

IN THE NATIONAL COMPANY LAW TRIBUNAL
JAIPUR BENCH

**CORAM: SHRI DEEP CHANDRA JOSHI,
HON'BLE JUDICIAL MEMBER**

**SHRI RUGHU NAYYAR
HON'BLE TECHICAL MEMBER**

In CP No. (IB) 247/9/JPR/2019

(Under Section 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicatory Authority) Rules, 2016)

IN THE MATTER OF:

Sangeeta Ajmera Prop. M/s The Manpower

Regd. Office: 36, Ekta Path,
Shreeji Nagar, Durgapura, Tonk
Road, Jaipur, Rajasthan- 302018

...Applicant / Operational Creditor

VERSUS

Shree Gangour Foods (Jaipur) LLP

Registered Office: 3rd Floor,
'Saraf Tower', Opposite Glass
Factory, Tonk Road, Jaipur,
Rajasthan- 302015

...Respondent/Corporate Debtor

For the Applicant : Mr. Saurabh Jain, Adv.

For the Respondent : Ms. Nivedita R Sarda, Adv.

Order Pronounced on: 30.05.2022

ORDER

Per: Shri Deep Chandra Joshi, Judicial Member

1. The present Application has been filed by Ms. Sangeeta Ajmera Proprietor of M/s Manpower ('Applicant') to initiate Corporate

Insolvency Resolution Process ('CIRP') against Shree Gangour Foods (Jaipur) LLP ('Respondent') under Section 9 of the Insolvency and Bankruptcy Code, 2016 ('IBC') for the alleged default on the repayment of Operational Debt amounting to Rs. 12,22,726/- (Rupees Twelve Lakhs Twenty-Two Thousand Seven Hundred and Twenty-Six Only).

2. The Respondent namely Shree Gangour Foods (Jaipur) LLP is a Limited Liability Partnership firm which was incorporated on 30.12.2016 in accordance with the Limited Liability Partnership Act, 2008 holding LLPIN- AAI-1419.
3. The details of the transactions leading to the filing of this application averred by the Applicant are as follows:
 - a. The Operational Creditor entered into an Agreement with the Corporate Debtor dated 16.06.2017 to provide manpower for restaurant and other work incident thereto at the Corporate Debtor's Restaurant situated Opposite Glass Factory, Tonk Road, Jaipur. The said agreement was for a period of 10 months commencing from 16.06.2017 and expiring on 31.03.2018. Thereafter, the parties entered into another agreement on 06.06.2018 which was for a period of 12 months i.e. from 01.04.2018 to 31.03.2019. Copy of the said agreements have been annexed as Annexure 4 and 5.
 - b. The Applicant has submitted that in compliance of the various terms and conditions laid down in the Agreements, the Applicant supplied

the manpower to the Corporate Debtor and further raised various invoices in lieu of the manpower supplied.

- c. Accordingly, the Applicant submitted that the default occurred due to the non-payment of invoices raised in respect of the manpower supplied to Corporate Debtor. It was further submitted that as the default occurred on various dates with respect to several transactions therefore, the default is a continuing one. The Applicant has further stated that bare perusal of invoices along with ledger of the Corporate Debtor as maintained by the Applicant/Operational Creditor would make it evident that an amount to the tune of Rs. 15,01,020/- (Rupees Fifteen Lakhs One Thousand and Twenty Only) is outstanding, due and payable by the Corporate Debtor as on April 2018.
- d. Thereafter, a Demand Notice dated 24.07.2019 for repayment of the unpaid operational debt amounting to Rs. 12,22,726/- (Rupees Twelve Lakhs Twenty-Two Thousand Seven Hundred and Twenty-Six Only) under Section 8 of the Code was sent vide registered post on 31.07.2019. The Copy of the Demand Notice has been annexed in the Application as Annexure – 2.
- e. The Debtor replied to the demand notice vide letter dated 08.08.2019 and denied any liability averred in the demand notice. The Applicant submitted that the aforesaid reply of the Corporate Debtor dated 08.08.2019 is frivolous and Corporate Debtor has first time created

a dispute which is not pre-existing. Merely disputing the claim by showing that there is certain counter claim without any evidence suggesting that the dispute was raised prior to issuance of demand notice under Section 8 or invoice, does not mean there is a pre-existing dispute.

