

IN THE NATIONAL COMPANY LAW TRIBUNAL MUMBAI - BENCH-VI

CP (IB) No. 3394/MB-VI/2019

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

IN THE MATTER OF:

WINTRY ENGINEERING & CHEMICALS PRIVATE LIMITED

[CIN: U24110MH1993PTC075503]

Registered Office: 384-M, Dabholkarwadi,

5th Floor, Kalbadevi Road,

Mumbai- 400002, Maharashtra.

...Operational Creditor

V/s

M/s. RUSHABH LIFESTYLE PRIVATE LIMITED

[CIN: U51101MH2013PTC241360]

Registered Office: 104, Mahim United Estate,

Mogul Lane, Mahim (West),

Mumbai -400016, Maharashtra

...Corporate Debtor

Reserved: 07.09.2023

Pronounced: 21.11.2023

CORAM:

HON'BLE SHRI K. R. SAJI KUMAR, MEMBER (JUDICIAL)

HON'BLE SHRI SANJIV DUTT, MEMBER (TECHNICAL)

Hearing: Hybrid

Appearances :

Operational Creditor: Adv. Anil Agarwal.

Corporate Debtor: None (*ex parte*).

ORDER**[Per: K. R. SAJI KUMAR, MEMBER (JUDICIAL)]****1. Background**

1.1. This Company Petition bearing C.P. (IB) No. 3394/MB/C-VI/2019 (Application) was filed on 19.09.2019 under Section 9 of the Insolvency and Bankruptcy Code, 2016 (IBC) read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (AA Rules) by Wintry Engineering and Chemicals Private Limited, the Operational Creditor (OC), through Mrs. Neha Pachariwal, Director of the OC, authorised *vide* Resolution passed by the Board of Directors of the OC dated 23.08.2019 for initiating Corporate Insolvency Resolution Process (CIRP) in respect of M/s. Rushabh Lifestyle Private Limited, the Corporate Debtor (CD).

1.2. The total amount of default involved is Rs. 37,75,360/- (Thirty-Seven Lakhs Seventy-Five Thousand Three Hundred Sixty Rupees) [principal amount- Rs. 30,94,697/- plus interest- Rs. 6,80,663/- calculated at the rate of 18% per annum from 07.04.2018 till 27.06.2019] which is based on the Arbitral Award dated 06.04.2018, passed in favour of the OC in Arbitration Case No. A3/2017-18 by the Arbitral Tribunal formed by Hindustan Chambers of Commerce, Mumbai.

1.3. The date of default as mentioned in the Part IV of the Application is 21.04.2018 i.e., after the date on which the period of fifteen days for payment of amount mentioned in the Arbitral Award dated 06.04.2018 had expired.

2. Contentions of OC

- 2.1. The OC submits that it is engaged in the business of manufacture and supply of chemical products and the CD is carrying on the business of textiles. The OC used to sell and deliver textile goods to the CD and carry out the processing of the textile goods for it under OC's various invoices from time to time.
- 2.2. The OC further submits that the CD never raised any dispute regarding quality and quantity of textile goods supplied to it. The CD also agreed to make payment of the OC's invoices within forty-five days as well as pay the overdue interest at the rate of 21% per annum as provided in the OC's invoices.
- 2.3. According to the OC, despite serving of various invoices, the CD failed to make payment of the total amount of Rs. 27,22,923/- (Twenty-Seven Lakh Twenty-Two Thousand Nine Hundred Twenty-Three Rupees), comprising of original amounts of invoices and interest. Aggrieved by the CD's failure to make payments, the OC was compelled to file arbitration proceedings with the Hindustan Chamber of Commerce (HCC) on 12.05.2017 as per the arbitration clause as mentioned in OC's invoices.
- 2.4. The OC submits that it appointed Mr. Pareshwar Taparia as their Arbitrator from the HCC's list of panels of arbitrators and due to failure of CD to appoint its own arbitrator, the HCC appointed Mr. Sanjay Dokania and Mr. Baijnath Rungta as Arbitrator and Presiding Arbitrator respectively, for the purpose of forming the Arbitral Tribunal in Arbitration Case No. A3/2017-18.

2.5. The Counsel for the OC submits that during the entire proceedings of the aforesaid Arbitration Case, the CD neither remained present nor filed any reply or document. It merely delayed the proceedings by seeking adjournments on various occasions through email messages on the pretext of talks of settlement without giving any evidence in support of the same. The CD had never raised any objection over the ledger account and interest calculation made by the OC or the quality as well as quantity of the goods supplied to it.

