

IN THE NATIONAL COMPANY LAW TRIBUNAL
JAIPUR BENCH

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

**SHRI RAJEEV MEHROTRA,
HON'BLE TECHNICAL MEMBER**

IA No. 326/JPR/2024
CP No. (IB)- 15/9/JPR/2023

(Under Section 9 of the Insolvency and Bankruptcy Code, 2016, read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicatory Authority) Rules, 2016)

IN THE MATTER OF:

M/S GUPTA FAB TEX
A-629, 4 Sen Colony, Guru Nanak
Path, Malviya Nagar, Jaipur-
302017 (Rajasthan)

...Operational Creditor/Petitioner

VERSUS

BUNAAI WHITEOFFICIAL PVT. LTD.
301-A, City Star Complex,
Vidhyadhar Nagar, Jaipur- 302039
(Rajasthan)

...Corporate Debtor/Respondent

AND IN THE MATTER OF:

IA (IBC) No. 326/JPR/2024

MEMO OF PARTIES

BUNAAI WHITEOFFICIAL PVT. LTD.
301-A, City Star Complex,
Vidhyadhar Nagar, Jaipur- 302039
(Rajasthan)

...Applicant

VERSUS



M/S GUPTA FAB TEX

A-629, 4 Sen Colony, Guru Nanak Path, Malviya Nagar, Jaipur-302017 (Rajasthan)

...Respondent No. 1

MR. ASHOK KUMAR GOYAL

(*Ex-Partner of M/s Gupta Fab Tex*)
67/13, Pratap Nagar, Shyopur Road, Jaipur- 302029 (Rajasthan)

...Respondent No. 2

For the Operational Creditor

: Prateek Kedawat, Adv.
Mohd. Bilal, Adv.

For the Respondent

: Dinesh Bishnoi, Adv.
Puneet Maheshwari, Adv.

Order Pronounced On: 23.09.2024

ORDER

Per: Shri Deep Chandra Joshi, Judicial Member

1. The present Application has been filed by *M/s Gupta Fab Tex* ('Operational Creditor') through its authorised representative, *Mr. Siddharth*, under Section 9 of the Insolvency & Bankruptcy Code, 2016 ('IBC'/ 'Code') against *M/s Bunaai Whiteofficial Pvt. Ltd.* ('Corporate Debtor') for initiation of Corporate Insolvency Resolution Process ('CIRP') on account of Corporate Debtor's default in payment of the Operational Debt of Rs. 5,59,63,578.40/- (Rupees Five Crores Fifty-Nine Lakhs Sixty-Three Thousand Five Hundred Seventy-Eight and Forty Paisa Only) along with 18% interest from the due date of invoices.

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2. The Operational Creditor is a partnership firm incorporated under the provisions of the Partnership Act, 1932. The office of the Operational Creditor is at A-629, 4 Sen Colony Guru Nanak Path, Malviya Nagar, Jaipur-302017.
 3. The Corporate Debtor is a Private Limited Company incorporated under the provisions of Companies Act, 2013 on 27.09.2018 having CIN: U17299RJ2018PTC062475. The authorized share capital of the Corporate Debtor is Rs. 2,50,00,000/- (Rupees Two Crores Fifty Lakhs Only) and the paid-up capital is Rs. 30,00,000/- (Rupees Thirty Lakhs Only). The registered office of the Corporate Debtor is situated at 301-A, City Star Complex, Vidhyadhar Nagar, Jaipur-302039. Therefore, the Corporate Debtor falls within the territorial jurisdiction of this Adjudicating Authority.
 4. The present application has been filed on the following set of facts:
 - 4.1. The Corporate Debtor through its authorised representative and director *Ms. Poonam Choudhary* approached the Operational Creditor for providing grey/ dyed fabric, dyed and printed fabric and dress material fabric at their factory premises situated at *F-870, First Floor, Road No. 14, VKIA Area, Jaipur- 302013 (Rajasthan)*. The Corporate Debtor used to place orders with the Operational Creditor since September 2019 for supplying the aforementioned material. The Operational Creditor had undisputedly supplied the said materials to the Corporate Debtor and issued E-way bills. Subsequently, the



Corporate Debtor raised a total bills/invoice of Rs. 3,68,89,318.46/- (Rupees Three Crores Sixty-Eight Lakhs Eighty-Nine Thousand Three Hundred Eighteen and Forty- Six Paisa Only).

