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

Company Petition No. (IB)-231(ND)/2023

IN THE MATTER OF:

M/s Shree Krishna Automobiles
Through its Partner,
Sh. Rajesh Jindal
Office at:
Basement of Shree Krishna Automobiles
KDB Road, Near New Anaj Mandi
Kurukshetra-138116 (Haryana) **... Applicant**

VERSUS

Nava Healthcare Private Limited
Registered office at:
C-1/10, Upper Ground Floor
Janak Puri, New Delhi - 110058 **... Respondent**

Section: 7 of IBC, 2016

Order Delivered on: 03.07.2023

CORAM

SH. ASHOK KUMAR BHARDWAJ, HON'BLE MEMBER (J)

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

PRESENT:

For the Applicant	: Adv. Vinod Chaurasia
For the Respondent	: Adv. Pankaj Kumar Singhal, Adv. Harshit Kumar Rawat

ORDER

PER: SH. L. N. GUPTA, MEMBER (T)

M/s Shree Krishna Automobiles through its Partner, Sh. Rajesh Jindal (for brevity, the '**Applicant'**) has filed the present petition under Section 7 of the Insolvency and Bankruptcy Code, 2016 (for brevity, '**IBC, 2016'**) read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 with a prayer to initiate the Corporate Insolvency Resolution Process against M/s Nava Healthcare Private Limited (for brevity, the '**Respondent**').

2. The Respondent namely, M/s Nava Healthcare Private Limited is a Company incorporated on 17.07.2006 with CIN U24233DL2006PTC151081 under the provisions of the Companies Act, 1956 having its registered office at C-1/10, Upper Ground Floor Janak Puri, New Delhi – 110058, which is within the territorial jurisdiction of this Tribunal. The Authorized Share Capital of the Respondent Company is Rs.6,00,00,000/- and Paid-up Share Capital is Rs.4,83,93,020/- as per Master Data.

3. It is stated by the Applicant that the Respondent is engaged in the marketing and distribution of drugs, pharmaceuticals, chemicals, etc. and the Applicant is a registered partnership firm and was appointed as Clearing & Forwarding Agent/Mother Warehouse (CFA) for the products being distributed by the Respondent. On 01.03.2020, the Respondent entered into an Agreement (hereinafter referred to as "**Agreement**") as per which, the

Applicant placed a security deposit of Rs. 2,00,00,000/- (Two Crores) only in 04 instalments of Rs. 50,00,000/- each. Due to non-payment of regular payment of CFA services, on 02.07.2021, the Applicant sent a legal notice for termination of the CFA service agreement and also demanded the refund of the security deposit of Rs. 2,00,00,000/- along with interest @ 9% and other dues.

4. It is stated by the Applicant that it had earlier filed a Section 9 petition against the Respondent vide CP No. (IB)-424(ND)2022, however, the said petition was dismissed vide order dated 10.11.2022 on the ground that Security Deposit with Interest cannot be considered an operational debt. Subsequently, the applicant filed another CP (IB)-47/ND/2023 under section 7 of IBC, 2016, which was withdrawn on 19.01.2023 with the liberty to file a fresh petition.

5. The particulars of the unpaid financial debt claimed and the date of default are mentioned in Part IV of the application, which is reproduced below:

PART – IV

PARTICULARS OF FINANCIAL DEBT

1.	TOTAL AMOUNT OF DEBT GRANTED DATE(S) OF DISBURSEMENT	Rs. 2,00,00,000/- (Two Crores) towards security deposit Plus Interest @ 9% in terms of Agreement i.e. Rs. 33,00,000/- as on 28.02.2023

in Rs.

Sl. NO.	Particulars of Financial Debt	Amount
1	Security Deposit - Principal Amount	2,00,00,000.00
2	Interest for the FY 2021-22	18,00,000.00
3	Interest for the Period 01/04/2022 to 28/02/2023	16,50,000.00
	Total	2,34,50,000.00
4	Less: TDS received for the FY 2021-22 (10 Months)	-1,50,000.00
	Total Financial Debt	**2,33,00,000.00**

Thus Total Financial Debt as on 28.02.2023 is Rs. 2,33,00,000/- (Two Crores Thirty Three Lakhs) including Interest.

