

**BEFORE THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH- III**

IB-2611/ND/2019

U/S. 9 of the IBC, 2016 and Rule 6 of the
Insolvency and Bankruptcy (Application to
Adjudicating Authority), Rule, 2016

IN THE MATTER OF

Mr. Dalip Narinder Gupta

Sole Proprietor of M/s Gem International

...Petitioner/Operational Creditor.

Versus

M/s Shree OM Enterprises Pvt. Ltd.

...Corporate Debtor.

Delivered on 25.10.2021

Coram:

SHRI P.S.N. PRASAD, HON'BLE MEMBER (JUDICIAL)

SHRI NARENDER KUMAR BHOLA, HON'BLE MEMBER (TECHNICAL)

Appearances:

Operational Creditor : DKS Associates

Corporate Debtor: Mr. Hitendra Kr. Nahata, Ms. Ritu Jain and
Anuj R. Yadav (Advocates)



ORDER

Per: Narender Kumar Bhola, Member (Technical)

1. Under consideration is IB-2611/ND/2019 filed under Section 9 of the Insolvency & Bankruptcy Code, 2016 (hereinafter referred as 'IBC, 2016') r/w Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. The Operational Creditor is seeking an Order to initiate Corporate Insolvency Resolution Process (hereinafter referred as 'CIRP') against the Corporate Debtor viz., M/s Shree Om Enterprises Private Limited, declare moratorium and appoint Interim Resolution Professional (hereinafter referred as 'IRP').

2. The Operational Creditor/Petitioner has averred as follows: -

- a. The Operational Creditor provides/supplies "Printing Inks and Adhesive (Hot melt adhesives) and such other products". The Corporate Debtor on the other hand is in the business of providing a wide range of printing services which include offset printing, digital printing, screen printing, flex printing services, digital flex printing services, promotional banner services, corporate gifts, such other related products and other business.
- b. It is submitted that the Corporate Debtor gave Order to the Operational Creditor to procure "Printing Inks". The Petitioner



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supplied the said goods "Printing Inks" to the Corporate Debtor between the period from September, 2013 to December, 2013 vide tax invoices aggregating to Rs. 5,65,392/-. It is stated that the corporate debtor made "on account" payment aggregating to Rs. 1,30,468/- and defaulted on the payment of the balance principal amount of Rs. 4,34,924/-.

- c. It is also submitted that the Corporate Debtor has issued four cheques dated 31.07.2015, 09.04.2016, 07.05.2016 and 03.11.2017 towards the outstanding debt payment, all of which have bounced and were dishonored/returned unpaid by their banker.
- d. It is further stated that Corporate Debtor has made "on account" of Rs. 12,855/- towards the debt on 19.01.2019. Hence, the fresh period of limitation starts/runs from 19.01.2019. It is further stated that on 23.05.2019, the corporate debtor has confirmed, acknowledged and agreed upon on the balance outstanding amount/debt amount payable to the Operational Creditor to be Rs. 4,34,924/- by stating so and duly signing and affixing their company seal as balance confirmation on the copy of the ledger statement of Corporate Debtor maintained in the books of account of Operational Creditor. Thus, the limitation period is renewed again and fresh period of limitation starts from 23.05.2019 so the present claim and petition is within the limitation period.



3. The Corporate Debtor has also appeared and filed the reply to the petition under consideration and argued on the following points:

- a. It is submitted that the Petition has been filed by the Operational Creditor on basis of six impugned invoices of year 2013 due for payment within year 2013 itself, which were majorly paid within FY 2013-14 because a payment of Rs.15,94,556/- was made by the Corporate Debtor to the Operational Creditor against total invoices of Rs.16,75,605/- in FY 2013-2014, so all invoices raised by operational creditor from 04.04.2013 till 26.03.2014 (including six impugned invoices) were duly paid by corporate debtor within same financial year and remaining petty amount was paid with interest to operational creditor by paying an amount of Rs. 2,00,000/- in year 2015 and 2016. Hence, all payments were completed with respect to transactions of FY 2013-2014.
- b. It is further submitted that an amount of Rs. 12,855/- was transferred on 19.01.2019 for delivering 26 Kg. Technomelt. However, operational creditor did not deliver the goods instead operational creditor concocted and manipulated the documents and used the payment as tool to serve his malafide the attention against corporate debtor. It is also argued that no legal proceedings were initiated by Operational Creditor against



Corporate Debtor for the reason that the cheques were issued to complete petty outstanding amount of less than a lakh and finally an amount of Rs. 2,00,000/- was paid against outstanding amount as final payment to clear remaining amount of FY 2013-2014 with interest thereon for delayed payment.

