

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 816 of 2022

(Arising out of Order dated 27th April, 2022 passed by National Company Law Tribunal, Allahabad Bench, Prayagraj in CP(IB) No. 355/ALD/2018)

IN THE MATTER OF:

SUBHASH CHAND GUPTA,

(Suspended Director/Shareholder of M/s. Shivalik Costyn Private Limited-under CIRP), Son of :Late O.P. Gupta, R/o:House No. 2B/2871, Jain Degree College Road, Opposite Police Line Kishore, Saharanpur, Uttar Pradesh, 247001

Email : shivalikgroup@gmail.com

...Appellant

Versus

1. BHAVESH TEXO FAB Private Limited,

Having Registered Office at :Shop No. 1, Plot No. R-11, Chanakya Place Part-II, Near Mandir, Uttam Nagar, New Delhi- 110059.

Email : sheetalgarg21@yahoo.com

2. MR. DINESH KUMAR (INTERIM RESOLUTION PROFESSIONAL OF M/s.

Shivalik Cotsyn Private Limited,

Having its Registered Office at: Delhi Road, Saharanpur- 247001 U.P.

Email: dkgc2004@yahoo.com

...Respondents

Appellant: Mr. Srijan Mehrotra, Advocate

Respondent: Mr. Avtaar Singh, Advocate for R-1

Mr. Sandeep Kumar, Advocate for R-2

J U D G E M E N T

ASHOK BHUSHAN, J:

1. This Appeal by a Suspended Director of the Corporate Debtor has been filed challenging the Order dated 27th April, 2022 passed by the National Company Law Tribunal, Allahabad Bench, Prayagraj (hereinafter referred to as “The Adjudicating Authority”) by which Order the Application under Section 9 of Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as “The Code”) filed by the Operational Creditor-the Respondent herein has been admitted.

2. Brief facts of the case necessary to be noted for deciding this Appeal are:-

- i. The Operational Creditor is engaged in business of trading of Cotton and Yarn. The Corporate Debtor placed purchase orders for purchase of Cotton from Operational Creditor from time to time and pursuant to said purchase orders, the Operational Creditor supplied goods to Corporate Debtor from its office in Ahmedabad. The Operational Creditor raised five invoices to the Corporate Debtor between 11th July, 2016 to 09th September, 2016 amounting to Rs. 68,86,488/- in aggregate.
- ii. The Operational Creditor is maintaining a running account of the transaction and balance amount payable by Corporate Debtor on 09th September, 2016 was Rs. 65,36,488/-.
- iii. The Appellant and one Mr. Saurabh Gupta, Director of the Corporate Debtor entered into Compromise Agreement dated 21.02.2017 with Director of the Operational Creditor and one Mr. Ashok Jain, Director

of M/s. Rishabh Texco Pvt. Ltd. As per Compromise Agreement, an amount of Rs. 80 Lakh was agreed to be adjusted as part payment of combined outstanding liability of Corporate Debtor to Operational Creditor as well as to M/s. Rishabh Texco Pvt. Ltd. In pursuance of Combined Agreement, sale deed could not be executed. Operational Creditor issued a Demand Notice under Section 8 of the Code dated 01.01.2018 demanding payment of Rs. 65,36,488/-. Corporate Debtor vide Letter dated 10.01.2018 replied the Demand Notice stating that amount of Rs. 65,36,488/- due to Operational Creditor has been adjusted against the amount of Rs. 32,82,255/- owed to the Corporate Debtor from M/s. Shiv Shakti International, Sirsa and Rs. 33,60,000/-owed from M/s. Harsh Trading Company.

- iv.** The Operational Creditor filed an Application under Section 9 of the Code in which Application it was also pleaded that in the balance sheet of Corporate Debtor for the financial year ending as on 31st March, 2017 amount due to Operational Creditor has been shown under the heading of 'Trade Payable'. Balance sheet also admitted under the heading 'Trade Receivable' amount of Rs. 32,82,255/- from M/s. Shiv Shakti International, Sirsa and Rs 33,60,000/- from M/s. Harsh Trading Company.
- v.** Section 9 Application was replied by the Corporate Debtor reiterating its stand that amount due to the Operational Creditor has been adjusted by payment made to M/s. Shiv Shakti International, Sirsa and M/s. Harsh Trading Company which are sister concern of the Operational Creditor. It was pleaded that the aforesaid payments were

made by the Corporate Debtor on the instruction of Mr. Sheetal Garg, Director of the Operational Creditor who was managing the affairs of all the three entities.