Dates of Disbursement are as below:

Sl No.	Date	Amount in Rs.
1.	01.03.2020	50,00,000/-
2.	20.03.2020	50,00,000/-
3.	20.04.2020	50,00,000/-
4.	20.05.2020	50,00,000/-
	Total	**2,00,00,000/-**

Dates of Default:

02.07.2021	Agreement Terminated vide legal notice dated 02/07 /2021 (Kindly refer page no. 77-85)
03.07.2021	3 months notice period started in terms of condition no. 2 I para no. 2 of agreement dated 01/03/2020.
06.08.2021	**E-mail from CD admitting the debt & confirming the payment schedule (Kindly refer page no. 69)**
05.10.2021	Last Payment received from Corporate Debtor (Kindly refer page no. 89)
08.10.2021	Last Email Reminder to release of payment to Corporate Debtor
16.10.2021 & 12.11.2021	**Cheque No. 386220 dated 16.10.2021 for Rs. 2,00,00,000/- issued by CD dishonuored. (Kindly refer page no. 86-94)**
19.11.2021	**E-mail from CD admitting the debt & confirming the payment**

<table>
<tr><td rowspan="4"></td><td rowspan="4"></td><td></td><td>schedule.
(Kindly refer page no. 63-64)</td></tr>
<tr><td>23.08.2022</td><td>Corporate Debtor filed its reply in CP No. (IB)-424(ND)2022 wherein vide para 9 at page no. 8 of reply admitted its liability towards security deposit of Rs. 2,00,00,000/-.
(Kindly refer page no. 137)</td></tr>
<tr><td>20.10.2022</td><td>Corporate Debtor filed its written submission in CP No. (IB)-424(ND)2022 and vide para 7 of page no. 2 admitted its liability towards security deposit of Rs. 2,00,00,000/-
(Kindly refer page no. 155)</td></tr>
<tr><td>18.09.2022</td><td>Corporate Debtor deposited TDS of Rs. 1,50,000/- on interest accrued for the FY 2021-22 (10 Months only) (Kindly refer page no. 59)</td></tr>
<tr><td>2.</td><td>AMOUNT CLAIMED TO BE IN DEFAULT AND THE DATE ON WHICH THE DEFAULT OCCURRED (ATTACH THE WORKING FOR COMPUTATION OF AMOUNT AND DAYS OF</td><td colspan="2">Rs. 2,00,00,000/- (Two Crores) towards security deposit Plus Interest @ 9% in terms of Agreement i.e. Rs. 33,00,000/- as on 28.02.2023

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	DEFAULT IN TABULAR FORM)	(see below)

	Total	2,34,50,000.00
4	Less: TDS received for the FY 2021-22 (10 Months)	-1,50,000.00
	Total Financial Debt	**2,33,00,000.00**

<u>Thus Total Financial Debt</u> as on 28.02.2023 is Rs. 2,33,00,000/- (Two Crores Thirty Three Lakhs) including Interest.

Dates of Disbursement are as below:

Sl No.	Date	Amount in Rs.
1.	01.03.2020	50,00,000/-
2.	20.03.2020	50,00,000/-
3.	20.04.2020	50,00,000/-
4.	20.05.2020	50,00,000/-
	Total	**2,00,00,000/-**

Dates of Default:

02.07.2021	Agreement Terminated vide legal notice dated 02/07 /2021 (Kindly refer page no. 77-85)
03.07.2021	3 months notice period started in terms of condition no. 2 I para no. 2 of agreement dated 01/03/2020.
06.08.2021	**E-mail from CD admitting the debt & confirming the payment schedule (Kindly refer page no. 69)**
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		16.10.2021 & 12.11.2021	**Cheque No. 386220 dated 16.10.2021 for Rs. 2,00,00,000/- issued by CD dishonuored. (Kindly refer page no. 86-94)**
		19.11.2021	**E-mail from CD admitting the debt & confirming the payment schedule.** **(Kindly refer page no. 63-64)**
		23.08.2022	**Corporate Debtor filed its reply in CP No. (IB)-424(ND)2022 wherein vide para 9 at page no. 8 of reply admitted its liability towards security deposit of Rs. 2,00,00,000/-.** **(Kindly refer page no. 137)**
		20.10.2022	Corporate Debtor filed its written submission in CP No. (IB)-424(ND)2022 and vide para 7 of page no. 2 admitted its liability towards security deposit of Rs. 2,00,00,000/- **(Kindly refer page no. 155)**
		18.09.2022	Corporate Debtor deposited TDS of Rs. 1,50,000/- on interest accrued for the FY 2021-22 (10 Months only) **(Kindly refer page no. 59)**

6. As per Part IV of the Application, the Applicant has claimed Rs.2,00,00,000/- towards security deposit + Interest (@ 9% in terms of the Agreement) of Rs. 33,00,000/- as of 28.02.2023.

7. The Applicant has relied on the following documents to prove the existence of financial debt -

i) Agreement dated 01.03.2020 between Nava Healthcare Private Limited and Shree Krishna Automobiles with Bank Statements.

ii) Statement showing the calculation of Amount in default as of 31.03.2022.

iii) Copy of Ledger Statements & relevant pages of 26AS i.e. TDS statement.

iv) Copies of email communications between parties.

v) Agreement Termination notice dated 02/07/2021

vi) Copy of Cheque number 386220 dated 16.10.2021 along with return memo dated 12.11.2021 & Bank Statements.

8. Based on the aforesaid facts and documents, the Applicant has prayed for the initiation of CIRP against the Respondent.

9. On issuance of the notice, the Respondent has filed its reply and stated that the present application is filed merely for the recovery of money, which is defeating the purpose of the IBC, 2016. It has relied on the judgment passed by the Hon'ble Supreme Court in the matter of M/s Invent Asset Securitization

and Reconstruction Pvt. Ltd. Vs. M/s Gimar Fibres Ltd. in Civil Appeal No. 3033 of 2022. The Respondent has further submitted that -

9.1 The application is not maintainable in terms of the provisions of section 10A of the Insolvency and Bankruptcy Code, 2016. The applicant has filed the record of default registered with NeSL admitting that the date of default was 01.06.2020 and therefore, the application is liable to be dismissed in terms of the provision of sec 10A of the Code.

9.2 The Respondent is a Company registered under the MSME Act, 2006, and CIR proceedings against a going concern jeopardizing the livelihood of several families are against the objectives of IBC.

9.3 The applicant herein is, again and again, abusing the process of law by filing bogus and frivolous applications for the recovery of monies only. It is humbly submitted to take note that -

a) Initially an application having CP (IB) No.424/ND/2022 was filed against the respondent under Section 9 of the Code which was dismissed by this Adjudicating Authority vide order dated 10.11.2022 as Application having CP (IB) No. 424/ND/2022 was not in consonance with the provision of IB Code, 2016 and rules regulations made thereunder.

b) Thereafter again an application having CP (IB) No. 47/ND/2023 was filed against the respondent under Section 7 of the Code which was withdrawn by the applicant herein vide order dated 19.01.2023.

10. After hearing the submission of both parties and perusing the documents placed on record, this Bench observes that on an earlier occasion, the Applicant had filed an application bearing no. (IB)-424(ND)/2022 under Section 9 of IBC 2016 which was dismissed by this Adjudicating Authority on the ground that the debt claimed by the Applicant was not an Operational Debt. The Applicant has now filed the instant Application under Section 7 of IBC 2016 claiming its debt as a Financial Debt.