- f. The aforementioned details as reflected in Part IV of the Application are as follows:

PART IV
PARTICULARS OF FINANCIAL DEBT

1.	Total amount of debt, details of transactions on account of which debt fell due, and the date from which such debt fell due	<u>Amount of Debt Granted:</u> Rs. 12,22,726/- (Rupees Twelve Lakhs Twenty-Two Thousand Seven Hundred and Twenty-Six Only)
2.	Amount claimed to be in default and the date on which the default occurred	<u>Amount Claimed:</u> Rs.12,22,726/- This Amount comprises of debts accruing due to non-payment of several invoices raised in lieu of the manpower supplied along with PF, ESI, GST late fees and interest. For convenience Computation sheet is annexed in the Application at Annexure – 1.

** Calculated as per the Terms & Conditions of the Agreement*

4. Consequent to the notice issued by this Adjudicating Authority, the Respondent filed its reply vide Dairy No. 2639/2019 dated 08.11.2019 stating as follows:
- a. The Respondent contended that the Applicant/Operational Creditor has not approached the Tribunal with clean hands and pivotal facts

and documents have been concealed in order to place itself as Operational Creditor and has relied on submission of incomplete documentation, information and frivolous averments.

- b. The Operational Creditor approached the Corporate Debtor to supply manpower on contractual basis for the purpose of carrying out business of restaurant by the Corporate Debtor, in furtherance of which both the parties entered into an agreement for a period of 10 months commencing from 16.06.2017 till 30.03.2018 and another subsequent agreement was executed on 06.06.2018 for a period of 12 months commencing from 01.04.2018 till 31.03.2019 in pursuance of which mutual understanding between the parties was extended on identical terms and conditions as of the erstwhile Agreement executed on 16.06.2017.
- c. The Corporate Debtor has submitted that there is no outstanding dues to the Operational Creditor, in fact the Corporate Debtor is entitled to recover Rs. 50,000/- (Rupees Fifty Thousand) which was paid additionally to the Operational Creditor against the invoices submitted and the advance salary being paid to the contractual labour supplied by the Operational Creditor.
- d. The Corporate Debtor further submitted that the issue is beyond the scope and vigil of IBC, 2016 as the amount claimed by the Operational Creditor is in dispute and there is no reason to believe

that the amount so claimed is due. The dispute is evident as petition filed itself claim that a violation of clause 4 & 6 of the Agreement has been made by the Corporate Debtor which is a matter of dispute.

- e. The Corporate Debtor has contended that the mails sent by the Operational Creditor dated 19.03.2018, 05.09.2018, 15.09.2018, 26.10.2018, 11.04.2019 and 01.07.2019, is in respect of demanding the payment towards the Statutory Dues which is the liability of the Operational Creditor as Clause 6(b) of the Agreement executed between the parties. Therefore, the burden of liability cannot be shifted to the corporate debtor.
- f. The Respondent further submitted that the claim petition depicts the wrong and the incomplete facts and documents, for instance the invoice annexed at page no. 64 of the Application was not issued to the Corporate Debtor and the same is related to Shree Gangour Foods (International) LLP which is a Group concern and is a separate legal entity.
- g. Further Respondent contended that it can be substantiated from the copy of the ledger of the Operation Creditor in the books of the Corporate Debtor for the period from 01.04.2018 till 31.12.2018 that if the salaries paid to the employees of the Operational Creditor, cash advances, invoices of another corporate entity and the liability pertaining to the GST, ESI and PF is excluded, in fact the Corporate

Debtor after this adjustment, is entitled to receive a sum of Rs. 50,518/- (Rupees Fifty Thousand Five Hundred Eighteen Only). (Annexure C of the reply).