- 4.2. In the meantime, upon constant pursuance, the Corporate Debtor has made payment Rs. 28,39,257/- (Rupees Twenty-Eight Lakhs Thirty-Nine Thousand Two Hundred and Fifty- Seven Only) on 26.08.2021. Thereafter, no payment has been made by the Corporate Debtor to the Operational Creditor.
- 4.3. The ledger balance in the books of the Operational Creditor shows an outstanding balance of Rs. 3,03,89,318.46/- (Rupees Three Crore Three Lakh Eighty-Nine Thousand Three Hundred Eighteen and Forty-Six Paisa Only) as on 31.03.2022.
- 4.4. Despite irregularity in the payments, the Operational Creditor has supplied material to the Corporate Debtor. However, the Corporate Debtor has failed to pay the outstanding Operational Dues. It is noteworthy that one of the directors of the Corporate Debtor has assured to make the payment, however, failed to do.
- 4.5. It is pertinent to note that as per the statement of account of the Operational Creditor, an amount of Rs. 5,59,63,578.40/- (Rupees Five Crores Fifty-Nine Lakhs Sixty-Three Thousand Five Hundred Seventy-Eight and Forty Paisa Only) is outstanding against the Corporate Debtor on account of supply of the said material.

-  4.6. A Demand Notice dated 10.01.2023 under Form-3 was issued by the Operational Creditor for demanding the outstanding amount of Rs. 5,59,63,578.40/- (Rupees Five Crores Fifty-Nine Lakhs Sixty-Three Thousand Five Hundred Seventy-Eight and Forty Paisa Only). The Corporate Debtor has not replied to the said Demand Notice till the date of filing of the Application.
- 4.7. The relevant details as reflected in Part IV of the Application are reproduced hereunder:

PART IV
PARTICULARS OF OPERATIONAL DEBT

1.	<p><i>Total amount of debt and the date from which such debt fell due</i></p> <p><i>The total amount in default i.e. due from, M/s Bunaai Whiteofficial Private Limited is Rs. 5,59,63,578.40/- (Rupees Five Crores Fifty- Nine Lakhs Sixty- Three Thousand Five Hundred Seventy- Eight and Forty Paisa Only) wherein principal outstanding amount towards supply of goods is Rs. Rs. 3,68,89,318.46/- (Rs. Three Crores Sixty- Eight Lakhs Eighty- Nine Thousand Three Hundred Eighteen and Forty- Six Paisa only) and interest on outstanding amount is Rs. 1,90,74,259.94/- (Rs. One Crore Ninety Lakhs Seventy- Four Thousand Two Hundred Fifty- Nine and Ninety- Four Paisa Only) calculated at the rate of 18% per annum from the date when invoices becomes due.</i></p> <p><i>The debt was due from 31.03.2022 which was last date of confirmation of dues i.e. due date of payment as per demand notice dated 10.01.2023 and which remained unpaid.</i></p>
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2.	<p><i>Amount claimed to be in default and the date on which the default occurred</i></p> <p><i>The total amount in default due from M/s Bunaai Whiteofficial Private Limited is Operational Debt of Rs. 5,59,63,578.40/- (Rupees Five Crores Fifty- Nine Lakhs Sixty- Three Thousand Five Hundred Seventy- Eight and Forty Paisa Only) wherein amount outstanding towards supply of goods is Rs. Rs. 3,68,89,318.46/- (Rs. Three Crores Sixty- Eight Lakhs Eighty- Nine Thousand Three Hundred Eighteen and Forty- Six Paisa only) and interest on outstanding amount is Rs. 1,90,74,259.94/- (Rs. One Crore Ninety Lakhs Seventy- Four Thousand Two Hundred Fifty- Nine and Ninety- Four Paisa Only) calculated at the rate of 18% per annum from the date when invoices becomes due.</i></p> <p><i>Claim date: 31.03.2022.</i></p>
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5. The Corporate Debtor filed its Reply *vide* Diary No. 2362/2023 dated 29.09.2023 and made the following submissions:

5.1. It is submitted that the partners of the Operational Creditor and the directors of the Corporate Debtor were good friends and due to their cordial relationship they incorporated various firms. The Operational Creditor is one of them which was constituted *vide* Partnership Deed dated 29.06.2019 wherein *Siddharth Gupta* and *Mamta Gupta* were partners of 50% shares and *Shri Ashok Kumar Goyal* having balance 50% shares. Later on, *Shri Ashok Kumar Goyal* got retired from the Partnership Firm *vide* Deed of Retirement dated 31.10.2021. The partner of the Petitioner Firm namely, *Mr. Siddharth Gupta* and the

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Director of the Corporate Debtor namely, *Shri Abhishek Choudhary* constituted an LLP i.e., *Bunaai Textiles LLP* vide LLP Agreement dated 13.11.2020.

