NATIONAL COMPANY LAW TRIBUNAL
GUWAHATI BENCH
GUWAHATI

C.P. (IB) No.11/GB/2021

In the matter of:

K. S. Marketing ... Operational Creditor / Applicant
V/s
Kitply Industries Ltd. ... Corporate Debtor / Respondents

Order delivered on 22nd June, 2021

Coram: Hon'ble Shri H. V. Subba Rao, Member (J): **Hearing through**
Hon'ble Shri Prasanta Kumar Mohanty, Member (T): **Video Conference**

ATTENDANCE-CUM- ORDER SHEET OF THE HEARING OF GUWAHATI BENCH OF THE NATIONAL COMPANY LAW TRIBUNAL ON 22.06.2021

Section: **Section 9 of the Insolvency and Bankruptcy Code, 2016**

S. NO.	NAME (CAPITAL LETTERS)	DESIGNATION	REPRESENTATION	SIGNATURE
1.	Mr. Raj Carolin	Advocate	Petitioners	Through Video Conference
2.				

O R D E R
[Per: Mr. H. V. SUBBA RAO, Member (J)]

The Petitioner/OC represented through respective Learned Counsel. There is no representation from the side of the Respondent/CD.

Today, the present matter is kept for pronouncement of order.

The present matter i.e. **C.P. (IB) No.11/GB/2021** is disposed of.

The detailed order is recorded, vide separate sheet.

Sd/-	**Sd/-**
(Prasanta Kumar Mohanty) **Member (Technical)** **& Adjudicating Authority**	**(H. V. Subba Rao)** **Member (Judicial)** **& Adjudicating Authority**

/Deka—22.06.2021/

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Coram:

Hon'ble Shri H. V. Subba Rao, Member (J):
And
Hon'ble Shri Prasanta Kumar Mohanty, Member (T):

Hearing through Video Conference

<u>Appearance</u>: For the OC / Petitioner - None
For the CD / Respondent - None

<u>O R D E R</u>
[Per: Mr. H. V. SUBBA RAO, Member (J)]

1. The Applicant has filed this Petition under Section 9 of the IBC, 2016 read with Rule 6 of the Insolvency & Bankruptcy (Application to Adjudicating Authority), 2016 for initiation of Corporate Insolvency Resolution Process in respect of the Corporate Debtor (CD) M/s. Kitply Industries Ltd.

2. It is stated by the Applicant that the appended application in Form No.5 with necessary attachments is preferred by the OC under Section 9 of the Insolvency and Bankruptcy Code, 2016. The OC is the supplier of plywood materials to the CD, Kitply Industries Ltd. on whose account huge amounts are entitled for realization as confirmed as per consignment agent agreement dated 01.05.2010, with the CD. Despite the admission of liability, the CD did not reveal the erstwhile proceedings initiated under SICA, 1985 to the knowledge and notice of the OC. Be that as it may, the proceedings started in the year 2012, under SICA became abated when IBC Act,

2016 came into force. Taking cue on the Schedule VIII of the I & B Code, 2016, the process of insolvency stood referred to this Tribunal under I & B Code, 2016 on motion of a Financial Creditor / IDBI. The said proceedings was registered as C. P. (IB) No.2/GB/2018. Sri Bijay Murmuria was initially appointed as IRP. The OC was not aware of such appointment of IRP at the relevant time since public announcement circulated in local dailies at Guwahati whereas the OC conducts business in southern part of India in the State of Kerala. On coming to know about the appointment of IRP at a later stage, the OC preferred a claim before the IRP on 26.11.2018. However, the same was rejected by the IRP on the ground that it was submitted beyond 90 days after the resolution process date and hence not entertainable under Regulation 12 (2) of IB Regulations, 2016. Challenging the same this OC preferred IA No.22/2019 in C.P. (IB) No.2/GB/2018 before this Tribunal. After perusing the records and hearing the matter, this Tribunal was pleased to dismiss the same, however, making it clear that nothing prevents this OC to pursue enforcement of debt legally due from the CD and mandated in terms of decree of support, if proper application under Section 9 of I & B Code, 2016 is submitted. Thereafter, as a prelude to initiating proceedings under Section 9 of the I & B Code, 2016 this OC has duly sent Form No.3 on 06.11.2020. Despite Form No.3 sent by RPAD was duly received by the CD on 22.11.2020, neither any reply not any payment hitherto has been made even after a lapse of three months. Hence, the OC/ petitioner has filed this Petition under Section 9 of the I & B Code, 2016 before this Tribunal on 20.03.2021.