11. On a perusal of Part IV of the application, it is observed that the claim of the Applicant is arising out of the Security Deposit amount, which was disbursed against interest @ 9% in terms of Clause 18 of the Agreement dated 01.03.2020, which reads thus:

18.Minimum Guaranteed Commission (MGC):

MGC is 2 % of net sales or Rs Rs. 450,000/- (rupees four lacs fifty thousand only) plus GST less TDS, Per Month whichever is higher and this Minimum Guaranteed Commission (MGC) shall be payable every month irrespective of any reasons that may affect the Sales. **All expiry / breakage are the responsibility of the company and it cannot be adjusted against the security deposit of the Agent.**

The Principal shall make payment of Interest at the rate of 9.00 % p.a. payable monthly on the amount of security deposit of Rs.2 (two) crores to be deposited by the Agent.

The Principal shall make payment (excluding GST) of a monthly support of the following fixed expenses to the Agent :

a) Telephone expenses Rs 2000/- per.month
b) Internet charges Rs 2000/- per.month.
c) Stationery Charges Rs 2000/- per.month.
d) Staff Salary Rs.14,000/- per month
e) Fixed Godown rent Rs 60,000/- per month

Agent will need to raise monthly invoice for above support

The details of payment schedule are given below::

S. No.	Cheque No	Date	Amount	Bank
1.	003053	01.03.2020	50 lacs	ICICI BANK
2.	003054	20.03.2020	50 lacs	ICICI BANK
3.	003055	20.04.2020	50 lacs	ICICI BANK
4	003056	20.05.2020	50 lacs	ICICI BANK

Commission and other charges as mentioned above will be paid on a monthly basis by 21st day of succeeding month.

12. Since the Applicant has disbursed the Security amount to the Respondent against the time value of money, the debt meets all the ingredients to be termed as Financial Debt. Even otherwise, the Respondent has not questioned the category of debt. The only legal objection taken by the Respondent is that the present Application is barred under Section 10A of IBC 2016. Hence, we would like to examine this contention.

13. It is contended by the Respondent that the Applicant has filed a record of default of NeSL, as per which the date of default is 01.06.2020, which falls within the Section 10A period. However, when we peruse Part IV of the present application, we observe that the date of default mentioned by the Applicant is 28.02.2023. However, in the interest of justice, we would like to examine when the financial debt in question became due and payable.

14. As per Clause 19 of the Agreement, the Security Deposit was refundable within 01 month of the termination of the Agreement, which reads thus:

> 19.Without prejudice to the Company's rights and remedies against the Agent the Company shall be entitled to adjust said deposit of Rs 2 cr /- (Rupees TWO CRORE Only)or any part thereof in or towards any loss, damage, costs, charges, expenses, shortages in the stock/inventory or other liabilities of whatsoever nature which the Company may suffer or be required to incur by reasons of the failure or neglect on the part of the Agent to observe and perform its duty & obligations in accordance with the terms of the agreement. However, any non-payment or delayed payment by the distributors of the Principal shall be excluded. Further, any adjustment shall be done only after specific agreement by the Agent. The Security Deposit of Rs 2 cr /- (Rupees TWO CRORE Only)would be refunded within one month of the termination of the agreement.

15. From the Application, it is seen that the Agreement was terminated by the Applicant vide its letter dated 02.07.2021, which reads thus:

ANIL KR. GARG
ADVOCATE
DELHI HIGH COURT
EN. NO.- D-179/1996 (R)
Ref. No. ....

OFF: CH. NO.– 58, WESTERN WING,
TIS HAZARI COURTS, DELHI
PH. NO.- 98116-08883
E-mail: anilgarg1996@gmail.com
Dated:...02/07/21

Speed-Post/Regd. A.D.

To,

M/s NAVA Healthcare Pvt. Ltd.,
Regd. off at B-702,
Vasundara Apartments,
Plot no. 16, Sector-6, Dwarka,
New Delhi-110075
THROUGH ITS MANAGING
DIRECTOR/DIRECTOR
MR. HEMANT SURI.

