

IN THE NATIONAL COMPANY LAW TRIBUNAL
 “CHANDIGARH BENCH, CHANDIGARH”
 (Exercising powers of Adjudicating Authority under
 the Insolvency and Bankruptcy Code, 2016)

CP (IB) No.126/Chd/Pb/2017

Under Section 9 of IBC, 2016

In the matter of:

Mahavir Traders

B-XXIV-2585/1A,
 Jagat Nagar, Basti Jodhewal
 Ludhiana, Punjab

... Petitioner/Operational Creditor

Vs.

Ajay Knitweaves & Fabrics Pvt.Ltd.

41/12, Village Bajra, Rahon Road,
 Ludhiana, Punjab

...Respondent/Corporate Debtor

Order delivered on : 12.03.2018

Coram: Hon’ble Mr.Justice R.P.Nagrath, Member (Judicial)

Hon’ble Mr.Pradeep R.Sethi, Member (Technical)

For the Petitioner : Mr.Nahush Jain, Advocate

For the Respondent : Mr.Ashok Kumar, Advocate

Per: Pradeep R. Sethi, Member(Technical)

Judgment

The instant petition has been filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 (for short to be referred hereinafter as the ‘Code’) on 15.11.2017. The petitioner is a partnership firm registered under No.3108/1976-77 with Registrar of Firms, Punjab and engaged in the business of trading in yarn. Copy of Form ‘C’ issued by Registrar of Firms is at annexure

A-8 dated 11.11.1976. Copy of Form 'D' and Form 'A' from Registrar of Firms is also annexed. The deed of partnership dated 01.04.2008 executed subsequently is at Annexure A-7 and latest partnership deed dated 01.04.2010 is also annexed with this document. The current partners of the firm are Mr.Gulshan Kumar and Mr.Ajit Kumar. The instant petition has been filed by the petitioner firm through Mr.Gulshan Kumar one of the partners who has also filed his affidavit dated 11.11.2017 in support of the contents of the application. The petitioner firm has filed application in Form No.5 as prescribed in Rule 6(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (for brevity, the Rules).

2. The corporate debtor- respondent is Ajay Knitwears and Fabrics Private Limited with identification No.U18101PB1999PTC022421. The date of incorporation of the corporate debtor is stated to be 01.4.1999. The authorised capital of the corporate debtor is ₹2.00 crores and paid up capital of ₹1,59,58,600. The registered office of the corporate debtor is at 41/12, Village Bajra, Rahon Road, Ludhiana, Punjab. Therefore, the matter falls within the territorial jurisdiction of this Tribunal.

3. In Part V of the application Form 5, it is stated that the debt arose due to sale of yarn by the operational creditor to the corporate debtor in the ordinary course of business. It is stated that a petition under section 433(e) read with section 434 of the Companies Act, 1956 was filed by M/s Mahavir Traders vide CP No.227 of 2016 with Hon'ble High Court of Punjab and Haryana at Chandigarh which was later on transferred to this Tribunal and vide order dated 10.07.2017, this Tribunal permitted the petitioner to withdraw the petition with

liberty to file fresh one on the same cause of action under the I&B Code, 2016 or other appropriate law, if so advised. Copy of the order dated 10.07.2017 of this Tribunal is at Annexure A-13.

4. Before filing of this petition, the petitioner sent the demand notice dated 11.08.2017 Annexure A-1. Along with this demand notice sent in Form No.3 and 4 as prescribed in Rule 5 of the Rules, details of various invoices under which the goods were sent to the respondent, were also attached. The postal receipt regarding sending notice by speed post Annexure A-1 (colly) is at page 24 of the paper book. The petitioner has attached tracking report showing that the notice was delivered to the corporate debtor on 16.08.2017. Affidavit to the effect that neither any notice was given by the corporate debtor relating to the dispute of unpaid operational debt nor any payment was received by the operational creditor against the unpaid / outstanding amount, is stated to be at Annexure A2. A copy of certificate from the financial institution maintaining the account of the operational creditor confirming that there is no payment of an unpaid operational debt by the corporate debtor is stated to be at Annexure A3.