- c. It is averred that the present petition is not maintainable in Code as it is hit by Limitation provided under section 238-A of the Code as the dues existed in year 2013. It is further argued that Annexure-D annexed with Petition is silent about the entry of Rs. 5,66,730/- which has been shown as opening balance in ledger account of FY 2013-2014 having brought forward from previous financial year. The operational creditor has not given any details nor filed any voucher against the same.
- d. The Corporate Debtor also relied on the Hon'ble Supreme Court Judgment in matter of B.K. Educational Services Private Limited Vs. Parag Gupta & Associates. It is held that the Code cannot be triggered lately for a debt which was time barred as that would lead to the absurd and extreme consequences of the Code being triggered by a stale or dead claim, leading to the drastic consequences of instant removal of the present board of directors of the Corporate Debtor permanently, and which may ultimately lead to liquidation and, therefore, corporate death.

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4. The Operational Creditor has also filed the rejoinder and denied each and every statement, claims, allegation and averment made by the Corporate Debtor in the reply, except and to the extent specifically admitted. Apart from submissions made in the petition, the Operational Creditor further submitted that the Corporate Debtor has also deviously considered the dishonored cheques as payment made by the Corporate Debtor. Hence, the corporate debtor is concealing/twisting/coloring the facts and misleading, misrepresenting to the Hon'ble Tribunal.
5. We have perused the pleadings, documents annexed therewith and arguments advanced by the Operational Creditor as well as Corporate Debtor. On perusal of the copy of ledger account of M/s Shree Om Enterprises Private Limited (Corporate Debtor) maintained in the books of Operational Creditor Annexed as Annexure "F" with the Petition (page 33-35), it is seen that most of the payments have been credited by the corporate debtor against the invoices raised by the Operational Creditor including the Six invoices on basis of which the captioned Petition has been filed and there is net addition of only an amount of Rs. 81,049/- as being outstanding against the Corporate Debtor with total outstanding being Rs. 6,47,779 as on 31.3.2014. The payments being received from Corporate Debtor by the Operational Creditor are



in a running account, have to be taken on “First in First Out” principle, meaning thereby that Invoices which were oldest in time would get paid with each subsequent payments and the latest invoices are to be held as being unpaid for the purpose of time limitation. It is also important to go through Section 60 and 61 of Indian Contract Act, 1872, which are as follows:

Section 60. Application of payment where debt to be discharged is not indicated. – *Where the debtor has omitted to intimate, and there are no other circumstances indicating to which debt the payment is to be applied, the creditor may apply it at his discretion to any lawful debt actually accrued due and payable to him from the debtor, whether its recovery is or is not barred by the law in force for the time being as to the limitation of suits.*

Section 61. Application of payment where neither party appropriates. – *Where neither party makes any appropriation, the payment shall be applied in discharge of the debts in order of time, whether they are or are not barred by the law in force for the time being as to the limitation of suits. If the debts are of equal standing, the payment shall be applied in discharge of each proportionately.*

Going by the said principle, it is clear that there was an outstanding of Rs. 6,47,779 against Corporate Debtor and the same represented the unpaid invoices of the periods later than the six invoices mentioned by the Operational Creditor. Further, it is also observed that Corporate Debtor had been issuing cheques of different amounts starting from 8.5.2014 to 03.11.2017 and many of the said cheques had dishonored on various dates. This is clearly brought on record by the Operational Creditor in Annexure “F” (ledger account of Corporate Debtor in the

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books of Operational Creditor) and the same is duly acknowledged by the Corporate Debtor under its signature and seal with PAN no.

