IN THE NATIONAL COMPANY LAW TRIBUNAL
ALLAHABAD BENCH,
PRAYAGRAJ

CP (IB) NO.92/ALD/2022

IN THE MATTER OF:
(An application under Section 9 of the Insolvency & Bankruptcy Code and under Rule 6 of Insolvency & Bankruptcy (Adjudicating Authority) Rules, 2016)

IN THE MATTER OF:
MR. OM PRAKASH,
Proprietor of Khandelwal Packing Corporation

...Operational Creditor

Versus

M/S AZAM RUBBER PRODUCTS PRIVATE LIMITED

…Corporate Debtor

Order pronounced on 13.04.2023

CORAM:
Sh. Praveen Gupta : Member (Judicial)
Sh. Ashish Verma : Member (Technical)

PRESENT-
Sh. Manas Arora, Adv. : For the Operational Creditor
Sh. Divyansh Rai, Adv. : For the Corporate Debtor

ORDER

1. The present application has been filed by the Operational Creditor Mr. Om Prakash, Sole Proprietor of M/S Khandelwal Packing Corporation as Applicant under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "I & B Code, 2016") read with Rule 6 of IB (Adjudicating Authority) Rules 2016 for initiation of the Corporate Insolvency Resolution Process (hereinafter

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referred to as "CIRP") againstthe Corporate Debtor namely M/s Azam Rubber Products Private Limited as Respondent.

2. The Respondent Operational Creditor is engaged in the business of manufacturing and supplying rubber products, corrugated sheet boxes, printed cartoons, high containers products. The Operational Creditor pursuant to orders placed by the Corporate Debtor agreed to supply the goods at the registered office of the Corporate Debtor.

3. The said goods were duly supplied and accepted by the Respondent Corporate Debtor without any demur or dispute alongwith invoices issued by the Applicant Operational Creditor. Despite the delivery of the said goods, the Corporate Debtor had failed to make the payment of 52 invoices to the tune of Rs.1,37,48,248/- (Rupees One Crore Thirty Seven Lakhs Forty Eight Thousands Two Hundred and Eighty Four only) which remained outstanding as Operational Debtor could not pay these amounts since the due date of respective invoices with first pending invoice being due on 7 days after being raised i.e. 05th December 2021 (Invoice Date being 28th November 2021) and last pending invoice being due on 08th June 2022 (Invoice Date being 31st May 2022). Copy of all the pending invoices raised based on the orders along with the proof of delivery of the said goods reflected from the e-way bills since 5th December 2021 is collectively annexed as Annexure A-3 of the Application.

4. As entire amount of 52 invoices as mentioned in previous para remained unpaid, the Applicant Operational Creditor sent two emails dated 20th June 2022 and 21st June 2022 demanding the payments. In response, Respondent Corporate Debtor sent email dated 22nd June 2022 admitting the due amounts sought to be paid but requested for some time owing to the financial crisis.

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Another set of emails have been exchanged between them on 24th June 2022 and the Corporate Debtor reiterated that the company is not in operation and they are facing financial crisis and therefore, again requested for more time to clear outstanding payments of Operational Creditor. A copy of the emails exchanged between the Operational Creditor and Corporate Debtor from 20th June 2022 to 24th June 2022 are annexed as Annexure A-5 of the Application.

5. Despite admission of the dues, no amounts were forthcoming and the same is quite evident from the emails exchanged between the Operational Creditor and the Corporate Debtor. The operational debt amounts as worked out by the Operational Creditor comes to Rs.1,51,49,029 (principle amount of Rs.1,37,48,284 and interest @ 24% p.a. of Rs. 14,00,745 as on 09.08.2022) due to 52 invoices remaining unpaid and outstanding since the due date.

6. Thereafter, the Operational Creditor sent a demand notice dated 09.08.2022 u/s 8(1) of the Code, which was duly received by the Corporate Debtor on 24.08.2022.It is further stated that despite service of demand notice, neither any payment nor any notice of dispute pertaining to the pre-existing dispute has been issued by the Corporate Debtor and after the lapse of 10 days from the date of delivery of the said demand notice, the Operational Creditor has moved the present petition.

