

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

CP (IB) No. 369/MB-IV/2022

Under Section 9 of the I&B Code, 2016

In the matter of:

Kepuce Footwear Private Limited

[CIN: U19200RJ2015PTC047186]

...Operational Creditor/Applicant

V/s

**Cosmic Export Solutions (India) Private
Limited**

[CIN: U51109MH2012PTC238800]

...Corporate Debtor/Respondent

Order Dated: 06.06.2023

Coram:

Mr. Prabhat Kumar

Hon'ble Member (Technical)

Mr. Kishore Vemulapalli

Hon'ble Member (Judicial)

Appearances (via videoconferencing):

For the Petitioner(s) : Mr. Girdhari Lal Sharma, Advocate.

For the Respondent(s) : Mr. Nausher Kohli a/w Ms. Tasneem
Zariwala and Mr. Rushab Chopra,
Advocates.

ORDER

Per: Kishore Vemulapalli, Member Judicial

1. This is an Application being C.P. (IB) No. 369/MB/C-IV/2022 filed on 27.01.2022 by Mr. Amit Kumar Sharma, Director of Kepeuce Footwear Private Limited, the Operational Creditor/Applicant, under section 9 of Insolvency & Bankruptcy Code, 2016 (I&B Code) for initiating Corporate Insolvency Resolution Process (CIRP) in the case of Cosmic Export Solutions (India) Private Limited, Corporate Debtor.
 - 1.1 The Operational Creditor has claimed a debt of Principal amount of Rs. 2,20,79,119/- and the date of default is 07.06.2018 as submitted by the Operational Creditor in Part 4 of the Petition.
2. The operational creditor is engaged in production of footwear and the Corporate Debtor was the regular purchaser of the footwear from the operational creditor since 2016. That in due course of business, Corporate Debtor issued purchase orders, orally or telephonically or in person to operational creditor and operational creditor sold and supplied the ordered goods as per the Corporate Debtor's purchase order.
 - 2.1 All the invoices issued by Operational creditor to Corporate Debtor against every purchase along with the Bilty/ consignment/ freight documents, as goods purchased by the Corporate Debtor were sent by the operational creditor through

transport/cargo/freight is annexed herewith collectively along with statement of account.

- 2.2 The Corporate Debtor had purchased the goods lastly from the operational creditor on 06.10.2017. Further, the Corporate Debtor has made the last payment of Rs. 5,00,000/- (Rupees Five Lakh Only) on 07.06.2018, which is evident from the books of account of operational creditor. Accordingly, a sum of Rs. 2,20,79,119/- (Rupees Two Crore Twenty Lac Seventy Nine Thousand One Hundred Nineteen only) is outstanding since 07.06.2018.
- 2.3 The Operational Creditor sent various Emails to the Corporate Debtor on 22.02.2017, 18.07.2017, 11.09.2017 and 02.10.2017 and made telephonic reminders as well for the demand of above mentioned outstanding amount of Rupees 2,20,79,119/- (Rupees Two Crore Twenty Lac Seventy Nine Thousand One Hundred Nineteen only), but the Corporate Debtor did not pay the dues.
- 2.4 The Operational Creditor had issued the Demand Notice dated 24.04.2021 to the Corporate Debtor, but the Corporate Debtor failed to reply to the same or make the payment of the outstanding amount. The Operational Creditor again sent the demand notice to the Corporate Debtor on 27.12.2021 for a total amount of debt of Rs. 2,20,79,119/- (Rupees Two Crore Twenty Lac Seventy Nine Thousand One Hundred Nineteen only).

3. The Corporate Debtor, vide its reply dated 03.10.2022, states that it is involved in facilitating Export Service around the world and it purchased goods viz. footwear for men and women in the name and style of "Kepuce Footwear Private Limited" from the Operational Creditor which were exported by the Corporate Debtor to West Africa. In or about, 05.05.2016, subject to the terms and conditions stipulated therein, the Corporate Debtor ordered footwear of certain specifications from the Operational Creditor and realised that the goods supplied by the Operational Creditor were marred with defects, including but not limited to discrepancy in the sizes of the goods supplied and quality defect and the same was intimated from time to time to the Corporate Debtor, particularly to one Mr. Sanjay Kumar Singh, the Managing Director of the Operational Creditor. The Corporate Debtor vide its reply dated 03.10.2022 raised several defences on the grounds of –

3.1 The Operational Creditor being Struck-Off from the Register Of Companies and as the Operational Creditor is no longer a 'Company' as defined under the Companies Act, 2013 as evidenced by the Company Master Data pertaining to the Operational Creditor annexed to the Company Petition at page no. 413.

3.2 Suppression of Memorandum of Settlement dated 24.02.2018 ('Settlement Agreement'), which was entered by both the parties mutually agreeing that the Corporate Debtor shall make payment of Rs. 5,00,000/- (Rupees Five Lakhs Only) to the Operational Creditor herein, as full, and final settlement and that the Operational Creditor shall forego all its claims against the Corporate Debtor as on date of the Settlement Agreement. Clause 7 of the said Settlement Agreement categorically records as under:

"It is agreed between the parties hereto that upon execution hereof and completion of payments as stated herein, KEPUCE as well as COSMIC

shall have no liability and/or responsibility towards each other in terms of the clauses of the present memorandum and/or transactions that have transpired before the signing and execution of the present memorandum."

