

**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-IV**

CP (IB) No.1427/MB-IV/2020

Under Section 9 of the I&B Code, 2016

In the matter of:

S. Kumar Nationwide Limited

[CIN: L17120MH1990PLC058361]

...Operational Creditor(s)

V/s

M/s GDS Buildcon Private Limited

[CIN: U51109MH2013PTC245727]

...Corporate Debtor

Order pronounced on: 30.08.2023

Coram:

Mr. Prabhat Kumar
Hon'ble Member (Technical)

Mr. Kishore Vemulapalli
Hon'ble Member (Judicial)

Appearances (via videoconferencing):

For the Petitioner(s) : Mr. Yash Dhruva a/w Ms. Meghna
Arvind, Adv.

For the Respondent(s) : Mr. Rahul Sarda a/w Ms. Anjali
Malekar, Adv.

ORDER

Per: Kishore Vemulapalli, Member (Judicial)

1. This is a Company Petition filed under section 9 of the Insolvency & Bankruptcy Code, 2016 (IBC) by S. Kumars Nationwide Limited ("the Operational

Creditor”), seeking initiation of Corporate Insolvency Resolution Process (CIRP) in the matter of BSFC Distributors Private Limited, the Corporate Debtor.

- 1.1. The Operational Creditor was admitted into the CIRP process 24.04.2018 on thereafter and ordered to be liquidated on 19.06.2019. The present application has been filed by the Liquidator of the Operational Creditor in terms of permission granted by this Hon'ble Tribunal under section 33(5) of the Insolvency and Bankruptcy Code, 2016, by order dated 18th February 2020.
 - 1.2. The Company Petition is filed on 16/09/2020 claiming an amount of Rs. 1,73,02,124 /- in default as on 05.03.2020 i.e. the principal amount of Invoices is Rs. 1,33,33,940/- and interest thereon as per the terms and conditions stated in the Invoices is Rs.39,68,184/- (Rupees Thirty-Nine Lakhs Sixty-eight thousand hundred one eighty-four only).
 - 1.3. The date of default is not specified in Part IV of the petition (the dates on which default has occurred is stated against each Invoice in the statement at Annexure D to the Petition). As per Annexure D the due date of invoices falls between 27.11.2011 to 04.01.2019.
2. The Operational Creditor manufactured textile fabrics and sold fabrics to Corporate Debtor for further resale/export by the Corporate Debtor to its customers. The material was supplied directly to the customers of the Corporate Debtor on the instruction of Operational Creditor and was billed to the Corporate Debtor. In some cases, the material was supplied to the Corporate Debtor also for further sale. There are various Invoices raised between 28th September, 2018 and 5th November, 2018 and the due date for payment for these invoices filed between 27.11.2011 to 04.01.2019. However, these invoices remained unpaid.

- 2.1.A Notice dated 07.10.2019 ("Demand Notice") was issued by the Operational Creditor to the Corporate Debtor calling upon the Corporate Debtor to make payment towards outstanding dues amounting to Rs. 1,59,25,623/- within 10 days from the date of issue of notice and the same was responded by the Corporate Debtor denying the liability stated in the Demand notice while making a reference to a prior refusal by the Corporate Debtor.
3. The Corporate Debtor has filed affidavit in reply dated 02.08.2022 stating that vide order dated 18th February 2020 this Hon'ble Tribunal has granted permission to initiate proceedings against the Respondent for recovery of the sum due and payable to the Petitioner, and cannot be interpreted to mean that this Hon'ble Tribunal has granted permission to file the present Petition which is for initiation of corporate insolvency resolution process against the Respondent; the Demand Notice dated 7th October 2019 was issued under section 8 of the Code, without any permission u/s 33(5) of the Code, as this permission can said to be granted vide order dated 18th February 2020 only even if it is admitted that the liquidator could have filed section 9 petition in terms of said order; the Operational Creditor has suppressed various documents and facts evidencing pre-existing dispute between the parties; the Respondent was liable to make payment only after making realisations from the customers of the Petitioner. Since, the customers, to whom goods were sold, have not paid the money to the Respondent, no payment becomes due; the opening balance as on 1.4.2018 as per Petitioner's books amounting to Rs. 23,04,638.79/- has been derived by wrongly debiting the account of the Respondent by a sum of Rs. 2,45,91,000/- in March 2018. If the said wrongful debit is excluded from the ledger account, it is clear that the ledger account of the Respondent in the books of account of the Petitioner has a credit (payable) balance of Rs. 2,22,86,361.21/-.