3. It is further submitted in the Application that the OC, K. S. Marketing is having Identification Registration of Firms No.3085/2014 dated 08.10.2014 issued by Department of Registration, Government of Kerala and the OC is situated at Room No.KA XVII-716, Port Road, Azhikode, Kannur District, Kerala State, PIN 670009, E-mail:rajcarolin@gmailcom.

4. The CD, Kitply Industries Ltd. is having identification No. U20211AS1982PLC001969 and was incorporated on 26.08.1982. The authorised capital of the CD is Rs.500,000,000.00 and paid up capital of the CD is

Rs.10,000,00.00. The Registered Office of the CD is at Makum Pathar, A. T. Road, Margherita – 786181 in the State of Assam.

5. It is also submitted in the Petition that Sri K. S. Faizal, S/o. P. P. Ibrahim Hazi, Room No.A. P. ZVII-716, Azhikode GRama Panchayat, Kannur District, Kerala State, PIN 670623, Managing Partner of K. S. Marketing is authorised to submit the present application on behalf of the OC and the said authorisation is attached with the Application. Mr. Raj Karolin V, Advocate, M. K. Associates, Power House Extension Road, Ernakulam North, Cochin, Kerala, India- 682018, E-mail:rajcarolin@gmail.com has been authorised by the OC to accept the service of process on its behalf and the authorisation is attached with the Application. However, the OC has not proposed any name of the Interim Resolution Professional.

6. It is submitted in the Petition that an amount of Rs.88,24,745.21 (Rupees Eighty Eight lacs Twenty Four thousand Seven hundred Forty Five and Paise Twenty One only) which includes 1% monthly interest, is the total amount of debt being the outstanding amount due from M/s. Kitply Industries Ltd., towards supply of plywood Board by K. S. Marketing as on 01.05.2018 as per Ledger Account of deposit as on 30.04.2018. The working for computation of the amount and date of default in tabular form is attached with the Application. The same is also given hereunder:

Sr. No.	Particulars	Amount
1.	Deposit paid as per Cheque No.517670, Federal Bank dated 08.05.2010	50,00,000.00
2.	Less refund of deposit by Kitply Industries Ltd. as per cheques dated 02.11.2012	(-)2,00,000.00
3.	Less refund of deposit by Kitply Industries Ltd. as per cheques dated 03.12.2012	(-)2,00,000.00
4.	Less refund of deposit by Kitply Industries Ltd. as per cheques dated 28.01.2013	(-)2,00,000.00
5.	Less refund of deposit by Kitply Industries Ltd. as per cheques dated 31.01.2013	(-)2,00,000.00
6.	Less refund of deposit by Kitply Industries Ltd. as per cheques dated 22.02.2013	(-)2,00,000.00
7.	Less refund of deposit by Kitply Industries Ltd. as per cheques dated 19.03.2013	(-)2,00,000.00

8.	Interest on deposit amount @1% per month till 05.05.2020	50,24,745.21
	Grand Total	**88,24,745.21**

7. In support of the claim of operational debt, the Applicant has referred to and or attached the following provisions of law / documents with the Application:

i) Acknowledgement of Registration of Firms No.3085/2014 dated 08.10.2014 issued by the Department of Registration Government of Kerala.

ii) Consignment Agent Agreement dated 01.05.2010 with the CD.

iii) Extract of Ledger Account for the period 01.04.2010 to 31.03.2018.

iv) Copy of Order dated in I.A. No.21 of 2019 in C.P.(IB) No.02/GB/2018 of NCLT, Guwahati Bench, Guwahati

v) Lawyer notice dated 17.11.2020 issued by Advocate Raj Carolin. V to Corporate Debtor and others.

vi) Copy of Form-3 under Rule-V of IB Rules issued to the CD

xii) Consignment tracking details of Form-3 issued to Corporate Debtor with the copy of postal receipt.

xiii) Authorisation letter by Operational Creditor to K. S. Harris.