- 3.3 The Operational Creditor has not annexed any invoices or bills pending payment on part of the Corporate Debtor after 07.06.2018 i.e., the date of payment of the settlement amount of Rs. 5,00,000/- (Rupees Five Lakhs Only). Once the Corporate Debtor accepted the payment of the full and final settlement amount in terms of the Settlement Agreement, the Operational Creditor no longer has any claim against the Corporate Debtor.
- 3.4 On 12.07.2021, the advocate for the Operational Creditor herein addressed an e-mail to the Director of the Corporate Debtor herein, thereby serving an incomplete notice, without annexures, to which he responded vide e-mail dated 17.07.2021 and inter alia denied the contents of the email dated 12.07.2021 and called upon the said advocate of the Operational Creditor to serve a complete copy of the notice and the annexures thereto. On 27.12.2021, the advocate for the Operational Creditor addressed an e-mail to the Corporate Debtor and again served an incomplete notice without all documents referred to therein. The Corporate Debtor has in its Interim Reply dated 05.01.2022 to the Demand Notice dated 27.12.2021, inter alia disputed the claim of the Operational Creditor, and stated that there is no amount due and payable by the Corporate Debtor to the Financial Creditor and called upon the Operational Creditor to provide the Corporate Debtor with all the purchase orders, invoices and freight documents which were referred to in the said Demand Notice, however, the Operational Creditor neglected to respond to the Interim Reply and instead, filed

the present Company Petition. It is submitted that without giving opportunity to the Corporate Debtor to peruse the documents referred to in the Demand Notice dated 27.12.2021, the Operational Creditor has breached the provisions of the Code and as such, its action under Section 9 of the Code is non-est.

- 3.5 The date of payment of full and final settlement amount cannot be date of default. The alleged Date of Default is 07.06.2018, which is in fact, by the Operational Creditor's own admission, the date on which the Corporate Debtor has paid the full and final settlement amount of Rs. 5,00,000/- (Rupees Five Lakhs Only). The Operational Creditor refused to provide debit notes to the Corporate Debtor, citing taxation issue. However, to have full and final settlement of accounts, in pursuance of the amicable settlement mentioned hereinabove, the Operational Creditor, through its Director Mr. Premchand Sharma, and the Corporate Debtor, through its Director Mr. Arun Khanna, entered into Memorandum of Settlement dated 24.02.2018, thereby inter alia agreeing that upon payment of the mutually agreed full and final settlement amount i.e., Rs. 5,00,000/- (Rupees Five Lakhs Only) by the Corporate Debtor herein to the Operational Creditor, the Corporate Debtor shall forego all the claims, as on date of the Settlement Agreement.
4. The Operational Creditor in its Rejoinder dated 10.02.2023 in which he denied the allegations raised by the Corporate Debtor in its reply on various issues.
- 4.1 The Operational Creditor says that the objection that operational creditor is "struck off" from the register of companies bears no relevance in the matter and does not disentitle the operational creditor to approach before the

Hon'ble Tribunal to initiate Corporate Insolvency Resolution Process against the corporate debtor to claim the lawful sale consideration.

4.2 The Operational Creditor states that the petition is maintainable by virtue of the Section 248 & 250 of Companies Act, 2013 read with the provisions of Insolvency and Bankruptcy Code, 2016, which gives the operational creditor a legal remedy to initiate legal process to realize the amount due to the operational creditor company. It further states that the Hon'ble National Company Law Appellate Tribunal, at New Delhi in case of *Hemang Phophalia vs. The Greater Bombay Co-operative Bank Ltd & Anothers*, bearing *Company Appeal No. 765 of 2019*, held that the company petition in respect of company whose name has been struck off from the register of companies, is maintainable by virtue of the provisions of Companies Act, 2013 and Insolvency and Bankruptcy Code, 2016. The certificate of Registration of Petitioner Company, Vat Registration, GST Registration etc are attached to the present petition.

4.3 It is further submitted that the objection regarding suppression of material facts about existence of any alleged Settlement Agreement dated 24.02.2018 between parties, is wrong and the said document is frivolous, forged and vague and that the director of the operational creditor had never entered into any settlement agreement with the corporate debtor, nor authorized any of its employees to enter into the so called settlement agreement. He further states that that the signatory in the

alleged settlement agreement dated 24.02.2018 i.e. Mr. Sanjay. Kumar Singh, was an employee of the operational creditor from January 2016 to December 2017 and he left the job in December 2017 which is evident from the salary vouchers and certificate of the Chartered Accountant of the Operational Creditor. The Operational Creditor further states that the directors of the corporate debtor company in collusion with Mr. Sanjay Kumar Singh had forged the settlement agreement dated 24.02.2018 without any authority to execute the same. It is wrongly stated that the payment of Rs. 5,00,000/- (Rupees Five Lac Only) was paid against the full and final settlement, where in fact, the above was received by the operational creditor against an outstanding amount of Rs. 2,25,79,119/-. After the abovementioned payment, there is an outstanding amount of Rs. 2,20,79,119/- (Rupees Two Crore Twenty Lac Seventy Nine Thousand One Hundred Nineteen only).

