IN THE NATIONAL COMPANY LAW TRIBUNAL,

KOLKATA BENCH
KOLKATA

C.P (IB) No.728/KB/2020

In the matter of

An application under 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules,2016.

And

In the matter of:

Venus Creation, having its registered office at 3A, Mangoelane, 1st Floor, Kolkata- 700001.

... Operational Creditor

Versus

In the matter of:

Sushwani Karani Event And Media Private Ltd., CIN: U18101WB2007PTC119785 having its registered office at 14/15, Bangur Avenue, Block-C, Kolkata -700055,West Bengal.

...Corporate Debtor

Date of hearing :05/05/2022

Order Pronounced on : 05/07/2022

Coram:

Mr. Rohit Kapoor, Member (Judicial)
Mr. Harish Chander Suri, Member (Technical)

Counsels appeared through Video Conference

For Operational Creditor : Mr. Sourojit Dasgupta, Adv.
Mr. Ajay Kumar Agarwal, Adv.

O R D E R

Per: Harish Chander Suri, Member (Technical)

1. The Court is convened by video conference today.

2. This petition under 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules,2016 has been filed by **Venus Creation,** through its proprietor, Mr. Rishi Nakhat (hereinafter referred as the Operational Creditor), seeking initiation of corporate insolvency resolution process in respect of **Sushwani Karani Event And Media Private Ltd,** CIN: U18101WB2007PTC119785, having its registered office at 14/15, Bangur Avenue, Block-C, Kolkata -700055,West Bengal, (hereinafter referred as the Corporate Debtor).

3. It is submitted in the petition that the Operational Creditor is engaged in the business of Gold Jewellary and the Corporate Debtor is carrying on Advertising Business of Media Newspaper etc. The Corporate Debtor approached the Operational Creditor for supply of Gold Ornaments by placing a Work Order dated 14th May, 2019. A copy of the Work Order is annexed as Annexure-D to the petition. The Operational Creditor supplied New Gold Ornaments weighting to 262.120 Gms as per Work Order for Rs. 8,93,911/- (Rupees Eight Lakhs Ninety Three Thousand Nine Hundred Eleven only) to the Corporate Debtor on 21/05/2019. The Corporate Debtor received the supplied materials after verification as good without any objection regarding the product quality in the supply of materials. During the business, the Operational Creditor has issued Tax Invoice and the material delivered to the

Corporate Debtor after verification of the goods by the recipient of the Corporate Debtor. Copy of the Bill and receipt is annexed as Annexure-E.

4. It is further submitted that the Corporate Debtor paid Rs.8,93,911/- on 20/05/2019 through banking instrument dated 20/05/2019 bearing No. 000181 drawn on Kotak Mahindra Bank, which has been returned by the Operational Creditor Banker Yes Bank Limited mentioning reason " FUNDS INSUFFICIENT", in the Cheque Return Advice dated 21/05/2019. Copy of the Bank Cheque Return Advice is annexed as Annexure- F.

5. It is submitted that the Operational Creditor immediately intimated to the Corporate Debtor about the return of cheque through telephonic discussion and further time to time by e-mail dated 27/05/2019 and 03/06/2019 and about the balance outstanding amount and on several occasions demanded the amount from Corporate Debtor but the Corporate Debtor refused to pay the amount stating the reason that they are awaiting the payment from some third party transaction . Ledger Statement, Bank Statement and Emails are annexed as Annexure- G,H,I respectively. It is submitted that the Corporate Debtor has no intention to pay the debt and therefore, it is necessary that insolvency proceedings be initiated against the Corporate Debtor.

6. It is further submitted that the <u>Demand Notice/Invoice in Form-3</u> are served through speed post vide Consignment Number RW354691523IN on dated 22/07/2019, which was duly received by Corporate Debtor on 23/07/2019, which was duly received by Corporate Debtor on 23/07/2019. A copy of the Demand Notice in Form-3 is annexed as Annexure-J and copy of the Postal Receipt is annexed as Annexure-K.