5.2. The idea behind the incorporation of these firms was to supply raw material to the Corporate Debtor and buy back the finished goods/material for sale in the open market it can be corroborated from the fact that the Corporate Debtor was the single buyer of the Operational Creditor and Corporate Debtor never issued a single purchase order for supply of goods. Further, the Operational Creditor entered into an agreement with the Corporate Debtor for selling of its product at different places.

5.3. It is submitted that due to dishonest acts of the present partners of the Operational Creditor, dispute arose between the current and ex-partner of the Operational Creditor namely, *Shri Ashok Kumar Goyal*, immediately after his retirement from the Operational Creditor firm. The said partner has claimed 50% of the amount against the material supplied to the Corporate Debtor and has also sent a demand notice to the Corporate Debtor seeking deposition of the 50% of the outstanding amount directly to him.

5.4. Further, the Operational Creditor never had the intention to settle the books with his Ex-partner namely, *Mr. Ashok Kumar Goyal*, and further *Mr. Siddharth Gupta*, partner in the Operational Creditor, in furtherance



of his dishonest intention cheated on the Corporate Debtor and its director and committing fraud in *Bunaai Textiles LLP* by way of illegally and unauthorizedly transferring funds of Rs. 15,00,000/- (Rupees Fifteen Lakh Only) in his father's bank account on 28.03.2023 and that too after filing of the present Petition.

5.5. The Operational Creditor Firm is not registered with the Registrar of Firm in terms of the provisions of the Section 58 and 59 of the Indian Partnership Act, 1932, therefore, in the light of Section 69 of the Indian Partnership Act, the present Petition concerning recovery of the alleged outstanding amount is not maintainable.

5.6. The Partners of the Operational Creditor Firm and the Directors of the Corporate Debtor are inter-se connected with each other and there is an existing dispute between them, the same has not been disclosed by the Operational Creditor before this Adjudicating Authority.

5.7. The alleged principal amount mentioned in the Company Petition is Rs. 3,68,89,318.46/- (Rs. Three Crores Sixty-Eight Lakhs Eighty-Nine Thousand Three Hundred Eighteen and Forty-Six Paisa only) is not admitted as it does not match with the ledger of the Corporate Debtor which has a balance of Rs. 3,03,89,381/- (Rs. Three Crores Three Lakhs Eighty-Nine Thousand Three Hundred and Eighty-One Only). There is an apparent pre-existing dispute between the Operational Creditor and the Corporate Debtor. The term 'dispute' has been defined



under Section 5(6) of the IBC, 2016. Therefore, in the light of the pre-existing dispute between the parties, the captioned petition is liable to be dismissed.

5.8. Apart from that, the Operational Creditor is not entitled to claim and file the present petition for the invoices raised during the period 25.03.2020 to 24.03.2021 and the total amount for this period is Rs. 2,87,92,029/- (Rupees Two Crores Eighty-Seven Lakhs Ninety-Two Thousand Twenty-Nine Only). In the light of Section 10A of the IBC, 2016 the Operational Creditor is not entitled to claim the amount of Rs. 3,68,59,318.46/- (Rupees Three Crores Sixty-Eight Lakhs Eighty-Nine Thousand Three Hundred Eighteen and Forty-Six Paisa only). The captioned petition is not maintainable and the Petitioner is not entitled to invoke the provisions of IBC, 2016. Therefore, the Petition filed by the Operational Creditor is not maintainable and is liable to be rejected in light of provisions of Section 4 of the IBC as the amount of claim is less than rupees One Crore and the claim under the Petition is being barred by Section 10A of the IBC, 2016.

5.9. The petitioner is not entitled to charge any interest on the alleged amount. A bare perusal of the invoices placed on record makes it clear that there was no clause regarding payment of interest on the delayed payment. Therefore, no interest can be charged in the absence of specific agreement between the parties.

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5.10. The present Petition was filed before this Adjudicating Authority on 08.02.2023 and three years back from filing of the Petition is 09.09.2020 however, the claim under the present Petition is prior to 09.09.2020. Therefore, the present Petition is barred by limitation in light of Section 238A of the IBC, 2016.