- h. The Respondent has relied on Clause 4 of the Agreement which specifically requires the Operational Creditor to submit the copies of challans in respect of the payments made towards statutory dues namely (i) ESIC and (ii) P.F. which was required to be deposited before 15th of the subsequent month but the same was not deposited by the Operational Creditor. Later the Operational Creditor submitted the challan for January 2018, February 2018 and March 2018 but not for October 2017, November 2017 and December 2017.
- i. The fact that Operational Creditor had not made the payment towards the statutory dues for the month of the November 2017, December 2017 and January 2018 as required under the Agreement came to the knowledge of Corporate Debtor from the traced copies of few of the employees Passbook registered under the Employees Provident Fund Organization, which is a clear contravention of Clause 4 and 6 of the Agreement. (Annexure – D of the reply).
- j. Even though the Operational Creditor did not submit the copies of challans, the Corporate Debtor was still interested to continue the understanding and therefore, continued to pay. Thereafter, in April, 2018 the Operational Creditor had not made the payment towards the

salaries of few of the employees deployed in the business of Corporate Debtor. Accordingly, it was agreed that initially the Corporate Debtor will directly make the payment of Rs. 2,61,044/- (Rupees Two Lakhs Sixty-One Thousand Forty-Four Only) towards the salaries of the remaining employees who have not received the salaries from Operational Creditor and latter the Operational Creditor will reimburse for the said payment or adjust the same from final bills raised in respect of its services but the same was not made. Copy of the same is annexed in the reply from the respondent under Annexure E.

- k. The Respondent further highlighted that as per the verbal understanding between the parties, certain cash advances amounting Rs. 1,94,870/- (Rupees One Lakh Ninety-Four Thousand Eight Hundred and Seventy Only) were also given to the employees deployed by the Operational Creditor on various dates as evidenced from the copy of the Attendance sheets, cash vouchers and the ledger statement for the period from 01.04.2017 to 31.03.2018 (Annexure A and Annexure F), however, the said advances were also not adjusted in the claim raised by the Operational Creditor.

5. The Applicant filed its rejoinder vide Diary No. 2765/2019 dated 26.11.2019 submitting the following:

- a. The Applicant in specifically replying to para no. F of the reply has submitted that on various occasions Corporate Debtor advanced amount to contractual employees, who were working at the restaurant of Corporate Debtor, however, the said amount was duly reimbursed by the Operational Creditor to the Corporate Debtor which is corroborated by cash voucher No. 039/2017-18 dated 23/02/2018. Copy of the said voucher has been submitted and marked as Annexure-14 of the Rejoinder.
- b. The Applicant has submitted that Clause 5 of the Agreement dated 16/06/2017 and 06/06/2018 clearly states that the Operational Creditor (referred as Contractor in the Agreement) shall pay salaries to employees and deposit PF, ESI Contributions, GST etc, after Corporate Debtor transfer the funds in the bank account of Operational Debtor. However, if there is any delay at the end of the Corporate Debtor, the entire responsibility will be of the Corporate Debtor, therefore the Corporate Debtor is liable to pay the amount of statutory dues to the Operational Creditor.
- c. The Applicant has submitted that the Corporate Debtor is trying to mislead the Authority by placing on record receipts for the month of May, 2019 which is beyond the agreement period, as the agreement dated 06.06.2018 in unequivocal terms states that the said agreement comes to an end on 31.03.2019. The Corporate Debtor neither

informed about the said advances nor sought permission for making such advances. The whole story is an afterthought, which is evident by taking into consideration the fact that there is not a single letter or mail with respect to the same. Further the Corporate Debtor never raised any claim against the Operational Creditor nor ever raised any dispute prior to the present proceedings.

