IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH

CP (IB) No. 3555/NCLT/MB/2018

Under Section 9 of the I&B Code, 2016

In the matter of

Trau Bros NV

…Operational Creditor/ Applicant

v/s

Osia Gems Private Limited

...Corporate Debtor

Order Dated 17.02.2020

Coram:

Hon'ble Member (Judicial): Mr. Bhaskara Pantula Mohan

Hon'ble Member (Technical): Mr. Rajesh Sharma

For the Petitioner: Adv. Nirman Sharma, Adv. Amogh Joshi;

For the Respondent: Adv. Sanjay Jain, Adv. Prachi Wazalwar;

Per: Rajesh Sharma, Member (Technical)

ORDER

1. This is an application being CP 3555(IB)/MB/2018 filed by **Traus Bros NV, a** company based in Belgium, the Operational Creditor / Applicant, under section 9 of Insolvency & Bankruptcy Code, 2016 (**I&B Code**) against **Osia Gems Private Limited,** Corporate Debtor, for initiating Corporate Insolvency Resolution Process (**CIRP**) claiming a total default of USD2,222,420.99.

2. This Application is filed by Mr. Amiel Philipe, the Director of the Operational Creditor, duly authorised by Board Resolution dated 27.07.2018.

3. The Applicant submits that it supplied rough diamonds to the Corporate Debtor under 7 invoices from 23.09.2016 to 09.11.2016. Copies of the invoices for the said supply are annexed to the Application. The details of the invoices and amounts in default are provided herein below in tabular form:-

Sr. No.	**Invoice Number and date**	**Due date**	**Outstanding Amount in (USD)**
1	2016703 dated 23.09.2016	07.12.2016	146,695.51
2	2016714 dated 28.09.2016	27.11.2016	431,591.00
3	2016715 dated 28.09.2016	24.12.2016	500,292.00
4	2016736 dated 10.10.2016	24.12.2016	76,529.61
5	2016764 dated 27.10.2016	26.01.2017	364,180.47
6	2016795 dated 08.11.2016	07.01.2017	304,416.00
7	2016803 dated 09.11.2016	08.01.2017	398,716.40
8	**TOTAL INVOICE AMOUNT**		**2,222,420.99**

4. The Applicant sought payment of USD 2,420,319 in its Letter dated 28.07.2017 attached to the email dated 31.07.2017 issued by the Applicant to the Corporate Debtor. Copy of the email along with attached letter dated 28.07.2017 is annexed to the Application.

5. The Applicant issued Demand Notice dated 14.06.2018 under section 8 of I & B Code, 2016 claiming a default of USD 2,222,420.99 being the balance amount payable under 7 invoices raised against supply of rough diamonds. The Corporate Debtor has made part payments under the invoices. Copies of the Demand Notice and proof of service is annexed to the Application.

6. The Applicant has annexed copy of 'Reply to Demand Notice' dated 02.07.2018 in which, the Corporate Debtor has sought information/documents from the Applicant showing purchase orders, details regarding the selection of materials, name of the

person who authorised orders on behalf of Osia Gems Private Limited to be shipped along with date of authorisation and also sought proof towards the admission and acknowledgement of the outstanding invoices by Corporate Debtor .

7. The Applicant in response to the Reply letter dated 02.07.2018 issued letter dated 20.07.2018 stating that the Corporate Debtor's reply to Demand Notice was an attempt to further delay and procrastinate by calling for information already within the Corporate Debtor's knowledge. Further it is also stated that all information required to be provided under the I&B Code, 2016 has already been provided. Copy of Applicant's Letter through its Counsel, dated 20.07.2018 and proof of service is annexed to the Application.

8. The Applicant has annexed copy of Letter dated 26.07.2018 issued by ABN -AMRO Bank N.V., Belgian Branch which lists 4 payments made totally amounting to USD 246,393.61 as on 26.07.2018.

9. The Applicant has filed affidavit dated 13.08.2018 in compliance of section 9(3)(b) of the I & B Code,2016 stating that the Corporate Debtor has neither issued a notice of dispute nor provided any proof of payment of operational debt.

10. The Corporate Debtor filed M.A No.1183/2018 on 12.10.2018 challenging the maintainability of the instant petition. The same is considered along with the Affidavit in Reply.

11. The Corporate Debtor filed its Affidavit in Reply on 02.01.2019. It is stated in the Affidavit in Reply that the Corporate Debtor did not place any order upon the Applicant for any consignment. That there is no agreement between the parties in relation to the supply.

