IN THE NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD

COURT - II

CP (IB) 224/NCLT/AHM/2021

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

In the Matter of:

Deepak Sharma, HUF **Applicant/ Operational Creditor**

Versus

Gurukrupa Apperals Private Limited **Respondent/ Corporate Debtor**

Order Pronounced on: 12/12/2022

Coram:

DR. DEEPTI MUKESH
HON'BLE MEMBER(JUDICIAL)
AJAI DAS MEHROTRA
HON'BLE MEMBER (TECHNICAL)

MEMO OF PARTIES

Deepak Sharma, HUF
H-18, Ground Floor, Safal III
Opp. New Cloth Market
Sarangpur,
AHMEDABAD 380 002 **…** **Applicant/Operational Creditor**

Versus

Gurukrupa Apperals Private Limited
Plot No. B/36-2 Zaveri Es.
Near Gajanand Industrial Estate
Kathwada, Daskroi
Ahmedabad 382 430
Gujarat State **…** **Respondent/Corporate Debtor**

Appearance:

For Applicant : Mr. Dev Patel, Advocate
For the Respondent : Mr. Rutvij Patel, Advocate

ORDER

1. This application is filed under Section 9 of Insolvency and Bankruptcy Code, 2016 (for brevity 'IBC, 2016')**,** read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (for brevity 'the Rules'), by **Mr. Deepak Sharma,** as a **Karta of HUF** (for brevity 'Applicant'), with a prayer to initiate the Corporate Insolvency Resolution Process against M/s. **Gurukrupa Apperals Private Limited** (for brevity 'Corporate Debtor').

2. The Applicant is a Karta of Deepak Sharma HUF having office at H-18, Ground Floor, Safal III, Opp. New Cloth Market, Sarangpur, Ahmedabad 380 002. The applicant is a denim supplier & cloth merchant.

3. The corporate debtor is a private limited company, incorporated under the provisions of Companies Act, 2013 on 14.06.2017 duly registered with Registrar of Companies, Ahmedabad, Gujarat State with CIN: U18209GJ2017PTC097870, having registered office at Plot No.

B/16-2, Zaveri Es. Nr. Gajanand Industrial Estate, Kathwada, Ahmedabad 382 430, Gujarat State. The nominal share capital of the corporate debtor is Rs. 1,90,00,000/- and paid up share capital is Rs. 1,90,00,000/-. The corporate debtor is engaged in purchasing fabric raw material and selling garments after carrying out due procedure on the raw material purchased.

4. It is submitted by the applicant that during the financial year 2018-2019, goods worth Rs. 6,57,51,401.32 were supplied to the corporate debtor out of which during the period April, 2018 to March, 2019, an amount of Rs. 3,51,03,966.32 remained due and receivable from the corporate debtor as on 31.03.2019. During the financial year 2019-2020, further goods worth Rs. 7,69,211/- were supplied to the corporate debtor. During financial year 2019-20 the corporate debtor had paid an amount Rs. 1,41,54,554/- to the applicant. Thus, as on 31.03.2020, an amount of Rs. 2,17,18,632.32 was due and receivable from the corporate debtor. During the financial year 2020-2021, the operational creditor had received a sum of Rs. 20,50,000/- from the corporate debtor. Thus, a sum of Rs. 1,96,68,623/- remained unpaid from the corporate debtor. As per the billing terms, interest of 18% per annum is payable beyond the due date. Accordingly, a sum of Rs.

99,73,644.61 accrued towards interest upto 15th August, 2021. Thus, total amount due, inclusive of interest at 18% is Rs. 2,96,42,267.61 upto 2021.

5. On not receiving any payments, the applicant issued demand notice dated 18.08.2021 under Section 8 of the Insolvency & Bankruptcy Code read with Rule 5 of the Insolvency and Bankruptcy Regulations, 2016 calling upon the corporate debtor to pay an aggregate amount of Rs. 2,96,42,267.61 from the date of demand notice. Demand notice of the applicant was replied by the corporate debtor vide letter dated 13.09.2021 inter alia raising dispute that the sole arbitrator has granted interim relief in Arbitration Case No. 116/2020 filed by the corporate debtor.