4. The Operational Creditor filed its affidavit in Rejoinder dated 15.02.2023 stating that the Respondent has acted as the wholesalers/distributors for the textile Fabrics manufactured by the Petitioner. Petitioner manufactured textile Fabrics and sold Fabrics to the Respondent, who in turn sold/exported the Fabrics to customers/consignees as more particularly set-out in the Invoices respectively raised by the petitioner on the Respondent; the Respondent never disputed and/or denied the said facts; there is admitted debt and occurrence of default, Petitioner issued Statutory Notice dated 7th October 2019, under Section 8 of the IB Code, demanding payment of the unpaid operational debt of Rs.1,59,25,623/- as on 30th September 2019. Please note, this has been further revised to Rs. 1,73,02,124/- on account of interest on delayed payment from 1st October 2019 till 5th March, 2020 (i.e. date of filing the petition (I.B.) No. 1427 of 2020). It is submitted that it is an admitted debt due and payable by the Respondent to the Petitioner. It is also an admitted fact that there is default on the part of the Respondent. Therefore, the Petitioner had sought permission from this Hon'ble Tribunal under Section 33 (5) of the IBC and after the prior permission granted by this Hon'ble Tribunal vide order dated 18th February 2020, the above Company Petition has been filed for initiating CIRP against the Respondent. In fact, the Respondent filed IA 896 of 2022 to set aside the order dated 18th February, 2020, which was heard and reserved for orders on 7th September, 2022 and the orders were pronounced on 9th February, 2023 wherein the Application of the Respondent was rejected.

5. This bench heard the counsels and perused the material on record.
 - 5.1. From the perusal of the Order dated from perusal of order dated 18.02.2020 the petitioner has filed an application MA 3816/2019 seeking approval of this tribunal in terms of Proviso to Sec 33(5) of the Code which relates

institution of any suit or legal proceeding by the liquidator. Accordingly, we do not find any merit in contention of the Corporate Debtor in this regard.

5.2. Further, we find that the leave was granted by this tribunal u/s 33(5) vide order dated 18.02.2020 while the petitioner liquidator had issued the demand notice on 07.10.2019 in terms of Section 8 and the petition in pursuance thereto was filed on 16.09.2020. This bench feels that the issuance of Demand Notice is merely precursor to the institution of a legal proceeding in the form of Section 9 application and Demand Notice u/s 8 is merely a final notice for payment or notification of dispute in relation to that amount. No proceeding can be said to have been instituted by the service of demand notice u/s 8 unless a Petition is filed u/s 9 of the Code, as that section does not mandatorily require the Operational Creditor to initiate legal proceedings as follows from use of word “*may*” used in Section 9(1) of the Code. Accordingly, we do not find any merit in this contention of the Corporate Debtor also.

5.3. As regards contention of the Respondent that the debt claims to be in default has not become due from payment because it becomes due only after realization of the sale proceeds from the customers in terms of the understanding arrive at with the resolution professional.