5. The application is stated to have been dispatched to the corporate debtor on 14.11.2017 by speed post as per receipt at page 137, in order to comply with the requirement of Rule 6(2) of the Rules.

6. When the matter was listed on 04.12.2017, defect was noticed in Form 2, the written communication from the resolution Professional and also in the Certificate issued by the Financial Institutions furnished in terms of Section 9(3)(c) of I&B Code, 2016. The petitioner was directed to remove the defects within 7 days. In compliance therewith the revised communication in Form No.2

from the proposed Insolvency Resolution Professional to act as the Interim Resolution Professional as well as revised certificate from the financial institution HDFC Bank along with affidavit dated 09.12.2017 of authorised representative was filed within the given time. Compliance was also made with reference to directions dated 04.12.2017 regarding service of notice issued to the corporate debtor for 18.12.2017 to show cause as to why this petition be not admitted. The affidavit of compliance, inter alia, states that the notice collected from the Registry was dispatched to the respondent-corporate debtor in original along with a complete set of the application on 09.12.2017 and was duly delivered on 11.12.2017. The original postal receipt and copy of tracking report filed vide diary No. 2908 dated 13.12.2017 are at Annexure A.

7. The respondent-corporate debtor filed reply to the application supported by the affidavit of Shri Jangi Lal Jain, Director of the respondent-corporate debtor. It is stated that nothing is due towards the respondent to the applicant as the applicant has not made delivery of the goods to the respondent which are mentioned in the said invoices and that the respondent vide its letters dated 20.06.2009 and 24.07.2010 has already asked / requested the applicant to produce the proof of delivery of the goods mentioned in the said invoices, but upto this date neither the said letters have been replied nor the applicant has given the proof of delivery of goods to the respondent. These letters are at Annexure R-1 and R-2 of the reply. The respondent has placed on record the Balance Sheet as on 31.03.2017 as Exh.R-3 and has stated that no due amount to the petitioner is shown therein. It is stated that the financial statement of the respondent as on 31.03.2016 placed on record by the petitioner has been made

in connivance with the ex-employee of the respondent only with the aim of getting wrongful gain to the petitioner. It is stated that the present claim is totally time barred and the same is liable to be dismissed.

8. We have heard the learned counsel for the parties and have perused the record.

9. Learned counsel for the petitioner referred to the application under Rule 6 of the Rules as well as the affidavits of compliance filed by diary No.2881 dated 11.12.2017 and 2908 dated 13.12.2017. Learned counsel for the petitioner contended that the petitioner has complied with all the requirements of Sections 8 and 9 of the Code, read with the Rules. The learned counsel also referred to Annexure A-11 of the petition which is a copy of the financial statement of the corporate debtor for the financial year ending 31.03.2016 obtained from the portal of Ministry of Corporate Affairs in which the amount of trade payables to the tune of ₹8,40,14,804 is shown in the balance sheet as at March, 2016. The learned counsel further referred to the breakup of the trade payables at page 79 of the petition.

10. At Sl.No.38 thereof, trades payable of ₹8,98,285 is shown in respect of Mahavir Traders. It was submitted on behalf of the petitioner that no notice of dispute was received in respect of the demand notice dated 11.08.2017 sent in Form No.5 and delivered on 16.08.2017. It was vehemently contended that the copy of the financial statement of the corporate debtor for the financial year ending 31.03.2016 (Annexure A-11 of the application) clearly amounts to acknowledgement of the amount of ₹8,98,285 owed towards the petitioner as on 31.03.2016.

11. With regard to the letters dated 20.06.2009 and 24.07.2010 it was submitted that these were never received by the petitioner. It was contended that the address of the petitioner given in the letter dated 20.06.2009 and 24.07.2010 was not its address at the relevant time. The learned counsel for the petitioner submitted that in the Balance Sheet as at March 2017, relied upon by the respondent, the dues to the petitioner are not shown but there are no notes to the account explaining the reasons for the omission of the entry which was appearing till the years prior thereto.