6. Thereafter, the applicant filed the instant application on 29.10.2021 under Section 9 of the Insolvency and Bankruptcy Code, 2016.

7. The corporate debtor filed affidavit in reply stating that:

- In 2017, the corporate debtor had commenced business relations with the applicant. It was mutually agreed upon by both the parties to supply the raw material required by the corporate debtor at applicant's purchase price + 4% margin.

- After some time, corporate debtor having suspected that the terms of the above agreement of adding only 4% profit margin, were not being followed by the applicant, brought said fact to the notice of the applicant through WhatsApp and telephone.
- With effluxion of time, issue with regard to quality of the goods was also raised by the respondents and also overcharging by the applicant much above the terms agreed upon.
- In F.Y. 2018-19, the applicant asked the corporate debtor to supply multiple cheques without dates for the purpose of security in exchange of signed letter head dated 13.02.2019, narrating all the terms of the arrangement.
- As the applicant continued to add margin of more than 4%, the corporate debtor was forced to discontinue the business with the applicant from April, 2019 onwards, however, continued making payment to the applicant.
- In violation of the agreement, the applicant started depositing the cheques without consulting the corporate debtor.

- Arbitration proceedings were initiated by corporate debtor vide arbitration case No. 116/2020 dated 20.10.2020 wherein the Arbitrator granted the following interim relief in favour of the corporate debtor.

  "Interim Award:

  Today the applicant's application allowed and Tribunal give the interim stay order to respondents not to deposit any cheques in his bank account or any other account in India (Cheque No. 001349 to 001359 or any other cheques given by applicant of ICICI bank, Bapunagar Branch, Ahmedabad, India) this interim order of arbitration is given for the time till the final award of the Arbitration".

- The applicant approached the Hon'ble High Court of Gujarat vide Special Civil Application No. 1670 of 2021 wherein the following interim relief was granted vide order dated 01.02.202.

  "ORAL ORDER

  Notice returnable on 24.02.2021. Ad-interim relief granted in terms of paragraph 10 (c), till the next date of hearing."

  After that no substantive order was passed by the Hon'ble High Court of Gujarat.

- There exists a dispute with respect to the amount of all the bills raised by the applicant as the applicant had not complied with the terms of the agreement.

- In absence of production of original purchase bills, account statements, calculations, ledgers and invoices produced by the applicant, the same is denied in toto by the corporate debtor.

8. The applicant filed rejoinder inter alia stating that:

- The applicant denied to have agreed to supply the goods to the corporate debtor at a price adding 4% margin on its purchase price. The applicant had issued invoices to the corporate debtor from time to time specifying that no claims can be made after seven days. All such invoices bear acknowledgement of the corporate debtor. The corporate debtor has not produced a single proof to show the evidence that the applicant had agreed to supply the goods at a price adding 4% margin on its purchase price, except as mentioned in letter dated 13.02.2019 annexed to the reply, which is a forged letter. The applicant had lodged First Information Report (FIR) in this respect, copy of which is annexed to the application. The letter attached to the reply dated 13.02.2019 does not satisfy the basic essentials of agreement as per Indian Contract Act, 1872.
- No evidence is produced by the corporate debtor in support of its dispute raised on for quality of the goods and price of the goods charged.

- By providing the blank cheques the corporate debtor has admitted the liability. The cheques issued by the corporate debtor were returned as the corporate debtor had closed the account.
- The agreement of arbitration cannot be unilateral or by will. It has to be by mutual agreement as observed in *Vijay Kumar Sharma v. Raghunandan Sharma (2010) 2 SCC 486.*
- In *Afcons Infrastructure Ltd. v. Cherian Varkey Construction (2010) 8 SCC 24,* it has been held that court cannot refer matter to arbitration without consent of the parties.
- In *Anil Agarwal v. State Bank of India (1999) 96 Comp Cas 686 (All HC),* it was held that arbitration agreement must provide right to both the parties to submit dispute to arbitration. Mere providing right to one party to submit to arbitration is not an arbitration agreement.
- The letter on which the corporate debtor is relying is dated 13.02.2019. After the said date, the applicant has sold goods to the corporate debtor of less than Rs. 10 lacs only and, therefore, the document on which the corporate debtor is relying is irrelevant in the present case.
- The statement made by the corporate debtor that it had requested the applicant to settle the accounts itself implies that the corporate debtor has admitted the debt.