6. The Applicant vide its written submissions has relied on the following cases:

- I. *Mobilox Innovations Private Limited Vs. Kirusa Software Private Limited. (AIR 2017 SC 4532).*
- II. *Kay Bouvet engineering Limited. Vs. Overseas Infrastructure Alliance (India) Private Limited. (AIR 2021 SC 4199).*
- III. *Ahluwalia Contracts (India) Limited Vs. Raheja Developers Limited, Judgement dated 23.07.2019, NCLAT, New Delhi, Company Appeal (AT) (Insolvency) NO. 720 of 2018.*
- IV. *Pedersen Consultants India Pvt. Ltd. Vs Nitesh Estates Limited, Judgement dated 24.07.2019, NCLAT, New Delhi, Company Appeal (AT) (Insolvency) NO. 720 of 2018.*
- V. *Henan Boom Gelatin Co. Ltd. Vs Sunil Healthcare limited, Judgement dated 17/11/2021, NCLAT, New Delhi, Company Appeal (AT) (Insolvency) no. 256 of 2021.*

7. We have heard the Ld. Counsels for the parties and perused the averments made in the application, reply, rejoinder, written submissions and the documents enclosed with the application.
8. This Adjudicating Authority having perused all the relevant papers and finding them in order notes that the Registered Office of the Respondent is situated in Jaipur, and therefore Adjudicating Authority has jurisdiction to entertain and try this Application. Further this matter is within the purview of Laws of Limitation, as the time period of default is in the year 2017 and the Application has been filed before this Adjudicating Authority on 18.09.2019, hence the period of three years after the default occurred had not been exhausted at the time of filing of this Application. Therefore, the present Application has been filed within the prescribed period of limitation.
9. It has been admitted by both the parties to the case that the parties had entered into an Agreement dated 16.06.2017 for a period of 10 months commencing from 16.06.2017 and expiring on 31.03.2018. Thereafter, a similar agreement was entered into on 06.06.2018 for a period of 12 months from 01.04.2018 to 31.03.2019. It is important to refer to the following clauses of the agreement to ascertain the present dispute:

“4. It is hereby agreed by and between the parties hereto that the Principal Employer shall be entitled to hold or deduct and/or hold the payment of the monthly bills if contractor fails to perform any of its duties and responsibilities mentioned in this Agreement to the satisfaction of the Company. Contractor shall

submit its bills for each calendar month, on or before 2nd of the subsequent month along with copies of attendance sheets duly signed by the representative of the Company confirming the number of persons deployed by them on a daily basis. All the bills should also be supported by the proof of all the statutory payments due to their resources from time to time.

5. *All monthly bills issued by the contactor must have Registration No. under P.F., P.T. Service Tax/GST and PAN no. Contactor shall rectify such discrepancies as may be pointed out by the company to the satisfaction of the Company. The Company shall pay monthly bill of Contractor on or before 5th of the subsequent month in order to enable them to pay the salaries to the persons deployed in the said company by the 7th of subsequent month. Contractor shall pay salaries to employees and deposit PF, ESI Contributions, GST etc. after we transfer the funds in your bank account and if there is any delay at our end, the entire responsibility is ours. Other than this if any other penalty and liability imposed by any government department on contractor due to delay of Principle Employer, the liability will be born by the Principal Employer. Contract shall submit copies of challans in respect of payments made by them on behalf of its employees towards the statutory compliances namely (i) E.S.I.C., (ii) P.F. which must be deposited on or before 15th for the subsequent month. If there is any discrepancy in the bills, the Principal Employer shall intimate contractor within 10 working days from the receipt of the bill. All the payments with respect to the disputed bills will be disbursed only on receipt of the supporting documents as mentioned above.”*

10. Bare perusal of clause 5 of the Agreement shows that the liability to deposit PF, ESI Contributions and GST is of the Operational Creditor but funds for the same shall be first transferred by the Corporate Debtor in the bank account of the Operational Creditor. Further the Corporate Debtor undertakes all responsibility for delay of payment in the said agreement.

