

NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH (COURT-II)

CP No. (IB)-781(ND)/2020

IN THE MATTER OF:

Deepika Surana

Registered Office at
G-448-A, Paryavaran Marg,
Ind. Area, Madanganj
Kishangarh (Ajmer),
Rajasthan-305801

...Applicant/Operational Creditor

VERSUS

V.K. Aggarwal & Company Private Limited

Registered Office at
9/18, Nehru Enclave, East of Kalkaji Extension,
New Delhi -110019

...Respondent No.1/Corporate Debtor

Mukul Aggarwal,

Flat No. 802, Tower C Omax
The forest SPA Gautam, Buddha Nagar,
U.P. – 201304

...Respondent No.2

Anshum Aggarwal,

Flat No.802, Tower C Omax
The forest SPA Gautam Buddha Nagar,
UP – 201304

...Respondent No.3

Section: 9 of IBC, 2016

Order Delivered on: 19.01.2022

CORAM:

SH. ABNI RANJAN KUMAR SINHA, HON'BLE MEMBER (J)

SH. L. N. GUPTA, HON'BLE MEMBER (T)

PRESENT:

For Applicant : Adv. Reema Jain and CA Ankur Dugar

ORDER

PER SHRI L. N. GUPTA, MEMBER (T)

Ms. Deepika Surana, being the Sole Proprietor of M/s. Harsh Trading Company (for brevity '**Operational Creditor/ Applicant**'), has filed the present Application under Section 9 of the 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') with a prayer to initiate the Corporate Insolvency Resolution Process against V. K. Aggarwal & Company Private Limited (for brevity '**Corporate Debtor/ Respondent**').

2. That the Applicant is the sole proprietor of a proprietorship firm with GSTIN 08BCMPS0380L1Z2 incorporated under the provisions of the Erstwhile Companies Act, 1956 having its registered Office at G-448-A, Prayavaran Marg, Industrial Area, Madanganj-Kishangarh (Ajmer) Rajasthan – 305801.

3. That the Corporate Debtor namely, V.K. Aggarwal & Company Private Limited is a Company incorporated on 25.06.2012 with CIN U45206DL2012PTC237993 under the provisions of the erstwhile Companies Act, 1956 having its registered Office at 9/18, Nehru Enclave, East Kalkaji Extension, New Delhi-110019, which is within the territorial jurisdiction of this Tribunal. The Respondent No.2 and 3 are the Directors of the Corporate Debtor.

4. It is submitted by the Applicant that the Corporate Debtor approached them in the year 2016 through an associate, M/s Vikhyaat Marbles for supply of imported Dyna marble slabs. That the operational creditor has accordingly undertaken supply of the marble through the associate, M/s Vikhyaat Marbles on credit for placing at the site of the Corporate Debtor at Supertech Super Nova Project, Noida, Sector 94-A of Supertech Realtors Pvt. Ltd. The relevant details as given by the applicant in part IV of its application are reproduced as below :

(12)

		c. That as on the below-mentioned dates, that the following purchases were made by the Corporate Debtor on credit basis and in respect of which payments are still pending:
Date of Invoice issued	Nature	Amount (in Rs.)
February 02, 2016	Invoice No. 04	8,50,222
February 04, 2016	Cash for freight	(50,000)
	RTGS from V.K. Aggarwal & Co.	(3,00,000)
	RTGS from V.K. Aggarwal & Co.	(1,00,222)
April 21, 2016	Invoice No. 01	22, 34,609
April 23, 2016	Cash for freight	(60,000)
March 31, 2019	Pending amount	25,74,609
November 30, 2019	Pending amount including interest	48,28,313

Therefore, an aggregate amount of Rs. 48,28,313/- (Inclusive of Interest) as on November 30, 2019 is outstanding, due and payable by the corporate debtor to the operational creditor. (A copy of ledger account in respect of the same is annexed herewith as *Annexure A-5*).

5. The applicant further submits that the invoices were raised on 2nd Feb 2016 and 21st April 2016 respectively. The invoices bear stamp of Commercial Tax Check Post Kishangarh IPO as well as a delivery confirmation stamp of Supertech Realtors. The corporate debtor made payments against the said invoice till 23.04.2016 but failed to make payment thereafter and an amount of Rs.48,28,313/- remains due and pending in spite of repeated telephonic communication and reminders. The corporate debtor issued post-dated cheques of Rs. 7,00,000/- dated 01st July 2016 and Rs 6,00,000/- of 11th July 2016 for payment of pending dues, which got dishonored and returned by bank with the remark “funds insufficient on 27.09.2016.”