7. In response to the Demand Notice dated 22/07/2019, the Corporate Debtor sent a reply through Advocate vide letter dated 27/07/2019, in which

certain baseless and unsustainable allegations against the Operational Creditor have been raised, it reflects that the intention of the Corporate Debtor is completely mala fide and denying the actual transactions incurred in between the Operational Creditor and the Corporate Debtor. Copy of the reply is annexed as Annexure-L.

8. It is submitted by the Operational Creditor that debt fell due on 21st May 2019 and the total amount of outstanding is Rs.9,68,559/- (Rs.8,93,911/- Principal Amount + Rs.74,648/- interest) upto 30/01/2020.

9. The Operational Creditor has placed on record the following documents in support of its claim:-

i. Copy of Work Order issued by Corporate Debtor & Invoice issued by Operational Creditor.
    a. Dated 14/05/2019
    b. Dated 21/05/2019 Invoice No. VC/0059/19-20
    A copy of the aforesaid documents are enclosed as Annexure D & E.

ii. Copy of Cheque Return Advice is enclosed as Annexure-F.

iii. Copy of Accounting Ledger-Annexure-G.

iv. Copy of Bank Statement-Annexure-H.

v. Copy of email dated 27/05/2019 & 03/06/2019, from Mr. Rishi Nakhat (Proprietor of Venus Creation) to Corporate Debtor-Annexure-I.

vi. Copy of Form-3 and Postal Receipt Annexure-J & K.

vii. Copy of Reply receipt from Corporate Debtor Advocate, Annexure- L.

10. On being served with the notice of the court, the Corporate Debtor has filed its reply affidavit.

11. **In reply to the petition,** the Corporate Debtor filed an affidavit of one of its Directors Bindiya Surana. It is submitted that Mr. Rishi Nakhat, who claimed to be proprietor of the Operational Creditor herein in the affidavit verifying the petition has made false statement and has committed forgery. It is submitted that Corporate Debtor has never received the said consignment of the gold ornament so the question of payment does not arise.

12. It is submitted that the encashment of the alleged security cheque which in turn gave rise to the alleged dispute was done without the knowledge of the Corporate Debtor. It is submitted that the Corporate Debtor had provided a security cheque to the Operational Creditor with the intention to proceed with a transaction which has never occurred from the part of the Operational Creditor since the Operational Creditor never delivered gold to the Corporate Debtor. The Operational Creditor is trying hard to pin an internal scam and fraud on the Corporate Debtor making it a scapegoat, in order to recover its losses.

13. It is submitted that the Operational Creditor has chosen to go "Forum Shopping" by choosing to proceed under the Insolvency and Bankruptcy Code, 2016 in order to avoid the adjudication of the issues involved herein by way of going through full-fledged evidence. The issues involved therein require a full-fledged trial. The dubious conduct of the Operational Creditor thus gives rise to reasonable doubt in the mind as to the intention of filing the aforesaid application under section 9 of the Code. The Corporate Debtor has denied and disputed the date of default and list of dates, synopsis and Memorandum of Appeal as set out in the Application to initiate the CIRP since it is false fabricated and initiated only for the purpose to cover up an internal fraud committed by the agents of the Operational Creditor.

14. The Corporate Debtor further submitted that the alleged consignment of gold was supplied on 21/05/2019 to the Corporate Debtor. Whereas, the

alleged cheque was issued on 20/05/2019, cannot be believed because as per the list of dates, the Operational Creditor delivered the gold to the Corporate Debtor even after the dishonor of the security cheque as alleged. It is submitted by the Corporate Debtor that since no gold was ever delivered to the Corporate Debtor, the question of encashment of security cheque does not and cannot arise. The plea of the Operational Creditor about delivery of gold is altogether false. The document relied upon by the Operational Creditor showing endorsement of receipt of the gold by the Corporate Debtor is false and incorrect. Since there was no legal debt in respect of the said security cheque, the dishonour of the same does not and cannot be the cause of action of this Case or any other legal action against the Corporate Debtor.

