IN THE NATIONAL COMPANY LAW TRIBUNAL, AHMEDABAD

DIVISION BENCH

COURT - 1

ITEM No.86

CP(IB) 263 of 2020

Order under Section 9 IBC

IN THE MATTER OF:

Fakirsons Papchem Pvt Ltd ....**Applicant**

V/s

Hitkari Packaging Pvt Ltd ....**Respondent**

Order delivered on ..31/05/2022

Coram:

Madan B. Gosavi, Hon'ble Member(J)

Kaushalendra Kumar Singh, Hon'ble Member(T)

PRESENT:

For the Applicant :
For the Respondent :

ORDER

The matter is listed today for pronouncement of the order.

The order is pronounced in the open court, vide separate sheet.

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KAUSHALENDRA KUMAR SINGH
MEMBER (TECHNICAL)

MADAN B GOSAVI
MEMBER (JUDICIAL)

BEFORE THE ADJUDICATING AUTHORITY

NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD BENCH
COURT-I

C.P. (IB)/263(AHM)/2020

(In the matter of Section 9 of Insolvency & Bankruptcy Code, 2016)

<u>In the matter of</u>
M/s. Fakirsons Papchem Pvt. Ltd.
(CIN: U24100GJ1992PTC017833)
302, Devarc Complex, Iscon Cross Roads,
S.G. Highway Road, Ahmedabad,
Gujarat - 380015

……Applicant/Operational Creditor

VERSUS

M/s. Hitkari packaging Pvt. Ltd.
A Company incorporated under the relevant
Provisions of the Companies Act, 1956
Having its registered address at: 339- 340,
G.I.D.C. Estate, Waghodia, Vadodara,
Gujarat – 391760.

…..Respondent/Corporate Debtor

Order reserved on: 10.05.2022
Order delivered on: 31.05.2022

<u>CORAM:</u>
Coram: MADAN B. GOSAVI (MEMBER JUDICIAL)
KAUSHALENDRA KUMAR SINGH (MEMBER TECHNICAL)

For the Applicant: Ld. Adv. Jamine Dave
For the Respondent: Ld. Adv. Vatsal R Patel

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O R D E R

Per Bench

1. The instant company application is filed by M/s. Fakirsons Papchem Pvt. Ltd. (hereinafter referred to as " Applicant") under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as **"IB Code"**) read with rule 6 of the IBBI (application to the Adjudicating Authority) Rules 2016 for initiation of the Corporate Insolvency Resolution Process against /Ms. Hitkari Packaging Pvt. Ltd (hereinafter referred to as a "Respondent") for the default amount of Rs. 7,26,061/- including interest.
2. The applicant has submitted that the respondent approached the applicant for the supply of goods, the applicant supplied the goods to the respondent between March 2009 to February 2010. The applicant was having a running account and used to supply goods as per the demand of the respondent.
3. It is submitted that due to non-payment of the outstanding amount by the respondent, the applicant had filed a civil suit bearing No. 581 of 2013 before the Learned Principal Senior Civil Judge Ahmedabad, and the said suit was decreed in favour of the applicant vide order dated 28.02.2017 for the amount of Rs. 10,13,948/-. Thereafter, the Principal Senior

Civil Judge on the application of the applicant issued a percept on 17.03.2017 against the respondent. Thereupon, the respondent issued four cheques of Rs. 3,27,005/- each in favour of the applicant.

4. It is also submitted by the applicant that out of four cheques two cheques bearing No. 107405 dated 20.06.2017 and cheque No. 107406 dated 20.07.2017 were dishonored by the bank due to insufficient funds. The respondent, against the dishonored cheques of Rs. 6,54,010/- paid an amount of Rs. 1,00,000/- on 14.07.2017 and Rs. 50,000/- on 22.09.2017. However, an amount of Rs. 5,04,010/- remains due and payable by the respondent to the applicant.

5. It is also submitted by the applicant that under the compelling circumstances the applicant issued a demand notice dated 06.07.2018 to the respondent and the same was served to the respondent on 10.07.2018. In response to the aforesaid demand notice the respondent sent its reply through an e-mail dated 28.07.2018 wherein, the respondent had admitted the outstanding amount and stated that Rs. 4,42,010/- is due and will pay shortly.

6. It is also submitted by the applicant that a company petition bearing No. CP (IB) 394 of 2018 was filed by the applicant on

14.08.2018 before this Adjudicating Bench however, due to some technical issue, the said application was withdrawn by the applicant vide order dated 20.10.2019 of this Adjudicating Bench. Thereafter, this present application is filed by the applicant to initiate the CIRP against the respondent.

7. The respondent appeared and file its reply and denied all the allegations of the applicant. It is stated by the respondent that the applicant is not an operational creditor under Section 5(21) of the IB Code, as the claim in this application is neither with respect for goods nor services. But this application is filed on the basis of ex-parte judgment-degree dated 28.02.2017 in Civil Suit bearing No. 538 of 2013.

