

**IN THE NATIONAL COMPANY LAW TRIBUNAL  
MUMBAI BENCH**

**CP 1731(IB)/MB/2018**

Under Section 9 of the I&B Code, 2016

In the matter of

**M/s Rajgopal Creation**

...Operational Creditor/ Applicant

v/s

**Samrat Gems Impex Private Limited**

...Corporate Debtor

**Order Dated 13.11.2019**

**Coram:** Hon'ble Mr M. K. Shrawat, Member (Judicial)

Hon'ble Mr C. B. Singh, Member (Technical)

**For the Applicant:** Adv. Rohan Kelkar and Adv. Zahra Baldiwala

**For the Respondent:** Adv. Vilas Jadhav and Adv. Pratap Sampat

*Per Chandra Bhan Singh, Member (Technical)*

**ORDER**

1. This is an application being CP 1731/2018 filed by M/s Rajgopal Creation, Operational Creditor or Applicant, under section 9 of Insolvency & Bankruptcy Code, 2016 (**I&B Code**) against Samrat Gems Impex Private Limited, Corporate Debtor, for initiating Corporate Insolvency Resolution Process (**CIRP**).
2. The Applicant is a Partnership Firm registered under the Indian Partnership Act, 1932. This Application is filed by Mr. Gopal Chandak, Partner of the Applicant Partnership Firm duly authorised to file the present Application.
3. The Applicant has claimed an amount of ₹62,64,355/-, inclusive of interest from the Corporate Debtor. The claim of the Applicant is based upon the Arbitration award dated 27.03.2015. A copy of the said arbitration award dated 27.03.2015 is annexed to the Application.

4. A brief history of the transaction between the Applicant and the Corporate Debtor is as follows. The Applicant and the Corporate Debtor were conducting business with each other since long until allegedly the Corporate Debtor committed default in making payment to the Applicant for the goods supplied. The Applicant initiated Arbitration proceedings on 19.08.2014 to resolve the issue that have crept between them. The Arbitration proceedings were referred to Hindustan Chamber of Commerce, Mumbai. An Arbitration award was passed on 27.03.2015 in favour of the Applicant.
5. The Arbitration award records that ample opportunities were provided to the Corporate Debtor to defend its case. The Arbitration award in favour of the Applicant provided for payment of ₹40,67,763/- from the Corporate Debtor to the Applicant within a period of 30 days from date of the said award and further interest thereon of 1.50% per month in case of failure to comply with the Award. The Applicant has filed Execution Application No. 574 of 2016 which is still pending.
6. The Corporate Debtor, on 04.05.2016, filed an appeal against the said Arbitration Award dated 27.03.2015. The said appeal was rejected vide an order of the Hon'ble High Court of Judicature at Bombay, dated 05.05.2016. The Corporate Debtor has not filed any further appeal challenging the order rejecting the appeal against the Arbitral Award.
7. The Applicant sent a Demand notice in Form-3 dated 19.03.2018 demanding payment of ₹62,64,355/-. The Corporate Debtor has neither paid the Award money nor replied to the Demand Notice till the date of filing of the Application. The Applicant filed this application on 10.05.2018. The Applicant has sought reliance upon the judgment of Hon'ble Bombay High Court in **R.K. Textiles, Mumbai v. Sulabh Textiles Pvt. Ltd., Mumbai, 2002 (4) Mh.L.J. 678** to submit that if the executing court cannot go into the merits of an award that has attained finality so is the Adjudicating Authority is restricted.
8. The Applicant has filed its Bank Account statements for the period 01.03.2015 to 31.03.2018 to show that no money is received from

the Corporate Debtor. The Applicant has also enclosed a certificate from its Banker, Union Bank, certifying that no money is paid by the Corporate Debtor to the Applicant during the period 01.03.2015 to 09.04.2018.

9. The Applicant has relied upon the judgment of Hon'ble NCLAT in ***Annapurna Infrastructure Pvt. Ltd. v. SORIL Infra Resources Ltd., 2017 SCC Online NCLAT 380*** to say that failure to pay money as per award is default under section 8(1) read with section 3(12) of the I&B Code and pendency of execution proceedings in respect of an award is not a bar to the CIRP.
10. The Corporate Debtor has filed its Affidavit in Reply opposing admission of Application filed by the Applicant under section 9. It is submitted that the Application is not maintainable in view of the pending litigation in the Hon'ble High Court, Bombay in the Execution Application. It is also contended by the Corporate Debtor that their exist disputes, regarding the quality of the goods supplied, between both the parties as the same is evident from the correspondences between them.
11. The Corporate Debtor has further challenged the jurisdiction of the Hindustan Chamber of Commerce to decide the Arbitration application.
12. On perusal of the documents submitted by the operational creditor, it is clear that debt amounting ₹62,64,355/- is due and payable by the Corporate Debtor pursuant to the Arbitration Award dated 27.03.2015.
13. The Corporate Debtor challenged the Arbitration Award dated 27.03.2015 before the Hon'ble High Court of Judicature at Bombay, in Arbitration Petition (L) No. 622 of 2016. The Hon'ble High Court rejected the said challenge vide its order dated 05.05.2016. It is not Disputed that the Corporate Debtor has not filed any appeal challenging the Arbitration Award thereafter. Hence the Arbitration Award attained finality on rejection of the Arbitration Petition by the Hon'ble High Court and no further appeal. In this regard, it is relevant to note the judgment of Hon'ble Supreme Court in ***K. Kishan v. Vijay Nirman Company Pvt. Ltd., 2018 SCC Online SC 1013*** wherein it is held as follows:

*"22. We repeat with emphasis that under our Code, insofar as an operational debt is concerned, all that has to be seen is whether the said debt can be said to be disputed, and we have no doubt in stating that the filing of a Section 34 petition against an Arbitral Award shows that a pre-existing dispute which culminates at the first stage of the proceedings in an Award, continues even after the Award, at least till the final adjudicatory process Under Sections 34 & 37 has taken place.*

*23. We may hasten to add that there may be cases where a Section 34 petition challenging an Arbitral Award may clearly and unequivocally be barred by limitation, in that it can be demonstrated to the Court that the period of 90 days plus the discretionary period of 30 days has clearly expired, after which either no petition Under Section 34 has been filed or a belated petition Under Section 34 has been filed. It is only in such clear cases that the insolvency process may then be put into operation."*

14. It is not disputed that the Corporate Debtor has not made payments as per the Arbitration Award which provided thirty days' time for payment of the awarded amount. As the same still remains unpaid, the said debt is in default.
15. As to the defence of the Corporate Debtor regarding pre-existing dispute, it must be noted that the claim of the Applicant in this Application is based on Arbitration Award. The correspondences on which Corporate Debtor seeks reliance to substantiate pre-existing dispute, are dated prior to the date of the Arbitration Award i.e. 27.03.2015. The Corporate Debtor could have taken defence of these correspondences in the Arbitration Proceedings or in appeal. As for the present proceedings, the claim is arising out of the Arbitration Award and there is nothing on record to suggest that there are any pre-existing dispute between the parties regarding the Arbitration Award amount. Further, the challenge to the jurisdiction of the Hindustan Chamber of Commerce to entertain the Arbitration proceedings cannot be pleaded before this Tribunal in the present proceedings as this question was to be decided by appropriate authority. This contention of the Corporate Debtor is therefore not tenable and hereby rejected.
16. The Corporate Debtor has not denied the supply of goods by the Applicant.

17. The outstanding debt of more than Rs One Lac is due and payable against the Corporate Debtor and Corporate Debtor has committed default in making the payment.
18. The application filed by the Operational Creditor is on proper Form 5, as prescribed under the Adjudicating Authority Rules and is complete.
19. The Applicant has proposed name of Mr. Anurag Kumar Sinha, a registered Insolvency Resolution Professional having Registration Number [IBBI/IPA-001/IP-P00427/2017-18/10750] as Interim Resolution Professional, to carry the functions of Interim Resolution Professional as mentioned under I&B Code.
20. The Application under sub-section (2) of Section 9 of I&B Code, 2016 filed by the Operational Creditor for initiation of CIRP in prescribed Form 5, as per the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 is complete. The existing operational debt of more than rupees one lakh against the Corporate Debtor and its default is also proved. Accordingly, the application filed under section 9 of the Insolvency and Bankruptcy Code for initiation of corporate insolvency resolution process against the Corporate Debtor deserves to be admitted.
21. This application is filed under Section 9 of I&B Code, 2016, filed by **M/s Rajgopal Creation**, against **Samrat Gems Impex Private Limited**, for initiating corporate insolvency resolution process is **admitted**. We further declare moratorium u/s 14 of I&B Code with consequential directions as mentioned below:
  - I. That this Bench as a result of this prohibits:
    - 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 activity 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 possession of the corporate debtor.

- II. That the supply of essential goods or services to the corporate debtor, if continuing, shall not be terminated or suspended or interrupted during the moratorium period.
- III. That the provisions of sub-section (1) of Section 14 of I&B Code shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.
- IV. That the order of moratorium shall have effect from the date of this order till the completion of the corporate insolvency resolution process or until this Bench approves the resolution plan under sub-section (1) of section 31 of I&B Code or passes an order for the liquidation of the corporate debtor under section 33 of I&B Code, as the case may be.
- V. That the public announcement of the corporate insolvency resolution process shall be made immediately as specified under section 13 of I&B Code.
- VI. That this Bench at this moment appoints Mr. Anurag Kumar Sinha, a registered Insolvency Resolution Professional having Registration Number [IBBI/IPA-001/IP-P00427/2017-18/10750] as Interim Resolution Professional to carry out the functions as mentioned under I&B Code. The fee payable to IRP/RP shall comply with the IBBI Regulations/Circulars/Directions issued in this regard.
- VII. Having admitted the Petition/Application, the provisions of Moratorium as prescribed under Section 14 of the Code shall be operative henceforth with effect from the date of appointment of IRP shall be applicable by prohibiting institution of any Suit before a Court of Law, transferring/encumbering any of the assets of the Debtor etc.

However, the supply of essential goods or services to the "Corporate Debtor" shall not be terminated during Moratorium period. It shall be effective till completion of the Insolvency Resolution Process or until the approval of the Resolution Plan prescribed under Section 31 of the Code.

- VIII. That as prescribed under Section 13 of the Code on declaration of Moratorium the next step of Public Announcement of the Initiation of Corporate Insolvency Resolution Process shall be carried out by the IRP immediately on appointment, as per the provisions of the Code.
- IX. The appointed IRP shall also comply the other provisions of the Code including Section 15 and Section 18 of The Code. Further the IRP is hereby directed to inform the progress of the Resolution Plan to this Bench and submit a compliance report within 30 days of the appointment. A liberty is granted to intimate even at an early date, if need be.
- X. The Petition is hereby "Admitted". The commencement of the Corporate Insolvency Resolution Process shall be effective from the date of order.

**SD/-**  
**Chandra Bhan Singh**  
Member (Technical)

**SD/-**  
**M.K. Shrawat**  
Member (Judicial)

**Date: 13.11.2019**