The Operational Creditor has annexed a Computation Sheet whereby the Operational Creditor has mentioned the Bill amount and further stated the payment received against those bill amounts. In support of the same, the Operational Debtor has annexed the invoices, ledger of the Corporate Debtor as well as the Bank Statement whereby it is made clear that the Corporate Debtor has not made full payment against the Bills raised by the Operational Creditor from June, 2017 to April, 2018.

11. It is abundantly clear from the documents produced before us that the Corporate Debtor has defaulted in making full payments against the services rendered by the Operational Creditor. The total payment due up till April 2018 is Rs. 15,01,020/- (Rupees Fifteen Lakhs One Thousand and Twenty Only). Further the total due as claimed by the Applicant is Rs.12,22,726/- (Rupees Twelve Lakh Twenty-Two Thousand Seven Hundred Twenty-Six Only). It is also seen that the said defaults are on various dates with respect to various invoices. Therefore, the default in non-repayment is a continuous one.
12. It is seen that a Demand Notice dated 24.07.2019 was sent for repayment of the Operational Debt which has been annexed as Annexure 2 of the Application. The Corporate Debtor replied to the demand notice vide notice dated 08.08.2019 denying any liability as demanded in the aforementioned notice. The Applicant has further contended that the

Corporate Debtor for the first time created a dispute which is not pre-existing vide the aforesaid reply.

13. The Respondent in its reply has contended that Corporate Debtor is entitled to receive a sum of Rs. 50,518/- (Rupees Fifty Thousand Five Hundred Eighteen Only) after excluding the salaries paid to employees by the Corporate Debtor, cash advances, invoices of another Corporate Entity and the liability pertaining to the GST, ESI and PF. The Respondent produced ledger of Operational Creditor for the period of 01.04.2018 to 31.03.2019 however no computation sheet has been produced before the Adjudicating Authority showing computation of aforesaid amount.
14. The Respondent in its submissions has stated that on rigorous pursual the Operational Creditor submitted the challan for January 2018, February 2018 and March 2018 but not for October 2017, November 2017 and December 2017 however as per the Annexure – 1 of the Application it is clear that the payments for the aforesaid months was not made completely. The contention stating that the Respondent had the right under clause 4 to withhold the payment stands nullified as the Respondent had earlier failed to make the full payment which is due from July, 2017. The clause 4 relied upon by the Respondent surely enumerates the right of the Corporate Debtor to hold payment but at the same instance we have to read clause 5 along with the aforesaid which submits that at the Corporate Debtor will be solely held responsible for the delay on their part. Further the Corporate

Debtor waived its right to withhold the payment when they continued to make part payment against the invoices issued by the Operational Creditor.

15. It is also observed that the Agreement between the parties clearly states that if there is any discrepancy in the bills issues, the Principal Employer i.e. the Corporate Debtor shall intimate the Contractor i.e. Operational Creditor herein within 10 working days from the receipt of the bill. Presently, the Corporate Debtor has failed to show any communication intimating the aforesaid dispute to the Operational Creditor. The Operational Creditor on the other hand has presented various e-mails demanding the amount due vide Annexure- 6 of the Application.
16. The cash vouchers annexed in the reply of the Corporate Debtor as Annexure E is for the period after March 2018 and the Applicant in the rejoinder has submitted that the amount paid by Corporate Debtor is duly reimbursed by Operational Creditor vide Cash Voucher No. 039/2017-18 dated 23.02.2018 (Annexure – 14).
17. The Corporate Debtor has stated that the invoice raised by the Operational Creditor at page no. 64 of the Annexure – 7, is raised on the sister concern of the Corporate Debtor and therefore, is not tenable. The invoice dated 01.05.2018 has been raised against the Corporate Debtor as well as its sister concern. Therefore, this contention of the Corporate Debtor is not tenable.

