IN THE NATIONAL COMPANY LAW TRIBUNAL, DIVISION BENCH – I, CHENNAI

IBA/775/2019

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

In the matter of ***M/s. GBJ Hotels Private Limited***

Gopal Das Mundhra,
Sole Proprietor of
M/s. Metalfab Corporation,
A/15, Mugappair Industrial Estate,
Mugappair East,
Chennai – 600 037, Tamil Nadu.

... *Operational Creditor*

-Vs-

M/s. GBJ Hotels Private Limited,
164 and 165, Avanashi Road, Peelamedu,
Coimbatore – 641 004, Tamil Nadu.

... *Corporate Debtor*

Order Pronounced on 31st May, 2021

CORAM :

R. VARADHARAJAN, MEMBER (JUDICIAL)
ANIL KUMAR B, MEMBER (TECHNICAL)

For Operational Creditor : Gaurav Kumar, Authorized Representative
For Corporate Debtor : Jayesh Dolia, Advocate

O R D E R

***Per:* R. VARADHARAJAN, MEMBER (JUDICIAL)**

1. This is an Application filed by one Mr. Gopal Das Mundhra, Sole Proprietor of M/s. Metalfab Corporation, *(hereinafter referred to as an "Operational Creditor")* against M/s. G.B.J. Hotels Private

Limited *(hereinafter referred to as Corporate Debtor)* under Section 9 of the Insolvency and Bankruptcy Code, 2016 *("IBC, 2016")* r/w Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 seeking thereof to initiate Corporate Insolvency Resolution Process against the Corporate Debtor.

2. From Part I of the Application, it is seen that the Operational Creditor is an individual and a sole proprietor of M/s. Metalfab Corporation.

3. From Part II of the Application, it is seen that the Corporate Debtor is a Company incorporated under the Companies Act, 1956 on 12.08.2008 with Corporate Identification No.U55101TZ2008PTC014695 and the Registered Office address of the Corporate Debtor as per Application is stated to be situated at No. 164 and 165, Avanashi Road, Peelamedu, Coimbatore – 641 004, Tamil Nadu.

4. Part III of the Application discloses the fact that the Applicant has not proposed the name of the IRP and left it to the discretion of this Tribunal to appoint the same.

5. From Part IV of the Application, it is seen that the Operational Creditor has claimed a sum of Rs.22,49,958.60 as due and payable from the Corporate Debtor which includes a principal amount of Rs.15,71,734/- and interest at the rate of 24% per annum crediting to a sum of Rs.6,78,224.60. It is stated in the Application that payment is due from 13.07.2016.

6. Part V of the Application discloses the details of the documents as such attached to this Application in order to prove the Operational Debt which are as follows:-

(i). Work Orders

(ii). Outstanding Invoices:
Invoice No.039 dated 28.06.2016
Invoice No.116 dated 13.12.2016
Invoice No.117 dated 13.12.2016

(iii). Work completion certificate dated 03.01.2017

(iv). Mail communication dated 03.08.2017 accepting amount due.

(v). Mail communications for payment follow up.

(vi). MSME council order dated 23.08.2018 passed in favour of M/s. Metalfab Corporation for amount to be received from M/s. G B J Hotels Private Limited.

7. Learned Authorized Representative for Operational Creditor submitted that the Corporate Debtor had issued Work order No.038 dated 11.03.2015 and Work order No.142 dated

25.01.2016 for supplying and installation of Façade Glazing Works and Pergola Skylight Glazing Works and based upon the same, Operational Creditor has supplied the materials and also installed the same in the premises of the Corporate Debtor and in pursuance of the same has also raised three invoices as follows:-

(i) Invoice No.039 dated 28.06.2016
(ii) Invoice No.116 dated 13.12.2016
(iii) Invoice No.117 dated 13.12.2016

8. Thereafter it was submitted that the Operational Creditor has submitted the Work Completion Certificate dated 03.01.2017 to the Corporate Debtor and that the Corporate Debtor through *e-mail* dated 03.08.2017 has accepted the amount due and payable by the Corporate Debtor. Further it was submitted by Learned Authorized Representative for Operational Creditor that the Operational Creditor has obtained an order from the MSME Council vide its order dated 23.08.2018 passed in favour of the Operational Creditor and the amount is due and payable by the Corporate Debtor.

9. It was submitted that in spite of the same, Corporate Debtor has not paid the outstanding amount which is due to the Operational Creditor and hence the Operational Creditor has sent Demand Notice as mandated under Section 8 of the IBC, 2016 in Form 3 to the Corporate Debtor on 06.06.2019 which was

delivered to the Corporate Debtor on 08.06.2019 and the Operational Creditor has filed an Affidavit as mandated under Section 9(3)(b) of IBC, 2016 wherein it has been stated that in spite of receipt of the same, Corporate Debtor has not paid the Operational Debt nor raised any dispute in relation to the same,. Hence, Learned Authorized Representative for Operational Creditor sought to initiate CIRP against the Corporate Debtor.

