



IN THE NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD
DIVISION BENCH
COURT - 1

ITEM No.3
C.P.(IB)/331(AHM)2022

Proceedings under Section 9 IBC

IN THE MATTER OF:

Shree Hari Coal Corporation Patner Harshil Snehal ShahApplicant

V/s

Akshar Fabrics Pvt LtdRespondent

Order delivered on: 11/09/2023

Coram:

Mr. Shammi Khan, Hon'ble Member(J)

Mr. Kaushalendra Kumar Singh, Hon'ble Member(T)

PRESENT:

For the Applicant :

For the Respondent :

ORDER

The case is fixed for pronouncement of the order. The order is pronounced in the open court, vide separate sheet.

-SD-

KAUSHALENDRA KUMAR SINGH
MEMBER (TECHNICAL)

-SD-

SHAMMI KHAN
MEMBER (JUDICIAL)



**BEFORE THE ADJUDICATING AUTHORITY
NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD BENCH
COURT-I**

CP (IB) 331 of 2022

*[Application for initiation of Corporate Insolvency Resolution Process under
Section 9 of the Insolvency & Bankruptcy Code, 2016]*

In the matter of:

Shree Hari Coal Corporation
314, International Business Center,
Gaurav Path Piplod,
Surat, Gujarat, India.

.....Operational Creditor

Versus

Akshar Fabrics Private Limited
CIN: U17119GJ1991PTC016031
Registered Office at:
Plot No. 306, GIDC, Opp.
Old Fire Station, Ankleshwar,
Gujarat-393002.

.....Corporate Debtor

Order pronounced on: 11.09.2023

**Coram: SHAMMI KHAN, MEMBER (JUDICIAL)
KAUSHALENDRA KUMAR SINGH, MEMBER (TECHNICAL)**

Appearance:

For the Applicant: Mr. Dhiren R. Dave, Advocate
For the Respondent: Mr. Pavan S. Godiawala, Advocate



O R D E R

1. The instant Application is filed on 07.12.2022 by **Shree Hari Coal Corporation** (Applicant/ Operational Creditor) through its designated partner Mr. Harshil Snehal Shah, under Section 9 of the Insolvency and Bankruptcy Code, 2016 (Code) read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 claiming to be an Operational Creditor for initiation of Corporate Insolvency Resolution Process (CIRP) against **Akshar Fabrics Private Limited** (Respondent/Corporate Debtor) for making default in payment of outstanding amount of Rs.4,34,16,554/-(Rupees Four Crore Thirty Four Lakh Sixteen Thousand Five Hundred and Fifty Four only) including interest amounting to Rs.97,13,136/-. The date of default stated in Form 3 is 04.10.2022.
2. The Operational Creditor i.e., **Shree Hari Coal Corporation** is a partnership firm engaged in the business of sale of steam coal. The office of the Operational Creditor is situated at 314, International Business Centre, Gaurav Path Piplod, Surat, Gujarat, India.
3. The Corporate Debtor i.e. **Akshar Fabrics Private Limited** was incorporated on 29.07.1991 under the Companies Act, 1956. The registered office of the Corporate Debtor is situated at Plot No.306, GIDC, Opp. Old Fire Station, Ankleshwar, Gujarat - 393002. Therefore, this Bench has jurisdiction to deal with this Application.
4. Briefly, the facts of the case as mentioned in the Application



and submitted by the Ld. Counsel for the Operational Creditor are summarized hereunder:

- i. The Operational Creditor supplied steam coal to Corporate Debtor for which invoices were raised upon the Corporate Debtor from 06.05.2022 to 04.09.2022; the same were received by the Corporate Debtor without any dispute. Copies of invoices are enclosed to the petition from page no. 25 to 133.
- ii. The terms and conditions stipulated in the invoices are as follows:
 - a. Goods once sold would not be exchanged or taken back.
 - b. Our risk and responsibility ceases after delivery
 - c. Insurance shall be covered by purchaser.
 - d. Interest @ 24% shall be charged on all unpaid amount after 7 days from supply.
- iii. Pursuant to issue of invoices, the Corporate Debtor made payment on running account basis and the amount paid by the Corporate Debtor was adjusted towards principle as well as delayed payment of interest. As per the invoice, the payment terms were 7 days from the date of invoice however, the Corporate Debtor failed to make the payment within agreed terms. The last payment made by the Corporate Debtor was on 04.10.2022.
- iv. Thereafter, Operational Creditor served a demand notice dated 17.10.2022 upon the Corporate Debtor under Section 8 of the Code which was sent to Corporate Debtor through post and the same was



delivered on 25.10.2022. The date of default mentioned in demand notice is 04.10.2022.

- v. After issuance of the demand notice, the Corporate Debtor made some payments and offered to make further payments in a span of 5 years which was not acceptable to the Operational Creditor. The last payment made by the Corporate Debtor was on 10.11.2022. Therefore, the Operational Creditor filed an Application under section 9 of the Code. The date of default mentioned in the said application is 10.11.2022.
 - vi. The Operational Creditor has relied on the below-listed documents to prove their averments: -
 - a) Summary of outstanding bills with interest.
 - b) Demand notice along with invoices.
 - c) Proof of dispatch and proof of delivery of demand notice.
 - d) Bank Statement for the period from 01.11.2022 to 12.11.2022.
5. The Corporate Debtor has filed its reply on 24.02.2023 the averments of the Corporate Debtor in the reply are stated below:
- i. The Corporate Debtor stated that the amount claimed in Form-3 is Rs.4,49,51,708/- whereas, the total amount claimed in the application is Rs.4,34,16,534/-. Further, the date of default is considered to be 10.11.2022 as the last payment was made on said date is incorrect as the Respondent made regular payments.



- ii. The demand notice was issued on 17.10.2022 and the default is committed after the issue of the demand notice i.e. on 10.11.2022 therefore, there was no default when the demand notice was issued.
- iii. The date of default stated by the Operational Creditor in the application is 10.11.2022. However, the Corporate Debtor has made payment in discharge of its liabilities through cheques on 09.11.2022, 10.11.2022, 16.11.2022, and 23.11.2022 which have been accepted by the Operational Creditor and the same is not mentioned in the application.
- iv. The Corporate Debtor is making payment to the Operational Creditor for the supply of coal and the same is accepted by the Operational Creditor without any formal communication which clearly shows that present proceedings are initiated only to pressurize the Corporate Debtor for making early payments.
- v. The Corporate Debtor stated that “non-payment” of debt is essential for triggering insolvency proceedings under the IBC 2016 and in the present case the nature of business of the Corporate Debtor is such that credit cycle is around 100-120 days. The Corporate Debtor has made payment to the Operational Creditor in discharge of accruing obligations in consistent and uniform manner and hence there is no “non-payment” of debt as required to fulfill default as under Section 3(12) of IBC.
- vi. The Corporate Debtor raised issues relating to quality



of the coal and stated that collateral damages have been suffered due to consumption of the coal however, by considering the long business relationship and cordial relations no claim has been made against the Operational Creditor.

- vii. The Corporate Debtor further stated that for the coal supplied till 04.09.2022 payments were made from 15.09.2022 till 14.02.2023. Therefore, there is no cause arising at all for issuance of section 8 notice. The Operational Creditor on one hand accepted the said amount and on the other hand also issued the alleged demand notice. The Corporate Debtor replied to said demand notice and denied the claim as there is no “default” however, the said reply is not produced along with the application by the Operational Creditor.
- viii. The Corporate Debtor stated that meeting had taken place between the Directors of Corporate Debtor and Operational Creditor on 03.10.2022 for settling the issues between the parties wherein it was orally agreed that Corporate Debtor will make payment of Rs. 5,00,000 every week (amounting to Rs.20,00,000) in discharge of obligation and interest based on continuous supply of coal. Accordingly, the payments were made and the same were accepted by the Operational Creditor which is reflected in the ledger produced by the Corporate Debtor.
- ix. The date of default stated in demand notice is 04.10.2022 while the date of default stated in the application is 10.11.2022 which is more than a month



after the issue of the demand notice. Hence; the Petition is not maintainable as the date of default in application is subsequent to the alleged purported demand notice.