6. It is stated by the Applicant that the Corporate Debtor through the Respondent No.2, i.e., Sh. Mukul Aggarwal on 13.04.2017, issued a joint confirmation of accounts with amounts due and pending towards the Applicant and other Operational Creditors namely M/s Vikhyaat Marbels and M/s Jai Chandrawal.

7. It is further stated by the Applicant that the registered office of the corporate debtor is not maintained. It is added that the RoC Delhi and Haryana under Section 248 of the Companies Act 2013 has struck off the name of the Appellant Company from its Register vide Notice No. ROC/DELHI 248(5)/STK-7/4865 dated 08.08.2018 at entry No.22691 for non-filing of annual returns.

8. That it is submitted by the Applicant that since the Corporate Debtor did not make the due payment of his operational debt, it had issued a Demand Notice dated 17.02.2019 and 20.06.2019 under Section 8 of IBC, 2016 at the registered office of the Corporate Debtor via Speed Post. It is stated that the notices remain unserved. It is added by the Applicant that it had sent another Demand Notice dated 31.12.2019 to the Director of the Corporate Debtor, which was served vide speed post on 06.01.2020 to Sh. Mukul Aggarwal. The applicant has also filed an affidavit under Section 9(3)(b) stating that no notice of dispute has been raised.

9. It is submitted by the applicant in Part IV that the amount of his total debt due as on date is of Rs.48,28,313/- including interest charged at the rate of 24% per annum from the date of invoice. That the invoices claimed in the Application are pertaining to the period from 02.02.2016 to 21.04.2016.

10. On perusal of records, it is found that the corporate debtor has been proceeded Ex-parte vide order dated 13.09.2021 of this bench. The scanned copy of the said order is reproduced overleaf :

IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI, SPECIAL BENCH (COURT-II)

Item No. 217
(IB)-781(ND)2020

IN THE MATTER OF:

Deepika Surana

... Applicant/Petitioner

Versus

V. K. Aggarwal & Company Pvt. Ltd. and
Anr.

... Respondent

Under Section: 9 of IBC, 2016

Order delivered on 13.09.2021

CORAM:

DR. DEEPTI MUKESH,
HON'BLE MEMBER (J)

SHRI. L. N. GUPTA,
HON'BLE MEMBER (T)

PRESENT:

Counsel for the Petitioner

ORDER

Ld. Counsel for the Applicant states that the notice is issued and the Corporate Debtor has been served through all modes including the substituted service through publication. None appeared for the Corporate Debtor. The Corporate Debtor is proceeded ex-parte.

List the matter for hearing on 28th October 2021.

-sd-

(L. N. GUPTA)
MEMBER (T)

-sd-

(DR. DEEPTI MUKESH)
MEMBER (J)

11. That none appeared on behalf of other respondents, they are proceeded ex-parte.

12. During the course of hearing on 23.11.2021, this Bench has raised a query from the Applicant that Whether an application under Section 9 initiating CIRP against the Corporate Debtor is maintainable if the name of the Corporate Debtor is struck off from the register of ROC. That the Applicant in response to the same placed reliance on the Judgement of Hon'ble NCLAT in the matter of "**Mr. Hemang Phophalia Vs. The Greater Bombay Co-Operative Bank Limited & Ors.**" Company Appeal (AT) (Insolvency) No. 765 of 2019 dated 05.09.2019, wherein it is held that:

"20. The name of the 'Corporate Debtor' (Company) may be struck-off, but the assets may continue. Whether in the present case, there are assets of the 'Corporate Debtor'

or not can be looked into only by the 'Interim Resolution Professional'/ 'Resolution Professional'.

21. The name of the Company having been struck-off, the Corporate Person cannot file an application under Section 59 for Voluntary Liquidation. In such a case and in view of the provisions of Section 250 (3) read with Section 248 (7) and (8), we hold that the application under Sections 7 and 9 will be maintainable against the 'Corporate Debtor', even if the name of a 'Corporate Debtor' has been struck-off.

