

**IN NATIONAL COMPANY LAW TRIBUNAL**

**MUMBAI BENCH, COURT- V**

**C.P. 1260/IB/MB/2021 &**

**IA. No. 847 of 2022**

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

*In the matter of*

**OM Industries,**

1135/2 Patil Industries Estate

Mahadik Colony Toap, Kolhapur

Pin Code 416122

**.....Operational Creditor**

**Vs**

**Birla Precision Technologies Ltd.,**

**(CIN: L29220MH1986PLC041214)**

23, Birla Mansion No. 2, 1<sup>st</sup> Floor,  
D.D. Sathe Marg, Parathana Samaj,  
Mumbai-400004

**.....Corporate Debtor**

**Order pronounced on: 27.07.2023**

**Coram:**

Hon'ble Sh. Kuldip Kumar Kareer, Member (Judicial)

Hon'ble Smt. Anuradha Sanjay Bhatia, Member (Technical)

***Appearances (via Videoconferencing)***

For the Operational Creditor: Adv Sandesh Shukla a/w Adv Shivani

Deshmukh i/b Abhay Nevagi and Associates

For the Corporate Debtor: Adv Umang Mehta a/w Adv Taher Habshee i/b  
Dhruve Liladhar & Co.

***Per: Kuldip Kumar Kareer, Member (Judicial)***

**ORDER**

1. This Company Petition has been filed by **OM Industries** (hereinafter called "**Petitioner**")/ "**Operational Creditor**") seeking to initiate Corporate Insolvency Resolution Process (**CIRP**) against **Birla Precision Technologies Ltd.** (hereinafter called "**Respondent**")/ "**Corporate Debtor**") alleging that the Corporate Debtor has committed a default to an extent of Rs. 1,55,57,967.00/-. This Petition has been filed by invoking the provisions of Section 8 and 9 of the Insolvency & Bankruptcy Code (hereinafter called "**Code**") read with Rule 5 and 6 of Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

**FACTS OF THE CASE**

2. The Operational Creditor is a Partnership Firm carrying out the business of manufacturing and supplying resin coated sand. The Operational Creditor had supplied resin coated sand with respect to purchase orders issued by Corporate Debtor being purchase order no. 00P118PO0100202 dated 13.10.2018, 00P120P00100152 dated 12.09.2020; and 00P120P000100216 dated 29.09.2020. The Operational Creditor raised total 62 invoices during the period from 07.11.2020 to 30.07.2021.
3. The Operational Creditor vide email dated 30.07.2021 had requested the Corporate Debtor to make the outstanding payment of Rs. 1,64,09,447/-. In this regard, the Corporate Debtor on 30.07.2021 made payment of Rs. 2,71,400/- to the Operational Creditor.
4. The Operational Creditor further addressed a letter dated 11.08.2021 calling upon the Corporate Debtor for balance confirmation as on

31.07.2021. subsequently, the Corporate Debtor made another payment of Rs. 2,49,240/- to the Operational Creditor on 13.08.2021.

5. The Operational Creditor sent a Demand Notice under Form 3 dated 18.09.2021, demanding the Corporate Debtor to make the pending payment of operational debt of Rs. 1,55,57,967.00/- within 10 days.
6. Since the Corporate Debtor did not make the payment of Operational Debt within the prescribed time frame, this necessitated the filing of the application under section 9 of the Code.

**REPLY FILED BY THE RESPONDENT**

7. At the outset, the Respondent denied all the contentions, averments, and statements made in the present petition.
8. It has been submitted that most of the invoices and their defaults fall between the period starting from 25.03.2020 upto 25.03.2021 because of which the present application is not maintainable, being barred under Section 10A of the Code. The balance amount which falls outside the period under Section 10A is Rs. 78,61,160/- out of which a sum of Rs. 2,71,400/- was paid on 30.07.2021. In this manner, the balance outstanding, which is not covered the period falling under Section 10A falls below the threshold of Rs. 1,00,00,000/-. Therefore, the application deserves to be dismissed.
9. The Respondent has further submitted that the Petitioner has supplied defective goods to the Respondent. The Respondent through various the letters had addressed the grievances of defective goods and asked the Operational Creditor to collect and replace the goods as per quality standards originally agreed. In this regard, the Respondent had also issued debit notes against many Invoices towards the rejection of defective goods on the account their inferior quality.

10. The Respondent has further submitted that there is a pre-existing dispute in the instant case, as the issues of deficiency of goods and debit notes were raised to the Petitioner well before the issuance of Demand Notice dated 18.09.2021 which had not been resolved till date.