8. The matter was heard on 07.04.2021 and 04.05.2021 and it is submitted that:

Recently the Hon'ble Supreme Court in the case titled as "***Ghanashyam Mishra and Sons Private Limited through the Authorised Signatory Vs. Edelweiss Asset Reconstruction Company Limited through the Director & Ors' Civil Appeal No.8129 of 2019 (delivered on 13.04.2021)*** reaffirmed the settled position of law that once the Resolution Plan is approved by this Hon'ble Adjudicating Authority under Section 31 of the Insolvency & Bankruptcy Code (hereinafter **'I & B Code')** in respect of the corporate debtor, it becomes binding on all the stakeholders (in this case the Operational Creditor/Petitioner, hereinafter **'OC'.** The Hon'ble Supreme Court in Para 95 of the said judgment held as under:

"….. That once a resolution plan is duly approved by the Adjudicating Authority under subsection (1) of Section 31, the claims as provided in the resolution plan shall stand frozen and will be binding on the Corporate Debtor and its employees, members, creditors, including the Central Government, any State Government or any local authority, guarantors and other stakeholders. On the date of approval of resolution plan by the Adjudicating Authority, all such claims, which are not a part of resolution plan, shall stand extinguished and no person will be entitled to initiate or continue any proceedings in respect to a claim, which is not part of the resolution plan….."

9. Further, Prior to Ghanashyam (supra), the Hon'ble Supreme Court in case titled as **'Committee of Creditors of Essar Steel India Limited vs. Satish Kumar Gupta and others'** (2020) 8 SCC 531 (famously known as Essar Judgment) settled the position of law and held in para 105 & 107 as under:

"105. …. Section 31 (1) o the Code makes it clear that once a resolution plan is approved by the Committee of Creditors it shall be binding on all stakeholders, including guarantors. This is for the reason that this provision ensures that the successful resolution applicant starts running the business of the corporate debtor on a fresh slate as it were …."

"107. ….. For the same reason, the impugned NCLAT judgment in holding that claims that may exist apart from those decided on merits by the resolution professional and by the Adjudicating Authority / Appellate Tribunal can now be decided by an appropriate forum in terms of Section 60 (6) of the Code, also militates against the rationale of Section 31 of the Code. A successful resolution applicant cannot suddenly be faced with "undecided" claims after the resolution plan submitted by him has been accepted as this would amount to a hydra head popping up which would throw into uncertainty amounts payable by a prospective resolution applicant who successfully take over the business of the corporate debtor. All claims must be submitted to and

decided by the resolution professional so that a prospective resolution applicant knows exactly what has to be paid in order that it may then take over and run the business of the corporate debtor. This the successful resolution applicant does on a fresh slate, as has been pointed out by us hereinabove. For these reasons, the NCLAT judgment must also be set aside on this count…."

10. It is a matter of record that the OC though belatedly but did file its claim before the RP of the Corporate Debtor during the Corporate Insolvency Resolution Process (hereinafter **'CIRP'**) on 26.11.2018 which was rejected by the RP. Pursuant thereto the OC filed the application challenging the rejection by RP before this Adjudicating Authority which was also rejected by this Adjudicating Authority vide order dated 10.05.2019. However, prior to that, this Adjudicating Authority vide order dated 07.12.2018 approved the resolution plan in respect of the Corporate Debtor. Thus on approval of the resolution plan, the claim of the OC stood extinguished and therefore the present Section 9 is wholly non maintainable and an abuse of the process and thus deserves rejection with costs.

11. In any event the OC neither challenged the order dated 10.05.2019 passed by this Hon'ble Adjudicating Authority rejecting its application being I. A. No.22 of 2019 filed by the OC in C.P. (IB) No.02/GB/2018 nor it challenged the approved Resolution Plan dated 07.12.2018 In fact it is the own admission of the OC in the said application being I. A. No. 22 of 2019 that it failed to file its proof of claim before the IRP within the stipulated time.

12. This Hon'ble Adjudicating Authority vide its order dated while dismissing an application being I. A. No.22 of 2019 filed by the OC in C.P.(IB) No.02/GB/2018 rightly held in para 12 as under:

"12. ….So, as per the amended Regulation 12 (2), which has come into force on 04.07.2018, the RP could not receive any claim submitted beyond 90 days after the CIRP begins. The CIRP begins in this case on 01.05.2018. Therefore, the submission of claim by the applicant on 20.11.2018 is no doubt beyond 90 days from 01.05.2018 when the CIRP has been initiated and therefore, the rejection of the claim, by applying Regulation 12(2) of the

Regulations of 2016 is found perfectly legal and proper and the RP has not committed any error or illegality in rejecting the claim. Moreover, the Resolution Plan has been approved by the Adjudicating Authority on 07.12.2018. Therefore the application of this nature cannot be entertained as this Adjudicating Authority has no power to reopen the resolution process which has already been closed. Therefor the remedy available to the applicant is lying elsewhere.

