

IN THE NATIONAL COMPANY LAW TRIBUNAL
JAIPUR BENCH

**CORAM: SHRI DEEP CHANDRA JOSHI,
HON'BLE JUDICIAL MEMBER**

**SHRI RAGHU NAYYAR,
HON'BLE TECHNICAL MEMBER**

CP No. (IB)- 121/9/JPR/2019

(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:

KAMAKSHI KRAFTEX PVT. LTD.

...Operational Creditor

Versus

M/S SARAF GARTEX LTD.

...Corporate Debtor

MEMO OF PARTIES

Kamakshi Kraftex Pvt. Ltd.

CIN: U74994RJ2007PTC024130

Office: D-12, Corporate Tower,

A-1, 8th Floor, J.N.L. Marg, Jawahar Circle,

Jaipur, Rajasthan-302017

...Applicant/ Operational Creditor

VERSUS

M/s Saraf Gartex Ltd.

CIN: U18101RJ1981PLC002345

Office: 115-B, Vishwakarma Industrial Area,

Road No. 9, Jaipur, Rajasthan-302013

... Respondent / Corporate Debtor

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For the Operational Creditor : Ajatshatru Mina, Adv.
Aishwarya Sharma, Adv.
For the Corporate Debtor : Ajit Maloo, Adv.

Order Pronounced On: - 11.03.2022

ORDER

Per: Shri Deep Chandra Joshi, Judicial Member

1. This Application has been filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 ('Code' / 'IBC') read with Rule 6 of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 ('Rules') by Kamakshi Kraftex Private Limited ('Applicant'), claiming to be an Operational Creditor with a prayer for initiation of Corporate Insolvency Resolution Process ('CIRP') against M/s Saraf Gartex Limited ('Respondent' / 'Corporate Debtor').
2. The Applicant has its registered office at D-12, Corporate Tower, A-1, 8th Floor, J.N.L. Marg, Jawahar Circle, Jaipur-302017 (Rajasthan); and is involved in manufacturing and distribution of industrial raw materials-fabrics. The Application has been filed in Form 5 as prescribed in Rule 6(1) of (Application to Adjudicating Authority) Rules, 2016.
3. The Respondent is a public limited Company incorporated under the Companies Act, 1956 in 1960, duly registered with the Registrar of Companies, Jaipur, bearing CIN: U18101RJ1981PLC002345. The Registered Office of the Respondent is at 115-B, Vishwakarma Industrial Area, Road No.9, Jaipur-302013 (Rajasthan). The company's nominal share capital is Rs. 10,800,000/- (Rupees

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One Crore Eighty Lakhs Only), and paid-up share capital is Rs. 10,800,000/- (Rupees One Crore Eighty Lakhs Only).

4. The facts of the case, briefly, as stated in the Application, show that the Applicant has been conducting business with the Respondent from time to time, wherein the Respondent approached the Applicant for the supply of various industrial raw materials-fabrics on an "on order" basis. In turn, the Applicant raised and issued invoices dated 26.05.2016 to 12.09.2016 (a total of eight invoices) in favour of the Respondent against the orders placed.

5. The Applicant submitted that the Respondent made part-payment of Rs. 14,65,606/- (Rupees Fourteen lakhs Sixty-Five Thousand Six Hundred and Six Only) to the Applicant. The Applicant further submitted that the last payment received from the Respondent was on 06.09.2016. Thereafter, the Respondent has failed to make the balance payment for the other invoices amounting to total debt of Rs. 6,45,886/-.

6. The Applicant further submits that excluding the aforesaid part-payments made by the Respondent, a sum of Rs. 6,45,886/- including interest @ 18% per annum is charged on outstanding invoices.

7. The Applicant issued and served a Demand Notice dated 28.04.2019 to the Respondent under Section 8 of the Code as per Form 3 as prescribed under Rule 5 of the Rules at its registered office demanding a sum of Rs. 6,45,886/- along with interest @18% per annum on the invoices. The Respondent neither paid the outstanding debt nor raised a dispute regarding the outstanding debt till

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the filing of the present petition. The demand notice was accompanied by computation of interest, details of invoices, and relevant dates of default. Copy of Demand Notice dated 28.04.2019 and postal receipt dated 29.04.2019 sent to the Respondent are annexed at Annexure A-10 of the Application, respectively.

8. The Applicant has filed a Statement of Bank Account maintained with State Bank of India from 03.06.2016 to 05.09.2016 at Annexure A-9 of the Application. It is stated that there is no repayment of the unpaid operational debt by the Respondent.