**REJOINDER FILED BY THE PETITIONER**

11. With regard to the contention that majority of defaults fall within the period under Section 10A, the Operational Creditor has submitted that it was a continuous default as accepted by the Respondent while making the part payment of the defaults. Therefore, the contention raised with regard to Section 10A of the Code is not tenable.

12. The Operational Creditor has submitted the Respondent has never raised any objections disputing the invoices and deficiency of goods. The Operational Creditor has submitted that Respondent has also never sent any letter demanding the replacement and re-delivery of goods with standard quality. The Operational Creditor has submitted that the Respondent has relied upon the forged and fabricated documents and therefore, no proof of service was produced by the Respondent.

13. With the above averments, the Operational Creditor has prayed for the admission of the present application.

**FINDINGS**

14. We have heard the Ld. Counsels for both the parties and perused the documents available on record.

15. The present application has been filed seeking to initiate the Corporate Insolvency Resolution Professional (CIRP) against the Corporate Debtor for the default committed of Rs. 1,55,57,967.00/-.

16. It is an undisputed fact that the Applicant had supplied resign coated sand with respect to purchase orders issued by Corporate Debtor being purchase order no. 00P118PO0100202 dated 13.10.2018; 00P120P00100152 dated 12.09.2020; and 00P120P000100216 dated 29.09.2020. In this regard, the Applicant had raised total 62 invoices during the period starting from 07.11.2020 to 30.07.2021. The Corporate Debtor made part payments of Rs. 2,71,400/- and 2,49,240/- on 30.07.2021 and 13.08.2021 respectively. The Petitioner sent a Demand Notice under Form 3 dated 18.09.2021 to the Corporate Debtor, demanding the pending payment of operational debt of Rs. 1,55,57,967.00/-. Thereafter, the Petitioner filed the present petition.

17. Having heard the Counsel for the Parties and after going through the record, we find that the Applicant issued 62 invoices during the period starting from 07.11.2020 to 30.07.2021. As per the invoices, there is no indication regarding the time span within which the amount of the invoice is to be paid. Therefore, the due date of each invoice can be treated as immediate. It is well settled that for the purposes of limitation as well as Section 10A of the Code due date or date of default of each invoices has to be taken into account. The details of the all 62 invoices are as follows:

<b>Sr.No.</b>	<b>Date of Invoice</b>	<b>Invoice No.</b>	<b>Credit Period</b>	<b>Due date</b>	<b>Invoice amount</b>
1	07.11.2020	277	IMMID	08.11.2020	129,467.00
2	10.11.2020	279	IMMID	10.11.2020	233,640.00
3	29.11.2020	293	IMMID	29.11.2020	259,600.00
4	03.12.2020	298	IMMID	03.12.2020	259,600.00
5	05.12.2020	303	IMMID	05.12.2020	233,640.00
6	09.12.2020	306	IMMID	09.12.2020	233,640.00
7	13.12.2020	310	IMMID	13.12.2020	259,600.00
8	16.12.2020	313	IMMID	16.12.2020	220,660.00
9	20.12.2020	316	IMMID	20.12.2020	246,620.00
10	25.12.2020	318	IMMID	25.12.2020	259,600.00
11	27.12.2020	319	IMMID	27.12.2020	246,620.00

12	29.12.2020	320	IMMID	29.12.2020	207,680.00
13	02.01.2021	322	IMMID	02.01.2021	259,600.00
14	06.01.2021	324	30	06.02.2021	259,600.00
15	10.01.2021	326	IMMID	10.01.2021	246,620.00
16	13.01.2021	328	30	13.02.2021	233,640.00
17	15.01.2021	330	30	15.02.2021	246,620.00
18	17.01.2021	333	IMMID	17.01.2021	259,600.00
19	23.01.2021	335	IMMID	23.01.2021	246,620.00
20	26.01.2021	336	IMMID	26.01.2021	246,620.00
21	29.01.2021	337	IMMID	29.01.2021	246,620.00
22	30.01.2021	338	30	29.02.2021	233,640.00
23	04.02.2021	341	30	04.03.2021	246,620.00
24	07.02.2021	342	30	07.03.2021	259,600.00
25	11.02.2021	344	30	11.02.2021	246,620.00
26	14.02.2021	346	30	14.03.2021	233,640.00
27	17.02.2021	347	30	17.03.2021	246,620.00
28	19.02.2021	349	IMMID	19.02.2021	246,620.00
29	21.02.2021	350	30	21.03.2021	233,640.00
30	25.02.2021	351	30	25.03.2021	246,620.00
31	02.03.2021	355	30	02.04.2021	298,540.00
32	05.03.2021	358	30	05.04.2021	233,640.00
33	09.03.2021	361	30	09.04.2021	259,600.00
34	12.03.2021	362	30	12.04.2021	259,600.00
35	14.03.2021	365	IMMID	14.03.2021	246,620.00
36	17.03.2021	368	30	17.04.2021	246,620.00
37	21.03.2021	369	IMMID	21.03.2021	246,620.00
38	25.03.2021	370	30	25.04.2021	246,620.00
39	27.03.2021	372	IMMID	27.03.2021	246,620.00
40	30.03.2021	373	30	30.04.2021	233,640.00
41	04.04.2021	4	IMMID	04.04.2021	259,600.00
42	09.04.2021	7	IMMID	09.04.2021	324,500.00
43	17.04.2021	10	IMMID	17.04.2021	259,600.00
44	28.04.2021	11	IMMID	28.04.2021	259,600.00
45	30.04.2021	12	IMMID	30.04.2021	346,625.00

