

**IN THE NATIONAL COMPANY LAW TRIBUNAL, MUMBAI BENCH
COURT III**

C.P. No. 463/IBC/MB/2022

Under Section 9 of the Insolvency and
Bankruptcy Code, 2016 read with
Rule 6 of the Insolvency and
Bankruptcy (Application to
Adjudication Authority) Rule 2016)

In the matter of

Trau Bros. N. V.

Having its registered office at:
Hoveniersstraat
53, Box 121, Antwerp 2018,
Belgium

...Operational Creditor

Verses

DRD Gems LLP

137, 4th Floor, Samrat Ashok CHS-3,
7 RR Thakkar Marg,
Malabar Hill, Mumbai - 400006

.....Corporate Debtor

Reserved for order on: 09.11.2022

Order Pronounced on: 06.12.2022

Coram:

Hon'ble Shri H.V. Subba Rao, Member (Judicial)

Hon'ble Smt. Anuradha Sanjay Bhatia, Member (Technical)

For the Petitioner: Mr. Nirman Sharma, Alabh Lal i/b Bharucha &
Partners

For the Respondent: None Appeared

Per: *Shri H.V. Subba Rao, Member (Judicial)*

1. This Company petition is filed by *Trau Bros. N. V.* (hereinafter called “Operational Creditor”) seeking to initiate Corporate Insolvency Resolution Process (CIRP) against *DRD Gems LLP* (hereinafter called “Corporate Debtor”) by invoking the provisions of Section 9 of Insolvency and Bankruptcy Code, 2016 (hereinafter called “Code”) read with Rule 6 of Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for resolution of a sum of USD 126,000.80 (United States Dollar One Hundred Twenty-Six Thousand and Eight Cents only) being an Operational Debt due and payable by the Corporate Debtor.

2. The brief facts of the case are as follows:
 - i. The Operational Creditor states that on 14.02.2017 the Corporate Debtor approached the Operational Creditor for purchase of Rough Natural Diamonds for a total amount of USD 126,000.80 (United States Dollar One Hundred Twenty-Six Thousand and Eight Cents only) and raised an invoice dated 14.02.2017 bearing no. 201714 for which the due date paid by the Corporate Debtor on 15.05.2017.
 - ii. The Corporate Debtor defaulted in making the payment towards the invoice. Therefore, the Operational Creditor on 30.11.2017 issued a letter to the Corporate Debtor demanding the payment for the amount of USD 126,000.80 along with 18% interest p.a. from the date of default i.e., 16.05.2017 towards the operational debt on account of goods supplied.
 - iii. The Operational Creditor has time and again issued various reminders to the Corporate Debtor for the payment of the operational debt but to no avail. In

response to the same the Corporate Debtor has not at any point disputed its default.

- iv. The Operational Creditor further states that Mr. Karan Sanjay Shah, partner of the Corporate Debtor at various occasions through electronic communications dated 27.09.2018, 08.03.2020 and 04.03.2021 have acknowledged the said Operational Debt due towards the Operational Creditor by the Corporate Debtor.
 - v. On 22.10.2021, the Operational Creditor issued a Demand Notice to the Corporate Debtor demanding an amount of USD 126,000.80 (United States Dollar One Hundred Twenty-Six Thousand and Eight Cents only) along with the interest of 18% p.a. charged from 16.05.2017 until October 2021 i.e., USD 226,170 (United States Dollar Two Hundred Twenty Six Thousand One Hundred and Seventy only) [INR 1,69,40,488.30/- (One Hundred Sixty Nine Crores Forty Lakhs Four Hundred Eighty Eight rupees and Thirty paisa) as of 22.10.2021] in respect of the admitted, undisputed and unpaid operational debt. The Corporate Debtor has failed to reply to the demand notice issued by the Operational Creditor dated 22.10.2021.
 - vi. Therefore, the Operational Creditor has filed the present application under Section 9 of the I.B. Code, 2016 to recover the total debt amount of USD 226,170 (United States Dollar Two Hundred Twenty Six Thousand One Hundred and Seventy only) [INR 1,69,40,488.30/- (One Hundred Sixty Nine Crores Forty Lakhs Four Hundred Eighty Eight rupees and Thirty paisa)].
3. Since the Corporate Debtor failed to appear despite notice he was set ex-parte vide order dated 20.06.2022 and the matter was listed for ex-parte arguments.