9. As claimed by the Applicant, the Respondent is liable to pay an amount of Rs.6,45,886/- (Rupees Six lakhs Forty-Five Thousand Eight Hundred and Eighty-Six Only), as an outstanding amount, as reflected in Part IV of the Form - 5 filed with the Application.

PART IV

Particulars of Operational Debt	
The total amount of debt, details of transactions on account of which debt fell due, and the date from which such debt fell due	Total debt due is Rs.6,45,886/- (Rupees Six Lakhs Forty-Five Thousand Eight Hundred and Eighty-Six Only), as of 06.09.2016, along with interest @18% per annum on the Invoices.
Amount claimed to be in default and the date on which the default occurred	Total debt due is Rs.6,45,886/- (Rupees Six Lakhs Forty-Five Thousand Eight Hundred and Eighty-Six Only).

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10. Notices were issued in the aforesaid Application, and the Respondent filed a reply *vide* Diary No. 2105/2019 dated 26.09.2019. It has been submitted that the petition is not maintainable as the alleged transactions are disputed. There is a serious dispute between Applicant and Non-Applicant regarding the quality of goods/fabrics. Further, the Sale of Goods Act, 1930 gives the buyer the right to examine the goods then only it is deemed to be accepted by the buyer. Once it is informed that the goods are not accepted due to the same not being of specific quality, the onus to take back the rejected goods is on the seller. Therefore, because of the Applicant's defective goods and delayed fabric supply, the non-applicant could not, complete its order on time.

11. The Corporate Debtor has stated that the statement of account of the Bank that the Applicant has filed is not admissible in evidence and cannot be relied upon. The statements were prepared as if it is a running and current account, whereas the transactions have taken place on a bill-to-bill basis. There is no running and current account between parties. It is also seen that the Respondent has attached various debit notes for the return of the goods purchased at different points in time *vide* Annexure R3- Annexure R11.

12. The Applicant thereby filed a rejoinder *vide* Diary No. 2423/2019 dated 17.10.2019 and denied the abovesaid allegations. It has been stated that the Corporate Debtor assessed the quality before issuing the Sales Invoice by the Applicant. Only when the Corporate Debtor affirmed the fabric's quality thereafter, the invoice was issued, and goods were transported to the Corporate Debtor.

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13. Further, it is stated by the Applicant that the Operational Creditor has never acknowledged the Debit Notes as it is not signed by any person authorized by the Operational Creditor, nor does it bear the seal/stamp of the Operational Creditor, thus are not authentic. Therefore, no deduction was made by the Operational Creditor during the period when these unpaid invoices were issued.

14. Additionally, it was mentioned in the sale invoice that there might be a variation of 5-10% on both sides and the condition that the Applicant will entertain no claim for the quality of goods after seven days of dispatch of goods. Thus, the Corporate Debtor raised the dispute regarding the quality of goods when the Applicant sent a reminder e-mail for the amount outstanding.

15. The Applicant has further submitted that the last supply of goods by the Operational Creditor to the Corporate Debtor was made on 12.09.2016 vide invoice No. 1095/16-17 for Rs. 2,50,842/-. The Respondent made the last payment on 06.09.2016 as reflected in the Bank statement at Page 33 (Annexure A-9) of the Application. The account of the corporate debtor is a running account, and thus the date of last payment is 06.09.2016 and therefore, the present Application is not barred by limitation as per Article 137 of the Limitation Act, 1963. The Applicant has submitted an affidavit under Section 9(3)(b) of the Code in the Application.

16. In its surrejoinder, vide Diary No. 2653 dated 13.11.2019, the Respondent stated that the related debit notes were attached with the respective cheques duly received by the representative of the Operational Creditor as full and final

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payment of the respective invoices. The quality of fabric supplied was not also at par with the industrial norm, where the maximum difference in the weight of the material can be 2-3%. However, in this regard, no evidence has been provided by the Corporate Debtor.

17. The Non-Applicant vide Diary No. 2732/2021 dated 15.12.2021 filed its written submission and has relied on the following Judgments:

- (i) Kay Bouvet Engineering Ltd v. Overseas Infrastructure Alliance (India) Private Limited, Civil Appeal No. 1137 of 2019.
- (ii) Transmission Corporation of Andhra Pradesh Limited vs. Equipment Conductors and Cables Limited, Civil Appeal No. 9597 of 2018.
- (iii) Firm of Shivallingappa Shankarappa Mendse at Amraoti by its agent Channappa Basappa Jainapure v. Joint Family of Ck. Balakrishna Chettiar and Son, Second Appeal No. 906 of 1959.