46	06.05.2021	14	IMMID	06.05.2021	346,625.00
47	09.05.2021	17	IMMID	09.05.2021	249,570.00
48	15.05.2021	20	IMMID	15.05.2021	249,570.00
49	25.05.2021	22	IMMID	25.05.2021	284,970.00
50	29.05.2021	24	IMMID	29.05.2021	271,400.00
51	01.06.2021	26	IMMID	01.06.2021	271,400.00
52	03.06.2021	27	IMMID	03.06.2021	271,400.00
53	07.06.2021	32	IMMID	07.06.2021	271,400.00
54	10.06.2021	33	IMMID	10.06.2021	271,400.00
55	13.06.2021	35	IMMID	13.06.2021	271,400.00
56	23.06.2021	37	IMMID	23.06.2021	271,400.00
57	26.06.2021	43	IMMID	26.06.2021	244,260.00
58	30.06.2021	45	IMMID	30.06.2021	271,400.00
59	08.07.2021	49	IMMID	08.07.2021	271,400.00
60	15.07.2021	54	IMMID	15.07.2021	271,400.00
61	18.07.2021	58	IMMID	18.07.2021	271,400.00
62	30.07.2021	60	IMMID	30/07/2021	271,400.00
<b>Total Outstanding Debt</b>					<b>1,55,57,967/-</b>

From the given table, it is evident that the due date for 31 invoices issued between 07.11.2020 and 21.03.2021, the aggregate of which amounts to Rs. 74,76,147.00/-, falls within the Section 10A period. Therefore, this Bench is of the considered view that out of 62 invoices, aforesaid 31 invoices are covered under Section 10A period regarding which the claim cannot be ever filed by the Operational Creditor.

18. As regards, the remaining 31 invoices, which are not covered under Section 10A period, the total outstanding amount of such invoices comes to Rs. 83,53,220.00/-, which falls below the minimum threshold of Rs. 1 Crore. The Corporate Debtor is stated to have paid a sum of Rs. 2,71,400/- and Rs. 2,49,240/- on 30.07.2021 and 13.08.2021 respectively, which should further be deducted from the total outstanding amount of Rs. 83,53,220.00/-. In this regard, reference can be made to **M/s Next**

**Education India Private Limited vs M/s K12 Techno Services Private Limited (Civil Appeal No. 1775 of 2021)** whereby the Hon'ble Supreme Court has held that in a case where several invoices are issued and some of the invoices are time barred, then the court must consider the remaining invoices which are within the limitation and whether they cross the minimum threshold limit of Rs. 1 Crore or not. Accordingly, it is evident that eligibility of each invoice needs to be considered separately in order to determine the threshold limit of Rs. 1 Crore. In the instant case, if the due date of all the invoices are accessed separately and the invoices which fall within the period of 10A are excluded, the claimed amount of the remaining invoices do not meet the threshold limit requirement. Therefore, in the light of the law laid down by the Hon'ble Apex Court and considering the facts and circumstances of the present case, this Bench is of the view that the present petition under Section 9 of the Code is liable to be dismissed as the claimed amount falls below the threshold amount of Rs. 1 Crore.

19. Accordingly, CP no. 1260 of 2021 is **dismissed** and **disposed of** and IA. No. 847 of 2022 filed by the Operational Creditor shall be dismissed to have been rendered **infructuous**. This order, however, will not preclude the Operational Creditor from proceeding against the Corporate for the recovery of the outstanding due at any other forum as per law as the debt is not extinguished with the passing of this order.

**Sd/-**  
**ANURADHA SANJAY BHATIA**  
**MEMBER (TECHNICAL)**

**Sd/-**  
**KULDIP KUMAR KAREER**  
**MEMBER (JUDICIAL)**