12. It is submitted that the Corporate Debtor's representative categorically refused to receive the diamonds from the Applicant stating that diamond market was low. It is further stated that the Applicant exported the alleged consignment of rough diamonds to the Corporate Debtor on its own will and for its

extraneous reasons in the absence of purchase orders or any agreement between the parties despite the refusal.

13. It is stated by the Corporate Debtor that the Applicant's agent requested the Corporate Debtor to at least polish the rough diamonds and hold the goods until the Applicant finds the buyers to purchase the polished diamonds or to then return the same, upon payment of the Corporate Debtor's professional charges.

14. The Counsel for the Corporate Debtor drew the attention of this Bench to the invoices and pointed out that in the invoices it is clearly written that "*title to the goods invoiced herein will not pass from seller to the buyer until the buyer has paid for the goods in full including applicable expenses*"

15. It is submitted by the Corporate Debtor that it is ready, willing and able to return the diamonds to the Applicant on the payment of Corporate Debtor's professional charges.

16. It is further argued by the Corporate Debtor that the Reply to Demand Notice has clearly sought for information relating to the purchase orders and other information as there is no operational debt.

17. Subsequently Rejoinder and Sur-Rejoinder have been filed by the parties to this Application. Thereafter both the parties have filed written submissions.

18. We have heard the parties and perused the records.

19. This Application has been filed by the Director of the Applicant being duly authorised by the Board Resolution dated 27.07.2018.

20. The Applicant has annexed copies of invoices of the diamonds supplied as listed above. Further, Copies of letters certifying that shipments sent by the Applicant are delivered to the Corporate Debtor are annexed to the Affidavit in Rejoinder.

21. The Applicant has annexed the letter dated 28.07.2017 issued to the Corporate Debtor vide email dated 31.07.2017. Further, a copy of the Demand Notice under section 8 of the I & B Code, 2016 has been annexed to the Application.

22. The Applicant has annexed copy of the Reply to demand Notice tendered by the Corporate Debtor which demands details of the person who placed the order with the Applicant along with the date of placing the order. Details of purchase orders, invoices have also been sought in the said reply. Relevant KP certificate, name of the person who authorised these orders on behalf of Osia Gems Private Limited. Further the explanation as to how the purported goods were shipped on such long duration credit is also sought for in the reply.

23. On perusal of Letter dated 20.07.2017, it is seen that the Applicant has informed the Corporate Debtor that all the relevant information has already been given to the Corporate Debtor along with the Demand Notice and the said Reply to Demand Notice is an attempt to further delay in repaying the Applicant's dues.

24. The Applicant has annexed email dated 01.11.2017, email dated 10.11.2017, 20.11.2017, 21.11.2017, 22.11.2017 wherein the Applicant has demanded the payments.

25. The Applicant has annexed copy of email dated 22.06.2018 issued by the Auditors of the Corporate Debtor seeking balance confirmation from the Applicant. Further, the Applicant has also annexed copies of balance confirmation statements for the years ending 31.03.2017 and 31.03.2018. On perusal of the same, it is established that as per the Corporate Debtor's books of accounts, outstanding balance of USD2671700.6 is due to the Applicant as on 31.03.2017. The Applicant has specifically mentioned on the said Balance Confirmation Statement that as per the books of the Applicant the total outstanding amount payable by the Corporate Debtor is USD2,777,484.77, further stating that difference in the books is of USD105,784.17.

26. The Applicant in the Rejoinder pointed out in para no.14 that the contents of paragraph no.8 and 15 of the Reply are mischievous as the offer of the Corporate Debtor to return the diamonds in original form cannot be accepted as it was never engaged to render services of polishing rough diamonds. Further, the rough

diamonds have changed form and it is impossible to identify and distinguish the diamonds supplied by the Applicant.

27. On perusal of the invoices, letter dated 26.07.2018 of ABN AMRO Bank N.V Belgiam Branch showing the monies received by the Applicant from the Corporate Debtor, Several follow up emails demanding payment of monies mentioned *supra,* it is established that the Applicant has supplied rough diamonds to Corporate Debtor. The receipt of which is not denied by the Corporate Debtor. The existence of 'operational debt' as per the provisions of the Code is established.