4. After briefly hearing the submissions of Operational Creditor this bench made a query as to how the above Company Petition is within limitation since the invoices pertain to 2017 for which the Learned Counsel appearing for the Operational Creditor submitted that there are series of continuous messages sent by the Corporate Debtor through WhatsApp texts admitting the default and liability which are annexed to the Company Petition as Annexure – H at page no. 48, 49, 50, 53 and 55 and as per the last WhatsApp message, the last date for filing the above petition falls during the period of COVID-19 and thereafter gets extended in view of the Suo Moto order passed by the Hon'ble Supreme Court extending the period of Limitation for filing cases and proceeding before all the courts and tribunals throughout the country due to COVID-19 and the above company petition being filed on 28.09.2022 is within Limitation. In order to establish that whether emails and WhatsApp text can be relied as evidence, he relied up on the judgement of the Hon'ble Supreme Court in **Ambalal Sarabhai enterprise Ltd. V. KS Infraspace LLP Limited and Anr., (2020) 5 SCC 410,** the issue before the Hon'ble Supreme Court was *inter alia* whether that emails and WhatsApp texts can be referred to as evidence to prove the existence of a concluded contract. The Hon'ble Supreme Court held that emails and WhatsApp texts which are virtual communications are in fact evidence and their contents can be relied on to ascertain the truth. The relevant paragraphs of the judgement are as follows:

Para. 17. The negotiations between the plaintiff and the defendant is reflected in approximately 17 e-mails exchanged between them commencing from December 2017 to 31.03.2018. The file size of the attachment to the mails has varied from 48-50-52-48-57-56 KBs indicating suggestions and corrections from time to time. The WhatsApp messages which are virtual

*verbal communications are matters of evidence with regard to their meaning and its contents to be proved during trial by evidence-in-chief and cross examination. The e-mails and WhatsApp messages will have to be read and understood cumulatively to decipher whether there was a concluded contract or not. The use of the words 'final draft' in the e-mail dated 30.03.2018 cannot be determinative by itself. The e-mail dated 26.02.2018 sent by the defendant at 11:46 AM had also used the same phraseology. The plaintiff was well aware from the very inception that the defendant was negotiating for sale of the lands simultaneously with two others. The plaintiff was further aware on 30.03.2018 itself that the deal with it had virtually fallen through as informed to the escrow agent. The fact that a draft MoU christened as 'final-for discussion' was sent the same day cannot lead to the inference in isolation, of a concluded contract. There is no evidence at this stage that the acceptance was communicated to the defendant before the latter entered into a deal with defendant no.2 on 30.03.2018 and executed a registered agreement for sale on 31.03.2018. Defendant no.2 paid Rs.17.69 crores and Rs.2.20 crores towards the income tax dues of the defendant the same day, as part of the consideration amount. It is only thereafter the plaintiff purports to have communicated its acceptance to the defendant on 31.03.2018 at 01.13 PM. The prolonged negotiations between the parties reflect that matters were still at the 'embryo stage' as observed in **Agriculture Produce Market Committee, Gondal and ors. vs. Girdharbhai Ramjibhai Chhaniyara and ors., (1997) 5 SCC 468**. The plaintiff at this stage has failed to establish that there was a mutuality between the parties much less that they were adidem.*

Para. 21. We are therefore of the considered opinion that in the facts and circumstances of the present case, and the

nature of the materials placed before us at this stage, whether there existed a concluded contract between the parties or not, is itself a matter for trial to be decided on basis of the evidence that may be led. If the plaintiff contended a concluded contract and/or an oral contract by inference, leaving an executed document as a mere formality, the onus lay on the plaintiff to demonstrate that the parties were adidem having discharged their obligations as observed in Brij Mohan (supra). The plaintiff failed to do show the same on admitted facts. The draft MoU dated 30.03.2018 in Clause C contemplated payment of the income tax dues of Rs.18.64 crores as part of the consideration amount only whereafter the agreement was to be signed relating back to the date 29.03.2008. Had this amount been already paid or remitted by the plaintiff, entirely different considerations would have arisen with regard to the requirement for execution of a written agreement remaining a mere formality. Needless to state the balance of convenience is in favour of the defendants on account of the intervening developments, without furthermore, interalia by reason of the plaintiff having waited for seven months to institute the suit. The question of irreparable harm to a party complaining of a breach of contract does not arise if other remedies are available to the party complaining of the breach. The High Court has itself observed that from the negotiations between the parties that “some rough weather was being reflected between the plaintiff and the defendant”. The Special Civil Judge failed to address the issue of delay. The High Court noticed the arguments of the defendants with regard to delay in the institution of the suit but failed to deal with it.