12. On the other hand, learned counsel for the respondent-corporate debtor contended that there is a dispute in as much as the petitioner did not make the delivery of the goods to the respondent in respect of the invoices as detailed in its letters dated 20.06.2009 and 24.07.2010. It was further contended that the petitioner has not furnished any evidence of delivery of goods. There is also challenge to the financial statement of the respondent relied upon by the petitioner having prepared in connivance with an ex-employee of the respondent only with the aim of getting wrongful gain to the petitioner and the balance sheet as on March 2017 annexed as Exh.R-3 by the respondent should be accepted. It is also submitted that the claim is barred by time.

13. Section 9 of the Code reads as under:-

“(1) After the expiry of the period of ten days from the date of delivery of the notice or invoice demanding payment under sub-section (1) of section 8, if the operational creditor does not receive payment from the corporate debtor or notice of the dispute under sub-section (2) of section 8, the operational creditor may file an application before the Adjudicating Authority for initiating a corporate insolvency resolution process.

(2) The application under sub-section (1) shall be filed in such form and manner and accompanied with such fee as may be prescribed.

(3) The operational creditor shall, along with the application furnish—

(a) a copy of the invoice demanding payment or demand notice delivered by the operational creditor to the corporate debtor;

(b) an affidavit to the effect that there is no notice given by the corporate debtor relating to a dispute of the unpaid operational debt;

(c) a copy of the certificate from the financial institutions maintaining accounts of the operational creditor confirming that there is no payment of an unpaid operational debt by the corporate debtor; and

(d) such other information as may be specified.

(4) An operational creditor initiating a corporate insolvency resolution process under this section, may propose a resolution professional to act as an interim resolution professional.

(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 repayment 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

(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 repayment 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 subclause (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.”

14. We find that the demand notices in Form No.3 and 4 were sent by the petitioner on 11.08.2017 raising invoice of the amount due for the supplies made from 11.06.2008 to 21.04.2009 for total amount of ₹21,47,069/-. Out of this amount, payments are shown to have been received and the last payment is stated to be made on 19.07.2011 and on that date, still the principal payment of ₹8,98,285/- was outstanding along with interest @ 24% from the date the payment was due. The demand notice called upon the respondent to pay the aforesaid sum of ₹8,98,285/- within ten days of receipt of the notice. The demand notice was sent by speed post on 14.08.2017 and delivered on 16.08.2017. The postal receipt is at Annexure A-1 with which the tracking report is annexed.

15. Shri Gulshan Kumar Jain, Partner of the petitioner firm has filed an affidavit dated 11.11.2017 Annexure A-2 stating that the petitioner did not receive any notice from the corporate debtor relating to a dispute of the unpaid operational debt nor it has received any payment against the outstanding amount in order to comply with the requirement of Section 9(3)(b) of the Code.

16. The petition before the Tribunal was filed on 15.11.2017 i.e. much after the expiry of the period of 10 days from the date of delivery of the demand notice. Certificates from the financial institutions i.e. HDFC Bank and Allahabad Bank have been filed at Annexure A-3 and A-4 vide diary No.2881 dated 11.12.2017. HDFC Bank has certified that there are no credits from the corporate debtor since 24.08.2016. Allahabad Bank has certified that the petitioner's account with this Bank was closed on 31.05.2017. It is also stated that no amount has been credited in the account of the petitioner at the instance of the respondent from 01.01.2016 till the date of closure of the account. The invoices relate to supply of polyester cotton yarn and therefore, the petitioner is an operational creditor and moreover, this is not disputed by the respondent. Therefore, the requirements of Section 9 (1) to (3) are satisfied and the only issues requiring consideration are whether there is existence of a "dispute" and whether this petition is time barred.

17. Section 5(6) of the I&B Code, 2016 defines 'dispute' as follows:-

"(6) "dispute" includes a suit or arbitration proceedings relating to—

- (a) the existence of the amount of debt;*
- (b) the quality of goods or service; or*
- (c) the breach of a representation or warranty"*

18. It is the settled principle of law that the above definition is inclusive and not confined only to the instances where the dispute is pending in the Civil Suit or arbitration proceedings.