6. The Corporate Debtor relied on the judgment of Hon'ble Supreme Court in the matter of B.K. Education Services Private Limited Vs. Parag Gupta & Associates. The only question raised in the aforementioned matter before Hon'ble Apex Court was "*Whether the limitation Act, 1963 will apply to applications that are made under section 7 and/or Section 9 of the Code on and from its Commencement on 01.12.2016 till 06.06.2018*". Hence, keeping in view the facts and circumstances of the present petition, the Hon'ble Supreme Court judgment quoted by the Corporate Debtor is not applicable to the Petition under consideration.
7. The Operational Creditor has relied upon judgement of Hon'ble Bombay High Court in the matter of Vijay Ganesh Gondhlekar vs Indranil Jairaj Damale 2008 CriLJ 657, 2007 (6) MhLj 419 to buttress its argument that the claim against Corporate Debtor is within limitation as the same starts with each re-issue of cheque upon dishonor of the earlier cheque of Debtor by its (Debtor's) banker. The last cheque in the instant case was issued by the CD on 3.11.2017 and the said cheque was presented again for payment on 24.1.2018 upon its dishonor earlier, the present petition has been filed on 12.10.2019

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which is well within limitation of three years. In this connection, the relevant para of the said judgement is reproduced below:

“8.....Thus when a drawer revalidates cheque from time to time which is permissible, it could be said that on each occasion there was a fresh promise as envisaged by section 25 of the Contract Act as well as an acknowledgment within the meaning of Section 18 of the Limitation Act if such revalidation is made within the period of limitation. In the instant case admittedly the accused-applicant had extended the date of cheque from time to time under his own signature and had validated the cheque. As said earlier such validation amounts to a fresh promise and therefore, he has revived a barred debt. The proceedings have been filed within 3 years from the last such revalidation and in view of this it could not be said that under the cheque the applicant sought to recover a barred debt. In view of this I find no substance in the application. It is dismissed.”

In view of the above ratio propounded by the Hon'ble Bombay High Court as also the reasoning brought out in Para 5 above, we concur with the argument of Operational Creditor that it's claim against CD herein is within limitation. The Corporate Debtor has also failed to raise any clinching issue/matter which indicates existence of pre-existing dispute between the parties prior to issue of statutory Demand Notice under the Code.

8. The Notification regarding the enhancement of minimum amount of default to Rs. one crore for the purpose of Section 4 was issued by the Ministry of Corporate Affairs on 24th March, 2020 and the amount defaulted by the Corporate Debtor as well as the filing of captioned petition is much before the coming into effect of notification dated 24th March, 2020. Since any notification issued by the Government is

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generally prospective in nature unless specifically expressed, hence the said notification is not applicable to the present case. Accordingly, this Tribunal admits this application and initiates the process of CIRP of the Corporate Debtor. The Applicant has not proposed any insolvency resolution professional. This Tribunal, hereby, appoints Insolvency Professional namely, Ms. Archana Singhal having IBBI registration IBBI/IPA-001/IP-P02036/2020-2021/13116 with e-mail archanafca@gmail.com as Interim Resolution Professional from the list provided by IBBI.

9. The IRP is directed to take charge of the respondent corporate debtor's management immediately. She is also directed to cause public announcement as prescribed under section 15 of the IBC, 2016, within three days from the date of this order received, and call for submissions of claim in the manner as prescribed.
10. The moratorium is declared which shall have effect from this Order till the completion of CIRP, for the purposes referred to in section 14 of the IBC, 2016. It is ordered to prohibit all of the following, namely: -
 - 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 (54 of 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.
11. The supply of essential goods or services of the Corporate Debtor shall not be terminated, suspended or interrupted during moratorium period. The provisions of sub-section (1) of section 14 of IBC, 2016 shall not apply to such transactions, as notified by the central government.
12. The IRP shall comply with the provisions of sections 13(2), 15, 17 and 18 of the Code. The directors of the Corporate Debtor, its Promoters or any person associated with the management of the corporate debtor shall extend all assistance and cooperation to the IRP as stipulated under

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section 19 for discharging his functions under section 20 of the IBC, 2016.

13. The Petitioner is directed to pay a sum of Rs. 2,00,000/- to the interim resolution professional upon the IRP filing the necessary declaration form as required under the provisions of the Code to meet out the expenses to perform the functions assigned to him in accordance to Regulation 6 of Insolvency Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

14. The operational Creditor is directed to send the copy of this Order to the IRP with immediate effect, so that he could take charge of the corporate debtor's assets etc., and make compliance with this order as per provisions of IBC, 2016.

15. The order is pronounced by the Adjudicating Authority through video conferencing.



(NARENDER KUMAR BHOLA)
MEMBER (TECHNICAL)



(P.S.N. PRASAD)
MEMBER (JUDICIAL)