18. It is evident from the reasons stated hereabove that Corporate Debtor has clearly defaulted in payment of debt due to the Operational Creditor. The Corporate Debtor has raised the contention of dispute just to flout the principle of law which states that if there is a pre-existing dispute between the parties, an application filed under Section 9 of the Code is not maintainable.
19. In Mobilox Innovations Private Limited Vs Kirusa Software Private Limited, para 34, the Hon'ble Supreme Court laid down what the Adjudicating Authority has to examine in an Application under Section 9. Para 34 is as follows:-

“34. Therefore, the adjudicating authority, when examining an application under Section 9 of the Act will have to determine:

- (i) Whether there is an “operational debt” as defined exceeding Rs 1 lakh? (See Section 4 of the Act)*
- (ii) Whether the documentary evidence furnished with the application shows that the aforesaid debt is due and payable and has not yet been paid? and*
- (iii) Whether there is existence of a dispute between the parties or the record of the 15 Company Appeal (AT) (Insolvency) No. 256 of 2021 pendency of a suit or arbitration proceeding filed before the receipt of the demand notice of the unpaid operational debt in relation to such dispute?*

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

However, the defence has to be plausible and while not examining it on merits, it must not appear as a moonshine defence.

20. Therefore, in the present matter at hand, there is a clear debt, repayment of which has been defaulted by the Corporate Debtor and there appears to be no pre-existing dispute between the parties. Any allusion to such dispute appears to be confirmed.
21. Under sub-section (4) of Section 9 of the Code, the Operational Creditor may propose the name of a Resolution Professional to be appointed as Interim Resolution Professional ('IRP') but it is not obliged to do so. In the instant case, the Operational Creditor has not proposed that any person may be appointed as IRP. Hence, this bench can appoint the RP from the pool of RPs empanelled with the IBBI.
22. In view of this Mr. Suresh Agarwal, duly registered with the Insolvency and Bankruptcy Board of India, with Registration No. IBBI/IPA-002/IP-N00764/2018-2019/12417 (email: suresh.neil@gmail.com ; mobile no.+91 9828147301), is hereby appointed as the IRP. The IRP is directed to take all such steps as are required under the statute, inter-alia in terms of Sections 15, 17, 18, 19, 20 and 21 of the Code and transact proceedings with utmost dedication, honesty and strictly in accordance with the provisions of the Code, and Rules and Regulations thereunder.
23. Consequences of initiation of CIRP shall be inter-alia as follows:
- (i) The IRP appointed by the Adjudicating Authority, Mr. Suresh Agarwal, is directed to take over the affairs of the Corporate Debtor and duties as required to be performed by him under the

provisions of Code including issue of publication in widely circulated Newspapers as contemplated under the provisions of the Code and calling for claims from the creditors of the Corporate Debtor; and collation of the same shall be done.

- (ii) Further, as a sequel of admission, moratorium as envisaged under Section 14 of the Code is invoked in relation to the Corporate Debtor which will be in vogue during the CIRP of the Corporate Debtor. The IRP shall carry out CIRP strictly as per the timelines specified and as envisaged under the provisions of the Code in relation to the Corporate Debtor.
- (iii) The said IRP shall act strictly in accordance with the provisions of the Code and with a view to defray his expenses to be incurred and fees on account, the Applicant is directed to deposit a sum of Rs. 2,00,000/- (Two Lakhs Only) within seven days from the date of this order. This amount shall be proportionately contributed and reimbursed to the Applicant upon formation of the Committee of Creditors. In terms of Section 17 and 19 of the Code all personnel of the Corporate Debtor including promoters and Board of Directors, whose powers shall stand suspended, shall extend all cooperation to the IRP during his tenure as such and the management of the affairs of the Corporate Debtor shall vest with the IRP.

- (iv) In terms of Section 9 of the Code, this order shall be communicated at the earliest, not exceeding one week from today, to the Applicant, Corporate Debtor as well as the IRP appointed by this Adjudicating Authority to carry out CIRP. A copy of this order shall also be communicated to IBBI for its records.

24. Accordingly, CP No. (IB)-247/9/JPR/2019 is admitted.

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(Deep Chandra Joshi)
Judicial Member

RAGHU
NAYYAR

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Date: 2022.05.30
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(Raghu Nayyar)
Technical Member