22. So far as, liability of the Ex-Directors or Shareholders or Officers are concerned, Section 248 (7) of the Companies Act being clear, we are not expressing specific opinion, till any order is passed by the Adjudicating Authority or demand is made by the 'Interim Resolution Professional'.

23. In view of the aforesaid provision, we hold that the Adjudicating Authority who is also the Tribunal is empowered to restore the name of the Company and all other persons in their respective position for the purpose of initiation of 'Corporate Insolvency Resolution Process' under Sections 7 and 9 of the I&B Code based on the application, if filed by the 'Creditor' ('Financial Creditor' or 'Operational Creditor') or workman within twenty years from the date the name of the Company is struck off under sub-section (5) of Section 248. In the present case, application under Section 7 having admitted, the 'Corporate Debtor' and its Directors, Officers, etc. deemed to have been restored in terms of Section 252(3) of the Companies Act."

13. After having submissions and perusing the documents placed on record by the Applicant, this Bench is of the view that the issue with regard to maintainability of the present Application against a struck off company needs to be examined first. In this context, it is worthwhile to refer to Section 250 of Companies Act 2013 :

“250. Effect of company notified as dissolved.—

*Where a company stands dissolved under section 248, it shall on and from the date mentioned in the notice under sub-section (5) of that section cease to operate as a company and the Certificate of Incorporation issued to it shall be deemed to have been cancelled from such date **except for the purpose of realising the amount due to the company and for the payment or discharge of the liabilities or obligations of the company.**”*

(Emphasis supplied)

14. Thus, as per Section 250 (Supra), the company which is struck off has been given an exception by the Legislature to not to be treated as dissolved in two circumstances i.e., (a) *for the purpose of realising the amount due to the company and;* (b) *for the payment or discharge of the liabilities or obligations of the company.*

15. Evidently, the Applicant is a Creditor of the Corporate Debtor, who had supplied goods to the Corporate Debtor, therefore the Corporate Debtor is under an obligation to make payment of its dues. Therefore, in our considered view, the Corporate Debtor, cannot be considered as dissolved for the purpose of realizing its unpaid dues through the present proceedings.

16. Further, prior to the enactment of IBC 2016, when Section 271(a) and Section 433(e) of the Companies Act 1956 i.e., ground to wound up the Company on being unable to pay its debts, were in vogue, the Legislature had allowed the struck off Company to be wound up by virtue of Section 248(8) of Companies Act 2013. The contents of Section of 248(8) are reproduced overleaf :

**“248. Power of Registrar to remove name of company
from register of companies –**

(8) Nothing in this section shall affect the power of the Tribunal to wind up a company the name of which has been struck off from the register of companies.”

17. That applying the same principal for the IBC Proceedings and in the light of the Section 250 of Companies Act 2013 & the Judgement of Hon’ble NCLAT passed in the matter of **Mr. Hemang Phophalia Vs. The Greater Bombay Co-Operative Bank Limited & Ors. - Company Appeal (AT) (Insolvency) No. 765 of 2019**, we are of the considered opinion that the present Application filed against the Struck off Company is maintainable.

18. That the next issue before us is that the Operational Creditor has claimed invoices from 02.02.2016 to 21.04.2016, whereas it has filed the petition on 07.03.2020. Therefore, we would like to examine that whether the present Application filed by the Operational Creditor is within the limitation period ?

19. That in this regard, the Applicant has relied upon the Balance confirmation statement reflecting the balance of Applicant payable by the Corporate Debtor as on 13.04.2017 as Rs.25,74,609 accepted and signed by the Director of the Corporate Debtor Mr. Mukul Aggarwal. The scanned copy of the same is reproduced overleaf :

ACCOUNT STATEMENTS FOR:

HARSH TRADING COMPANY					
DATE	DETAIL	AMOUNT			
		DEBIT	CREDIT	BALANCE	
02-02-2016	Invoice No. 04	850222		850222	
04-02-2016	Cash for Freight		50000	800222	
	RTGS from V.K. Aggarwal & Co.		300000	500222	
17-04-2016	RTGS from V.K. Aggarwal & Co.		100222	400000	
21-04-2016	Invoice No. 01	2234609		2634609	
23-04-2016	Cash for Freight		60000	2574609	
		3084831	510222	2574609	Balance

