IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI
BENCH-III

Company Petition No. (IB)- 721/(ND)/2022

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

IN THE MATTER OF:

M/s. Montage Enterprises Private Limited

.... Operational Creditor

Vs.

M/s. Pitabara Business Promotions Private Limited

.... Corporate Debtor

CORAM:

SHRI BACHU VENKAT BALARAM DAS

HON'BLE MEMBER (JUDICIAL)

SHRI ATUL CHATURVEDI

HON'BLE MEMBER (TECHNICAL)

ORDER PRONOUNCED ON: 23.12.2022

ORDER

SH. ATUL CHATURVEDI, HON'BLE MEMBER (T)

The instant application is filed by M/s. Montage Enterprise Private Limited (hereinafter referred as 'Applicant'/ 'Operational Creditor') incorporated under the provisions of the erstwhile Companies Act, 1956 and having CIN: U74950DL2002PTC114886 under Section 9 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'the Code') read with rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating

Authority) Rules, 2016 (for brevity 'the Rules') with a prayer to initiate Corporate Insolvency Resolution Process in respect of M/s. Pitambara Business Promotions Private Limited (hereinafter referred as 'Respondent Company' or 'Corporate Debtor') for defaulting the payment of Rs. 23,71,67,214.48/- which includes principal amount of Rs.22,77,70,160/- and interest amounting Rs.93,97,054.48/- @18% p.a. on the outstanding principal amount.

2. The Respondent Company M/s. Pitambara Business Promotions Private Limited having CIN: U51909DL2019PTC354412incorporated under the provisions of the Companies Act,2013 having its registered office situated at B-109, G/F, Shop No.-7, Gali No.10, Shashi Garden, Mayur Vihar Phase -I, East Delhi, Delhi-110091. Since the registered office of the respondent corporate debtor is in New Delhi, this Tribunal having territorial jurisdiction over the NCT of Delhi is the Adjudicating Authority in relation to the prayer for initiation of Corporate Insolvency Resolution Process in respect of respondent corporate debtor under sub-section (1) of Section 60 of the Code.

3. Briefly stated, the facts of the present case as averred by the applicant are that the applicant is engaged in the business of traders, wholesalers and distributors of flexible packaging materials and other allied products and had entered into a 'Goods Sale and Purchase Agreement' dated 19.09.2019 ('Agreement') with the Corporate Debtor. The applicant submits that as per the terms of the said agreement dated 19.09.2019, the applicant was to supply goods to the corporate debtor and in furtherance of which the applicant was to raise the bills. The corporate debtor started making default in payments to the applicant and the invoice(s) since 30.04.2021 went unpaid by the corporate debtor. The applicant on various occasions approached the corporate debtor for

payment of the outstanding invoices to which the corporate debtor assured the applicant that the outstanding invoices will be paid with the subsequent invoices are raised. The applicant on the assurances given by the corporate debtor continued to supply the goods to the corporate debtor but the corporate debtor continued to make default in making payments. The applicant had sent a Demand Notice dated 10.09.2022 in Form-3 as provided under Section 8 of the Code, 2016 which was received by the corporate debtor on 13.09.2022 demanding outstanding principal amount of Rs. 22,77,70,160/- along with interest calculated at the rate of 18% per annum amounting to Rs. 93,97,054.48/-. The corporate debtor had sent reply to the demand notice on 20.09.2022 to the applicant wherein the corporate debtor had admitted its liability. Hence the applicant prays for the initiation of the CIRP of the corporate debtor.

4. The corporate debtor has filed its reply dated 14.11.2022 and submits that the applicant had entered into "Goods Sales and Purchase Agreement" dated 19.09.2019 with the corporate debtor based on the credentials set forth by the corporate debtor. The corporate debtor submits that even in the light of Covid-19, when the whole world was struggling to run the business, the corporate debtor never made any unreasonable delay in payments, however due to post Covid-19 recession, the corporate debtor faced shortage of funds and a financial crunch which made it difficult for the corporate debtor even to run the business.

