IN THE NATIONAL COMPANY LAW TRIBUNAL,

KOLKATA BENCH
KOLKATA

C.P (IB) No.74/KB/2021

In the matter of

An application under 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules,2016.
And
In the matter of:

Mangilal Suthar, having its registered office at 26, Chanditala Main Road, New Alipore Kolkata- 700053.

… Operational Creditor

Versus

In the matter of:
Ganapati India International Pvt. Ltd., CIN U74910WB2011PTC160064, having registered office at RC-64, ADDA PLOT,Phase-II, Bengal Ambuja, City Centre, Durgapur, West Bengal, 713216.

…Corporate Debtor

Date of hearing :13/05/2022
Order Pronounced on :13/07/2022

Coram:

Mr. Rohit Kapoor, Member (Judicial)
Mr. Harish Chander Suri, Member (Technical)

Counsels appeared through Video Conference

For Operational Creditor	:	Mr. Chandra Sekhar Jha. Adv. Mr. Narayan Thakur, Adv.
For Corporate Debtor	:	Mr. Arif Ali , Adv. Mr.Kuldip Mallik,Adv. Mr. Sayantak Das, Adv.

O R D E R

Per: Harish Chander Suri, Member (Technical)

1. The Court is convened by video conference today.

2. This petition under 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules,2016 has been filed by **Mangilal Suthar**, Proprietor of M. Arts (hereinafter referred as the Operational Creditor), seeking initiation of corporate insolvency resolution process in respect of **Ganapati India International Pvt. Ltd**., CIN U74910WB2011PTC160064, having its registered office at RC-64, ADDA PLOT, Phase-II, Bengal Ambuja, City Centre, Durgapur, West Bengal, 713216, (hereinafter referred as the Corporate Debtor).

3. It is submitted in the petition that the Operational Creditor is interior work contractor and designer and carries on business at Kolkata. The Corporate Debtor is a company within the meaning of the Companies Act, 1956. It is submitted that the corporate debtor is building contractor and deals in constructions work in the State of West Bengal and different parts of India has been carrying on business with the Operational Creditor since long time.

4. It is submitted that during the period of 2016-17, the Operational Creditor and the Corporate Debtor entered into an agreement/contract being

No. GIIPL/Seg-A/MA/Extn/52/415 dated 05/09/2016 and 09/02/2017 respectively in respect of which several interior work orders were issued by the Corporate Debtor to the Operational Creditor for interior work. Pursuant to which, the Operational Creditor completed the said work as per the terms and conditions laid down in the agreement with full satisfaction of the Corporate Debtor and the same was confirmed, admitted and acknowledged by the Corporate Debtor. It is submitted that when the Operational Creditor made demand of their bills pursuant to the said agreement, the Corporate Debtor failed to make payment of the bill and the dues of Rs.1,47,74,691/- as on March 31, 2020 are still due and payable by the Corporate Debtor against the said work contract. It is submitted that on January 10, 2019,the Corporate Debtor acknowledged the outstanding dues vide its email and payment certificate dated January 10, 2019. Thereafter, number of reminders and various correspondences were made by the Operational Debtor vide demand notice dated 18.03.2020 and 06.07.2020 the receipt of which has been acknowledged by the Corporate Debtor but till date no payment has been made. It is submitted that on 16th October, 2020, the Corporate Debtor paid Rs. 10,00,000/- and subsequently on 15.01.2021 after receipt of the aforesaid Demand Notice under section 8 of the IB Code, 2016, the Corporate Debtor paid Rs. 10,00,000/- out of the total outstanding dues.

5. After giving adjustment to Rs.20,00,000/- received, the Corporate Debtor promised to pay the remaining amount of Rs.1,27,74,691/- within one week but till date the Corporate Debtor did not pay the remaining amount of the admitted claim. It is submitted that no part of the claim is barred by limitation. It is submitted that the statutory notice dated 13th October, 2021 was inadvertently sent in the name of M. Arts but subsequently the same was rectified by a corrigendum dated 13th January, 2021 sent to the corporate debtor which was duly received and acknowledged by the Corporate Debtor.