- 4.4 The Operational Creditor further denied that the goods provided by it to the Corporate Debtor were defective and provided at higher price cap and the same was as per the market standards and as agreed by the Corporate Debtor.
5. The Corporate Debtor vide an Affidavit filed on 11.03.2023, has placed on record its police complaint dated 13.02.2023, sent by registered post and which was delivered on 15.02.2023 alleging offences of cheating and criminal breach of trust on part of Mr. Premchand Sharma and Mr. Amit Premchand Sharma, i.e. the directors the Operational Creditor.

6. We have carefully gone through the documents and pleadings available on record and considered the arguments of both the sides.

6.1 On perusal of the purported settlement agreement this bench finds that the said agreement is signed by one Mr. Premchand Sharma on behalf of the Operational Creditor and the said agreement neither contains the designation of Mr. Premchand Sharma, nor give any reference to document of authorisation in his favour to execute this agreement on behalf of Operational Creditor. Though, this bench finds from the petition that Mr. Premchand Sharma is the director of the Operational Creditor, but his Signature on Board Resolution enclosed to the petition as page No 14 are materially different than the signature found on the settlement agreement. The Corporate Debtor has relied upon the doctrine of Indoor Management to argue that irregularity in the procedural matters cannot invalidate a document having been executed by the director of the Company. This bench is not in agreement with this proposition as the settlement agreement neither refers to the designation of Mr. Sharma nor has reference to any document giving authority to him to do so. Accordingly, this bench feels that the settlement agreement cannot be relied upon to accept the contention of Corporate Debtor in this respect.

6.2 The Corporate Debtor has also raised existence of prior dispute but has failed to bring on record any communication with the Operational Creditor in this respect. In the absence of any evidence indicating existence of prima facie dispute this bench is not inclined to agree with this submission.

6.3 The striking of the name of the applicant by the ROC cannot disentitle it from proceeding further in an application for

resolution of a Corporate Debtor. The Hon'ble NCLAT in the case of *Hemang Phophalia vs. The Greater Bombay Co-operative Bank Ltd & Anothers*, bearing *Company Appeal No. 765 of 2019* allowed the application even in case of Corporate Debtor whose name was struck off.

6.4 On perusal of the documents available on record, it is observed that the last payment of Rs. 5,00,000/- (Rupees Five Lakh Only) was made on 07.06.2018. The payments had fallen due on account of supplies made between 04.06.2016 to 06.10.2017. In view of part payment having been made on 07.06.2018 and the relaxation in filing applications granted by Hon'ble Supreme Court on account of COVID, the delay in filing of present application merits condonation u/s5 of the Limitation act thereby extending the period of limitation as originally expiring between 04.06.2016 to 06.10.2017 is which is evident from the books of account of the Operational Creditor.

7 In view of the above, this Bench finds that there exists an undisputed Operational debt within the meaning of Sec 5(21) of the Code exceeding Rs. 1,00,00,000/- and the Corporate Debtor is in default in payment thereof, this application deserves to be allowed.

ORDER

This Application being C.P. (IB) No. 369/NCLT/MB/C-IV/2022 filed under Section 9 of I&B Code, 2016, filed by Kepeuce Footwear Private Limited, Operational Creditor/ Applicant against Cosmic Export Solutions (India) Private Limited, Corporate Debtor for initiating Corporate Insolvency Resolution Process is **Admitted**. We

further declare moratorium u/s 14 of I&B Code with consequential directions as mentioned below:

- 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. That this Bench hereby appoints Mr. Pramodkumar Ramesh Ladda, a registered insolvency resolution professional having Registration Number - IBBI/IPA-002/IP-N00694/2018-2019/12148 and Email Id.- csladdaji@gmail.com as Interim Resolution Professional to carry out the functions as mentioned under I&B Code, the fee payable to IRP/RP shall comply with the IBBI Regulations/Circulars/Directions issued in this regard.
- VII. The Operational Creditor shall deposit a sum of Rs.5,00,000/- (Rupees two 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).

- e) A copy of this Order be sent to the Registrar of Companies, Maharashtra, Mumbai, for updating the Master Data of the Corporate Debtor.
- f) The Registry is directed to immediately communicate this order to the Operational Creditor, the Corporate Debtor and the Interim Resolution Professional even by way of email or WhatsApp. **Compliance report of the order by Designated Registrar is to be submitted today.**

Sd/-

Prabhat Kumar
Member (Technical)
/LRA Akshata/

Sd/-

Kishore Vemulapalli
Member (Judicial)