ALSO AT:
1105, 11th Floor, Kirti Shikhar,
District Centre, Janak Puri,
New Delhi-110058.

ALSO AT:
Plot No. 36-37, Gurunanak Vihar-II,
Chander Vihar, Nilothi Extension,
Delhi-110041

Sir,

Under the instructions from and on behalf of my client M/s SHREE KRISHNA AUTOMOBILES, K.D.B. Road, Near New Grain Market, Kurukshetra, Haryana-136118, through its Partner Sh. Rajesh Jindal, I hereby serve you with the legal notice as under:-

1. That you, the addressee, carries on the business of marketing and distributing drugs and pharmaceuticals, chemicals etc. under the name & style M/s NAVA Healthcare Pvt. Ltd. and you, the addressee, in search of appointing an agent in state of Haryana for ware housing, storing and transmission of your products.

2. That my client also doing business and having great reputation in the market and accordingly after due negotiation you, the addressee and my above said client entered into an Agreement dated 01.03.2020 thereby you, the addressee, appointed my client as Cleaning & Forwarding Agent (CFA)/Mother Warehouse on certain terms & conditions.

3. That as per agreement dated 01.03:2020 my client paid/deposited Rs. Two Crore to you, the addressee, as fully refundable security. It is also agreed that you, the addressee, shall make payment of interest @ 9% p.a. on above said security deposited i.e Rs. Two Crore.

4. It is also agreed between you, the addressee, and my client that you, the addressee, shall pay to my above said client on monthly basis in following manner:

a) MGC- 2% of net sales or Rs. 4,50,000/- (rupees four lacs fifty thousand) Plus GST, Less TDS, Per Month whichever is higher and same shall be payable every month irrespective of any reasons.

b) Telephone Expenses	Rs. 2,000/- Per Month
c) Internet charges	Rs. 2,000/- Per Month
d) Stationary charges	Rs. 2,000/- Per Month
e) Staff salary	Rs. 14,000/- Per Month
f) Fixed Godown Rent	Rs. 60,000/- Per Month

the above mentioned commission and other charges are payable on monthly basis on or before 21st day of succeeding month.

5. That almost every month my client requested you to provide the details(total amount) of monthly net sales of company to raise bill as per agreement dated 01.03.2020 but you, the addressee

always avoided the lawful request of my client on one and the other pretext and suggested that my client will raise bill @ Rs. 4,50,000/- per month as mentioned in agreement and later we will settle the account as per net sales of company and in compelled circumstances my client issued bill(s) as per minimum guarantee amount i.e. Rs. 4,50,000/- per month and other fixed charges as mentioned in agreement.

6. That my client performing its duty as per agreement dated 01.03.2020 with the entire satisfaction of you, the addressee but you, the addressee, are very irregular in making the payment of above mentioned MGC as well as occurred interest on above mentioned security amount as mentioned in para no. 4 of this notice and failed to make the payment as agreed vide agreement dated 01.03.2020. My above said client repeatedly demanded its payment telephonically and sending various e-mails and even personally visited your office and met you, the addressee and your staff and requested with folded hands to make the payment but every time you postponed the matter with one and the other pretext.

7. That my client maintaining a running account in your name and as on date i.e. upto 01.07.2021, a sum of Rs. 67,34,755/- is due and payable by you, the addressee, to my client.

8. It is pertinent to mention here that due to ongoing situation of COVID-19 pandemic all reserves of my client have dried up. However, being medicine company your business is running smoothly but you, the addressee, is not discharging your legal liability towards my client by not releasing the payment of my client and by doing so you, the addressee, causing suffering and hardship to my client.

9. That you Mr. Hemant Suri being the Managing Director/ Director and responsible for day to day affairs of M/s NAVA Healthcare Pvt. Ltd. assured my client for the payment as per agreement dated 01.03.2020.

10. That you, the addressee, deliberately with malafide and ulterior motive, withheld the legally recoverable payment of my client.