2.6. The OC submits that the Arbitral Tribunal passed the Arbitral Award dated 06.04.2018 in favour of the OC and directed the CD to pay the same which contains the following amounts:

Sr. No.	Particulars	Amount (In Rupees)
1.	Unpaid Principal amount as per OC's invoices	21,37,409/-
2.	Interest Claim on the Principal amount up to 03.05.2017	5,85,514/-
3.	Interest Claim on the Principal amount from 04.05.2017 to 06.04.2018 at the rate of 18% per annum	3,56,274/-
4.	Arbitration Cost	15,500/-
Total Amount of Arbitral Award		30,94,697/-

2.7. The OC further submits that the CD failed to comply with the order of the Arbitral Tribunal dated 06.04.2018, and it neither paid any amount nor

gave reply to the OC even after the expiry of the period of fifteen days on 21.04.2018 for compliance of the Arbitral Award.

2.8. In view of the above events, the OC issued a Demand Notice under Section 8 of the IBC on 27.06.2019 to the CD. The CD failed and willfully refused to respond to the Demand Notice and no payment has been released in favour of the OC till date.

2.9. The OC further submits that it filed an Affidavit dated 31.08.2019 under Section 9(3)(b) of the IBC regarding the fact that the OC has not received any notice or letter regarding any dispute of unpaid operational debt or dispute over any invoices from the CD.

3. Contentions of CD

3.1. We observe that the CD neither appeared after service of notice nor filed any reply despite various opportunities afforded. On account of CD's conduct during the entire proceedings, the CD was set *ex-parte* and its right to file reply was forfeited *vide* order dated 29.10.2021.

3.2. The CD did not send any reply to the notice under Section 8 of the IBC, which was observed by this Adjudicatory Authority *vide* order dated 07.09.2023. The Counsel for OC argued that CD's conduct as demonstrated by its continuous non-appearance in the matter indicates that it has no respect for the law. In view of the above, there is absence of pleadings or arguments on behalf of the CD and thus we proceeded with the matter as per law.

4. Analysis and Findings

4.1. The date of default mentioned by the OC in Part IV of the Application is 21.04.2018. The Demand Notice also states the date of default as the same. The total amount of default has been shown as Rs. 30,94,697/-. Upon perusal of the documents available on record, we find that the date of default for the purpose of determining the maintainability of this Application is 21.04.2018, i.e., the date on which the period of fifteen days expired for payment of the said amount as awarded in the Arbitral Award dated 06.04.2018. We find that the present Application was filed on 19.09.2019, i.e. within the period of 3 years from the date of default, and is hence, maintainable to be adjudicated by us under Section 238A r/w Article 137 of the Limitation Act, 1963.

4.2. The Arbitral Award aforesaid reveals that the CD herein remained absent throughout the proceedings, after receipt of notice from the Arbitral Tribunal on 28.08.2017; 18.10.2017; 11.10.2017; 09.01.2018; and 14.03.2018. However, it had been sending e-mails dated 10.11.2017 and 22.12.2017 informing that it was working towards a mutually agreeable settlement but there were no talks between the parties and the Arbitral Award was passed *ex-parte*. We find that despite several opportunities granted by this Adjudicating Authority to the CD to file its reply and argue its case on merits, it chose not to avail of the opportunities. The CD was thus set *ex-parte* on 29.10.2021. Records reveal that it did not represent itself from 09.09.2021 to 07.09.2023 and did not offer any explanation to the payments due to the OC, the debt and default as claimed in this Application.

4.3. There was no response from the CD after the receipt of Demand Notice dated 27.06.2019 under Section 8 of the IBC. Even after this C.P. was de-reserved

on 18.08.2023 for *de-novo* hearing, the CD remained absent to the proceedings. Neither any dispute was brought to the notice of the OC nor there was pendency of any suit or arbitration proceedings relating to the existence of the amount of debt against the Arbitral Award dated 06.04.2018. Para 10 of the Arbitration Award indicates that the Defendant (CD herein) remained absent throughout the proceedings. It did not raise any dispute regarding quality and quantity of goods; it agreed to make payment to the Plaintiff (OC herein) within forty-five days of the receipt of invoice; it issued three cheques as part payments to the OC which got dishonoured for want of sufficient funds. It is further found by the Arbitration Tribunal that the Defendant (CD) was only seeking adjournments on the ground of talks of settlement; however, nothing concrete came out. All these clearly indicate admission of debt by the CD and its conduct to avoid making payments due and payable to the OC. It remains to be an operational debt within the meaning of Section 5(21) of the IBC.

4.4. Pre-existing dispute as regards operational debt is crucial in deciding admissibility of an application under Section 9 of the IBC. In the instant case, although the dispute was raised by the Plaintiff (OC herein) by invoking the arbitration clause printed on its invoices and as reflected in the findings of the Arbitral Tribunal, the Defendant (CD herein) neither contested the arbitral proceedings before the Arbitral Tribunal nor challenged the Award under the provisions of the Arbitration and Conciliation Act, 1996 (Arbitration Act). The Arbitral Award is dated 06.04.2018. Since the CD remained *ex-parte* in the proceedings before us also, there is nothing to show that the Arbitral Award dated 06.04.2018 was ever challenged. Following the law laid down by the

Hon'ble Supreme Court in *K. Kishan v. Vijay Nirman Company Private Limited*, (Civil Appeal No. 21825/2017, decided on 14.08.2018), insolvency process may be put into operation after the expiry of the limitation period under Section 34(3) of the Arbitration Act, if any. Since the Arbitral Award had attained finality on 06.08.2018, i.e., the maximum of one hundred and twenty days from 06.04.2018, being the date of the Award, in terms of sub-section Section 34(3) of the Arbitration Act, the present Application for initiating CIRP which was filed on 19.09.2019, is maintainable.