5.3.1. We find that the Corporate Debtor had, vide its letter dated 07.02.2019, had intimated the petitioners that the Corporate Debtor has been supporting the Corporate Debtor throughout from more than 3 years and in spite of the fact that the Corporate Debtor was admitted under CIRP process, we have continued to support which is very well evident from the records available, which can be perused by you to get to the facts of the case. We also find from perusal of this letter the following was clarified to the Resolution Professional:

“With aforesaid understanding SKNL used to get the orders and deliveries were being routed under “Bill to Ship To” Model, i.e. invoiced through BSFC to their customers. Under the arrangement BSFC was getting commission as facilitator for providing business support service, working capital/advance for providing and managing bank accounts for receivable routed through BSFC. All payment/return and damages, if any, from customers was on account of SKNL with entire responsibility of collection rested with SKNL’s team for both domestic and export orders. This understanding was finalized with SKNL’s ex MD Nitin Kasliwal, Girish Rao, JS Shetty & Ajay Agarwa, in the interest of SKNL’s continuing operations.

Based on the aforesaid arrangements, claims, (if any), raised by SKNL’s customers billed through BSFC channel, would be charged back by BSFC to SKNL on pro rata basis. The creditor period for the collection from BSFC was kept at

- *60 days for sales to domestic customer &*
- *As per LC terms, or creditor period agreed between export customers & SKNL Operational Management Term.*

The collection from SKNL’s customers used to come as per market segments/category, which comprises of creditor days from 0-200 days. The responsibility of collection from customers to BSFC was with Marketing department of SKNL and BSFC only facilitated the Bharuch Operations & Support through its thick & thin in terms of providing working capital support & banking Operational support which is duly reflected in the financials of the plant & plant operations report for last three years. Till Nov 18 we haven’t charged any rate of interest for early payments for funding in form of yarn dyes & chemicals which we were asked to send on job work challan by SKNL operational management & all our payment were made on or before the due dates.

5.3.2. From the perusal of the all nine invoices claim to be in default, we find that the goods under the cover of these invoices had a consignee situated outside India and the goods were supplied on account of the Corporate Debtor on the terms 'against Invoice/ Advance'. From the perusal of the letter of the Corporate Debtor as quoted aforesaid, we find that it is the case of the Corporate Debtor that payment was due to the Operational Creditor only in accordance with *"LC terms, or creditor period agreed between export customers & SKNL Operational Management Term"*. Since, all the invoices against which debt is claimed to be in default pertains to the goods supplied to the overseas customers, this bench is of the view that the payment was to be made in accordance with *LC terms, or creditor period agreed between export customers & SKNL Operational Management Term*. The Corporate Debtor has not brought on record any evidence suggesting that any open credit period was agreed by SKNL Operational Management Term in relation to the supplies to the export customers. The reply of the Corporate Debtor dated 30.07.2022 also does not contain any averment in relation to this aspect. Except a bald statement since its customer have not paid the money in respect of goods dispatched and no payment has been realized so far, the Corporate Debtor cannot be mad liable to pay the amount claimed to be in default as the same cannot be due in terms of afore-stated understanding.

5.3.3. This bench also finds that each of nine invoices contain in specific payment terms and corporate debtor has not brought on record any evidence suggesting that it had taken up the payment terms stated in the invoices with the Operational Creditor at any time after receipt of those invoices. Since, the payment was recoverable from over-seas parties and the realization there from is also regulated by the Authorized Dealer Bank on behalf of RBI, we do not find merit in the contention of the

Corporate Debtor that payment from these parties has not been realized by him in the absence of any evidence suggesting prayer for extension of period for realization having been filed with the Authorized Dealer Bank by the Corporate Debtor.

5.4. Last, the Corporate Debtor has taken up the dispute in relation to a debit of Rs.2,45,91,000 in March, 2018 made by the Operational Creditor in its books. We find that this issue is not connected with debt claim to be in default because the applicant has filed a claim in relation to debt outstanding against nine invoices. We find that the Operational Creditor was admitted into CIRP 24.04.2018 and if the books of the Corporate Debtor was showing amount recoverable from the Operational Creditor as is pleaded by the Corporate Debtor, if the said debit is ignored, why the Corporate Debtor not made any claim before the Resolution Professional in relation to such receivable in the CIRP process. It is trite law that upon admission into CIRP the debt due to the creditors are classified into two parts i.e. (a) debt due as on CIRP commencement date, (b) Debt due in relation to transactions on or after CIRP commencement date. Accordingly, we do not find any substance in this argument also.