5. Further, the corporate debtor submits that it is an admitted fact that the corporate debtor was unable to adhere to the payment due to the applicant since 30.05.2021 upon which the corporate debtor requested the applicant to continue the supply and as soon as the financial situation of the corporate debtor is restored to normal, the corporate debtor shall clear the entire debt on a priority basis. The corporate debtor was shocked

to receive demand notice dated 10.09.2022 on 13.09.2022 claiming the payment of the outstanding debt from 30.04.2022 to 15.06.2022. The corporate debtor has duly responded to the demand notice vide reply dated 20.09.2022 requesting the applicant time to repay the debts. The corporate debtor submits that it has never denied in admitting claim due to the applicant, it is the plight of the corporate debtor that it is unable to meet the expenses owed to the applicant. The corporate debtor seeks three year's time to repay the defaulted principal amount without any interest in instalments.

6. We have heard Ld. Counsel for both the parties and perused the averments made in the application and reply filed by the parties. The relevant documents annexed with the respective submissions have been examined.

7. On-going through the submissions made by the Learned Counsel for both the Parties and on perusing the documents placed on record, this Adjudicating Authority is of the considered opinion that the "debt and default" in this case are proved beyond doubt as the Corporate Debtor has acknowledged and assured to repay the overdue amount in its reply dated 20.09.2022 to the demand notice sent by the applicant as well as in the pleadings. Further, on perusal of the 'Goods Sale and Purchase Agreement' dated 19.09.2019, we come to conclusion that the nature of debt is a "Operational Debt" as defined under section 5 (21) of the Code and the amount of outstanding Operational Debt is above the pecuniary threshold limit of Rs.1 Crore as envisaged under Section 4 of the Code, 2016. It has also been established that there is a "Default" as defined under section 3 (12) of the Code on the part of the Corporate Debtor. Therefore, the two essential qualifications, i.e., existence of 'debt' and 'default', for admission of a petition under section 9 of the Code, 2016 have been met in this case.

8. The Hon'ble Supreme Court judgement in **Mobilox Innovations Private Limited Vs Kirusa Software Private Limited [Civil Appeal No. 9405 of 2017 para 34,** wherein the Hon'ble Supreme Court laid has down what the Adjudicating Authority has to examine in an Application under Section 9.

> *"34. Therefore, the adjudicating authority, when examining an application under Section 9 of the Act will have to determine:*
> *(i) Whether there is an "operational debt" as defined exceeding Rs 1 lakh? (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 one of the aforesaid conditions is lacking, the Application would have to be rejected. Apart from the above, the adjudicating authority must follow the mandate of Section 9, as outlined above, and in particular the mandate of Section 9(5) of the Act, and admit or reject the Application, as the case may be, depending upon the factors mentioned in Section 9(5) of the Act."*

9. With regard to the corporate debtor's submission of seeking time to repay the operational debt due to the applicant, it is a settled preposition of law that an application under Section 9 of the Code, 2016 have to be mandatorily admitted if all the conditions stipulated in clauses (a) to (e) of Section 9(5)(i) of the IBC are satisfied.

10. At this juncture, it will be advantageous to refer the judgement dated 12.07.2022 of the Hon'ble Supreme Court in the case **Vidharbha Industries Power Limited vs. Axis Bank Limited [Civil Appeal No. 4633 of 2021]** wherein the Hon'ble Supreme Court observed as follow: -

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"74. Sub-section (5) of Section 9 of the IBC provides that the Adjudicating Authority (NCLT) shall, within 14 days of the receipt of an application of an operational creditor under sub-section (2) of Section 9, admit the application and communicate the decision to the Operational Creditor and the Corporate Debtor, provided, the conditions stipulated in clauses (a) to (e) of Section 9(5)(i) of the IBC are satisfied. The Adjudicating Authority (NCLT) must reject the application of the Operational Creditor in the circumstances specified in clauses (a) to (e) of Section 9(5)(ii) of the IBC.

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An application of an Operational Creditor for initiation of CIRP under Section 9(2) of the IBC is mandatorily required to be admitted if the application is complete in all respects and in compliance of the requisites of the IBC and the rules and regulations thereunder, there is no payment of the unpaid operational debt, if notices for payment or the invoice has been delivered to the Corporate Debtor by the Operational Creditor and no notice of dispute has been received by the Operational Creditor. The IBC does not countenance dishonesty or deliberate failure to repay the dues of an operational creditor."