VIKHYAAT MARBLES					
DATE	DETAIL	AMOUNT			
		DEBIT	CREDIT	BALANCE	
09-03-2016	Invoice No. 002	250159		250159	
10-04-2016	Invoice No. 005	212858		463017	
	Difference in Measurement 22.80 sq. ft.		7296	455721	
24-04-2016	Cheque for Freight		40000	415721	
25-04-2016	RTGS from V.K. Aggarwal & Co.		500000	-84279	
26-04-2016	Invoice No. 006	25191		-59088	
24-05-2016	Invoice No. 007	303914		244826	
	Difference in Measurement 12.47 sq. ft.		2993	241833	
24-05-2016	RTGS from V.K. Aggarwal & Co.		350000	-108167	
30-05-2016	Invoice No. 008	446354		338187	
	Difference in Measurement 51.92 sq. ft.		12461	325726	
05-06-2016	Invoice No. 009	325559		651285	
05-06-2016	Invoice No. 010	352911		1004196	
	Difference in Measurement 7.19 sq. ft.		1726	1002470	
15-06-2016	Invoice No. 011	264800		1267270	
	Difference in Measurement 22.55 sq. ft.		5412	1261858	
17-06-2016	NEFT from V.K. Aggarwal & Co.		200000	1061858	
25-06-2016	Invoice No. 012	342920		1404778	
	Difference in Measurement 14.66 sq. ft.		3519	1401259	
09-08-2016	NEFT from V.K. Aggarwal & Co.		150000	1251259	
30-08-2016	RTGS from V.K. Aggarwal & Co.		500000	751259	
03-09-2016	RTGS from Supertech		940000	-188741	
07-10-2016	Invoice No. 014	856294		667553	
12-10-2016	Invoice No. 015	75052		742605	
16-01-2017	RTGS from Supertech		500000	242605	
		3456012	3213407	242605	Balance

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JAI CHNDRAWAL GRANITES					
DATE	DETAIL	AMOUNT			
		DEBIT	CREDIT	BALANCE	
15-05-2016	Invoice No. 119	698146		698146	
23-05-2016	Cash for Freight		130000	568146	
	Difference in Measurement 127.78 sq. ft.		9200	558946	
		698146	139200	558946	Balance

TOTAL BALANCE DUE as on 13-04-2017	
Harsh Trading Company	2574509
Vikhyat Marbles	242605
Jai Chandrawal Granites	558946
TOTAL	3376160

accepted
 13/4/2017.

20. Since the aforesaid acknowledgement of debt dated 13.04.2017 has been made within 3 years of limitation of filing of the present Application on 17.03.2020 and which has not been contested, we are of the view that the present Application filed by the Operational Creditor is within the limitation period.

21. In the given facts and circumstances, the Operational Creditor has been able to establish the default on the part of Corporate Debtor in payment of the operational debt of more than Rs.1,00,000/- (One Lakh), therefore, **the Application is admitted in terms of Section**

9(5) of the IBC, 2016. Accordingly, the CIRP is initiated and moratorium is declared in terms of Section 14 of the IBC, 2016.

As a necessary consequence of the moratorium in terms of Section 14(1) (a), (b), (c) & (d), the following prohibitions are imposed, which must be followed by all and sundry:

“(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;

(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.”

22. Since there is no IRP proposed by the Operational Creditor, this Bench appoints Mr. Dinesh Chandra Agarwal (IBBI Registration No. IBBI/IPA-001/IP-P00090/2017-18/10186 & Email Id : padamdinesh@gmail.com) as an IRP of the Corporate Debtor with immediate effect from the panel of the IPs recommended by IBBI to this Adjudicating Authority and orders that:

“Mr. Dinesh Chandra Agarwal is directed to take charge of the CIRP of the Corporate Debtor with immediate effect. The Court Officer will inform the IRP so appointed by all modes.”

23. The Operational Creditor is directed to deposit Rs.2,00,000/- (Two Lakh) only with the IRP to meet the immediate expenses. The amount, however, will be subject to adjustment by the Committee of Creditors as accounted for by the Interim Resolution Professional and shall be paid back to the Operational Creditor.

24. A copy of this Order shall be communicated immediately to the Operational Creditor, the Corporate Debtor and the IRP named above, by the Registry/Court Officer. In addition, a copy of the Order shall also be forwarded by the Registry to IBBI for their records.

Sd/-
(L. N. GUPTA)
MEMBER (T)

Sd/-
(ABNI RANJAN KUMAR SINHA)
MEMBER (J)