7. In its reply, the Corporate Debtor avers that he had raised objections regarding the quality of the goods supplied and the Operational Creditor had acknowledged the same. The Operational Creditor also assured the Corporate Debtor that he will compensate the Corporate Debtor for the same and accordingly reconcile the accounts but now the operational creditor has gone against his word and filed the present petition. Thus, the Corporate Debtor

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states that since there is a pre-existing dispute, this application is liable to be dismissed.

8. The corporate debtor submits that the present application is not maintainable under section 9 of the code since there is no default on the part of the Corporate Debtor in terms of section 3(12) of the Code. The amount claimed to be in default by the Operational Creditor is not payable since the Operational Creditor has filed instant application without reconciliation of its accounts and hence the amount claimed is superficial and imaginary

9. The corporate debtor also stated that his company is solvent and is fully functional. Thus, this present application has been filed as a money-recovering tool and is filed with malicious intent. It is thus, liable to be dismissed with cost as provided under section 65 of the I & B Code, 2016.

10. The Corporate Debtor further avers that the present I&B Code cannot be used as an alternate mechanism for recovery suits because it would go against the very objective of the Code which is to develop credit market and encourage entrepreneurship and investment. In support of his contention, the corporate debtor has referred to the case of ***M/s India Design Worx v. M/s Premier Restaurant Private Limited (Company Petition No.IB-2135/ND/2019)*** wherein the Hon'ble NCLT Delhi held at the insolvency proceedings cannot be used as a debt recovery tool.

11. The Operational Creditor has also filed the rejoinder wherein it is averred that the Corporate Debtor has not disputed the existence of the debt and default on its part within a period of 10 days of receipt of Demand notice as mandated within section 8 (2) of the Code and hence there exists no pre-existing dispute. The Corporate Debtor has failed to place on record any documentary evidence/

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proof to substantiate its averments regarding the defective or bad quality of goods supplied by the Operational Creditor. It is further emphasized by the Operational Creditor that in his emails dated 22.06.2022, the Corporate Debtor has acknowledged and admitted that it has received the goods and the payment for the same is due.

12. We have considered the submissions made by the Ld. Counsels for the parties and perused the records.

13. On perusal of the record, we found that the Managing Director, Mr. Mohd. Azam Khan of the Corporate Debtor in his email dated 22nd June 2022, sent in response to emails dated 20th June 2022 and 21st June 2022 by the Operational Creditor requesting for release of outstanding amounts due from the Corporate Debtor on supply of goods, it has been clearly stated by him that his company is not in operation and they are facing financial crisis and therefore, more time has been requested for payment of the outstanding amounts. Thereafter again, in another email dated 24th June 2022, Mr. Mohd. Azam Khan has reiterated that his company is not in operation and further sought more time for payment of outstanding amount referring to the financial crisis being faced by the company. In none of these two communication, the Corporate Debtor has raised any dispute as regards the payment of outstanding amounts or any objection regarding the quality of the goods supplied. All these communications were made before the issuance of notice under Section 8 of the I & B Code, 2016. Even on issuance of notice under Section 8 of the I & B Code, 2016 by the Operational Creditor, no reply has been submitted by the Corporate Debtor mentioning any existing dispute on payment of the debt. Section 8(2) of I & B Code, 2016 clearly provides that on issuance of notice under Section 8(1) by the Operational Creditor, the Corporate Debtor shall

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within a period of ten days of the receipt of the demand notice, bring to the notice of the Operational Creditor the existence of a dispute, if any, or record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or pay the unpaid operational debt. The Corporate Debtor has neither made the payment of unpaid operational debt of Rs. 1,51,49,029/- as mentioned in the demand notice under Section 8(1) of I & B Code, 2016 nor issued any notice for dispute. Therefore, the Operational Creditor has been found justified in its plea for submitting the application under Section 9 of I & B Code 2016 seeking starting of CIRP against the Corporate Debtor after 10 days of issuing of notice u/s 8 of I & B Code, 2016.