5.5. In view of the above discussion, this bench finds that the ground of pre-existing dispute is a moon shine defence and has no substance. Accordingly, this bench is of the considered view that there existed no prior dispute in relation to amount of debt claimed in default in the petition.

6. In view of the above finding, this bench feels that present petition deserves to be allowed and the Corporate Debtor deserves to be admitted into CIRP process.

ORDER

7. The petition bearing CP (IB) No.1427/MB-IV/2020 filed under section 9 of the Insolvency & Bankruptcy Code, 2016 (IBC) by S. Kumars Nationwide Limited (“the Operational Creditor”), seeking initiation of Corporate Insolvency

Resolution Process (CIRP) in the matter of BSFC Distributors Private Limited, the Corporate Debtor is **Admitted**.

- I. That this Bench as a result of this prohibits:
 - a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;
 - b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;
 - c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitization and Reconstruction of Operational 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 possession of the corporate debtor.
- II. That the supply of essential goods or services to the corporate debtor, if continuing, shall not be terminated or suspended or interrupted during the moratorium period.
- III. That the provisions of sub-section (1) of Section 14 of I&B Code shall not apply to
 - a. such transactions as may be notified by the Central Government in consultation with any Operational sector regulator;

- b. a surety in a contract of guarantee to a Corporate Debtor.
- IV. That the order of moratorium shall have effect from the date of this order till the completion of the corporate insolvency resolution process or until this Bench approves the resolution plan under sub-section (1) of section 31 of I&B Code or passes an order for the liquidation of the corporate debtor under section 33 of I&B Code, as the case may be.
- V. That the public announcement of the corporate insolvency resolution process shall be made immediately as specified under section 13 of I&B Code.
- VI. The bench hereby appoints Mr. Lalit Kumar Dangi, an Insolvency Professional registered with Indian Institute of Insolvency Professionals of ICAI having registration number IBBI/IPA-001/IP-P01821/2019-2020/12859 Email: lalitkumardangi@gmail.com . He is appointed as IRP for conducting CIRP of the Corporate Debtor and to carry the functions as mentioned under IBC, the fee payable to IRP/RP shall comply with the IBBI Regulations/Circulars/Directions issued in this regard. The IRP shall carry out functions as contemplated by Sections 15,17,18,19,20,21 of the IBC.
- VII. During the CIRP Period, the management of the Corporate Debtor shall vest in the IRP or, as the case may be, the RP in terms of section 17 of the IBC. The officers and managers of the Corporate Debtor shall provide all documents in their possession and furnish every information in their knowledge to the IRP within a period of one week from the date of receipt of this Order, in default of which coercive steps will follow.

- VIII. The Operational Creditor shall deposit a sum of Rs.5,00,000/- (Rupees Five lakh only) with the IRP to meet the initial CIRP cost, if demanded by the IRP to fund initial expenses on issuing public notice and inviting claims. The amount so deposited shall be interim finance and paid back to the applicant on priority upon the funds available with IRP/RP. The expenses, incurred by IRP out of this fund, are subject to approval by the Committee of Creditors (CoC).
- IX. The Registry is directed to communicate this Order to the Operational Creditor, the Corporate Debtor and the IRP by Speed Post and email immediately, and in any case, not later than two days from the date of this Order.
- X. A copy of this Order be sent to the Registrar of Companies, Maharashtra, Mumbai, for updating the Master Data of the Corporate Debtor. The said Registrar of Companies shall send a compliance report in this regard to the Registry of this Court **within seven days** from the date of receipt of a copy of this order.

Sd/-
PRABHAT KUMAR
MEMBER (TECHNICAL)
30.08.2023.

Sd/-
KISHORE VEMULAPALLI
MEMBER (JUDICIAL)