28. The Corporate Debtor has not denied the transactions with Applicant in the Reply to Demand Notice under section 8 of I & B Code, 2016. The Corporate Debtor has in fact sought for relevant documents in respect of the supplied diamonds. However, strangely, in the Reply to the Application, the Corporate Debtor has taken a contention that the diamonds supplied were supplied only for polishing and the same is not sale. The said contention is based on the invoices placed on record where it is provided that "*Title to the goods invoiced herein will not pass from the seller to the buyer until the buyer has paid for the goods in full including any applicable expenses."*

29. It is however pertinent to note that the Corporate Debtor has not communicated to the Applicant in respect of any deficiency in the goods. The diamonds have been polished. The Corporate Debtor having utilised the rough diamonds and having not raised any dispute prior to the Demand Notice cannot at this belated stage contend that the title is not transferred yet and there is no sale.

30. That section 24 of the Sale of Goods Act, 1930 is applicable to this situation. The same is extracted herein below for the sake of convenience.

> *"Goods sent on approval or "on sale or return".-When goods are delivered to the buyer on approval or " on sale or return " or other similar terms, the property therein passes to the buyer- (a) when he signifies his approval or acceptance to the seller or does any*

> *other act adopting the transaction; (b) if he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time."*

31. On bare reading of the section extracted herein above, it is clear that the buyer of the goods, should within a reasonable time return the goods if the buyer rejects the sale. A buyer cannot keep the goods with him for an unreasonable time. It is seen here that the Corporate Debtor has not indicated to the Applicant, rejecting the goods supplied within reasonable time hence the Corporate debtor's contention does not sustain.

32. On perusal of the invoices and the shipment delivery proof, the Corporate Debtor has failed to raise dispute in respect of the quality of goods despite the emails demanding payment of monies. The said materials were supplied in the year 2016. However, the dispute raised is only after this Application is filed.

33. The Corporate debtor has defaulted in making payments to the Applicant on the respective due dates as mentioned in the Application and has failed to establish the existence of a *bonafide* dispute prior to the receipt of Demand Notice. In this regard, it is imperative to mention that the decision in *Mobilox Innovation Private Limited v. Kirusa Software Private Limited, AIR 2017 SC 4532,* wherein, the Hon'ble Supreme Court has elaborately dealt with what amounts to 'dispute' under the code. The relevant para is extracted herein below.

> *"It is clear, therefore, that once the operational creditor has filed an application, which is otherwise complete, the adjudicating authority must reject the application under Section 9(5)(2)(d) if notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility. It is clear that such notice must bring to the*

notice of the operational creditor the "existence" of a dispute or the fact that a suit or arbitration proceeding relating to a dispute is pending between the parties. Therefore, all that the adjudicating authority is to see at this stage is whether there is a plausible contention which requires further investigation and that the "dispute" is not a patently feeble legal argument or an assertion of fact unsupported by evidence. It is important to separate the grain from the chaff and to reject a spurious defence which is mere bluster. However, in doing so, the Court does not need to be satisfied that the defence is likely to succeed. The Court does not at this stage examine the merits of the dispute except to the extent indicated above. So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application."

34. It is established that the Corporate Debtor has defaulted in payment of operational debt of the Applicant which is above a sum of ₹1,00,000/-.

35. On perusal of the dates of default in respect of each invoice mentioned in the Form 5, the claim made is within the period of limitation.

36. The Applicant has proposed that **Mr. Adesh Kumar Gupta**, an insolvency resolution professional having Registration Number **[IBBI/IPA-001/IP-P00747/2017-18/11251]** be appointed to carry out the functions as mentioned under I&B Code, 2016.

37. The Application under sub-section (2) of Section 9 of I&B Code, 2016 is complete. The existence of operational debt of more than rupees one lakh against the corporate debtor and its default is proved. Accordingly, the petition 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.

ORDER

This petition filed under Section 9 of I&B Code, 2016, presented by **Traus Bros N V** Operational Creditor / Petitioner against **Osia Gems Private Limited**, Corporate Debtor for initiating corporate insolvency resolution process is at this moment **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 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 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 –

(a) such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

(b) A surety in a contract of guarantee to a Corporate Debtor

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. Adesh Kumar Gupta,** a registered insolvency resolution professional having Registration Number **[IBBI/IPA-001/IP-P00747/2017-2018/11251]** 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.

38. The Registry is at this moment directed to immediately communicate this order to the Operational Creditor, the Corporate Debtor and the Interim Resolution Professional even by way of email or WhatsApp. **Compliance report of the order by Designated registrar is to be submitted today**

Sd/-	**Sd/-**
Rajesh Sharma	**Bhaskara Pantula Mohan**
Member (Technical)	Member (Judicial)

17.02.2020