15. It is submitted that the alleged emails sent by the Operational Creditor to the Corporate Debtor intimating the dishonour of the alleged cheque have been intentionally done to the wrong ID. The alleged emails have been sent to "skadvertising@gmail.com" whereas the official email id of the Corporate Debtor is suswanikem@gmail.com. The Corporate Debtor has denied the averment of the petition which are contrary to the record.

16. It is denied that the Corporate Debtor approached the Operational Creditor for supply of Gold Ornaments as alleged. Instead, the Work Order was issued on 14.05.2019 on the request of the Operational Creditor. The Operational Creditor never supplied gold articles of any value to the Corporate Debtor on 21/05/2019 or any other date prior thereto or subsequent thereto in pursuance of the Work Order dated 14/05/2019 as alleged. It is submitted that the dishonour of the security cheque, does not give rise to any legal liability or debt in the absence of delivery of Gold articles to the Corporate Debtor.

17. It is submitted that unfortunately the Corporate Debtor handed over the security cheque to the Operational Creditor but no gold was ever delivered

to the Corporate Debtor by the Operational Creditor. The Operational Creditor has filed this present application with mala fide intention just to extract the money from them by misusing the said Security Cheque without performing their obligation under the intended Contract.

18. The Corporate Debtor has further submitted that since the Operational Creditor and the Corporate Debtor had a long standing cordial business relationship, the norm or practice was that the operational creditor would deliver the consignment of Work Order as placed by the Corporate Debtor and then the Corporate Debtor would release payment for the same. The said cheque which was dishonoured was issued by the Corporate Debtor as a security in order to safeguard the interests of the Operational Creditor, according to the practice that was customary in between the parties. The Corporate Debtor has submitted that the alleged sign and seal as is apparent from the Tax Invoice is forged and fake and thus denied by the Corporate Debtor. It is denied that the Corporate Debtor had paid the alleged principal sum towards the payment of receipt of the gold ornament as alleged vide cheque no, 000181 drawn of Kotak Mahindra Bank, Synagogue Street Branch as advance payment on 20/05/2019. It is submitted that the cheque was security cheque issued according to the business custom and practice in between the parties. Since the Operational Creditor did not perform its duty by delivering the consignment, the question of payment by the Corporate Debtor cannot arise. The performance of contract therefore, is incomplete and as such cannot be enforced.

19. The Corporate Debtor has further submitted that there was no telephonic conversation between the Operational Creditor and the Corporate Debtor regarding dishonour of the security cheque. The Operational Creditor has very conveniently sent emails on email id, which does not belong to the Corporate Debtor. The Operational Creditor in order to camouflage and cover up the internal scam has sent mail with a malafide intention. The Operational Creditor was very well aware of the correct email address and in spite of being

aware of the same has intentionally sent emails to the wrong email address to entangle the Corporate Debtor in false case.

20. It is submitted that due to the dubious and doubtful conduct of the Operational Creditor, it becomes highly imperative that a full trial, with evidentiary proof and cross examination of the parties in the instant matter needs to be conducted for the proper adjudication of the present case and the application under section 9 is liable to be dismissed.

21. **During the course of arguments**, the Ld. Counsel for the Operational Creditor submitted that there was no dispute as regards the quality of goods or services and that the dispute was raised by the Corporate only after receipt of the Demand Notice.

22. It is submitted by the Ld. Counsel for the Operational that the Hon'ble NCLAT in the case of Kirusa Software Private Limited held that merely raising an illusory dispute in response to a demand notice shall not to use as a tool to reject the application, if the Adjudicating Authority believes that there is a debt and default on the part of the Corporate Debtor. It is pertinent to note that the Adjudicating Authority is empowered and required to verify the bonafide of a dispute if the application for initiation of Corporate Insolvency Resolution Process is filed by a Financial Creditor. However, such is not the situation in the event the dispute relates to an Operational Creditor. In such a scenario the onus to prove the existence of a bonafide dispute shifts from the Operational Creditor to the Corporate Debtor.