5.11. It is further submitted the Respondent on several occasions has raised objection pertaining to delay in the delivery of the goods supplied by the Operational Creditor however no heed was paid to this issue.

5.12. The Corporate Debtor has also relied on the Judgement of the Hon'ble Apex Court in the matter of *Bhaskar Laxman Jadhav and Ors. Vs Karamveer Kakasaheb Wagh Education Society & Ors.* (2013) 11 SCC 531.

6. The Operational Creditor filed its Rejoinder *vide* Diary No. 2910/2023 dated 08.12.2023 and made the following submissions: -

6.1. It is submitted that in the instant matter debt is due, undisputed and well within limitation. Further, the balance confirmation was also sent by the Corporate Debtor on 21.12.2022. Further it is submitted that it is an admitted fact that the Petitioner supplied goods to Corporate Debtor as it is apparent from sale invoices, GSTR1, GST3B and E-Way bills wherein the Respondent committed default of Rs. 3,68,89,318.46/- (Rupees Three Crore Sixty-Eight Lakh Eighty-Nine Thousand Three Hundred Eighteen Only and Forty-Six Paise Only). Furthermore, the

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Respondent himself accepts the liability of Rs. 3,03,89,381/- (Rupees Three Crore Three Lakh Eighty-Nine Lakh Three Hundred Eighty-One Only). Additionally, there are sale invoices, GST Returns and E-way Bills to confirm the supply and sale were made to Corporate Debtor.

- 6.2. Further, it is submitted that the alleged dispute is between Ex-partners of Operational Creditor Firm that is not relevant in the instant matter.
- 6.3. In the present case, the amount is due towards the Operational Creditor partnership firm not against erstwhile partner, *Mr. Ashok Kumar Goyal*. Further, it is mentioned that it is not lawful for the Corporate Debtor to discharge/adjust its liability towards the Operational Creditor by way of making payment to the Ex-partner since the dues are towards the Operational Creditor not towards Ex-partner, namely Mr. Ashok Kumar Goyal.
- 6.4. The Corporate Debtor is trying to deviate from the subject matter and deliberately creating false backdated letters and communications to create a confusion in the name of authority.
- 6.5. The partnership deed was created on 01.07.2019 and subsequently *Mr. Ashok Kumar Goyal* was retired *vide* deed dated 30.09.2021 w.e.f. 31.10.2021. Currently *Mrs. Mamta Gupta* and *Mr. Siddharth Gupta* are partners in the firm and there should be no effect of non-registration. The partnership firm is duly executed on a stamp paper with a valid PAN and GSTIN and is registered all relevant documents such GST



Returns and Invoices have been submitted and the amount is due from the Corporate Debtor. A bare perusal of Section 69(2) of the Indian Partnership Act, 1932 makes it clear that the provisions would not apply only to a suit and not to proceedings. Applications filed under IBC are not suits but only proceedings. It supports of its argument the Operational Creditor also relied on the Judgment of Hon'ble NCLT Mumbai Bench in the matter of *M/s Shree Dev Chemicals Corporation Vs Gammon India Limited* [2020] ibclaw.in 60 NCLT.

7. During the pendency of the main Petition, the Corporate Debtor has filed an Interlocutory Application bearing *IA (IBC) No. 326/JPR/2024* under Rule 11 of NCLT Rules, 2016 for seeking appropriate directions for the determination of the claim of the Operational Creditor :: in order to secure the ends of justice and proper adjudication of the matter. The aforementioned Application has been filed on the following set of facts: -

- 7.1. It has been submitted that one of the directors of the Corporate Debtor namely, *Mr. Abhishek Choudhary*, and one of the directors of Operational Creditor namely, *Mr. Siddharth Gupta*, are designated partners of *M/s Bunaai Textiles LLP*. Therefore, *M/s Bunaai Textiles LLP* is a related party of the Operational Creditor and the Corporate Debtor under the provisions of the IBC, 2016 and thereby the Operational Creditor is also a related party of the director of the Corporate Debtor. Thus, the Operational Creditor is also a related party



of the Corporate Debtor in terms of the business carried out between them.

7.2. It has been stated by the Operational Creditor that *Mr. Ashok Kumar Goyal* ('Respondent No. 2') having 50% shares in the Operational Creditor had retired from the said Firm by way of Deed of Retirement of Partnership dated 31.10.2021 and clause 7 of the said deed provides that:

"That the retiring partner Shri Ashok Kumar Goyal shall be entitled to receive whatever amount stands to their credit balance as on 31.10.2021 after the necessary debits and credits. The continuing partners shall pay the same according to mutually decided."