5. Further, the Counsel appearing for the Operational Creditor also relied on another judgment of the Hon’ble NCLAT in the matter of **Rajendra Bhai Panchal vs. Jay Manak Steels**

Through its Sole Proprietor & Anr., (2020 SCC Online NCLAT 730) [Arising out of Order dated 03.06.2020 passed by the National Company Law Tribunal, Ahmedabad Bench, Ahmedabad in C.P. (IB) 227/NCLT/AHM/2018]. in this matter the NCLT, Ahmedabad Bench admitted a petition under Section 9 of the Code against a corporate debtor. While admitting this petition, the NCLT *inter alia* relied on WhatsApp texts that were exchanged between the operational creditor and the corporate debtor in the matter, which reliance was upheld by the Hon'ble NCLAT in the appeal (Company Appeal No. 592 of 2020 decided on 20 October 2020 against order dated 03.06.2020). The relevant paragraphs of the matter are as follows:

Para. 9. That the messages on 'WHATSAPP' (Electronic Record) were taken to be conclusive in nature and the reply the 'Corporate Debtor' to the effect that it shall reply later, was taken against it, by the 'Adjudicating Authority' as an admission of 'default' which is against the Judgement of the Hon'ble Supreme Court in 'Ambalal Sarabhai Enterprise' V. 'KS Infraspace LLP Ltd. and Ors.' (reported in 2020 SCC online SC 1). In fact, in the said judgement it was made clear that the clarity on 'WhatsApp Chats' and the evidentiary value can only be ascertained in the course of their trial by the Court in the process of examination and cross-examination and not otherwise. Besides this, the procedure before the 'Adjudicating Authority' is summary in character and it does not conduct 'Trial'. Also, that these 'WhatsApp Chats' were without placing on record the certificate under Section 65B of the Indian Evidence Act, 1872 (mandatory for placing electronic evidence on record).

Para. 29. There is no pre-existing dispute in the instant case and it is very vital to note that no reply was issued to the demand notice of the First Respondent / 'Operational Creditor'

and in reality, the 'pre-existing dispute' ought to have been in existence when the demand notice of the 'Operational Creditor' as per Section 8(1) of the 'I&B' Code was issued by the 'Operational Creditor'. In terms of the ingredients of Section 8(2) of the 'I&B' Code, the 'Corporate Debtor' is to bring to the notice of the 'Operational Creditor' about the existence of a dispute and / or the record of the pendency of a suit or arbitration proceeding filed before the receipt of such notice or invoice in relation to such dispute within a period of ten days from the date of receipt of such demand notice or copy of invoice(vide Section 8(2)(a) of the Code).

Para. 47. It cannot be lost sight off that an unpaid 'Demand Notice' is evidence of Debtor's inability to pay its debts for the purpose of bankruptcy proceedings and it is a just ground for a creditor to justify the filing of the petition. An 'Adjudicating Authority' is not to decide how much due is. Further, an 'Adjudicating Authority' is required to examine before admitting or rejecting an application u/s 9 of the Code as to whether the 'dispute' raised by the 'Corporate Debtor' qualify as a 'dispute' as defined under sub-section (6) of Section 5 and whether notice of 'dispute' given by the 'Corporate Debtor' satisfies the conditions prescribed in sub-section (2) of Section 8 of the Code. Further, the existence of an 'undisputed sum' is a condition precedent for initiating 'Corporate Insolvency Resolution Process'.

Para. 48. In the present case, no reply was issued to the 'Demand Notice' dated 06.04.2018 of the First Respondent / 'Operational Creditor' by the 'Corporate Debtor' and this is clearly an adverse circumstance against the Appellant, in the considered opinion of this Tribunal.