11. Having regard to the conspectus of facts of the present case and the judgements cited (supra), this Adjudicating Authority is of the considered view that the corporate debtor is in default of payment of the outstanding operational debt owed to the applicant and the mandatory requirements as prescribed under Section 9(5) of the Code, 2016 are satisfied. Therefore, the present company application (**C.P. No. (IB)- 721(ND)/2022) stands admitted and the CIRP is hereby initiated against M/s. Pitambara Business Promotions Private Limited.**

12. The applicant in Part -III of the application has proposed the name of IRP, accordingly, this bench appoints Mr. Mohan Lal Jain, as the Insolvency Resolution Professional of the corporate debtor. The registration number of the IRP being IBBI/IPA-002/IP-N00006/2016-2017/10006 and email id –ml_jain@sumedhamanagement.com. The IRP above named is appointed subject to the condition that no disciplinary proceedings are pending against him. The specific consent in Form 2 of Insolvency and

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Bankruptcy Board of India (Application to Adjudicating Authority) Rule, 2016 is attached with the application. However, the Authorization for Assignment attached with the application was valid from 30.11.2021 to 29.11.2022, therefore the IRP is directed to file the renewed Authorisation for Assignment Certificate and other required disclosures be made as required under IBBI (insolvency Resolution Process for Corporate Persons) Regulations, 2016 with this Adjudicating Authority within a period of 3 days from the Pronouncement of the order.

13. We direct the applicant to deposit a sum of Rs. 2 lacs with the Interim Resolution Professional, namely Mr. Mohan Lal Jain to meet out the expense 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 be subject to adjustment by the Committee of Creditors, as accounted for by Interim Resolution Professional, and shall be paid back to the Operational Creditor

14. We also declare moratorium in terms of Section 14 of the Code. The necessary consequences of imposing the moratorium flows from the provisions of Section 14 (1) (a), (b), (c) & (d) of the Code. Thus, the following prohibitions are imposed:

"(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 Securitization 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."

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(e)The IB Code 2016 also prohibits Suspension or termination of any license, permit, registration, quota, concession, clearances or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license, permit, registration, quota, concessions, clearances or a similar grant or right during the moratorium period."

15. It is made clear that the provisions of moratorium shall not apply to transactions which might be notified by the Central Government or the supply of the essential goods or services to the Corporate Debtor as may be specified, are not to be terminated or suspended or interrupted during the moratorium period. In addition, as per the Insolvency and Bankruptcy Code (Amendment) Act, 2018 which has come into force w.e.f. 06.06.2018, the provisions of moratorium shall not apply to the surety in a contract of guarantee to the corporate debtor in terms of Section 14 (3) (b) of the Code.

16. The Interim Resolution Professional shall perform all his functions contemplated, inter-alia, by Sections 15, 17, 18, 19, 20 & 21 of the Code and transact proceedings with utmost dedication, honesty and strictly in accordance with the provisions of the Code, Rules and Regulations. It is further made clear that all the personnel connected with the Corporate Debtor, its promoters or any other person associated with the Management of the Corporate Debtor are under legal obligation under Section 19 of the Code to extend every assistance and cooperation to the Interim Resolution Professional as may be required by him in managing the day-to-day affairs of the 'Corporate Debtor'.

17. In case there is any violation committed by the ex-management or any tainted/illegal transaction by ex-directors or anyone else, the Interim Resolution Professional would be at liberty to make appropriate

application to this Tribunal with a prayer for passing a appropriate orders. The Interim Resolution Professional shall be under duty to protect and preserve the value of the property of the 'Corporate Debtor' as a part of its obligation imposed by Section 20 of the Code and perform all his functions strictly in accordance with the provisions of the Code, Rules and Regulations.

18. A copy of the order shall be communicated to the applicant, Corporate Debtor and IRP above named, by the Registry. In addition, a copy of the order shall also be forwarded to IBBI for its records. Applicant is also directed to provide a copy of the complete paper book to the IRP. A copy of this order is also sent to the ROC for updating the Master Data. ROC shall send compliance report to the Registrar, NCLT.

Let copy of the order be served to the parties.

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(ATUL CHATURVEDI)
MEMBER (TECHNICAL)

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(BACHU VENKAT BALARAM DAS)
MEMBER (JUDICIAL)