN: 05200117) and Mr. Jamalodin Nasimodin Sheikh (DIN: 05200128). The Corporate-Debtor is dealing in float glass materials. The nominal share capital of the company is Rs.2,10,00,000/- (Rupees Two Crore Ten Lakhs Only) and the paid-up share capital is also Rs.2,10,00,000/- (Rupees Two Crore Ten Lakhs Only). The registered office of the Corporate Debtor Company is situated at: Survey No. 459, Por Gam, Gandhinagar - 382 421, Gujarat, India.

4. It is the case of the Petitioner/Operational-Creditor that, it supplied float glasses to the Corporate Debtor on credit basis vide two invoices bearing No. EX. 18 and Ex. 19, both dated 27.06.2015, each of Rs.7,45,909/- which in total amount to worth of **Rs.14,91,818/-** the same was duly received by the Corporate-Debtor-Company but the aforesaid outstanding amount is still unpaid.

5. Hence, the Petitioner issued a demand notice to the Respondent/Corporate-Debtor at its registered address under Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 on 3rd August, 2017 but the Respondent did not respond to the same till filing of the present Petition before this Adjudicating Authority. It is also stated that the Petitioner issued a legal notice to the



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Respondent/Corporate-Debtor by demanding outstanding payment of Rs.14,91,818/- along with interest accrued thereon.

6. The Petitioner in the support of the present petition has annexed with certain documents, which includes a copy of its invoices along with notice of demand, a letter from the Punjab National Bank, Ambawadi Branch, Ahmedabad pertaining to the period from 27.07.2015 to 29.07.2017 (by showing that during such period no payment has been received from the respondent corporate debtor), the financial statements of the corporate debtor, an affidavit in support of the present I.B. Petition under Section 9 of the code, a copy of the Board resolution dated 12.06.2017, authorising its Director, Mr. Shekhar Bansal to initiate Corporate Insolvency process against the Corporate-Debtor, a copy of the legal notice dated 11.05.2016, computation of outstanding amount and invoices raised on the corporate debtor and the proof of service of application to the corporate debtor.

7. In response to the present I.B. Petition, the Respondent/Corporate-Debtor filed its objection cum reply by contending as under:

"2. The applicant herein has filed the above numbered C.A. in C.P. for recovering the debt of Rs.14,91,918/- before this Hon'ble



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Tribunal. The said debt is not admitted at the outset as amount due and payable to the applicant.

3. It is submitted that the entire transaction of the business in question was transacted through the agent. The quality of the material supplied by the applicant was inferior in nature and therefore, the agent was informed accordingly and the same was asked to convey the same to the company with a request to take back the material supplied by the applicant after making inspection and preparing a report. But no one from the applicant turned up. However, all of a sudden the applicant has sent a notice on 11.05.2016. The same was replied to by the Objector Company by Regd. Post AD on 26-9-2017 which have been returned unserved. Copies of the unserved envelopes with remarks "not known" are annexed hereto & marked as Annexure-R1-colly. The same were attempted to served on more than one occasion.

4 The applicant was informed through the Agent about the inferior quality of material supplied by the applicant who did not even turn for inspection and make report about the same and since the material could not be used for our purpose, the Objector Company is not liable to make any payment and there is no debt outstanding against the account of the Objector Company with the applicant. Hence the application filed by the applicant is liable to be not entertained and the same be dismissed.

5. When the Objector Company has clarified the position in its reply which has been not accepted by the applicant, the applicant has no claim to approach this Hon'ble Tribunal."

8. In addition to the above, the Corporate-Debtor-Company has further filed written submission by making some admission with regard to present case and by contending that:

"3. The Corporate Objector has further filed an affidavit as an evidence in support of its case, wherein it has been clearly stated



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that 15% of the raw material has been consumed by the Corporate Objector and in respect of the same, the Corporate Objector is prepared to pay a sum of **Rs.2,23,773/- which is being separately sent to the Applicant.**

4. The applicant in his counter affidavit in paragraph 6 has stated that an FIR has been lodged against the Corporate Objector but the same is not true and thus applicant has stated incorrect and untrue fact on oath and hence he is liable to dealt with.

5. It is submitted that we have not directly purchased any goods from the Applicant or the Commission Agent and it is purchased through the mediator, who in support of our say, has filed a separate affidavit which is on the record of the Tribunal.