14. During the course of hearing, the Ld. Counsel of the Corporate Debtor has been specifically asked by us to produce any documentary evidence showing the material supplied by the Operational Creditor being bad in quality but no such evidence could be produced before us. He only stated that the objection regarding quality of the good supplied was raised telephonically. He has also been asked if the good were found bad in quality, whether the same were used in manufacturing process or not on which he categorically stated that the material supplied were not used in manufacturing process as found bad in quality but he could not produce any evidence to show as to where and in what condition, the material of bad quality worth Rs. 1,37,48.284/- are lying or disposed of as scarp. Therefore, we find that the Ld. Counsel of the Operational Creditor has failed to demonstrate about any pre-existing dispute on payment of outstanding debt demanded by the Operational Creditor or to substantiate his claim of the material supplied by the Operational Creditor being bad in quality. Even no notice of dispute has been issued by the Corporate Debtor.

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"In Jord Engineers India Ltd. Vs. Valia & Co. [2018] ibclaw.in 17 NCLAT*, the goods supplied was of inferior quality, but no such dispute was raised by the Appellant prior to issuance of notice under Section 8(1). The question of quality was raised by the Appellant only when reply under Section 8(2) was filed by the Corporate Debtor. Therefore, that cannot be taken into consideration to annul the initiation of CIRP."*

In the present case, the Corporate Debtor has not even raised the question of quality of the goods supplied even in reply to notice under Section 8(1) and such plea was taken only while submitting the reply to the application and that too without any supporting evidence and hence such plea of dispute cannot be admitted at this stage.

"In Rajeev K Aggarwal Vs. Panipat Texo Fabs Pvt. Ltd. [2018] ibclaw.in 97 NCLAT*, raising of dispute in regard to quality of goods being inferior/substandard or defective for the first time in reply to demand notice or in response served by the Adjudicating Authority would not constitute a prior and pre-existing dispute contemplated under law as a defence to the initiation of Corporate Insolvency Resolution Process, more so when the contemporary record in regard to transactions between the Corporate Debtor and the Operational Creditor at the time of delivery of goods or immediately thereafter does not demonstrate raising of any dispute with respect to quality of goods supplied by the Operational Creditor."*

In the present case also, no contemporary record exist with regard to dispute raised by the Corporate Debtor in respect of quality of good supplied by the Operational Creditor.

NCLAT in K.K. Capital Services Limited Vs. Sristi Hospitality Private Limited [2020] ibclaw.in 164 NCLAT, *held that disputes raised by the Corporate Debtor in the reply to the notice, not supported by any documentary evidence, are spurious, Hypothetical and illusory.*

In the present case, as it is already discussed above that the Ld. Counsel of the Corporate Debtor could not produce any documentary

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evidence with regards to the dispute in quality of good supplied by the Operational Creditor and hence, his plea of raising dispute regarding quality of good supplied on telephone is nothing but spurious, Hypothetical and illusory and cannot be taken as pre-existing dispute.

15. As regards the plea of the financial status of the Corporate Debtor as being a solvent company and doing the business and hence, the provision of I & B Code 2016 cannot be used against it for recovery of outstanding amount, we find that such plea of the Corporate Debtor is not relevant for passing of order under Section 9(5) of the I & B Code, 2016, either accepting or rejecting the application filed by the Operational Creditor. For taking a decision under the provision of Section 9(5) of I & B Code, 2016, we have only to examine the condition given in this provision. For a ready reference, these provisions are reproduced as below:

> *"9(5) The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), by an order-*
>
> *(i) admit the application and communicate such decision to the operational creditor and the corporate debtor if,--*
>
> *(a) the application made under sub-section (2) is complete;*
>
> *(b) there is no payment of the unpaid operational debt;*
>
> *(c) the invoice or notice for payment to the corporate debtor has been delivered by the operational creditor;*
>
> *(d) no notice of dispute has been received by the operational creditor or there is no record of dispute in the information utility; and*

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(e) there is no disciplinary proceeding pending against any resolution professional proposed under sub-section (4), if any;

(ii) reject the application and communicate such decision to the operational creditor and the corporate debtor, if--

(a) the application made under sub-section (2) is incomplete;

(b) there has been payment of the unpaid operational debt;

(c) the creditor has not delivered the invoice or notice for payment to the corporate debtor;

(d) notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility; or

(e) any disciplinary proceeding is pending against any proposed resolution professional:

Provided that Adjudicating Authority, shall before rejecting an application under sub-clause (a) of clause (ii) give a notice to the applicant to rectify the defect in his application within seven days of the date of receipt of such notice from the Adjudicating Authority.