6. This Adjudicating Authority vide order dated 15.05.2023 reserved the present application for order however, the same was released for clarification vide order dated 20.06.2023 on the point of date of default. The date of default stated in the application is 10.11.2022 as the last payment was received on said date and the demand notice under section 8 of IBC is dated 17.10.2022, this clearly shows that demand notice was served even before the date of default as stated by the Operational Creditor. Further, proof of service of application served on Board was also not attached.
7. In compliance of order dated 20.06.2023, the Operational Creditor filed affidavit dated 28.06.2023 wherein it is stated that as on the date of demand notice the date of default is considered to be 04.10.2022 as the last payment was received on said date. However, after issue of demand notice further payment was made by Corporate Debtor and also offer was made for making the payment in a span of 5 years which was not acceptable to Operational Creditor as the same was against the terms of invoices. The last payment received from the Corporate Debtor after issue of demand notice was on 10.11.2022. Hence, date of default stated in the application is 10.11.2022. Further, proof of serving copy of application to the Board is also attached to the said affidavit.
8. We have heard the learned counsel for the both the parties



and have perused the material available on record. It is noted that the Operational Creditor has supplied Steam Coal to the Corporate Debtor for which the invoices were raised from 06.05.2022 to 04.09.2022. It is also noted that the Operational Creditor has placed on record the invoices which became due within 7 days from the date of invoice. The Corporate Debtor failed to make payment within agreed terms. The last payment made by Corporate Debtor was on 04.10.2022. As a consequence the Operational Creditor was constrained to send demand notice dated 17.10.2022 demanding payment of unpaid operational debt of Rs.4,49,51,708/-. The date of default mentioned in demand notice is 04.10.2022. After issue of demand notice some payment was made by Corporate Debtor on 10.11.2022. The Corporate Debtor replied to the said demand notice on 16.11.2022 stating that there is no default and hence there is no claim which is unpaid. The Operational Creditor in the present Application has claimed an amount of Rs.4,34,16,534/-.

9. The amount claimed by Operational Creditor in Part-IV is above pecuniary threshold limit of Rs.1 Crore as envisaged under Section 4 of the Code, 2016. The date of default stated in demand notice is 04.10.2022, demand notice is dated 17.10.2022 and the present application is filed on 07.12.2022. Hence, application is well within limitation. After issue of demand notice some payment has been made by the Corporate Debtor on 10.11.2022, which indicates acknowledgment of debt, even after making such payment the amount claimed by Operational Creditor is still outstanding thus, debt and default are proved.



10. The claim of the Operational Creditor stands established as there is a default in payment of the amount due to the Operational Creditor. The existing default amount is of more than **rupees one crore** which meets the threshold limit as per section 4 of the Code and is well within the limitation for filing the present Application. The Application is otherwise defect-free & on record and the same deserves to be admitted.
11. The Operational Creditor did not suggest the name of any Resolution Professional (RP) for appointment as Interim Resolution Professional (IRP). Therefore, we will appoint one from the list provided to us by IBBI.
12. In view of the facts as discussed hereinabove, it is held that, the Corporate Debtor has defaulted in the payment of its debts. Accordingly, we admit this Application and order as under:-
 - (i) The Application bearing **CP(IB)/331/(AHM)/2022** filed by **Shree Hari Coal Corporation** (Operational Creditor) under Section 9 of the Insolvency and Bankruptcy Code, 2016 (Code) read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating CIRP against **Akshar Fabrics Private Limited** (Corporate Debtor) is admitted and the moratorium is declared for prohibiting all of the following in terms of Section 14(1) of the Code.
 - (a) *the institution of suits or continuation of pending suits or proceedings against the Respondent/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 Respondent/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 Respondent/Corporate Debtor in respect of its property including any action under the Securitisation 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/Corporate Debtor.*
- (ii) 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 Adjudicating Authority approves the Resolution Plan under sub-section (1) of Section 31 or passes an order for liquidation of Respondent/Corporate Debtor Company under Section 33 of the IBC, 2016, as the case may be.
- (iii) We hereby appoint **Mr. Nimai Gautam Shah** having Registration No. IBBI/IPA-001/IP-P00154/2017-2018/10323 E-mail Id: cnjabd@gmail.com to act as an IRP under section 13(1) (c) of the Code. He shall conduct the Corporate Insolvency Resolution Process as per the provisions of Insolvency and Bankruptcy Code, 2016 r.w. Regulation made thereunder.
- (iv) The IRP shall perform all his functions as contemplated, *inter-alia*, by sections 17, 18, 20 & 21 of the Code. It is further made clear that all personnel