6. It is important to appreciate the relevant contents of Section 65 of the THE INSOLVENCY AND BANKRUPTCY CODE, 2016, which is reproduced below:

65.

(1) If, any person initiates the insolvency resolution process or liquidation proceedings fraudulently or with malicious intent for any purpose other than for the resolution of insolvency, or liquidation, as the case may be, the adjudicating authority may impose upon such person a penalty which shall not be less than one lakh rupees, but may extend to one Crore rupees.

(2) If, any person initiates voluntary liquidation proceedings with the intent to defraud any person, the adjudicating authority may impose upon such person a penalty which shall not be less than one lakh rupees but may extend to one Crore rupees.

In the present case, the applicant has initiated the present proceedings fraudulently or with malicious intent and hence penalty is liable to be imposed by this Hon'ble Tribunal.

7. I humbly submit that the petition of the petitioner suffers from **suppressio veri** and **suggestio falsi** as the applicant has suppressed many material facts and stated many false things to mislead this Hon'ble Tribunal.

8. I say and submit that, the applicant has not made out any case whatsoever for grant of any reliefs as prayed for or otherwise and the petition filed by the applicant is liable to be dismissed. I say that the applicant has in fact made several baseless



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allegations, raised several contentions that are clearly devoid of any merit or substance whatsoever and have, purportedly in support thereof, and made various false and misleading statements.

9. Since there is a defective service at the instance of the applicant, the petition does not fall within the ambit of Insolvency and Bankruptcy Code, 2016. Hence the petition is required to be dismissed.

10. The Corporate Objector submits that affidavit sworn by the Director of the applicant company is not in proper format and does not disclose the material fact as provided under the Code for initiating the proceeding before this Hon'ble Tribunal and since the petition itself is in defective form the same deserves to be dismissed.

11. The applicant has not complied with any of the aforesaid requirements as provided in the Code, which is mandatory to declare all the requirements. In view of the above defect, the petition of the applicant is required to be dismissed as defective.

9. After hearing the Learned Counsel for both the parties and examining the contents of the present I.B. Petition as well as the and reply filed, this Adjudicating Authority, vide its order dated 05.10.2018 felt expedient to seek for some more information and clarification from the Corporate-Debtor as well as from the Petitioner, before passing an appropriate order on admission or otherwise of the present I.B. Petition. Which reads as under:

"2. We feel expedient to get some more information and clarification before passing an appropriate order on admission or otherwise from the present I.B. Petitioner.

3. Since the present I.B. Petition is filed under Section 9 of the IB Code and a perusal of the material available on record



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e.g. I.B. Petitioner and additional affidavit filed by one Shri Kiritbhai Ratilal Shah (who claims to be a mediator cum agent of the applicant) gives such impression that the Corporate Debtor Company has made use of some material supplied to it by the Applicant/Operational Creditor, and thus partly consumed it (to the extent of 15% of the total material supplied) but later on made complaint about quality of goods supplied.

4. It is also contended that the remaining 85% of the material supplied are reported to have been returned back to the Operational Creditor by the Corporate Debtor.

5. In the light of the above narrated facts, the Corporate Debtor is required to produce proof of delivery of the unused material, back to the applicant/Operational Creditor and to clarify further, whether payment in respect of the material used and consumed by the Corporate Debtor Company has been made or otherwise. If so, then the Corporate Debtor is required to furnish proof thereof.

6. The applicant as well as the Corporate Debtor company are equally expected to provide the details of particulars about lodging of Police complaint and the stage of enquiry going on, if any.

7. The above stated information and clarification are to be given by two weeks from the date of receipt of an authentic copy of this order.”

10. In response to the above stated queries, the Corporate Debtor did not file a formal reply, so as to clarify its stand and furnish proof of payment made to the petitioner towards the value of the consumed goods and material already utilised by it and further proof for return of unused material to the Petitioner/Operational-Creditor. While, on the other hand, the Learned Counsel, appearing for the



Attorney

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Petitioner has orally submitted that the Petitioner did not receive any payment towards the value of consumed goods/ materials utilized nor delivered back the goods already sold to the present I.B. Petitioner. As per the Learned Petitioner's Counsel, such burden of proof of payment and return of unaccepted material lies on the Corporate-Debtor-Company only. We carefully considered the above stated contention of the Petitioner. It is undisputed that the Corporate-Debtor has partly utilized and consumed the material/goods supplied to it but did not make payment till date, which amount to **Rs.2,23,773/- (Rupees Two Lakhs Twenty-Three Thousand Seven Hundred Seventy-Three only)**. Such defaulted amount is more than rupees one lakh. Hence, the Petitioner is eligible to initiate the Corporate Insolvency Resolution Process in respect of the Corporate-Debtor-Company.