Para. 54. In so far as the WhatsApp communication / remark / comment reportedly made by the Appellant through the 'Corporate Debtor' that 'I will call you later', this was only

looked into by the 'Adjudicating Authority' as one of the unfavorable circumstances against the 'Corporate Debtor' besides taking into other facts of the case into account and arrived at a conclusion that the 'Corporate Debtor' having an outstanding debt liability towards payment of materials that were supplied to it and made use of by it for a sum of Rs. 9,42,841/- and in short, there was no objection raised by the Appellant in regard to the quality of goods in the purported WhatsApp comment / remark.

6. The learned counsel appearing for the Operational Creditor also relied on the judgment of Hon'ble Supreme Court in the case of **SUO MOTU WRIT PETITION (C) NO. 3 OF 2020** wherein the Hon'ble Supreme Court took Suo Motu cognizance of the difficulties that might be faced by the litigants in filing petitions/ applications/ suits/ appeals/ all other quasi proceedings within the period of limitation prescribed under the general law of limitation or under any special laws (both Central and/or State) due to the outbreak of the COVID-19 pandemic.
7. The counsel appearing for the Operational Creditor invited the attention of this Bench to the relevant invoice dated 14.02.2017 (annexed to the Company Petition as Annexure – D at Page no. 27) basing on which the above Company Petition is filed along with the demand notice dated 22.10.2021, issued by the Operational Creditor to the Corporate Debtor demanding the payment of the Operational Debt for which no reply has been received from the Corporate Debtor.
8. After hearing the submissions and upon perusing the material available on record it is of the opinion that the Company Petition is within limitation.

9. In view of the above, this Bench feels that the Petitioner has successfully demonstrated the existence of “debt” and “default” committed by the Corporate Debtor in this case and the debt is also within limitation. Since the Corporate Debtor did not file any reply, the claim of Operational Creditor remained unchallenged. Thus, Company Petition satisfies all necessary legal requirements for admission. Accordingly, the above Company Petition is admitted by passing the following:

ORDER

- a. The above Company Petition No. 463/IBC/MB/2022 is hereby allowed and initiation of Corporate Insolvency Resolution Process (CIRP) is ordered against DRD Gems LLP.
- b. Since the Operational Creditor has not suggested the name of IRP to perform the duties of the Interim Resolution Professional (IRP) in the petition, this Bench is appointing the IRP from the list furnished by the Insolvency and Bankruptcy Board of India (IBBI). This Bench hereby appoints **Mr. Hirachand Nemichand Bafna**, Insolvency Professional, Registration No: IBBI/IPA-001/IP-P01207/2018-19/11922, having email: hnb1502@rediffmail.com and having phone no. (+91) 9820428608 as the interim resolution professional to carry out the functions as mentioned under the Insolvency & Bankruptcy Code, 2016.
- c. The Operational Creditor shall deposit an amount of Rs. 5 Lakhs towards the initial CIRP costs by way of a Demand Draft drawn in favour of the Interim Resolution Professional appointed herein, immediately upon communication of this Order. The IRP shall spend the above amount only towards expenses and not towards his fee till his fee is decided by COC.
- d. That this Bench hereby prohibits 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; transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein; 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; the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the Corporate Debtor.

- e. That the supply of essential goods or services to the Corporate Debtor, if continuing, shall not be terminated or suspended or interrupted during moratorium period.
- f. That the provisions of sub-section (1) of Section 14 shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.
- g. That the order of moratorium shall have effect from the date of pronouncement 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 or passes an order for liquidation of corporate debtor under section 33, as the case may be.
- h. That the public announcement of the corporate insolvency resolution process shall be made immediately as specified under section 13 of the Code.
- i. During the CIRP period, the management of the corporate debtor will vest in the IRP/RP. The suspended directors and employees of the corporate debtor shall provide all documents in their possession and furnish every information in their knowledge to the IRP/RP.

- j. Registry shall send a copy of this order to the Registrar of Companies, Mumbai, for updating the Master Data of the Corporate Debtor.

Accordingly, this Petition is admitted.

The Registry is hereby directed to communicate this order to both the parties and to IRP immediately.

Sd/-
ANURADHA SANJAY BHATIA
MEMBER (TECHNICAL)

Sd/-
H.V. SUBBA RAO
MEMBER (JUDICIAL)