8. It is also stated by the respondent that an amount of Rs. 8,04,010/- has been already paid to the applicant against the decree amount of Rs. 6,93,382/- along with interest @ 12 percent per annum from 20.02.2010. Moreover, the invoice produced before the Civil Court is different from the invoices sent with the demand notice. It is further stated by the respondent that decree holder cannot invoke proceeding under the Code.

9. The applicant has filed its rejoinder on 25.01.2021 wherein, the applicant has stated that vide e-mail dated 14.08.2018 the

respondent itself admitted the debt of Rs. 4,42,010/-. The applicant further denied the contention of the respondent that the applicant is not an operation creditor within the meaning of Section 5(21) of the IB Code is completely illusionary or misconceived. The Hon'ble NCLAT in the case of "*Ugro Capital Ltd Vs. Bangalore Dehydration and Drying Equipment Co. Pvt. Ltd. (BDDE)," reported in [2020] 115 taxmann.com 362 (NCLAT)* has held that decree holder is included in the creditors. The relevant paras of the judgment are as under thus:

> ***19.*** *It is important to point out that the definition of creditor provided in section 5(10) of the I & B Code provides that "Creditor means any person to whom a debt is owed and includes a financial creditor, an operational creditor, a secured creditor, an unsecured creditor, and a decree-holder."*
>
> *20. Based on the decree of the Court this petition was filed Under Section 7 of the Code. Since the definition of the word creditor in the I & B Code includes decree-holder, therefore if a petition is filed or the realization of a decretal amount, then it cannot be dismissed on the ground that the applicant should have taken steps for filing an execution case in Civil Court.*

10. The applicant further denied the contention of the respondent that the present application is barred by limitation on the ground that Ld. Senior Civil Court, Ahmedabad issued percept vide order dated 17.03.2017, pursuant thereto, the respondent has issued four cheques amounting to Rs. 3,27,005/- each, and out of four cheques, two cheques were dishonored on 19.09.2017 and 19.10.2017 respectively. Hence the default has occurred on 17.10.2017 in terms of the judgment of the Hon'ble Supreme Court in the case of *Jignesh Shah V. UOI*, [2019] taxman.com 486 (sc), the relevant paras of the judgment are as under;

"28. A reading of the aforesaid provisions would show that the starting point of the period of limitation is when the company is unable to pay its debts and that Section 434 is a deeming provision that refers to three situations in which a Company shall be deemed to be "unable to pay its debts" under Section 433(e). In the first situation, if a demand is made by the creditor to whom the company is indebted in a sum exceeding one lakh then due, requiring the company to pay the sum so due, and the company has for three weeks thereafter "neglected to pay the sum", or to secure or compound for it to the reasonable

satisfaction of the creditor. "Neglected to pay" would arise only on default to pay the sum due, which would clearly be a fixed date depending on the facts of each case. ***Equally in the second situation, if execution or other process is issued on a decreed or order of any Court or Tribunal in favour of a creditor of the company, and is returned unsatisfied in whole or in part, default on the part of the debtor company occurs. This again is clearly a fixed date depending on the facts of each case.*** *And in the third situation, it is necessary to prove to the "satisfaction of the Tribunal" that the company is unable to pay its debts. Here again, the trigger point is the date on which default is committed, on account of which the Company is unable to pay its debts. This again is a fixed date that can be proved on the facts of each case. Thus, Section 433(e) read with Section 434 of the Companies Act, 1956 would show that the trigger point for the purpose of limitation for filing of a winding-up petition under Section 433(e) would be the date of default in payment of the debt in any of the three situations mentioned in Section 434. "(Emphasis in bold Supplied)*

11. The applicant further submitted that the contention of the respondent that the entire principal amount has been paid is

false and baseless. In the judgment of *Jignesh Shah (supra)* the Hon'ble Supreme Court has clearly held that in a case where execution or other process is issued on a decree or order of the court or Tribunal in favour of the creditor of the company and is returned unsatisfied in whole or in part, default on the part of debtor company occurs, such default makes entitled applicant to file Insolvency application.

12. Heard the Ld. Counsel of the applicant and the respondent and perused the material on record. It appears that this application is based on a decree dated 28.02.2017 passed by the Ld. Principal Senior Civil Judge, Ahmedabad, wherein it was directed to the respondent for the payment of Rs. 6,93,382/ towards the principal amount along with interest @12% per annum from 20.02.2010 pay to the applicant. Thereafter the precept under section 46 of the Code of Civil Procedure was issued by the Principal Senior Civil Judge, Ahmedabad (Rural) at Mirzapur for attachment of the property of the respondent for the amount of Rs. 13,08,023/- on 20.03.2017 in Precept No. 03/2017.

13. It is also noted that upon issuance of the precept, the respondent issued four cheques of Rs. 3,27,005/- each, out of four cheques, two cheques were dishonored. It is not a dispute

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that thereafter the respondent paid an amount of Rs. 1,00,000/- and 50,000/- on 17.07.2017 and 22.09.2017 respectively. The demand notice was issued to the respondent on 06.07.2018 which was delivered on 10.07.2018 and the respondent in its reply dated 20.07.2018 admitted that an amount of Rs. 4,42,010/- is outstanding and will pay shortly.