11. As per the record, the amount due to the Applicant from the Respondent is in respect of supply of goods i.e. float glasses to the Corporate-Debtor as operational goods. Hence, the amount as claimed by the Petitioner from the Corporate-Debtor falls within an operational debt within the ambit and scope of Section 5, sub-section (21) of the Code. As such operational debt is still due and unpaid to the Applicant. Hence, the Applicant can be treated as an **"Operational Creditor"** within the meaning of sub-section (5) of Section 20 of the Code.



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12. As the amount of goods supplied/ goods utilised has been defaulted and due by the Respondent-Company which incorporated under the provision of the Companies Act. Hence, the Respondent is a company within the definition of Corporate-Debtor and purport of sub-section (8) of Section 3 of the Code.
13. This court further by its order dated 07.06.2019 sought further clarification from the parties about receipt if any of the amount of Rs.2,23,773/- which is stated to being sent by the Corporate-Debtor separately towards the part payment of the consumed goods /materials and in case, the Operational-Creditor is not in receipt of such amount, then it should state about non-receipt. However, the Corporate-Debtor also did not furnish proof of payment of amount as admitted by itself towards the value of the consumed /utilized material by it, which were undisputedly supplied by the Operational-Creditor.
14. While the Petitioner in its written submission has categorically stated that it has not received any amount towards its debts or being the price of the partly used goods or material. Therefore, this Court may infer that the Corporate-Debtor has failed in even to make payment of the value of the materials already utilised and consumed by it. That apart, the Corporate-Debtor did not furnish any proof showing that unused/unacceptable goods have been



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delivered back or despatched to the destination of the Operational-Creditor. In absence of any proof/evidence, it can be safely concluded that such unacceptable and unused material(s) which were supplied by the Operational-Creditor are still lying with and in the possession of the Corporate-Debtor-Company.

15. It is also a matter of record in response to the above stated query of this Court, no formal affidavit was filed by the Petitioner or by the Corporate-Debtor. In fact, both the parties sought time but orally explained about the status of the pending criminal complaint/enquiry. However, no such particulars of such pending criminal complaint/enquiry were furnished to this Court. Hence, it can be assumed that there is no any pending criminal complaint made by of the Corporate-Debtor against the Operational-Creditor.

16. We perused the records of the case as per the material available on record that there is no proof of payment made by the Corporate-Debtor to the Petitioner or availed receipt or acknowledgement from the Operational-Creditor towards partly used goods/material(s) and in custody of the Respondent while the burden of proof lies with the Corporate-Debtor to furnish proper proof of payment of Rs.2,20,773/- in favour of the Operational-Creditor as claimed by him in his written submission dated



J. Kumar

14.06.2017. However, such fact is controverted and has been denied by the Operational-Creditor in his written submission.

17. It can also be seen that the Operational-Creditor has further controverted with this fact that there is existence of any dispute. As per the petitioner, the Corporate-Debtor-Company never brought on record with supporting documents to show that there is existence of any dispute among the parties or the Corporate-Debtor-Company has refused and delivered back 85% of goods supplied to the Operational-Creditor. This infers such that, goods are still lying within the custody of the Corporate-Debtor. That apart, the Operational-Creditor has further disputed such stand of the Corporate-Debtor that entire transaction for supplying of the goods was done through a mediator but as per the Operational-Creditor, it was a direct deal between the Operational-Creditor and the Corporate-Debtor and thus there was no involvement of any middleman. Therefore, the Corporate-Debtor is directly responsible and liable for making payment of outstanding amount.