6. It is submitted that neither the Operational Creditor has received outstanding due nor has any dispute been raised by the Corporate Debtor in writing against the Notice dated 13/10/2020 and corrigendum dated

13/01/2021 and the cause of action arose on 10th January, 2019, 18th March, 2020, 24th October, 2020 and finally on 23rd January, 2021 which is still continuing.

7. The Operational Creditor has further claimed the said amount along with interest @ 18% p.a. being the prevalent lending from the due date till actual date of payment and the worksheet showing all the details has been enclosed with the petition.

8. The Operational Creditor has filed an affidavit deposing that there is no notice given by the Corporate Debtor relating to any dispute whatsoever with regard to any unpaid debt.

9. It is further submitted that the notice under section 8 and the corrigendum were duly served to the Corporate Debtor as per the Track Consignment Report, but the Corporate Debtor choose not to reply to the said notice.

10. The Operational Creditor has also filed statement of accounts in the ICICI Bank to indicate the part payments received by it from the Corporate Debtor and also to indicate that no payment has been received thereafter and the said amount outstanding operational debt of Rs.1,27,74,691/- still remains due and payable by the Corporate Debtor.

11. It is submitted that when the notice of this petition was given to the Corporate Debtor, the Corporate Debtor did not file any reply to the petition in spite of various opportunities granted to the Corporate Debtor to file reply affidavit. On 16th March, 2022 both the parties were present through their counsel and submitted that the matter was likely to be settled but since no settlement between the parties took place. The matter was finally heard on 13th May,2022.

12. Ld. Counsel for the parties was heard at length. The Operational Creditor on the one hand submitted that the work was completed without any

delay and the remaining amount has been acknowledged by the Corporate Debtor but on the other hand Ld. Counsel for the corporate debtor raised various grounds referring to various clauses of the agreement and sought to bring this matter under the purview of Section 10 A of the Code stating that the Operational Creditor has claimed in part IV that *" The total sum due is Rs.1,27,74,691/- as on March 31, 2020. In this connection, the dues of Rs. 1,47,74,691/- as on March 31, 2020 arising out of ……the Corporate Debtor in confirmation and commitment started to repay in different instalments to the Operational Creditor a total sum of Rs. 1,27,74,691/- as on March 31, 2020".*

13. It is submitted that no application for institution of CIRP could be instituted for any default arising on or after 25th March, 2020 and admittedly the pleadings state about March,31 2020 as the date of default.

14. It is submitted that the Operational Creditor at all material point of time in his petition as well as in his alleged Notice under section 8 has stated "dues of Rs. 1,47, 74,691 as on March 31, 2020". It is submitted that no application is maintainable for default occurring during the said period. The said petition is barred by law and therefore, requires to be dismissed.

15. It is submitted that if the date as stated above i.e. March 31,2020 is not considered then Part IV of the Form 2 of the petition does not state any date of default and as stated above as no tabular statement has been provided, the said petition is not maintainable and ought to be dismissed.

16. The corporate debtor has submitted that no application could have been instituted for any default arising on or after 25th March, 2020 and according to the Corporate Debtor admittedly the pleading states about March 31,2020 as the date of default. It is submitted that the Section 8 Notice stated " dues" of Rs. 1,47,74,691/- as on March 31,2021. Therefore, the application is not maintainable. It is stated that even if for the sake of arguments, the Notice under section 8 is looked into for default, the said notice alleges " the default arose on January 10,2019 , 18th March 2020 and 6th July ,2020 when the Corporate Debtor admitted his claim and acknowledged it liability". It is

stated that in this matter, the alleged notice under section 8, default arose due to acknowledgement by the Corporate Debtor of its liabilities. It is submitted that the Corporate Debtor has made no acknowledgement of liability towards the Operational Creditor

17. Ld. Counsel for the Corporate Debtor submitted that section 3(12) of the Code defines default as under:

> "default" means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not repaid by the debtor or the corporate debtor, as the case may be".