- vi.** The Adjudicating Authority after hearing the parties, by the Impugned Order dated 27th April, 2022 admitted Section 9 Application finding that debt is owed by the Corporate Debtor and corporate debtor defaulted in making the payment of debt.
- vii.** Aggrieved by the order dated 27th April, 2022, this Appeal has been filed.

3. Learned Counsel for the Appellant challenging the Impugned Order submits that no amount is due to the Operational Creditor by the Corporate Debtor. In the Reply to Demand Notice, it was categorically stated that as per instruction received from Mr. Sheetal Garg, Director of the Operational Creditor, Corporate Debtor made payment to M/s. Shiv Shakti International, Sirsa and M/s. Harsh Trading Company, which fact was further pleaded in the Counter Affidavit filed in Section 9 Application. All the three entities namely Operational Creditor, M/s. Harsh Trading Company and M/s. Shiv Shakti International, Sirsa are companies controlled by one person namely Mr. Sheetal Garg and the payment was supposed to be made to the Operational Creditor would be deemed to be made in full if the same was paid to M/s. Shiv Shakti International, Sirsa and M/s. Harsh Trading Company. Learned Counsel for the Appellant further submits that Application was filed by the Corporate Debtor under Section 156(3) of the Criminal Procedure Code before the Magistrate where the Magistrate found that *prima facie* evidence of fraud and cheating is there and directed the

police to register a First Information Report. An FIR has already been registered dated 03.03.2019 under Case Crime No. 0135/2019 under Section 420, 467, 468, 471 and 120-B where Report under Section 173(2) of Cr. PC was also filed.

4. Learned Counsel for the Respondent refuting the submissions of Learned Counsel for the Appellant submits that the Operational Debt of the Operational Creditor remains unpaid which is clearly reflected in the balance sheet of the Corporate Debtor ending on 31.03.2017. The amount due to the Operational Creditor has been shown as 'Trade Payable', the exact amount due to the Operational Creditor by the Corporate Debtor i.e. Rs. 65,36,488/- has been shown as 'Trade Payables' in the balance sheets whereas amount of Rs. 33,60,000/- to M/s. Harsh Trading Company and Rs. 32,82,255/- to M/s. Shiv Shakti International, Sirsa are shown as 'Trade Receivables'. The argument that payment due to the Operational Creditor has been adjusted is contrary to the own balance sheet of the Corporate Debtor. Further the Settlement Agreement dated 21.02.2017 entered with the Appellant and Mr. Ashok Jain and Mr. Sheetal Garg indicate acknowledgement of debt by the Corporate Debtor which also support the submission of Learned Counsel for the Respondent that amount remained unpaid. It is further submitted that in so far as the Criminal Proceedings initiated by the Appellant against the Operational Creditor is concerned, the proceedings were initiated after Section 8 Notice was given by the Operational Creditor and further the proceedings initiated in Criminal Case against Mr. Sheetal Garg has been stayed by Hon'ble Allahabad High Court

vide order dated 25.01.2021, hence no credit can be taken of said proceedings by the Appellant in the present proceedings.

5. We have considered the submissions of Learned Counsel for the Parties and have perused the record.

6. From the pleadings of the parties, which was before the Adjudicating Authority, it is clear that there is no denial by the Corporate Debtor of entitlement of the Operational Creditor of its dues of Rs. 65,36,488/- arising out of five invoices as claimed by the Operational Creditor in its Section 9 Application. The defence which was taken by the Corporate Debtor in its Reply to Section 8 Notice as well as Counter Affidavit to Section 9 Application is that the said amount stood paid to two entities which were under the same management i.e. M/s. Harsh Trading Company and M/s. Shiv Shakti International, Sirsa hence the dues of Operational Creditor stood squared off. The defence of the Corporate Debtor is that the said payments were made by the Corporate Debtor on instruction of Mr. Sheetal Garg who was managing the Operational Creditor as well as those two entities. Two relevant materials which were brought before the Adjudicating Authority by the Operational Creditor in the above regard needs to be noted.