19. The Hon'ble Supreme Court in Mobilox Innovations Pvt.Ltd. Vs. Kirusa Software Pvt. Ltd. (2018) 1 SCC 353 has held as follows: -

“It is clear, therefore, that once the operational creditor has filed an application, which is otherwise complete, the adjudicating authority must reject the application under Section 9(5)(2)(d) if notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility. It is clear that such notice must bring to the notice of the operational creditor the “existence” of a dispute or the fact that a suit or arbitration proceeding relating to a dispute is pending between the parties. Therefore, all that the adjudicating authority is to see at this stage is whether there is a plausible contention which 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 and to reject a spurious defence which is mere bluster. However, in doing so, the Court does not need to be satisfied that the defence is likely to succeed. The Court does not at this stage examine the merits of the dispute except to the extent indicated above. So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application.”

20. In the facts of the present case, the respondent's contention is that the petitioner did not make delivery of the goods to the respondent which are mentioned in the said invoices, so the question of making payment to the petitioner does not arise at all. In this regard, letters dated 20.06.2009 and 24.07.2010 Annexure R-1 and R-2 were already sent to the petitioner. These letters make reference to Invoice No. V-129 dated 06.09.2008 for ₹3,47,281/- and Invoice No.V-065 dated 21.04.2009 for ₹.4,11,946/- requesting the petitioner to produce proof of delivery of goods physically in order to settle the payment of the bills.

21. We are unable to accept the above contention which is patently based on the created documents which are not supported by any proof. The respondent has not filed copy of its record to show that entry of dispatch of these letters exists in the record of the respondent nor these letters bear the reference or dispatch numbers which are sufficient factors to outrightly reject these letters.

22. It was forcefully contended by learned counsel for the petitioner that these letters are apparently fake as the address of petitioner is mentioned as per present address, whereas in the bills/invoices in question of the year 2009 it was 'Guru Nanak Market, Hazuri Road, Ludhiana'. The above contention make the submission of the petitioner forceful and strong.

23. It was contended by the respondent that the petitioner has not furnished any evidence of delivery of the goods to the respondent. The petitioner has filed the copy of the financial statement of the corporate debtor for the financial year ending 31.03.2016 (wrongly mentioned as 31.03.2017 in the index of the application) obtained from the portal of Ministry of Corporate Affairs. The copy as Annexure A-11 of the petition has already been discussed in para No.9 above and shows Trades Payables to M/s. Mahavir Traders of ₹.8,98,285/- as at March 2016. The petitioner's contention is that this is an explicit acknowledgement of debt and that the contention of non-delivery of goods in respect of two invoices is only a made-up story. On the other hand, the respondent has relied upon the Balance Sheet ending March 2017 (Exh.R-3) and has stated that no dues to the petitioner are shown therein. However, the respondent has not placed on record any details to reconcile the position of account of the petitioner shown in the balance sheets of March 2016 and March 2017. The respondent's contention is that the financial statement of respondent placed on record by the applicant has been made in connivance with the ex-employee of the respondent and is not supported by any documentary proof. Moreover, the balance sheet as at March 2016 filed by the petitioner at Annexure A-11 of the application is signed by the chartered accountants as well as two

directors of the corporate debtor. The respondent has not even placed on record the audited balance sheets for the years 2008-09 to 2014-15 to bring support to the contention that the entry in the Account Statement for 2015-16 was made in connivance with the petitioner. Therefore, we conclude that there is no plausible contention of the respondent which requires further investigation and that the “dispute” is a patently feeble legal argument or an assertion of fact unsupported by evidence. The dispute raised is therefore, spurious, hypothetical and illusory.