18. In the light of above discussions, the default of debt is well established. Further, no notice of dispute was given by the Respondent to the Applicant even after the receipt of demand notice from the Applicant. Hence, such plea of dispute seems to be raised only after filing of the present



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I.B. Petition before this court. Hence, such plea as of by the Corporate-Debtor is not having adequate force and appears to be a **moon shine defence**, as held by the Hon. Supreme Court in the matter of **Mobilox Innovations Private Ltd Vs. Kirusa Software Private Ltd.** and observed 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."*

By placing reliance of the above stated precedent of the Hon. Supreme Court, we find that objection raised by the Corporate-Debtor is devoid of merits and being after thought plea. Therefore, present petition is found complete and deserve for the admission.



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19. The Applicant did not name the Interim Insolvency Resolution Professional in the Application. Applicant made a request to refer the matter to the Insolvency Board under Section 16 of the Code. Therefore, there is no mandatory requirement to file the Written Communication of the Interim Resolution Professional. Hence, the present application is found complete and deserve for admission.

20. In view of the above discussion and on the basis of the material available on record, we hold that it is a fit case to initiate insolvency resolution process by admitting the Application under Section 9 of the Code. Hence, **the present I.B. petition is hereby admitted.**

21. As Section 13 of the Code enjoins upon the Adjudicating Authority to exercise its discretion to pass an order to declare a moratorium for the purposes referred to in Section 14, to cause a public announcement of the initiation of corporate insolvency resolution and call for submission of claims as provided under Section 15 of the Code. Sub-section (2) of Section 13 says that public announcement shall be made immediately after the appointment of Interim Resolution Professional. In the instant case, simultaneous with the admission order, this Adjudicating Authority is not going to appoint Interim Resolution Professional because the Applicant has not



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propose the name of Interim Resolution Professional. Hence, this Adjudicating Authority is hereby ~~to~~ appoint [✓] Mr. Manish Santosh Buchasia (having Insolvency Professional Registration. No. IIBI/IPA-002/IP-N00487/2017-2018/11449) as an Interim-Resolution-Professional. His Email ID is: manishbuchasiacs@gmail.com and Mobile Number is: 9898055367 as an Interim Resolution Professional, subject to confirmation received from the Insolvency and Bankruptcy Board of India. The Registry is directed to address a letter to the Insolvency and Bankruptcy Board of India, New Delhi for confirming the name of Mr. Manish Santosh Buchasia as an Interim Insolvency Resolution Professional and informing that there is no disciplinary proceeding pending against him.

22. This Adjudicating Authority hereby declares moratorium under Section 13(1)(a) prohibiting the following as laid down in Section 14 of the Code;

- (i) *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;*
- (ii) *transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;*
- (iii) *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*



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and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);
(iv) *the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.*

(d) However, the supply of goods and essential services to the corporate debtor shall not be terminated or suspended or interrupted during moratorium period. The moratorium order in respect of (i), (ii), (iii) and (iv) above shall not apply to the transactions notified by the Central Government.

23. This order of moratorium shall come in to force from the date of order till the completion of Corporate Insolvency Resolution Process subject to the Proviso under sub-section (4) of Section 14. However, public announcement shall be made after the appointment of an Interim Resolution Professional as soon as the confirmation is received from the Insolvency and Bankruptcy Board of India.

24. Thus, the present IB petition is admitted with following observations/directions:

25. As per the provisions of Section 13 and 14 of the I.B. Code on the date of commencement of insolvency, this adjudicating authority declares moratorium for prohibiting all of the following, namely: -



Admission

- (a) *The institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgement, 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 Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 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.*
- II. *The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during the moratorium period.*
- III. *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.*
- IV. *The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process.*

26. After receiving the confirmation from the I.B.B.I., the Interim-Resolution-Professional is further directed to make public announcement of moratorium in respect of Corporate-Debtor-Company soon after receipt of an authenticated copy of this order and to proceed and act further as per the order/direction issued by this Adjudicating-Authority and to follow the provisions Section

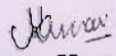



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13 and 14 and relevant provisions of the Insolvency and Bankruptcy Code.

27. An authentic copy of this order be communicated by the Petitioner as well as by this Registry to the Corporate-Debtor-Company, as well as to the Interim-Resolution-Professional and the Registrar of Companies at the earliest.

28. The present I.B. Petition stands admitted.


Manorama Kumari,
Adjudicating Authority
Member (Judicial)


Harihar Prakash Chaturvedi,
Adjudicating Authority
Member (Judicial)