- The cheques were issued by the corporate debtor with full assumption of liability and to gain the confidence of the applicant. Despite knowing its liability, the corporate debtor closed the account.
- As per the terms of invoice, if the corporate debtor has to raise any debit/credit note, such claim has to be made within a period of seven days from the date of invoice. Till date not a single debit/credit note is received.

9. As per directions of the Bench, the applicant filed additional affidavit inter alia stating that:

   (a) The alleged letter dated 13.02.2019 annexed to the reply filed by the corporate debtor is a forged one, therefore, the applicant had filed Criminal Complaint against director of the corporate debtor whereby FIR bearing No. 1119102521032 on 28.03.2021 before Kagdapith Police Station. Copy of FIR is annexed with the affidavit. Proceedings pursuant to aforesaid FIR was initiated against the corporate debtor and its director and the same is pending for adjudication before concerned court. Copy of status of criminal proceedings is annexed. On the basis of said document, corporate debtor had initiated arbitration in total contravention of the provisions of law and, therefore, said arbitration initiated based on the said letter dated 13.02.2019 has been challenged by the applicant before Hon'ble High Court of Gujarat vide Special Civil Application No. 1670 of 2021 wherein vide order dated 01.02.2021, Hon'ble High Court has granted interim relief vide order dated 01.02.2021. Copies of memorandum of SCA 1670 of 2021, status of said petition and order dated 01.02.2021 are filed.

(b) The arbitrator is facing several criminal proceedings. Copies of criminal proceedings pending against the arbitrator is annexed.

10. Applicant filed written submissions inter alia stating that:

(a) Total debt due from the corporate debtor as on 15.08.2021 is Rs. 2,96,42,267.61 including interest @ 18% per annum.

(b) Ledger account of corporate debtor maintained by the applicant shows that last payment was made on 09.10.2020 and, thereafter, principal amount of Rs. 1,96,68,623.32 remained payable by corporate debtor.

(c) Corporate debtor has produced its own ledger account which shows outstanding liability of Rs. 1,89,09,945/-.

(d) Invoices have not been disputed by the corporate debtor.

(e) As per the terms of invoices, debt became due immediately and on failure, interest @ 18% per annum is payable and accordingly details of default and calculation of interest is provided and annexed with the petition.

(f) Cheques worth more than Rs. 1,00,00,000/- were issued by the corporate debtor, copy of which are annexed to the application.

(g) Notice in Form 3 and Form 4 dated 18.08.2021 came to be issued and the same have been duly served through RPAD as well as by email.

(h) Mere existence of a letter dated 13.02.2019 would not amount to a pre-existing dispute when the same has never been put into effect by corporate debtor itself and, therefore, said letter is irrelevant and reliance placed on the same is not sustainable.

(i) Arbitration process has been initiated by corporate debtor unilaterally without giving any notice or approaching Hon'ble High Court under Section 11 of the Arbitration and Conciliation Act, 1996. Therefore, said arbitration proceedings are without jurisdiction and nullity. Judgement of Hon'ble High Court in

LPA No. 1011 of 2021 is against the very arbitrator to whom the corporate debtor has approached for unilateral initiation of arbitration. Arbitration proceedings are stayed by the Hon'ble High Court vide order dated 01.02.2021 copy of which is annexed.

(j) Arbitrator himself is facing several criminal proceedings for indulging into such unilateral arbitration and initiating and impersonating as arbitrator.

(k) In the present case no authorised or legally maintainable proceedings are pending for adjudication and therefore it cannot be said that there is a pre-existing dispute merely because a letter dated 13.02.2019 is produced by the corporate debtor, more particularly when the said letter is issued after original invoices being accepted.

(l) The letter dated 13.02.2019 and initiation of arbitration thereto have been found to be prima facie without authority and, therefore, same has been stayed by the Hon'ble High Court. Therefore, there is no legal proceedings pending for adjudication and consequently it cannot be said that there is a pre-existing dispute considering letter dated 13.02.2019.