14. The contention of the respondent that the applicant does not fall under the definition of Operation Creditor under Section 5(21) does not sustain. Section 3(10) clearly states that the Creditor includes the decree-holder. For ready reference we produce section 3 (10) as under;

"**Section 3 sub-section 10- creditor** means any person to whom a debt is owed and includes a financial creditor, an operational creditor, a secured creditor, an unsecured creditor, and a decree-holder"

15. The decree passed by the Principal Senior Civil Judge, Ahmedabad is well within the definition of operational debt under Section 5(21) read with 3(6) of the IB Code. For ready reference, we reproduce both the Sections as under;

5(21) "operational debt" means a claim in respect of the provision of goods or services including employment or a debt in respect of the [payment] of dues arising under any law for the time being in force and payable to the Central Government, any State Government or and local authority;

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"Section 3 (6) Claims means

(a) A right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured or unsecured;

(b) Right to remedy for breach of contract under any laws for the time being in force, if such breach gives rise to a right to payment, whether or not such right is reduced to judgment, fixed, matured, unmatured, disputed, undisputed, secured or unsecured;

16. The contention of the respondent that the invoices produced before the Principal Senior Civil Judge Ahmedabad were different from the invoices sent along with the demand notice is also not sustained as the decree has been duly passed in favour of the applicant which has not been challenged by the respondent. Moreover, the respondent has already issued four cheques of Rs. 3,27,005/- each out of which two cheques have been dishonored and the last cheque was dishonored on 18.10.2017, and the respondent has admitted the debt of Rs. 4,42,010/- in its letter email dated 14.08.20218.

17. We are of the considered view that the default amount is well within the limitation for filing the present application and meets the threshold limit as prescribed under section 4 of the Code.

The application is otherwise complete as per Section 9 of the IB Code. Accordingly, we allow this application with the following directions: -

Order

I. The respondent M/s. Hitkari Packing Private Limited is admitted into the Corporate Insolvency Resolution Process under Section 9 of the Insolvency and Bankruptcy Code, 2016.

II. We appoint **Mr. Mukesh Ramjibhai Dayani, having Registration No. IBBI/IPA-002/IP-N01138/2021-2022/13915, e-mail id: mukeshdayani.ip@gmailcom** under section 13(1) (c) of the IB Code as IRP as proposed by the Financial Creditor.

III. The Moratorium under Section 14 of the Code shall come to 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 or passes an order for liquidation of Corporate Debtor under Section 33, as the case may be.

IV. The Adjudicating Bench hereby prohibits the institution of suits or continuation of pending suit or proceedings against the Corporate Debtor including the execution of any judgment, decree, or order in any Court of law, and further prohibits Tribunals, Arbitration Panels, or other Authority(s), transferring, encumbering, alienating or disposing of any of Corporate Debtor 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 SARFAESI Act, 2002 the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the Respondent.

V. Further, litigation or application, if any, is pending before any competent Court of law under the provisions of the SARFAESI Act and RDB Act, prior to the pronouncement of this order such proceedings are expected to be dealt with in accordance with law i.e., Section 14 and Section 238 of the Code.

VI. The supply of essential goods or services to the respondent, if continuing, shall not be terminated or suspended, or interrupted during the moratorium, period. The respondent to provide effective assistance to the IRP as and when he takes charge of assets and management of the respondent.

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VII. The IRP so appointed shall make a Public announcement of the Corporate Insolvency Resolution Process (CIRP) immediately as specified under Section 13 of the Code and by calling for submissions of the claim under Section 15 of the Code.

VIII. The IRP shall perform all his functions as contemplated by the code. It is further made clear that all personnel connected with the Corporate Debtor, its Promoter, or any other person associated with the management of the Corporate Debtor are under legal obligation as per Section 19 of the Code to extend every assistance and co-operation to the Interim Resolution Professional. Where any personnel of the Corporate Debtor, its Promoter, or any other person is required to assist or co-operate with the IRP if do not assist or cooperate, the IRP is at liberty to make the appropriate application to this Adjudicating Authority with a prayer for passing an appropriate order.

IX. The IRP shall be under a duty to protect and preserve the value of the properties of the respondent company and manage the operations of the Respondent Company as a going concern as a part of an obligation imposed by the Code.

X. We direct the applicant to pay the IRP a sum of **Rs. 25,000/- (Rs. Twenty five thousand only)** as fees & expenses till the COC decides about his fees/expenses.

XI. The Registry is directed to communicate this order to the the applicant and respondent, and to the Interim Resolution Professional and the concerned Registrar of Companies, after completion of necessary formalities, within three working days and upload the same on the website immediately after pronouncement of the order.

18. The commencement of the Corporate Insolvency Resolution Process (CIRP) shall be effective from the date of this order.

19. Accordingly, CP (IB) No. 263 of 2020 is allowed.

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(Kaushalendra Kumar Singh)
Member (Technical)

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(Madan B. Gosavi)
Member (Judicial)

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