18. It is submitted that the date of default ought to be considered from the date of non-payment of debt when whole or any part of, amount of debt has become due and payable and is not repaid by the debtor from the Corporate debtor. It is submitted that according to the notice, the default arose due to acknowledgement by the Corporate Debtor and not due to default actually occurring.

19. It is submitted that notice has been issued by the proprietorship firm being the M.Arts, not by the Proprietor and in case of a proprietorship firm where the proprietor alone will have to sue though he may do so as the sole proprietor of the proprietorship concern. It is submitted that the proprietorship firm does not have any legal existence neither a corporate entity nor an individual person.

20. It is submitted by the Ld. Counsel for the Corporate Debtor that the section 8 notice is very important to initiate corporate insolvency process and the same has been sent by the proprietary concern as the Operational Creditor and not by the proprietor.

21. It is submitted that the Operational Creditor has relied upon a Project Completion Agreement which has allegedly been executed on December 19, 2018.However, the same is an unsigned document, which only bears the signature of the Operational Creditor not of the Corporate Debtor. It is

submitted that the said agreement has been executed by proprietorship firm and not by the proprietor being namely, Mangilal Suthar.

22. It is submitted that the email at page 25 has been issued on January 10, 2019 by one MRC Prism Project Pvt. Ltd. and not by the Corporate Debtor as alleged. It is submitted that the Contract dated September5, 2016 at Claus 55 states that Certificate of Completion of Work is required to be issued by Engineers upon deciding that the work is completed.

23. It is submitted that the Operational Creditor has also illegally claimed refund of Retention money of Rs.34,83,723/- in order to increase their claim to more than the threshold limit of Rs.1Crore.

24. It is submitted that no default on the Corporate Debtor has taken place and the petition has been instituted on the basis of alleged acknowledgment of the Corporate Debtor and not default.

25. Ld.Counsel for the Corporate Debtor has stated that he seeks unconditional apology for not producing the document before this Adjudicating Authority and he seeks to refer to emails and submits that all the emails are very much within the knowledge of the Operational Creditor.

26. We have gone through the petition and the Ld. Counsel for the Operational Creditor has taken us through all the documents enclosed therewith. The most important part in this matter is that the Corporate Debtor has neither sent any reply to the notice sent by the Operational Creditor under section 8 nor has sent any reply even to the corrigendum letter dated 13/01/2021 whatever defence it had, had to be stated in the reply to the notice or corrigendum notice, which were duly received by it. Even, on receipt of the notice from this Adjudicating Authority, the Corporate Debtor has not cared even to file its reply to the petition. Mr.Arif Ali, Advocate appeared for the Corporate Debtor on 1st November, 2021 when last opportunity was granted to the Corporate Debtor to file reply within two weeks and when the matter was listed on 16th March , 2020, the Corporate

Debtor sought time for entering into a settlement, the matter was adjourned to **25th April, 2022** and thereafter on 13th May,2022 when the matter was finally heard and reserved for orders in the absence of any reply affidavit filed by the Corporate Debtor

27. The contention of the Corporate Debtor that the petition has been filed by the proprietorship concern or the notice has been sent on behalf of the proprietorship concern is misplaced and cannot be accepted. The petition and the affidavit clearly named Mangilal Suthar as the Operational Creditor and the next line is part of his address i.e. proprietor of M. Arts. M.Arts is only the trade name /address of the Operational Creditor and there is no harm if a person files a petition in his own name and addresses himself to be proprietor of his trade name. After all a person has a right to address himself as the proprietor of a proprietorship firm. The contention of the Corporate Debtor is misplaced and cannot be accepted. The debt of Rs.1,47,74,691/- had become due and payable under the agreement /contract being No. GIIPL/Seg-A/MA/Extn/52/415 dated 05/09/2016 and 09/02/2017 respectively, pursuant to which several interior work orders were issued by the Corporate Debtor, out of which Rs.20,00,000/- had been paid as stated above thereby leaving a balance of Rs.1,27,74,691/-.The Corporate Debtor had infact affirmed the outstanding due vide email and payments certificate dated January 10, 2019. Once an acknowledgment is made for a job having been satisfactorily done, the amount becomes due to the vendor/ the Operational Creditor. The Corporate Debtor in this matter cannot escape the liability simply by beating about amount the bush and taking refuge under one or other clause of the agreement or seeking refuge under any notification that a default has taken place during the period, for which no petition could be filed in the present matter, the facts are quite different.