7.3. The Operational Creditor has filed the Petition claiming the amount against the material supplied to the Corporate Debtor during the partnership tenure of Respondent No. 2 when he had 50% ownership in the Operational creditor. Thus, by virtue of the terms of the retirement of Respondent No. 2, he is claiming 50% of the outstanding amount from the Corporate Debtor i.e. Rs. 1,51,94,690/- (Rs. One Crore Fifty-One Lakhs Ninety-Four Thousand Six Hundred Ninety Only).

7.4. In the aforementioned circumstances, one of the erstwhile Partners of the Operational Creditor who had 50% shares in the Operational Creditor is claiming amount from the Corporate Debtor. Further, the

 Operational Creditor is also claiming the entire amount from the Corporate Debtor as claimed by Respondent No. 2 under the terms of his deed of retirement. Thus, the same tantamount to a dispute for the legal entitlements between the Respondents in the main Petition.

7.5. It was submitted that if this Adjudicating Authority decides that the erstwhile partner is entitled to get 50% of the admitted outstanding amount than after settling of the claims of the Operational Creditor, the claim towards the payable amount remains to the tune of Rs. 86,52,084/- (Rs. Eighty- Six Lakhs Fifty- Two Thousand Eighty- Four Only).

7.6. In view of the aforementioned circumstances, the Corporate Debtor has prayed for determination of the claims of the creditors towards the amount payable to them.

8. *Mr. Ashok Kumar Goyal, ('AKG')* Ex-Partner of the Operational Creditor has filed its Written Submissions vide Diary No. 2168/2024 dated 03.09.2024 and stated the following:

8.1. AKG is the erstwhile partner of the Operational Creditor who was holding 50% shares in the Partnership Firm till 31.10.2021. Thereafter, AKG got retired on 31.10.2021 without settling its accounts lying towards credit balance with regards to the aforesaid share that has become due and payable to him. The said partnership firm i.e., the Operational Creditor, has been reconstituted by the remaining partners

 i.e., *Mr. Siddharth Gupta* and *Mrs. Mamta Gupta*. The remaining partners of the partnership firm promised to make payment to AKG. However, the said payments had not been released.

8.2. Further, the issue between the Operational Creditor and the Corporate Debtor includes the setting off the due outstanding amount with regard to supply of finished goods to the associated entities of the said firm. It was assured to the Answering Respondent that as and when the aforesaid outstanding amount will be received from the Corporate Debtor, the same shall be paid to AKG.

8.3. It was contended that in terms of Section 37 of the Indian Partnership Act, 1932, on retirement of the partner, the reconstituted firm continues and the retiring partner is to be paid his due amount. However, the same has not been done in the instant case. Further, as per the terms of the retirement deed AKG is entitled to receive his claim equivalent to 50% share in the partnership and the same stands to the credit balance in his favour.

8.4. Furthermore, it is submitted that the Operational Creditor is trying to prevent AKG of his legitimate claim with regards to his partnership share of 50% by filing the instant Petition.

9. The Corporate Debtor has filed its Written Submissions *vide* Diary No. 2167/2024 dated 03.09.2024 wherein it has reiterated the submissions made in the Reply and has also relied upon the following judgments:-



- I. *The Bangalore Sales Corporation v/s Sark Spice Products Pvt. Ltd. CP (IBC).37/KOB/2022*
 - II. *Phoenix Arc Private Limited v/s Spade Financial Services Limited & Ors. Civil Appeal No. 2842/2020*
 - III. *Bhaskar Laxman Jadhav and Ors. v/s Karmaveer Kakasaheb Wagh Education Society & Ors. (2013) 11 SCC 531*
10. The Operational Creditor has filed its Written Submission *vide* Diary No. 2182/2024 dated 04.09.2024 wherein it has reiterated the submissions made in the Company Petition. Moreover, in relation to the IA (IBC) 326/JPR/2024 it has been submitted that the alleged dispute raised by the Corporate Debtor is inter-se dispute between the Operational Creditor and *Mr. Ashok Kumar Goyal* and since the goods have been purchased by the Corporate Debtor from the Operational Creditor, *Mr. Ashok Kumar Goyal* has no right to directly receive any amount from the debtors of the Operational Creditor.
11. We have heard the Ld. Counsels for the parties and perused the averments made in the Application, Reply, Rejoinder, Written Submission along with the documents enclosed therein.
12. Before we delve into the merits of the case, it is relevant to deal with the preliminary objections raised by the Corporate Debtor qua the maintainability of the instant Petition. The Corporate Debtor in its Reply has contended that the Operational Creditor is not a registered firm under Section 58 and 59 of the Indian Partnership Act, 1932 ('Partnership Act') and hence, as per Section 69(2) of the Partnership Act, it cannot initiate the



proceedings for recovering the alleged due amount. Thus, the moot question of law that arises for our consideration is whether an unregistered partnership firm can initiate the proceedings under Section 9 of the Code.