4.5. On perusal of the documents submitted by the OC, it is clear that the operational debt of Rs. 37,75,360/- is due and payable by the CD to the OC in terms of Section 4 of the IBC, and thus, we have already found this Application under Section 9 of the IBC to be maintainable. The Application is complete and has been filed in the proper format. In view of the above, we find that the matter is fit for admission under section 9(5)(i) of the IBC.

4.6. The OC has proposed the name of Mr. Pawan Kumar Ramdhan Agarwal, a registered Insolvency Professional having Registration Number- IBBI/IPA-001/IP-P00414/2017-2018/10737 and email- arbitratorpr@gmail.com as the Interim Resolution Professional (IRP).

ORDER

The Application bearing C.P. (IB) No. 3394/NCLT/MB/C-VI/2019 filed by Wintry Engineering & Chemicals Private Limited, the OC, under Section 9 of the IBC read with Rule 6 of the AA Rules, for initiating CIRP in respect of M/s. Rushabh Lifestyle Private Limited, the CD is **admitted**.

We further declare moratorium u/s 14 of IBC, with consequential directions as follows:

I. We prohibit-

- a) the institution of suits or continuation of pending suits or proceedings against the CD 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 CD 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 CD 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 possession of the CD.

II. That the supply of essential goods or services to the CD, if continuing, shall not be terminated or suspended or interrupted during the moratorium period.

III. That the order of moratorium shall have effect from the date of this order till the completion of the CIRP or until this Tribunal approves the resolution plan under sub-section (1) of section 31 of the IBC or passes an order for liquidation of the CD under section 33 of the IBC, as the case may be.

IV. That the public announcement of the CIRP shall be made in accordance with the provisions of the IBC, the Rules and Regulations made thereunder.

V. That this Bench hereby appoints Mr. Pawan Kumar Ramdhan Agarwal, a registered Insolvency Professional having the Registration Number- IBBI/IPA-

001/IP-P00414/2017-2018/10737 and email- arbitratorpr@gmail.com as the Interim Resolution Professional (IRP), having valid Authorisation for Assignment up to 17.01.2024, to carry out the functions under the IBC, the fee payable to IRP/RP shall be in accordance with the Regulations/Circulars issued by the IBBI.

- VI. During the CIRP Period, the management of the CD shall vest in the IRP or, as the case may be, the RP in terms of section 17 of the IBC. The officers and managers of the CD shall provide all documents in their possession and furnish every information in their knowledge to the IRP within a period of one week from the date of receipt of this Order, in default of which coercive steps will follow under the provisions of the IBC read with Rule 11 of the National Company Law Tribunal Rules, 2016 (NCLT Rules). The CD or any of its directors or officers shall not commit any offence under Chapter VII of Part II of the IBC.
- VII. The IRP/IP shall submit to this Adjudicatory Authority periodical reports with regard to the progress of the CIRP in respect of the CD.
- VIII. In exercise of the powers under Rule 11 of the NCLT Rules, we order the OC to deposit a sum of Rs.5,00,000/- (Five Lakh Rupees) with the IRP to meet the initial CIRP cost, if demanded by the IRP to fund initial expenses on issuing public notice and inviting claims, etc. The amount so deposited shall be interim finance and paid back to the OC on priority upon the funds available with IRP/RP. The expenses, incurred by the IRP out of this fund, shall be subject to approval by the Committee of Creditors (CoC).
- IX. A copy of this Order be sent to the Registrar of Companies, Maharashtra, Mumbai, for updating the Master Data of the CD. The said Registrar of

Companies shall send a compliance report in this regard to the Registry of this Adjudicatory Authority within seven days from the date of receipt of a copy of this order.

- X. The Registry is directed to immediately communicate this order to the OC, the CD and the IRP by way of e-mail and WhatsApp, not later than two days from the date of this Order.
- XI. A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.
- XII. C.P. (IB) No. 3394/MB/C-VI/2019 to come up on 04.01.2024 for filing the periodical report.
- XIII. **Compliance report of the order by Designated Registrar is to be submitted today.**

**Sd/-
SANJIV DUTT
MEMBER (TECHNICAL)**

**Sd/-
K. R. SAJI KUMAR
MEMBER (JUDICIAL)**

//Tanmay Jain//