23. In the reply affidavit filed by the Corporate Debtor, it was submitted that the Corporate Debtor had provided a security cheque to the Operational Creditor. This contention of the Corporate Debtor is denied by the Operational Creditor and it is submitted that the material was received by the Corporate Debtor after verification as 'good' without any objection and never claimed that material was not delivered. The Corporate Debtor has submitted that the consignment of gold was supplied on 21st May, 2019 to the Corporate Debtor.

It is submitted in the reply that since no gold was ever delivered to the Corporate Debtor, the question of encashment of security cheque does not arise. The Corporate Debtor submitted that the Operational Creditor has made contradictory statements. On the one hand, it is submitted by the Operational Creditor that the consignment of gold was supplied on 21st May, 2019 to the Corporate Debtor, whereas the alleged cheque was issued on 20th May,2019 and the same was sent for encashment on the same date. Further, the alleged cheque got dishonoured on 21st May, 2019. Thus, it is not believable that the Operational Creditor delivered the gold to the Corporate Debtor, even after the dishonour of the security cheque as alleged. It is submitted in the reply that since no gold was ever delivered to the Corporate Debtor, the question of encashment of security cheque does not and cannot arise and that the plea of the Operational Creditor about the delivery of gold is altogether false. The Corporate Debtor has even denied the receipt of gold by the Corporate Debtor as false and incorrect.

24. The Operational Creditor has even denied having receipt of any telephone calls from the Operational Creditor regarding dishonour of the cheque and submitted that even the emails have been sent to skadvertising@gmail.com whereas the official email ID of the Corporate Debtor is suswanikem@gmail.com.

25. After going through petition and the reply affidavit and after hearing Ld. Counsel for the Operational Creditor, we are not satisfied with the pleas taken by the Corporate Debtor in its reply affidavit. The Operational Creditor has taken us through each and every documents placed on record including the Demand Notice under section 8 of the Code dated July 22,2019 demanding a sum of Rs.8,93,911/- from the Corporate Debtor, which was duly served on the Corporate Debtor as per the Track Consignment Report on 23rdJuly,2019. In the reply affidavit, although the Corporate Debtor has denied having received the gold ornaments against which the amount is being claimed by the Operational Creditor but from the plea taken by the Corporate Debtor that the cheque bearing no.000181 dated 20th May, 2019 amounting to Rs.

8,93,911/- drawn on Kotak Mahendra Bank, Synagogue Street Branch, Kolkata was given as a security cheque appears to be improbable.

26. It is stated by the Corporate Debtor that the Operational Creditor had presented the cheque for encashment without intimation to the Corporate Debtor and in support thereof, the Corporate Debtor has referred to some judgment of the Hon'ble Supreme Court of India.

27. The Corporate Debtor has not shown any previous transaction when the Corporate Debtor had issued any cheque to the Operational Creditor as a security which had been encashed by the Operational Creditor later, after delivery of the goods. The Corporate Debtor has also not shown any letter or email written by it. Either at the time of issuing that security cheque or immediately when came to it came to know that the gold ornaments have not been delivered, directing the Operational Creditor to return its cheque which is stated to have been issued as a security to the Operational Creditor. Once it had been shown to the Corporate Debtor that the Operational Creditor has tried to commit fraud by forging the signature and stamp of the Corporate Debtor, did the Corporate Debtor lodged any report with the police against the Operational Creditor for having committed a fraud with it.