(6) The corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (5) of this section."

16. Taking into account the above provisions, we find that the application made under sub-section (1) of Section 9 alongwith documents and fees as mentioned in its sub-section (2) is complete, no payment of the unpaid operational debt of Rs.1,51,49,029/- has been made in response to notice for the payment to the Corporate Debtor issued under Section 8(1) of the I & B Code, 2016 after it has been delivered and also, no notice of dispute has been given by the Corporate

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Debtor to the Operational Creditor and also, there is no record of dispute in the information utility as envisaged in sub-Section (2) of section 8 thus, fulfilling all conditions as provided under clause (i) of sub-section (5) of Section 9. Therefore, after finding that all the conditions for admission of application under Section 9(5)(i) of the I & B Code 2016 against the Corporate Debtor, has been fulfilled and the Ld. Counsel of the Corporate Debtor has failed to demonstrate before us anything about there being any dispute as regards the payment of the operational debt, we find this application fit for admitting under Section 9(5) of the I & B Code, 2016 for starting CIRP against the Corporate Debtor. After satisfying ourselves that the amount involved is above the threshold limit of Rs. 1 crore and it is within the limitation period as the default of payment of debt has occurred from 28th November, 2021 to 31st May, 2022 and this application has been filed on 14.09.2022, we have decided to admit this application filed u/s 9(1) by the Operational Creditor to start CIRP against Corporate Debtor.

17. The Operational Creditor has proposed the name of Mr. Rajeev Ranjan Singh as the IRP in the present application. Hence, the verification of the said IRP has been carried out by Law Research Associate of this Tribunal, Aditi Kharbanda, and it is found that there is no proceeding pending against the proposed IRP. Hence, we hereby appoints Mr. Rajeev Ranjan Singh having Registration No. IBBI/IPA-002/IP-N00707/2018-2019/12418, R/o of Flat No.14049, 16 Avenue, Gaur City-2, Greater Noida West, Gautam Buddha Nagar, Uttar Pradesh, 201310, Email:ip.rajeevsingh@gmail.com as the IRP.

18. Accordingly, this application is admitted u/s 9(5) of I & B Code, 2016 under the following terms and conditions.

i) The application filed by the Operational Creditor under Section 9 of the

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Insolvency & Bankruptcy Code, 2016 for initiating the Corporate Insolvency Resolution Process against the Corporate Debtor i.e. M/s Azam Rubber Products Private Limited is hereby admitted.

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

iii) This Adjudicating Authority hereby appoint Mr. Rajeev Ranjan Singh having Registration No. IBBI/IPA-002/IP-N00707/2018-2019/12418 , R/o of Flat No.14049, 16 Avenue, Gaur City-2, Greater Noida West, Gautam Buddha Nagar, Uttar Pradesh, 201310, Email:ip.rajeevsingh@gmail.com to act as the IRP under Section13(1)(c) of the Code. The consent affidavit under Form 2 is at page 171 of the present petition and the Law Research Associate of this Tribunal, Aditi Kharbanda, has checked the credentials of Mr. Rajeev Ranjan Singh and there is nothing adverse against him.

iv) The IRP shall cause a public announcement of the initiation of the 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 the Insolvency & Bankruptcy Code, 2016 shall be made immediately.

v) Moratorium under Section 14 of the Insolvency & BankruptcyCode, 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;

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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 (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.

vi) 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.

vii) The provisions of sub-section (1) of Section 14 of I & B Code, 2016 shall not apply to such transactions as may be notified by the Central Government inconsultation with any financial sector regulator.

viii) The order of moratorium shall have effect from the date of admission till the completion of the Corporate Insolvency Resolution process.

ix) 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.

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x) 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 in accordance with I & B Code, 2016 read with the relevant rules & regulation framed thereunder.

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

xii) Registry is hereby directed to communicate the order to the Operational Creditor, the Corporate Debtor, the IRP and the jurisdictional Registrar of Companies by Speed Post as well as through email.

xiii) List the matter on 15th May, 2023 for filing of the progress report.

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

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(Ashish Verma)
Member (Technical)

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(Praveen Gupta)
Member (Judicial)

13th April, 2023

Priya Agarwal
(Stenographer)