13. In order to determine the aforementioned issue, it is relevant to refer to Section 69 of the Partnership Act and the same is reproduced hereunder:-

“Section 69 Effect of Non-Registration.

(1) No suit to enforce a right arising from a contract or conferred by this Act shall be instituted in any Court by or on a behalf of any persons suing as a partner in a firm against the firm or any person alleged to be or to have been a partner in the firm unless the firm is registered and the person suing is or has been shown in the Register of Firms as a partner in the firm : Provided that the requirement of registration of firm under this sub-section shall not apply to the suits or proceedings instituted by the heirs or legal representatives of the deceased partner of a firm for accounts of the firm or to realise the property of the firm.

(2) No suit to enforce a right arising from a contract shall be instituted in any court by or on behalf of a firm against any third party unless the firm is registered and the persons suing are or have been shown in the Register of Firms as partners in the firm.

(2A) No suit to enforce any right for the dissolution of a firm or for accounts of a dissolved firm or any right or power to realise the property of a dissolved firm shall be instituted in any Court by or on behalf of any person suing as a partner in a firm against the firm or any person alleged to be or have been a partner in the firm, unless the firm is registered and the person suing is or has been shown in the Register of Firms as a partner in the firm : Provided that the requirement of registration of firm under this sub-section shall not apply to the suits or proceedings instituted by the heirs or legal representatives of the deceased partner of a firm for accounts of a dissolved firm or to realise the property of a dissolved firm.

(3) The provisions of sub-sections (1), (2) and (2A) shall apply also to a claim of setoff or other proceedings to enforce a right arising from a contract but shall not affect (a) the firms constituted for a



duration upto six months or with a capital upto two thousand rupees; or; (b) the powers of an official assigned, receiver or Court under the Presidency Towns Insolvency Act, 1909, or the Provincial Insolvency Act, 1920, to realise the property of an insolvent partner.

(4) This section shall not apply

(a) to firms or partners in firm which have no place of business in the territories to which this Act extends, or whose places of business in the said territories are situated in areas to which, by notification under section 56 this Chapter does not apply, or

(b) to any suit or claim of set-off not exceeding one hundred rupees in value which, in the presidency towns, is not of a kind specified in section 19 of the Presidency Small Cause Courts Act, 1882, or outside the Presidency towns, is not of a kind specified in the Second Schedule to the Provincial Small Cause Courts Act, 1887, or to any proceeding in execution or other proceeding incidental to or arising from any such suit or claim.”

14. The said issue came up for consideration before the Hon'ble NCLAT in the case of *Rourkela Steel Syndicate v/s Meity Fabricators Pvt. Ltd.* (2023) ibclaw.in 102 NCLAT

“6. An application under Section 9 of IBC cannot be said to be a suit and analogy of Hon'ble Supreme Court judgment in Hargovindbhai Dave's case, supra, is fully applicable to the application filed under Section 9 IBC also. Further, also it is well settled by the judgment of the Hon'ble Supreme Court in B.K. Educational Services (P) Ltd. v. Parag Gupta and Associates, (2019) 11 SCC 633 that provision of Section 5 Limitation Act are also fully applicable in Section 7 & 9 IBC applications. Section 5 Limitation Act is not applicable in a suit which is also a clear indication that Application under Section 7 & 9 are not a suit.

7. The Judgments of Hon'ble Supreme Court relied by the Adjudicating Authority regarding bar of Section 69(2) is not attracted in the present case since the application under Section 9 cannot be treated as suit.”