10. The Respondent / Corporate Debtor has filed its counter and has stated in the counter that there is a dispute in relation to the claim being made by the Operational Creditor and also referred to an *e-mail* dated 12.09.2017 wherein the Operational Creditor has admitted that only a sum of Rs.5.50 Lakhs is overdue. However, it was submitted that during October 2017, there were glass breakages in pre-function area and the same was communicated by the Corporate Debtor to the Operational Creditor on 13.10.2017. The said e-mail is reproduced as under

> *Mr. Gopal Mundra,*
> *We would like to bring to your notice that we have already informed you about the glass breakage in pre-function area, you've also collected the sample of the broken glass and confirmed that you will provide a solution for this. Till date there is no reply from you and it's been a month since the breakage happened. The glass needs to be fixed at the earliest. This is the second instance in the same pre-function area. Revert back your action plan immediately.*
> *Now the main lobby entrance vestibule are glass is creating noises and not closing properly which is installed by you and we need you to correct this issue too.*

Revert back with your action plan for rectifying these issues at the earliest. In case of failure of the rectification we will be forced to deduct the value of rectification plus the charges from your retention money.

Regards,
Joseph Camillus.

11. Thereafter it was submitted that since there was no response from the Operational Creditor, the Corporate Debtor has spent a sum of Rs.83,625/- and carried out all repair works for the glass breakage and as such it was submitted that there is a dispute in relation to the quality of work being provided by the Operational Creditor.

12. Further, it was submitted that vide e-mail dated 31.07.2018 the Corporate Debtor had raised discrepancies with regard to the work done by the Operational Creditor such as door corrections as well as glass breakages and requested the Operational Creditor to co-operate in this regard so that issues may be closed amicably. Hence, it was submitted by Learned Counsel for Corporate Debtor that there is a dispute with respect to the claim made by the Operational Creditor and as such he sought for dismissal of the present Petition.

12. The Operational Creditor has filed rejoinder wherein it is sought to contend that in relation to the defence raised by the

Corporate Debtor in respect of breakage of glass, it was submitted that on 13.10.2017 itself, the Operational Creditor had sent the experts to collect the samples and submit the same to the glass manufacturer viz., Saint - Gobain and lodged the complaint with the glass manufacturer and subsequently on 16.10.2017 the Operational Creditor by way of *e-mail* informed the action taken by them to the Corporate Debtor. Thereafter, it was submitted that on 24.10.2017, Operational Creditor by way of e-mail has sent the report of compliance which was received from the glass manufacturer viz., Saint – Gobain.

13. Perusal of the said report states that the breakage of glass is not due to the manufacturing defect but is an inherent risk or problem associated with use of tempered glass. Thus, it was contended by Learned Authorized Representative for Operational Creditor that defect in supply of material is not attributable to the Operational Creditor as per the report given by the glass manufacturer.

14. Thereafter, it was submitted that Corporate Debtor has issued two cheques in favour of Operational Creditor and the same was returned with an endorsement *'fund insufficient'*. Further it was submitted that on 15.03.2018 Petition was filed under the MSME Act after two cheques were returned unpaid by the

Corporate Debtor due to 'funds insufficient'. The MSME Facilitation Council has passed an order dated 23.10.2018 in favour of the Operational Creditor which is not disputed by the Corporate Debtor.

15. Further it was also averred in the rejoinder that in the MSME order dated 23.10.2018, it has been recorded that there is no dispute in the amount which is payable by the Corporate Debtor. Hence, Learned Authorized Representative for Operational Creditor has sought for admission of the present Application.

16. Heard submissions made by Authorized Representative / Counsel for the parties. Learned Counsel for Corporate Debtor sought to raise a defence that there is a 'dispute' which is in existence between the parties in relation to the breakage of glass. However, the said defence as set out by the Corporate Debtor seems to be a patently feeble defence. However, it is seen that the breakage of glass as per the report given by the glass manufacturers cannot be construed as a deficiency in service on the part of the Operational Creditor and thereby giving rise to a 'dispute' which is existing between the parties. In fact after the issue of the breakage of glass, the Corporate Debtor has issued a cheque to the Operational Creditor on 23.11.2017 and on presentation, the same was returned with an endorsement *"funds insufficient".*

17. Further it is seen from the records of the proceedings dated 22.02.2021, 22.03.2021 and 16.04.2021 the Corporate Debtor has sought time under the garb of settlement as the Respondent / Corporate Debtor was taking every effort to settle the matter between the parties amicably and sought for adjournments on the said pretext. Finally when the matter came up for hearing on 16.04.2021, the Corporate Debtor again sought for an adjournment on the pretext that a draft memo in relation to the settlement is yet to be finalized. However, this Tribunal was not inclined to grant any further adjournment and reserved the matter for orders.