In view of the above settled position of facts and law the present application preferred by OC under Section 9 of I & B Code is barred by time and after the Resolution Plan was approved way back on 07.12.2018 and the Resolution Applicant has already stepped into the shoes of the Corporate Debtor and also the corpus of Resolution Plan has also been disbursed amongst the stakeholders. In any event the claim of the Applicant OC stands extinguished on approval on approval of the resolution plan and thus neither it is entitled to pursue and maintain this present application nor this Hon'ble Adjudicating Authority with all due respect and humbleness has any power and jurisdiction to consider the present application. The Corporate Debtor therefore prays that this Hon'ble Adjudicating Authority may be pleased to dismiss the present application and impose exemplary cost on OC for wasting the previous judicial time of this Hon'ble Adjudicating Authority."

13. It is observed that:

(1) The Application filed under Section 7 of IBC CPIB (IB) No.2/2016 by the FC IDBI Bank was admitted by this Bench and CIRP started on 01.05.2018.

(2) The IRP was subsequently appointed as RP continued the CIRP and issued Public Announcement in English Newspaper :Financial Express" and also in vernacular Newspaper "Amar Asom" mentioning the last date of submission of claims by the Creditors as on 16.05.2018.

(3) The Applicant OC here filed the claim on 26.11.2018.

(4) The IRP / RP rejected the claim, which was submitted more than ninety days after the commencement of Insolvency Resolution Process date and communicated the decision to the Applicant here on 26.11.2018.

(5) The Resolution Plan has been approved by this Bench on 07.12.2018.

(6) The Applicant had filed an IA No.22 of 2019 with a prayer that the order of rejection of its claim by IRP/RP to set aside as it was not aware about the CIRP of the CD and it came to know about the CIRP of the CD from the internet only after second week of November, 2018 and thereafter only it had filed its claim. The prayer made in the said IA was rejected by this Bench.

(7) The Applicant has filed this petition under Section 9 of I & B Code after 2 years of the Resolution Plan approved and Plan is under implementation.

(8) The Hon'ble Supreme Court in the case titled as "**Ghanashyam Mishra and Sons Private Limited through the Authorised Signatory Vs. Edelweiss Asset Reconstruction Company Limited through the Director & Ors' Civil Appeal No.8129 of 2019 (delivered on 13.04.2021)** reaffirmed the settled position of law that once the Resolution Plan is approved by this Hon'ble Adjudicating Authority under Section 31 of the Insolvency & Bankruptcy Code (hereinafter **'I & B Code')** in respect of the corporate debtor, it becomes binding on all the stakeholders (in this case the Operational Creditor/Petitioner, hereinafter '**OC'.** The Hon'ble Supreme Court in Para 95 of the said judgment held as under:

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"105. …. Section 31 (1) o the Code makes it clear that once a resolution plan is approved by the Committee of Creditors it shall be binding on all stakeholders, including guarantors. This is for the reason that this provision ensures that the successful resolution applicant starts running the business of the corporate debtor on a fresh slate as it were …."

ORDER

14. Considering the (a) Submission/papers/documents made available before this Bench, (b) the observations made in Para 13 (1) to (8) above and (c) the Judgment of the Hon'ble Supreme Court in the cases of "the Committee of Creditors of Essar Steels India Ltd. Vs. Satish Kumar Gupta and others and "Ghanashyam Mishra and Sons Private Limited through the Authorised Signatory Vs. Edelweiss Asset Reconstruction Company Limited through the Director & Ors' Civil Appeal No.8129 of 2019 delivered on 13.04.2021 the present petition CP(IB) No.11/GB/2021 needs to be rejected as the Law is settled that once the Resolution Plan approved by the Adjudicating Authority becomes binding on all stakeholders and all claims not dealt stand extinguished.

We do not find any merit in the contention of the Petitioner that it could not know about the initiation of CIRP within 90 days from the date of initiation is not acceptable when the notice inviting claims was published by the IRP in Newspapers.

15. Hence this CP (IB) No.11/GB/2021 is hereby rejected so as to no cost with the above observations.

Sd/-	**Sd/-**
(**Prasanta Kumar Mohanty)** **Member (Technical)** **& Adjudicating Authority**	**(H. V. Subba Rao)** **Member (Judicial)** **& Adjudicating Authority**

/Deka—22.06.2021/