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-  15. Thus, in view of the Judgment of the Hon'ble NCLAT in the case of *Rourkela Steel Syndicate (supra)* it becomes conspicuous that Section 69 of the Partnership Act does not bar an unregistered partnership firm from filing a Petition under Section 9 of the Code.
16. The Corporate Debtor has also raised the issue of limitation and has contended that some of the invoices in default as alleged by the Operational Creditor pertains to the period prescribed under Section 10A of the Code i.e., 25.03.2020 to 25.03.2021 and thus, should be excluded while calculating the amount of default for purposes of threshold as prescribed under Section 4 of the Code.
17. In order to deal with the aforementioned objection raised by the Corporate Debtor, it is pertinent to refer to the Ledger Account of the Operational Creditor which reveals that the Corporate Debtor has made continuous payments in the period ranging from November 2019 to January 2021 and the last payment was made on 26.08.2021.
18. Thus, it becomes clear that the Corporate Debtor had made regular payments from November 2019 to January 2021. As per Section 10A of the Code, no application for initiation of CIRP of a Corporate Debtor cannot be filed for a default arising between 25.03.2020-25.03.2021. Thus, the said Section requires that a default has to occur in the said period for taking the benefit of the same. In the instant case, since the Corporate Debtor had made regular payments till January 2021, it cannot be said that any default occurred during



the said period and therefore, the Corporate Debtor cannot claim the benefit of Section 10A of the Code.

19. Further, the Corporate Debtor has contended that the instant Petition is barred by limitation in view of Section 238A of the Code. It was submitted that the instant Petition was filed on 08.02.2023 and since, the prescribed limitation period is of three years, the Operational Creditor cannot file a claim prior to 09.02.2020.
20. It is seen from the ledger account of the Operational Creditor that the Corporate Debtor has made the last payment on 26.08.2021 and the instant Petition is filed on 10.02.2023. Thus, it transpires that the same has been filed well within the limitation.
21. In addition to the aforementioned Objections, the Corporate Debtor has claimed set off against the alleged claims of the Operational Creditor on account of goods supplied to one of the stores of the Operational Creditor at Indore and the goods supplied to the Operational Creditor by the sister concerns of the Corporate Debtor namely, *Ordinaree Tribe Pvt. Ltd.* and *Urbanstree*.
22. In the instant case, the material supplied by the sister concerns of the Corporate Debtor to the Operational Creditor have no bearing in the adjudication of the instant Petition. Therefore, we are not inclined to accept the submissions made on behalf of the Corporate Debtor with regards to

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setting off the amount on the basis of the dealings between the Operational Creditor and the other concerns.

23. In so far as the merits of the Petition are concerned, the Corporate Debtor has contended that there exists a pre-existing dispute and in light of Section 8(2) of the Code, the instant petition is not maintainable. It was stated that the Partners of the Operational Creditor and the Director of the Corporate Debtor are inter se connected with each other and there is an existing dispute between them. As a partner of the Operational Creditor, *Shri Siddharth Gupta*, and the Director of the Corporate Debtor, *Shri Abhishek Choudary*, constituted an LLP i.e., *Bunaai Textiles LLP* vide LLP Agreement dated 13.11.2020. In the said LLP, *Mr. Siddharth Gupta* has illegally transferred funds of Rs. 15,00,000/- (Rupees Fifteen Lakh Only) and in this regard, *Mr. Abhishek Choudhary* who is also a director of the Corporate Debtor has seized the bank accounts of the LLP. Thus, there is an existing dispute between the parties.

24. At this juncture, it is pertinent to refer to Section 5(6) of the Code which defines dispute as: -

*"(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;"*

25. A perusal of the aforementioned definition reveal that for purposes of Section 8 and 9 of the Code, a dispute must pertain to supply of goods or

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 services qua the operational debt. While in the instant case, the Corporate Debtor has tried to establish the inter-se dispute between the partners of the Corporate Debtor and the Operational Creditor as a dispute. We are of the opinion that the inter-se disputes among the directors of the Operational Creditors and the Corporate Debtor does not qualify as a dispute for the purposes of Section 8 and 9 of the Code.

26. At this juncture, it is germane to refer the Judgement of the Hon'ble Apex Court in *Mobilox Innovations Private Limited Vs Kirusa Software Private Limited* wherein in para 34 the Hon'ble Supreme Court laid down the guidelines for adjudicating Section 9 Application. Para 34 is as follows: -

“34. Therefore, the adjudicating authority, when examining an application under Section 9 of the Act will have to determine:

- (i) *Whether there is an “operational debt” as defined exceeding Rs 1 lakh? (See Section 4 of the Act)*
- (ii) *Whether the documentary evidence furnished with the Application shows that the aforesaid Debt is due and payable and has not yet been paid? and*
- (iii) *Whether there is existence of a dispute between the parties or the record of the 15 Company Appeal (AT) (Insolvency) No. 256 of 2021 pendency of a suit or arbitration proceeding filed before the receipt of the demand notice of the unpaid operational Debt in relation to such dispute?*

If any one of the aforesaid conditions is lacking, the Application would have to be rejected. Apart from the above, the adjudicating authority must follow the mandate of Section 9, as outlined above, and in particular the mandate of Section 9(5) of the Act, and admit or reject the Application, as the case may be, depending upon the factors mentioned in Section 9(5) of the Act.”