18. In Kay Bouvet (*supra*), while dealing with the existence of a commercial dispute, the Hon'ble Supreme Court held *whether there is a plausible contention that requires further investigation and that the dispute is not a patently feeble legal argument or an assertion of fact unsupported by evidence. It is important to separate the grain from the chaff.*

19. In Transmission Corporation (*supra*), the Hon'ble Supreme Court again reiterated that the existence of an undisputed debt is a *sine qua non* of initiating CIRP. It further states that *the adjudicating authority shall satisfy itself that there is a debt payable and there is operational debt, and the corporate debtor has not*

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repaid the same.

20. In Firm of Shivallingappa (*supra*), the Hon'ble Madras High Court emphasized Section 59 of the Sale of Goods Act and held that the buyer is entitled to reject the goods upon and allowed to sue for damages for breach of warranty.

21. The Applicant vide Dairy No. 2837/2021 dated 22.12.2021 filed its written submission and has relied on the following judgments:

- (i) Phoenix Global DMCC v. ANA International Trading P. Ltd., CP/500 (IB)/CB/2017.
- (ii) H. H Chemicals v. Paramount Impex Private Limited, CP/IB/1484/ND/18.
- (iii) Greenply Industries Limited v. Southern Cooling Tower Private Limited, CP (IB) No. 699/KB/2017.
- (iv) Mobilox Innovations Pvt. Ltd. v. Kirusa Software Pvt. Ltd., Civil Appeal No. 9405/2017.
- (v) Prabhat Marketing Co. Ltd., Company Petition No. 04/2012.

22. It is seen that as per the terms mentioned in the sales invoice and mutual understanding between the parties, no claim for the quality of goods was to be entertained by the Operational Creditor after seven days of dispatch of the goods. Further, the Operational Creditor has supplied a copy of the Test Reports of the fabrics issued by the Textiles Committee, Ministry of Textile, Government of India. In the said report, the material of the Operational Creditor was found to be of good quality and approved by the Textile Committee; it is annexed as Annexure A-4 of Rejoinder.

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23. Therefore, in a case where an Independent Analyst certified the products supplied to be under the specification and upon acceptance of such report by the Corporate Debtor, any subsequent claims are not tenable. Further, if the Corporate Debtor used the goods, later he cannot take the defence of goods being sub-standard and avoid making the payment.

24. The Non-Applicant's main contention lies in the quality of goods supplied and the existence of dispute of non-payment thereof. The same is supported by issuing the Debit Notes to the Operational Creditor. However, the Debit Notes or any documents evidencing the return of the goods have no value unless it countersigned or accepted by the Operational Creditor.

25. In the instant case, the debit notes are in possession of the Corporate Debtor, and the Operational Creditor has not issued Credit Notes to the Corporate. Moreover, there is no proof of service of debit notes brought on record. There is no dispute between the parties, and such contention is only raised with a motivation to avoid debt payment.

26. This Adjudicating Authority has perused all the relevant papers and found them in order. The Registered Office of the Respondent is situated in Jaipur, and therefore this Adjudicating Authority has jurisdiction to entertain and try this Application. The matter is within the purview of the Law of Limitation as the last payment was made on 06.09.2016 and the Application filed on 21.05.2019. It is a settled principle, when payment on account of debt is made before the expiration of the prescribed period, a fresh period of limitation shall be computed from when the

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payment was made. Therefore, the present Application has been filed within the period of limitation.

27. The first issue for consideration is whether the demand notice in Form No.3 dated 28.04.2019 was served upon the Respondent. The demand notice was sent via a registered post on 29.04.2019 to the corporate debtor and its directors. The postal receipt is attached on Page 37 (Annexure A-9) of the Application.

28. The next issue for consideration is whether the Respondent disputed the operational debt. The Respondent Corporate Debtor has filed a reply and argued that they had been dissatisfied with the goods' supply and quality. However, they have not submitted any authentic communication to substantiate the same. Thus, as per documents placed on record with the adjudicating authority, there is no dispute as to the outstanding liability of the Respondent Corporate Debtor towards the Applicant Operational Creditor.