24. The respondent’s contention that the claim of the petitioner is time barred is now to be examined. The respondent has not disputed the fact that the company filed the Balance Sheet as at March 2016 with the Registrar of Companies. The existence of the Trades Payable of ₹8,98,285/- in the name of Mahavir Traders in the Balance Sheet as in March 2016 is accepted. The respondent has not raised any dispute that the Trades Payable of ₹8,98,285/- do not have connection with the invoices issued by the petitioner during the period 11.06.2008 to 21.04.2009 nor has the respondent contended/filed evidence that the Trades Payable of ₹8,98,285/- in the name of Mahavir Traders did not exist in the accounts of the petitioner since 2008-2009. In these circumstances, the acknowledgement of the debt is available in the accounts of the petitioner since 2008-09 upto 31.03.2016. As already discussed above, the respondent’s contention that the financial statement of respondent placed on record by the petitioner has been made in connivance with the ex-employee of the respondent is not supported by any proof and moreover, the Balance Sheet as at March 2016 filed by the petitioner at Annexure A-11 of the application is

signed by the Chartered Accountant as well as two Directors. Therefore, the respondent's explanation is found without any basis.

25. As discussed in the preceding para, the respondent has sought to rely upon the Balance Sheet as in March 2017 (Exh.R-3) and has stated that no dues to the petitioner are shown therein. However, the respondent has not filed on record any details to reconcile the account of the petitioner shown in the Balance Sheet of the respondents of March 2016 and March 2017.

26. Further, as discussed in para No.3 above a petition under section 433(e) read with section 434 of the Companies Act, 1956 was filed by the petitioner against the respondent vide CP No.227 of 2016 in the Hon'ble High Court of Punjab and Haryana at Chandigarh which was later transferred to this Tribunal and by order dated 10.07.2017, this Tribunal permitted the petitioner to withdraw the petition with liberty to file fresh one on the same cause of action. Copy of the order is at Annexure A-13 of the application. The petition for winding up was filed on 08.11.2016 and notice was issued on 02.12.2016 by the Hon'ble Punjab and Haryana High Court to the respondent company to show cause as to why the petition be not admitted. The deletion of the Trades Payable to Mahavir Traders in the Balance Sheet of March 2017 appears to be an afterthought by the respondents to remove evidence of the Trades Payable of Mahavir Traders in the respondents' accounts. In view of the foregoing discussion, the respondent's contention that the claim is time barred cannot be accepted.

27. The petitioner, being an operational creditor, is not bound to propose the name of the Resolution Professional to be appointed as Interim

Resolution Professional. The petitioner, however, has filed written communication in Form 2 (Annexure A-10 of application and Annexure A-2 of diary No.2831 dated 11.12.2017) from Mr.Anjum Goyal, registered Resolution Professional having allotted Registration No. IBBI/IPA-002/IP-N00251/2017-18/10765, giving all the necessary particulars as required in the form and that he is presently not serving as IRP/RP/Liquidator in any proceedings. It is also stated by him that there are no proceedings pending against him with the Insolvency and Bankruptcy Board of India (IBBI) or ICSI. Having perused the form, we find the same to be in order.

28. In result, thereof, we find that all the compliances have been made and the application is complete and the petition deserves to be admitted. In view of the above, the instant petition is admitted declaring moratorium for prohibiting all of the following in terms of Section 14(1) of the Code: -

- (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;

(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.

29. It is further directed that the supply of essential goods or services to the Corporate Debtor as may be specified, if continuing, shall not be terminated or suspended or interrupted during moratorium period. The provisions of sub-section (1) shall however not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

30. The order of moratorium shall have effect from the date of this order till completion of the corporate insolvency resolution process or until this Bench approves the resolution plan under sub-section (1) of Section 31 or passes an order for liquidation of Corporate Debtor under Section 33 as the case may be.

31. The matter be listed on 16.03.2018 for passing of the formal order of appointment of Interim Insolvency Resolution Professional with further directions. Copy of this order be communicated to both the parties.

Pronounced in open court.

Sd/-
(Justice R.P.Nagrath)
Member (Judicial)
Adjudicating Authority

Sd/-
(Pradeep R.Sethi)
Member(Technical)
Adjudicating Authority

March 12, 2018
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