28. It is highly improbable that the Corporate Debtor would issue a cheque of the exact amount of invoice as a security cheque. The invoice is dated 21st May, 2019 and the cheque is dated 20th May, 2019. If as per the Operational Creditor, the new gold ornaments weighting 262.120 Gram as per work order for Rs.8,93,911/- were supplied to the Corporate Debtor on 21st May, 2019 and the Corporate Debtor received the supplies after verification as good without any objection regrading the product quality in the supply of materials.

29. We do not think that the Corporate Debtor would issue a cheque of exactly the same Invoice amount without receiving the goods or the Invoice. We do not believe that it was a security cheque. The dispute has been raised by the Corporate Debtor only after receipt of the Demand Notice. The

Operational Creditor has been able to prove its case and the plea raised by the Corporate Debtor is very week defence, which would not nullify the claim of the Operational Creditor. We, therefore, order that this petition deserves to be admitted and the defence raised by the Corporate Debtor is, therefore, rejected.

30. We, therefore, pass the following orders:-

O R D E R S

i) The application filed by the Operational Creditor under Section 9 of the Insolvency & Bankruptcy Code, 2016 for initiating Corporate Insolvency Resolution Process against the Corporate Debtor, is hereby **admitted**.

ii) We hereby declare a moratorium and public announcement in accordance with Sections 13 and 15 of the I & B Code, 2016.

iii) Moratorium is declared for the purposes referred to in Section 14 of the Insolvency & Bankruptcy Code, 2016. The I.R.P. shall cause a public announcement of the initiation of Corporate Insolvency Resolution Process and call for the submission of claims under Section 15. The public announcement referred to in clause (b) of sub-section (1) of Section 15 of Insolvency & Bankruptcy Code, 2016 shall be made immediately.

iv) Moratorium under Section 14 of the Insolvency & Bankruptcy Code, 2016 prohibits the following:

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 (54 of 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.

v) The supply of essential goods or services rendered to the corporate debtor as may be specified shall not be terminated, suspended, or interrupted during the moratorium period.

vi) The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

vii) The order of moratorium shall have effect from the date of admission till the completion of the corporate insolvency resolution process.

viii) Provided that where at any time during the Corporate Insolvency Resolution Process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of Section 31 or passes an order for liquidation of the corporate debtor under Section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be.

ix) The Operational Creditor has not proposed name of any Insolvency Resolution Professional. Therefore, as per the provisions of Section 16(3) (a) of the IBC, so, we appoint **Ms. Rachna Jhunjhunwala, IRP** having Reg. No. **IBBI/IPA-001/IP-P00389/2017-18/10707** email ID. Jsa.jhunjhunwala@gmail.com to act as Interim Resolution Professional (IRP). He shall file Form-2, and that no disciplinary proceedings are pending against him with the Board.

x) **Ms. Rachna Jhunjhunwala,** is hereby appointed as Interim Resolution Professional for ascertaining the particulars of creditors and convening a Committee of Creditors for evolving a resolution plan subject to production of written consent within one week from the date of receipt of this order.

xi) The Interim Resolution Professional should convene a meeting of the Committee of Creditors and submit the resolution passed by the Committee of Creditors and shall identify the prospective Resolution Applicant within 105 days from the insolvency commencement date.

xii) The Operational Creditor/Applicant is directed to deposit **Rs.1,00,000/- (Rupees One Lakh only)** with the IRP appointed hereinabove within **three** days from this order. IRP can claim the preliminary expenses and fees subject to the approval by the CoC and after constitution of CoC.

31. Registry is hereby directed to communicate the order to the Operational Creditor, the Corporate Debtor, the I.R.P. and the jurisdictional Registrar of Companies by Speed Post as well as through email.

32. List the matter on **22/08/2022** for filing of **Progress Report**.

33. Certified copy of the order may be issued to all the concerned parties, if applied for, upon compliance with all requisite formalities.

(Harish Chander Suri)
Member (Technical)

(Rohit Kapoor)
Member (Judicial)

Order signed on the 5th day of July, 2022

PJ