29. We have gone through the contents of the Application filed in Form No.5 and found the same to be complete. As discussed above, there is a total unpaid operational debt (in default) of Rs.6,45,886/- (Rupees Six Lakhs Forty-Five Thousand Eight Hundred and Eighty-Six Only), including the interest @ 18% per annum. It is observed that the Operational Creditor has issued various invoices (Annexure A-1 to Annexure A-8) for goods supplied to the Respondent Corporate Debtor. Applicant Operational Creditor has given demand notice in Form-3 dated 28.04.2016, duly served on the Respondent Corporate Debtor. This Adjudicating Authority has held above that the Operational Creditor correctly

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delivered the demand notice in Form No.3, and no pre-existing dispute is proved.

30. It has been shown that the Corporate Debtor has failed to make payment of the aforesaid amount due as mentioned in the statutory notice to date. It is also observed that the conditions under Section 9 of the Code stand satisfied. Hence, this Adjudicating Authority is inclined to commence CIRP against the Corporate Debtor as envisaged under the provisions of IBC, 2016.

31. Under sub-section (4) of Section 9 of the Code, the Operational Creditor may propose the name of a Resolution Professional to be appointed as Interim Resolution Professional ('IRP'), but it is not obliged to do so. In the instant case, the Operational Creditor has not proposed the name of any person to be appointed as IRP. Hence, this bench will appoint the RP from the pool of RPs empanelled with the IBBI. Therefore, the bench is appointing Mr. Arvind Kaushik, bearing Registration No. IBBI/IPA-001/IP-P00291/2017-18/10535 with the e-mail address ca73588@gmail.com and phone number +91- 9413972351 as the IRP in the present matter. The said IRP is directed to file the written consent to act as resolution professional in Form-A provided under Regulation 4(2) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Regulations, 2019.

32. In this matter, the Interim Resolution Professional appointed herein, Mr. Arvind Kaushik, shall exercise all the powers enumerated under the Code read with Rules made thereunder. He is directed to make recommendations with reasons in writing for acceptance or rejection of this Application within the stipulated time

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as envisaged under the Code. The Interim Resolution Professional shall provide a copy of the report to the Corporate Debtor as soon as filed before this Adjudicating Authority. The Applicant shall provide a copy of the Application, if not provided already, along with this order to IBBI for its records.

33. The IRP is directed to take all such steps as are required under the statute, inter-alia in terms of Sections 15, 17, 18, 19, 20, and 21 of the Code and transact proceedings with utmost dedication, honesty and strictly under the provisions of the Code, and Rules and Regulations thereunder.

34. Consequences of commencement of CIRP shall be inter-alia as follows:

- (i) The IRP appointed by the Adjudicating Authority, Mr. Arvind Kaushik, is directed to take over the affairs of the Corporate Debtor and duties as required to be performed by him under the provisions of Code including the issue of a publication in widely circulated Newspapers as contemplated under the provisions of the Code and calling for claims from the creditors of the Corporate Debtor; and collation of the same shall be done.
- (ii) Further, as a sequel of admission, moratorium, as envisaged under Section 14 of the Code, is invoked concerning the Corporate Debtor, which will be in vogue during the CIRP of the Corporate Debtor. The IRP shall carry out CIRP strictly as per the timelines specified and as envisaged under the provisions of the Code concerning the Corporate Debtor.
- (iii) The said IRP shall act strictly following the provisions of the Code,

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and to defray his expenses to be incurred and fees on the account, the Applicant is directed to deposit a sum of Rs. 2,00,000/- (Two Lakhs Only) to the account of IRP within three days from the date of this order. The IRP shall duly file a status report apprising this Adjudicating Authority about the progress of CIRP as unfolding concerning the Corporate Debtor. In terms of Section 17 and 19 of the Code, all personnel of the Corporate Debtor including promoters and Board of Directors, whose powers shall stand suspended, shall extend all cooperation to the IRP during his tenure as such and the management of the affairs of the Corporate Debtor shall vest with the IRP.

(iv) In terms of Section 9 of the Code, this order shall be communicated at the earliest, not exceeding one week from today, to the Applicant, Corporate Debtor, as well as the IRP appointed by this Adjudicating Authority to carry out CIRP. A copy of this order shall also be communicated to IBBI for its records.

35. Copy of this order to be supplied to the Applicant. The Applicant and his counsel are directed to serve a copy of this order along with a copy of the Application and documents on the Resolution Professional by all modes for information.

36. The Registry is directed immediately to send a soft copy of the instant Application along with this order to the RP nominated herein on his e- mail id.

37. Accordingly, CP No. (IB)- 121/9/JPR/2019 is admitted.

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Deep Chandra Joshi
Judicial Member

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Raghu Nayyar
Technical Member