11. The corporate debtor filed written submissions stating that:

- Applicant kept asking for cheques as security. In exchange of written terms & conditions acknowledged on the duly signed and stamped letter head of applicant dated 13.02.2019, the corporate debtor provided 13 cheques without bearing any date.
- Despite frequent requests by corporate debtor to verify the purchase price by showing original bills, the applicant did not cooperate and hence, business was stopped.
- In April, 2019, goods worth approx. 1,37,44,000/- were returned.
- Corporate debtor kept making frequent requests to show original bills in order to settle the accounts.
- Operational creditor attempted to encash the cheques and hence cheques were not honoured and arbitration proceedings were commenced by corporate debtor.
- Corporate debtor made a claim of Rs. 98,47,005/- to be returned to it by applicant.
- Operational creditor initiated frivolous proceedings and filed FIR and complaint.

- Both the FIR and complaint were found to be untrue and allegation of fraud has been disposed of by the Police. Final Report under Section 173, Criminal Procedure Code dated 28.03.2021 issued by Police Sub-Inspector of Kagadpith Police Station, Ahmedabad City is annexed to the additional affidavit filed by the corporate debtor.
- Even in application, calculation of interest is not in consonance.

12. As per order of the Bench, the corporate debtor filed additional affidavit enclosing therewith the following documents:

    (a) Copy of arbitration application initiated by the corporate debtor.

    (b) Copy of the "B" Summary report along with translation of the relevant portion of the report.

13. As per part IV, Form 5 total amount of debt is Rs. 2,96,42,267.61 (Rupees two crore ninety-six lacs forty-two thousand two hundred sixty-seven and paise sixty-one only). The invoices raised on different dates fell due on different dates from 07.08.2018 to 01.07.2019 as mentioned in Part IV, Form 5. The application filed on 29.10.2021 is within limitation and not barred by law.

14. Registered office of the corporate debtor is situated in Ahmedabad, Gujarat State and, therefore, this Tribunal has jurisdiction to entertain and try this application.

15. Heard submissions and perused the documents on record. The arguments of both sides are dealt with as under:

16.1 Except a copy of letter dated 13.02.2019, the corporate debtor has not brought on record any document in support to prove that it was mutually agreed upon by both the parties that the applicant will supply goods to the corporate debtor at a price adding 4% to its purchase price. From the statement of the corporate debtor, the applicant had commenced business with the corporate debtor in the year 2017. The letter deciding the terms is of 13.02.2019. First bill against which the claim raised is dated 07.08.2018 and the last bill is dated 01.07.2019. After the said date 13.02.2019, the applicant had raised only four bills from 19.03.2019 to 01.07.2019 towards the goods supplied to the corporate debtor worth less than Rs. 10.00 lacs only. Therefore, terms of said letter dated 13.02.2019 cannot be relied for transactions prior to that date and invoices raised prior will not be covered/ applicable for the transactions which had taken place much before the said date.

16.2 It is observed that the terms of invoice specify that "No claim after 7 days". Thus, if the corporate debtor had any issues of charging higher amount/quality, quantity, the same could have brought to the notice of the applicant within seven days as specified in the invoice. The column provided in all the invoices stating that "We declare that this invoice shows the actual price of the goods described and that all particulars are true and correct", are duly signed by the corporate debtor in case of the transactions made between the parties.

16.3 No document is brought on record by the corporate debtor in support of any complaint with regard to quality/quantity and price of the goods supplied by the applicant.

16.4 As per the outstanding statement annexed to the application, invoices from 07.08.2018 are unpaid and the said statement has not been disputed by the corporate debtor and as admitted by the corporate debtor, even after issuing letter/agreement dated 13.02.2019, it continued to make payments till 09.10.2020 without raising any complaint with regard to the quality/ quantity/rate charged.

16.5 The cheques handed over by corporate debtor to applicant again establishes the debt. Similarly, defence raised by the corporate debtor about the arbitration proceeding is not convincing in light of the fact that the arbitration was initiated by the corporate debtor unilaterally without giving notice or approaching Hon’ble High Court of Gujarat mandated under Section 11 of the Arbitration and Conciliation Act, 1996 which is challenged and stay is granted. The appointment of arbitrator is challenged and he is framing criminal proceedings for indulging into various acts including impersonification.