28. If the Corporate Debtor had any valid defence, it could have been stated so in its reply to notice under section 8 or in reply to even the corrigendum issued by the Operational Creditor, and even if it could not be done, it could have filed its reply to the petition. Even that has not been done

in spite of the opportunities given to the Corporate Debtor. At the stage of arguments only, the Corporate Debtor is trying to escape its liability and make odd types of arguments, which cannot be accepted.

29. The petition is otherwise complete in all respects.

30. We are, therefore, satisfied that the Operational Creditor has proved the outstanding operational debt, and the default in making payment thereof and that this petition deserves to be admitted. We, therefore, pass the following orders:-

O R D E R S

i) The application filed by the Operational Creditor under Section 9 of the Insolvency & Bankruptcy Code, 2016 for initiating Corporate Insolvency Resolution Process against the Corporate Debtor, is hereby **admitted**.

ii) We hereby declare a moratorium and public announcement in accordance with Sections 13 and 15 of the I & B Code, 2016.

iii) Moratorium is declared for the purposes referred to in Section 14 of the Insolvency & Bankruptcy Code, 2016. The I.R.P. shall cause a public announcement of the initiation of Corporate Insolvency Resolution Process and call for the submission of claims under Section 15. The public announcement referred to in clause (b) of sub-section (1) of Section 15 of Insolvency & Bankruptcy Code, 2016 shall be made immediately.

iv) Moratorium under Section 14 of the Insolvency & Bankruptcy Code, 2016 prohibits the following:

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 Securitisation 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 corporate debtor.

v) The supply of essential goods or services rendered to the corporate debtor as may be specified shall not be terminated, suspended, or interrupted during the moratorium period.

vi) The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

vii) The order of moratorium shall have effect from the date of admission till the completion of the corporate insolvency resolution process.

viii) Provided that where at any time during the Corporate Insolvency Resolution Process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of Section 31 or passes an order for liquidation of the corporate debtor under Section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be.

ix) The Operational Creditor has not proposed name of any Insolvency Resolution Professional. Therefore, as per the provisions of Section 16(3) (a) of the IBC, so, we appoint **Mr. Sanjeev Jhunjhunwala, IRP** having Reg. No. **IBBI/IPA-001/IP-P00325/2017-18/10595** email ID. sanjeevjhunwala@gmail.com to act as Interim Resolution Professional (IRP). He shall file Form-2, and that no disciplinary proceedings are pending against him with the Board.

x) **Mr. Sanjeev Jhunjhunwala,** is hereby appointed as Interim Resolution Professional for ascertaining the particulars of creditors and convening a Committee of Creditors for evolving a resolution plan subject to production of written consent within one week from the date of receipt of this order.

xi) The Interim Resolution Professional should convene a meeting of the Committee of Creditors and submit the resolution passed by the Committee of Creditors and shall identify the prospective Resolution Applicant within 105 days from the insolvency commencement date.

xii) The Operational Creditor/Applicant is directed to deposit **Rs.5,00,000/- (Rupees Five lacs only)** with the IRP appointed hereinabove within **three** days from this order. IRP can claim the preliminary expenses and fees subject to the approval by the CoC and after constitution of CoC.

31. Registry is hereby directed to communicate the order to the Operational Creditor, the Corporate Debtor, the I.R.P. and the jurisdictional Registrar of Companies by Speed Post as well as through email.

32. List the matter on **26/08/2022** for filing of **Progress Report**.

33. Certified copy of the order may be issued to all the concerned parties, if applied for, upon compliance with all requisite formalities.

(Harish Chander Suri)
Member (Technical)

(Rohit Kapoor)
Member (Judicial)

Order signed on this, the 13th day of July, 2022

PJ