-  27. Further, the Hon'ble Apex Court in the case of *M/s S.S. Engineers & Ors. vs. Hindustan Petroleum Corporation Limited*, observed that:

"32. On a reading of Sections 8 and 9 of the IBC, it is patently clear that an Operational Creditor can only trigger the CIRP process, when there is an undisputed debt and a default in payment thereof. If the claim of an operational creditor is undisputed and the operational debt remains unpaid, CIRP must commence, for IBC does not countenance dishonesty or deliberate failure to repay the dues of an Operational Creditor. However, if the debt is disputed, the application of the Operational Creditor for initiation of CIRP must be dismissed."

28. Thus, it is no more res-integra that for non-admission of a Section 9 Application, the existence of a dispute must be plausible, and it must not appear as a moonshine defence.
29. In the present Application from facts and records, we are of the opinion that the Operational Creditor has established debt and default as required for the purposes of Section 9 of the Code. Thus, we are of the view that in the present matter, all the ingredients laid out under Section 9 are fulfilled. Therefore, we are inclined to initiate CIRP of the Corporate Debtor in the present matter.
30. In so far as the *IA No. 326/JPR/2024* filed by the Corporate Debtor is concerned, it is relevant to mention that this Adjudicating Authority had given the Corporate Debtor time to settle the matter with the Operational Creditor and the same has also been recorded in the Order Sheet dated 03.07.2024. Moreover, at this stage, we are of the opinion that directions




with regard to determination of the claim of the Operational Creditor and *Mr. Ashok Kumar Goyal* (ex-partner of Operational Creditor) towards the outstanding amount cannot be given as the same has no bearing in the adjudication of Section 9 Petition.

31. Under sub-section (4) of Section 9 of the Code, the Operational Creditor may propose the name of a Resolution Professional to be appointed as Interim Resolution Professional ('IRP') but it is not obliged to do so. In the instant case, the Operational Creditor has proposed has proposed the name of the IRP, therefore, we appoint *Mr. Vikas Rajvanshi*, having Registration Number IBBI/IPA/-002/IP-N00018/2016-2017/10032, duly registered with ICAI Insolvency Professional Agency, to be appointed as the Interim Resolution Professional. The Applicant has filed Consent in Form 2 under Insolvency and Bankruptcy Board of India (Application to Adjudicating Authority) Rules, 2016, stating that no disciplinary proceedings are pending against the above-named IRP.
32. The IRP is directed to take all such steps as are required under the statute, inter-alia in terms of Sections 15, 17, 18, 19, 20 and 21 of the Code and transact proceedings with utmost dedication, honesty and strictly in accordance with the provisions of the Code, and Rules and Regulations thereunder. It is directed to the Interim Resolution Professional /Resolution Professional to check the genuineness of the claim while admitting the operational dues of the Applicant.



 33. Consequences of initiation of CIRP shall be inter-alia as follows:

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

33.3. The said IRP shall act strictly in accordance with the provisions of the Code and with a view to defray his expenses to be incurred and fees on account, the Applicant is directed to deposit a sum of Rs. 2,00,000/- (Rupees Two Lakhs Only) within seven days from the date of this order. This amount shall be proportionately contributed and reimbursed to the Applicant upon formation of the Committee of Creditors. In terms of Section 17 and 19 of the Code all personnel of the Corporate Debtor including promoters and Board of Directors, whose powers shall stand suspended, shall extend all cooperation to



the IRP during his tenure as such and the management of the affairs of the Corporate Debtor shall vest with the IRP.

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

34. In view of the aforementioned observations, *CP No. (IB)-15/9/JPR/2023* is admitted and IA No. *326/JPR/2024* stands disposed off.

35. The Registry is directed immediately to send a soft copy of the instant Application along with this order to the parties along with the RP nominated herein.

Sd/-
DEEP CHANDRA JOSHI,
JUDICIAL MEMBER

Sd/-
RAJEEV MEHROTRA,
TECHNICAL MEMBER