7. The Balance Sheet of the Corporate Debtor as on 31st March, 2017 signed on 01.09.2017 has been filed by the Operational Creditor along with Section 9 Application. Copy of the balance sheet is part of Section 9 Application and has been filed in this Appeal in Volume-II. In the balance sheet under “Note 4” which is “Current Liabilities” under Heading “(A)”- “Trade Payables” are mentioned. “Note 4” and “A” ‘Trade Payable’ is as follows:

“Note 4		<u>2017</u>	<u>2016</u>
Current Liabilities		AMOUNT	AMOUNT
1	TRADE PAYABLES (A)	56,780,124.66	49,317,881.39
2	OTHER LIABILITIES (B)	635,319.00	566,690.00
	TOTAL	57,415,443.66	49,884,571.39

(A) TRADE PAYABLES		<u>2017</u>	<u>2016</u>
		AMOUNT	AMOUNT
1	-
...	-
16	M/S BHAVESH TEXCOFAB PVT. LTD. AHMEDABAD	6,536,488.00	-
...
35	M/S RISHABH TEXCO PVT. LTD. AHMEDABAD	7,825,916.00	10,170,741.00”

8. The above indicates that at Item No. 16, Operational Creditor M/s. Bhavesh Texco Fab Pvt. Ltd., Ahmedabad where amount mentioned is Rs. 65,36,488/-. The entry further indicates that in the last year no such amount was trade payables to the Operational Creditor since admittedly the amount liability arose on account of five invoices which were issued by the Operational Creditor during the period 11th July, 2016 to 09th September, 2016 that is for the financial year 2016-17. It is also relevant to notice that another entity mentioned in Item No. 35 is M/s. Rishabh Texco Pvt. Ltd., Ahmedabad where Trade Payables are mentioned as Rs. 78,25,916/-. In the same balance sheet under “Note 10” Heading “Trade Receivables”- M/s. Harsh Trading Company and M/s. Shiv Shakti International, Sirsa have been mentioned. Note 10 of the Balance Sheet is as follows:

“NOTE 10		<u>2017</u>	<u>2016</u>
TRADE RECEIVABLES		AMOUNT	AMOUNT
1	-
...	-
4	M/S HARISH TRADING CO.	3,360,000.00	-
...
8	M/S SHIV SHAKTI INTRIONATIONAL, SIRSA	3,282,255.00	-

...”

9. The above indicates that in the same balance sheet, the amount of Rs. 33,60,000/- and Rs. 32,82,255/- which is claimed by the Appellant to have been adjusted from the dues of the Operational Creditor are shown as ‘Trade Receivables’ from above two entities. The balance sheet of the Corporate Debtor itself bely the defence set up by the Corporate Debtor that the amount payable to the Operational Creditor has been paid by making payment to M/s. Harish Trading Company and M/s. Shiv Shakti International, Sirsa. Learned Counsel for the Appellant submitted that M/s. Harish Trading Company and M/s. Shiv Shakti International, Sirsa are not related parties to the Operational Creditor and nothing has been brought on record to indicate that above two entities are related parties to the Operational Creditor more so when the said amount which is sought to be adjusted is still shown as ‘Trade Receivables’. The Corporate Debtor himself has not taken any set off of the said amount hence the defence raised before the Adjudicating Authority has rightly been rejected by the Adjudicating Authority.

10. There is one more document which has been filed by the Operational Creditor along with Section 9 Application which is Settlement Agreement dated 21.02.2017 between Subhash Gupta and Mr. Saurabh Gupta (First Party) and Mr. Ashok Jain and Mr. Sheetal Garg (Second Party). The settlement agreement clearly indicates that the first party has agreed to sell their share in the immovable property to Mr. Ashok Jain and Mr. Sheetal Garg at the rate of Rs. 3,50,000/- Per Bigha and First party has received Rs.