16.6 The FIR filed with respect to forging of letter dated 13.02.2019 has been closed on 09.08.2021. Relevant portion of the report submitted by the Second Police Inspector, Kagadapith Police Station, Ahmedabad City reads as under:

> “Thus, during the investigation of this work it has been found that a civil matter is currently pending in the Hon’ble Court regarding the said application case and the said matter is about taking of money so that the police cannot take any action regarding taking of money and the applicant should take action through the court. Hence, no action is required to be taken regarding the application and thus, the application is requested to be closed.”

16.7 As regards the issue with regard to the pre-existing dispute relating to the amount of the bills/rates charged by the applicant, the corporate debtor has not brought on record any document to substantiate its claim.

16.8 The contention raised by the corporate debtor relying on the letter dated 13.02.2019, claimed to have been entered between the parties, cannot be considered as a genuine document as the same has neither been sealed nor signed by both the parties nor it has been notarised.

17. We are supported by the observations made in the judgement of Hon'ble Supreme Court in ***Mobilox Innovative Private Limited vs. Kirusa Software Private Limited [2017] 1 IBJ (JP) 2 SC*** that while examining an application under Section 9 of the Act, will have to determine the following: -

(i) Whether there is an "operational debt" as defined exceeding Rs. 1.00 lac (See Section 4 of the Act)

(ii) Whether the documentary evidence furnished with the application shows that the aforesaid debt is due and payable and has not yet been paid?

and

(iii) Whether there is existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before the receipt of the demand notice of the unpaid operational debt in relation to such dispute?

If any of the aforesaid conditions is lacking, the application would have to be rejected.

18. The documents produced by the operational creditor establishes the 'debt' and there is default on the part of the Corporate Debtor in payment of the 'operational debt'. Moreover, the dispute raised with respect to pendency of Arbitration is not acceptable as there is stay by the Hon'ble High Court.

19. In light of the above discussions, the present application is admitted, in terms of section 9 (5) of IBC, 2016.

20. The applicant has not proposed the name of the Interim Resolution Professional (IRP). Therefore, we hereby appoint Mr. Sanjay B. Shah having address at B-303, Sanidhya Apartment, 3, Marutinagar, Airport Road, Rajkot 360 001 with registration No. IBBI/IPA-001/IP-P-02677/2022-23/14106 and having email ID ip@sbshah.in subject to the condition that no disciplinary proceedings are pending against him. Specific consent of the IRP in Form 2, along with disclosures as required under IBBI (Insolvency Resolution Process for Corporate

Persons) Regulations, 2016 to be filed within a period of one week from the date of this order.

21. As a consequence of the application being admitted in terms of Section 9(5) of IBC, 2016, moratorium as envisaged under the provisions of Section 14 (1) shall follow in relation to the Corporate debtor, prohibiting actions as per clauses (a) to (d) of Section 14 (1) of the Code. However, during the pendency of the moratorium period, terms of Section 14(2) to 14(4) of the Code shall remain in force.

22. We direct the Operational Creditor to deposit a sum of Rs. 2.00 lacs (Rupees two lacs only) with the Interim Resolution Professional, namely Mr. Sanjay Shah to meet the expenses to perform the functions assigned to him in accordance with Regulation 6 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Person) Regulations, 2016. The needful shall be done within one week from the date of receipt of this order by the Operational Creditor. The amount, however, is subject to adjustment by the Committee of Creditors, as accounted for by Interim Resolution Professional, and shall be paid back to the Operational Creditor.

23. A copy of the order shall be communicated to the applicant, IRP and the corporate debtor. A copy of order along with complete copy of application be served to IRP by the applicant within 7 days of order. In addition, a copy of the order shall also be forwarded to IBBI for its records and taking steps for updating the Master Data of the corporate debtor in MCA portal and shall forward the compliance report to the Registrar, NCLT.

Sd/-	**Sd/-**
AJAI DAS MEHROTRA **MEMBER (TECHNICAL)**	**DR. DEEPTI MUKESH** **MEMBER (JUDICIAL)**

Nair/Abhishek (LRA)