connected with Respondent/Corporate Debtor, its Promoter or any other person associated with management of the Respondent/Corporate Debtor are under legal obligation under Section 19 of the Code to extend every assistance and co-operation to the Interim Resolution Professional. Where any personnel of the Respondent/Corporate Debtor, its Promoter or any other person, is required to assist or co-operate with IRP, do not assist or Co-operate, the IRP is at liberty to make appropriate application to this Adjudicating Authority with a prayer for passing an appropriate order.

- (v) This Adjudicating Authority directs the IRP to make public announcement of initiation of Corporate Insolvency Resolution Process (CIRP) and call for submission of claims under Section 15 as required by Section 13(1) (b) of the Code.
- (vi) The IRP is expected to take full charge of the Respondent/CD's assets, and documents without any delay whatsoever. He is also free to take police assistance in this regard, and this Court hereby directs the Police Authorities to render all assistance as may be required by the IRP in this regard.
- (vii) The IRP or the RP, as the case may be shall submit to this Adjudicating Authority periodical report with regard to the progress of the CIRP in respect of the Respondent/Corporate Debtor.
- (viii) It is further directed that the supply of goods/services to the Respondent/Corporate Debtor Company if



continuing, shall not be terminated or suspended, or interrupted during the moratorium period.

- (ix) The IRP shall be under a duty to protect and preserve the value of the property of the 'Corporate Debtor Company' and manage the operations of the Respondent/Corporate Debtor Company as a going concern as a part of the obligation imposed by Section 20 of the Insolvency & Bankruptcy Code, 2016.
- (x) The Applicant/Operational Creditor is directed to pay an advance of **Rs 2,00,000/- (Rupees Two Lakh Only)** to the IRP within one week from the date of receipt of this order for the purpose of smooth conduct of the Corporate Insolvency Resolution Process (CIRP) and IRP to file proof of receipt of such amount to this Adjudicating Authority along with First Progress Report within 30 days.
- (xi) The Registry is directed to communicate a copy of this order to the Applicant/Operational Creditor, the Respondent/Corporate Debtor, and to the Interim Resolution Professional and the concerned Registrar of Companies, after completion of necessary formalities, within seven working days and upload the same on the website immediately after pronouncement of the order. The Registrar of Companies shall update its website by updating the Master Data of the Respondent/Corporate Guarantor in MCA portal specific mention regarding admission of this Application and shall forward the compliance report to the Registrar, NCLT.
- (xii) **The IRP shall also serve a copy of this order to the**



various departments such as Income Tax, GST, State Trade Tax, and Provident Fund etc. who are likely to have their claim against Corporate Debtor as well as to the trade unions/employee's associations so that they are informed of the initiating of CIRP against the Corporate Debtor timely.

(xiii) The Registry is further directed to send a copy of this order to the Insolvency and Bankruptcy Board of India for their record.

13. Accordingly, **CP(IB) 331 of 2022** is allowed and stands admitted. A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

**-SD-
KAUSHALENDRA KUMAR SINGH
MEMBER (TECHNICAL)**

**-SD-
SHAMMI KHAN
MEMBER (JUDICIAL)**

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