80 Lakhs as advance from the Second Party by way of adjustment of liability to the First Party to the extent of Rs. 40 Lakhs in respect of M/s. Rishabh Texco Pvt. Ltd. and to the extent of Rs. 40 Lakhs by way of adjustment of liability from Mr. Sheetal Garg in respect of M/s. Bhavesh Texo Fab Pvt. Ltd. Ahmedabad. Translated copy of the settlement agreement is part of Section 9 Application. Following part of the Settlement Agreement is relevant and reads as follows:

“.....

That We, First Party whose land bearing Khasra No. 1102/10 Mi, area 12 Bigha Pukhta and Khasra No. 1102/1 area 5 Bigha Biswa Pukhta etc. whose details is mentioned in Sale Deed dated 18.04.2007 and some part of these lands is mentioned in the name of Saurabh Gupta S/o Shri Subhash Gupta in khasra Numbers 1090/2 area Bigha 10 Biswa Pukhta and area 1092/2, area 10 Biswa Pukhta, Khasra Numbers 1091/2, 2092/2, 1097/6, 1103/4, 1104/7 and 1106/1 situated at Village Kheri, Shikohpur, Zaidid Musthaqam, Pargana – Bhagwanpur, Teshil – Roorki, District – Haridwar, Uttaranchal, in other words, the First Party has been the owner of 12.5% of total 192 Bigha land which is equivalent to 24 bigha. We have the right to sell, Mortgage etc. of this property. We the First Party have agreed to sell our share of this property without trees to the Second Party Sh. Ashok Jain and Shree Sheetal Garg at the rate of Rupees, 3,50,000/- (Rupees Three Lacs Ffity Thousand only) Per Bigha and the First Party has received Rupees 80,00,000/- (Rupees Eighty Lacs only) as advance from the Second Party vide this agreement by way of

*adjustment of liability of first party to the extent of Rs. 40,00,000/-, due to Sh. Ashok Jain in respect of his firm M/s. Rishabh Texco Prviate Limited, Ahmedabad (Gujrat) and in the same way Rs. 40,00,000 has been received by the First Party by way of adjustment of liability to the extent of Rs. 40,00,000/- from Sh. Sheetal Garg in respect of his firm M/s Bhavesh Texo Fab Pvt. Ltd., Ahmedabad (Gujrat). The amounts received from both aforesaid second parties have been adjusted in the dues of M/s. Shivalik Cotex Ltd., Saharanpur and M/s Shivalik Cotsyn Prviate Limited, Delhi Road, Saharanpur of the firms of first party.
.....”*

11. The Settlement Agreement is signed by the Appellant which is a fact not denied. The settlement agreement contains an acknowledgement of liability by the Appellant towards the Operational Creditor for which adjustment of liability of Rs. 40 Lakhs have been mentioned in the agreement. The Adjudicating Authority has rightly relied on Settlement Agreement to come to the conclusion that debt of operational creditor has been acknowledged by the Appellant, Director of the Corporate Debtor.

12. Now coming to the submission of Learned Counsel for the Appellant relying on criminal proceedings initiated by lodging an FIR No. 135 of 2019 which according to own case of the Appellant was filed by way of Application under Section 156 sub-section 3 dated 05.02.2019, that is much after service of Demand Notice by the Operational Creditor. It is true that FIR was registered in which charge sheet has also been filed but as submitted by Learned Counsel for the Respondent the Allahabad High Court vide its order

dated 25.01.2021 has stayed the further proceedings in State Vs. Sheetal Garg and Anr.

13. We are of the view that Appellant cannot take any benefit of Criminal Proceedings initiated by the Appellant by filing an Application under Section 156 of the Cr. PC which proceedings were initiated subsequent to receipt of Demand Notice. Application under Section 9 was to be considered and decided on the basis of material which was brought by the Operational Creditor with regard to its debt and default and the Adjudicating Authority being satisfied that there is debt which remained unpaid, no error has been committed by the Adjudicating Authority in admitting Section 9 Application.

14. In view of the foregoing discussions, we do not find any error in the order of the Adjudicating Authority admitting Section 9 Application. There is no merit in the Appeal, the Appeal is dismissed.

**[Justice Ashok Bhushan]
Chairperson**

**[Barun Mitra]
Member (Technical)**

**New Delhi
11th May, 2023**

Basant B.