18. Thus, the Operational Creditor has proved the debt is due and payable by the Corporate Debtor and that the Corporate Debtor has committed default in payment of the said operational debt to the Operational Creditor. Further, the defence as set out by the Corporate Debtor also does not hold any merit in view of the report submitted by the Glass manufacturer stating that the breakage of glass was not due to the manufacturing defect but it is an inherent risk or problem associated with use of tempered glass.

19. Further it is seen that the Application has been filed by the Operational Creditor before this Tribunal on 24.06.2019 and the last date of invoice is being 13.12.2016 as such the Application

falls within the period of limitation. Further in relation to the pecuniary jurisdiction enhanced from Rs.1 lakh to Rs. 1 crore on and from 24.03.2020, it is seen the present Application was filed before this Tribunal on 24.06.2019 and as such this Tribunal has got pecuniary jurisdiction to entertain the present Application.

20. Thus, taking into consideration the facts and circumstances of the case as well as the position of Law, we are of the view that the Petition, as filed by the Operational Creditor, is required to be admitted under Section 9(5) of the IBC, 2016. Since the Operational Creditor has not named the Insolvency Resolution Professional, this Tribunal based on the latest list furnished by Insolvency and Bankruptcy Board of India applicable for the period between January – June 2021 appoints **Mr. Arpit Kothari,** *with Registration No. IBBI/IPA-001/IP-P02140/2020-2021/13290 (email id:- ak@nirmalandarpit.com)* as the "Interim Resolution Professional" subject to the condition that no disciplinary proceedings are pending against such an Interim Resolution Professional named and disclosures as required under IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 are made within a period of one week from the date of this order. As a consequence of the Application being admitted in terms of Section 9 (5) of the Code, the moratorium as envisaged under

the provisions of Section 14(1) and as extracted hereunder shall follow in relation to the Corporate Debtor:

a. The institution of suits or continuation of pending suits or proceedings against the respondent 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 respondent 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 respondent in respect of its property including any action 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 the possession of the respondent.

Explanation.-For the purposes of this sub-section, it is hereby clarified that notwithstanding anything contained in any other law for the time being in force, a licence, permit, registration, quota, concession, clearance or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license or a similar grant or right during moratorium period;

21. However, during the pendency of the moratorium period in terms of Section 14(2) (2A) and 14(3) as extracted hereunder:

(2) The supply of essential goods or services to the Corporate Debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.

(2A) Where the interim resolution professional or resolution professional, as the case may be, considers the supply of goods or services critical to protect and preserve the value of the Corporate Debtor and mange the operations of such Corporate Debtor as a going concern, then the supply of such goods or services shall not be terminated, suspended or interrupted during the period of moratorium, except where such Corporate Debtor has not paid dues arising from such supply during the moratorium period or in such circumstances as may be specified.

(3) The provisions of sub-section (1) shall not apply to

(a) such transactions, agreements or other arrangement as may be notified by the Central Government in consultation with any financial sector regulator or any other authority;

(b) a surety in a contract of guarantee to a corporate debtor.

22. The duration of the period of moratorium shall be as provided in Section 14(4) of the Code and for ready reference reproduced as follows:

> (4) The order of moratorium shall have effect from the date of such order till the completion of the Corporate Insolvency Resolution Process:
>
> Provided that where at any time during the Corporate Insolvency Resolution Process period, if the Adjudicating Authority approves the Resolution Plan under sub-Section (1) of Section 31 or passes an order for liquidation of Corporate Debtor under Section 33, the moratorium shall cease to have effect from the date of such approval or Liquidation Order, as the case may be.

23. The Operational Creditor is directed to pay a sum of **Rs.2,00,000/-** *(Rupees Two Lakhs Only)* to the Interim Resolution Professional upon the Interim Resolution Professional filing the necessary declaration form as required under the provisions of the Code to meet out the expenses to perform the functions assigned to her in accordance to Regulation 6 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

24. Based on the above terms, the Application stands **admitted** in terms of Section 9(5) of IBC, 2016 and the moratorium shall

come in to effect as of this date. A copy of the Order shall be communicated to the Operational Creditor as well as to the Corporate Debtor above named by the Registry. In addition, a copy of the Order shall also be forwarded to IBBI for its records. Further, the Interim Resolution Professional above named who is figuring in the list of Resolution Professionals forwarded by IBBI be also furnished with copy of this Order forthwith by the Registry, who will also communicate the initiation of the CIRP in relation to the Corporate Debtor to the Registrar of Companies concerned.

-Sd-	-Sd-
ANIL KUMAR B	**R. VARADHARAJAN**
MEMBER (TECHNICAL)	MEMBER (JUDICIAL)

Raymond