11. That the above said act and action of you, the addressee, are malicious, totally against the spirit of the transaction recorded in the agreement dated 01.03.2020 and against the standard business ethics too. My client repeatedly reminded you and requested to do act as per spirit of agreement and gave sufficient time to act as per agreement but you failed to do so and even you, the addressee, started to avoid taking phone calls of my client and you with malafide intention ignore the e-mail(s) of my client and never replied the same. It is pertinent to mention here that due to your above mentioned behavior my client sent a Legal notice to you but despite the service you failed to reply and comply the same and in such compelled circumstances my client is left with no option but to invoke condition no. 2/para 2 of agreement dated 01.03.2020 and hereby terminate the agreement dated 01.03.2020 and as per agreement giving three month notice started from 03.07.2021.

I, therefore, hereby call upon you to render the account of monthly net sales of the company and meantime tender the the amount of Rs. 67,34,755/- (Rs. Sixty Seven Lakhs Thirty Four Thousand Seven Hundred and Fifty five). I hereby further call upon you to refund Rs. 2,00,00,000/- (Two Crore) deposited by my client with you as security with up to date interest @ 9% p.a as agreed vide agreement dated 01.03.2020 and Rs. 21,000/- as charges of this legal notice, as per the terms & conditions of the agreement

dated 01.03.2020, failing which my client shall be constrained to take appropriate legal action against you, in the appropriate court of law at Delhi at your risk, costs and consequences. Note that my client reserve its right to issue fresh bill(s) as per net sales of the company or on the basis of net sales of previous year(s). A copy of this legal notice is being kept in my office for further reference and action.

Anil Kumar Garg
Advocate

16. Hence, in terms of the conjoint reading of Clause 19 of the Agreement and the termination letter dated 02.07.2021, the debt became due and payable on 01.08.2021 and the said debt does not fall within the Section 10A period. Hence, we do not find any merit in the objection.

17. During the course of the hearing on 12.06.2023 as well as in the pleadings, the Ld. Counsel appearing for the Respondent had contended that the present application has been filed by the Applicant for the purpose of recovery and not for resolution of the Respondent. However, we do not find anything placed by the Respondent on record as to how the application is not for the purpose of resolution of the Respondent. Hence, we reject this contention of the Respondent being devoid of merit.

18. In the given facts and circumstances, the present Application being complete and the Applicant/Financial Creditor having established the default on the part of the Respondent for an amount above the threshold limit, **the present Application is admitted in terms of Section 7(5) of the IBC and accordingly, and Moratorium is declared in terms of Section 14 of the Code.** 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:

> "(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."

19. As proposed by the Applicant, this Bench appoints Mr. Gurdev Bassi as IRP having Registration No. IBBI/IPA-001/IP-P-01633/2019-2020/12504, Email id: <ipgurdevbassi@gmail.com> subject to the condition that no disciplinary proceeding is pending against the IRP so named and disclosures as required under IBBI Regulations, 2016 are made by him within a period of one week from this Order. This Adjudicating Authority further orders that:

> *"Mr. Gurdev Bassi, E-mail id: <ipgurdevbassi@gmail.com> as IRP having Registration No. IBBI/IPA-001/IP-P-01633/2019-2020/12504 is directed to take charge of the CIRP of the Respondent with immediate effect. The IRP is directed to take the steps as mandated under the IBC specifically under Sections 15, 17, 18, 20, and 21 of IBC, 2016.*

20. The Applicant 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 Interim Resolution Professional and shall be paid back to the Applicant.

21. A copy of this Order shall be communicated by the Registry/Court Officer of this Tribunal to the Applicant, the Respondent, and the IRP mentioned above.

22. In addition, a copy of this Order shall also be forwarded by the Registry/Court Officer of this Tribunal to the IBBI and NeSL for their records.

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

Sd/-
(ASHOK KUMAR BHARDWAJ)
MEMBER (J)