

**NATIONAL COMPANY LAW TRIBUNAL,  
COURT-V, MUMBAI BENCH**

**C.P. No. 1417/IBC/MB/2020**

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*

**M/s Gopinath Enterprise Private Limited**

Having registered office at:

Block No. 162, B/h. Bharat Alluminum,  
Santej, Kalol, Dist. Gandhinagar, GJ 382721.

...Operational Creditor/Petitioner

Vs

**M/s Aadinath Polyfab Private Limited**

Registered office at:

Plot No. H – 25, Adl. M.I.D.C., Industrial Area  
Kudavali Village, Murbad, Dist – Thane  
Murbad MH 421401 IN.

....Corporate Debtor

**Order Reserved on: 06.01.2023**

**Order Pronounced on: 24.02.2023**

**Coram:**

Hon'ble Shri Kuldip Kumar Kareer, Member (Judicial)

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

**Appearances (via Video Conferencing):**

**For the Petitioner:** Mr. Vijay Lambachiya, Advocate.

**For the Corporate Debtor:** Mr. Divyakant Lahoti, Advocate.

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

**ORDER**

1. This Company Petition is filed by **M/s Gopinath Enterprise Private Limited** (hereinafter called as “Petitioner”) seeking to initiate of Corporate Insolvency Resolution Process (CIRP) against **M/s Aadinath Polyfab Private Limited** (hereinafter called as “Corporate Debtor”) alleging that the Corporate Debtor committed default to the extent of Rs. 4,68,21,644/- which is inclusive of 18% per annum amounting to Rs. 59,93,094/- to the Petitioner. This Petition has been filed by invoking the provisions of Section 9 Insolvency and Bankruptcy code (hereinafter called “Code”) read with Rule 6 of Insolvency & Bankruptcy (Application to Adjudication Authority) Rules, 2016.
2. The Petition reveals that the Corporate Debtor approached the Petitioner for getting supply of HDPE Geomembrane Sheet etc. in the year 2019. Subsequently, the Corporate Debtor entered into an agreement dated 07<sup>th</sup> June, 2019. The Petitioner was supplying the aforesaid goods to Corporate Debtor even before the execution of the agreement with Corporate Debtor. The Petitioner supplied the aforesaid goods to the Corporate Debtor to his complete satisfaction and the Corporate Debtor never raised any dispute or any objection at the time of supply of said goods. The Corporate Debtor even not raised any dispute after utilization of said goods supplied by the Petitioner nor till issue of this notice. Further, the bills which were raised during the period of 18.05.2019 to 17.06.2019 were received by the Corporate Debtor without any objection/dispute.
3. Since the Corporate Debtor failed to make the payment in the given time line, the Petitioner repeatedly sent reminder to Corporate Debtor to make the payment of outstanding amount.
4. Thus, the Petitioner issued the demand notice to the Corporate Debtor dated 02<sup>nd</sup> November, 2020 in Form-3 and Form-4 under Section 8 of Code calling upon the Corporate Debtor to release the payment within 10 days from the date of the receipt of notice.

5. The Petitioner has further placed reliance on the master data of the Petitioner and the Corporate Debtor. Also, true copies of the various bills and the ledger account which clearly shows the bill and payment details.
6. The Corporate Debtor has filed their reply thereby denying all the averments made in the Petition. The Corporate Debtor submitted that the Petitioner has purportedly claimed Rs. 4,08,28,550/- (Principal Amount) and Interest Rs. 59,93,094/ @ 18% p.a on account of non-payment of a total sum of Rs. 4,08,28,550/- only for seventeen invoices which were issued between 18<sup>th</sup> May, 2019 and 17<sup>th</sup> June, 2019.
7. The Corporate Debtor further submitted that it is evident from the bare perusal of the invoices and the ledger account maintained by the Petitioner and the Demand Notice dated 02<sup>nd</sup> November, 2020 that there was a running account maintained between the parties. Both the parties have maintained a Running Account in respect of the invoices issued by the Petitioner and on account payments made by the Corporate Debtor. In accordance to the on-account transactions between the parties, the last payment of Rs. 24,77,000/- was made by the Corporate Debtor on 29<sup>th</sup> July, 2020 towards the aforesaid invoices.
8. Further, a sum of Rs. 1,74,63,868/- has already been settled by the Corporate Debtor towards the supply of the goods from the Seller/Petitioner on the basis of the invoices raised between 18<sup>th</sup> May, 2019 and 17<sup>th</sup> June, 2019.
9. The Corporate Debtor has further placed reliance on Section 10A of Code stating that Section 10A of the Code starts with a non-obstante provision which has the effect of overriding on Sections 7, 9 and 10 of the Code. The proviso to Section 10A clearly stipulates that “no application shall ever be filed” for initiation of CIRP “for the default occurring during the said period”. The expression “shall ever be filed” is clear indicator that the intent of the legislature is to the institution of any petition for commencement of CIRP

in respect of a default which has occurred on or after 25.03.2020 for period of six months, extendable upon one year as notified. In the present case, in view of the on-account transactions between the parties, the default, if any has occurred only after the last payment of Rs. 24,77,000.00/- was made by the Corporate Debtor on 29.07.2020. Therefore, the default has occurred after 25.03.2020 and hence, the default falls within the conspectus of Section 10A of the Code.

10. Without prejudice, the date of default as per the Petitioner for the alleged non-payment is on 25.03.2020. The Demand Notice is accordingly issued by the Petitioner on 02.11.2020 and the Petition has been filed on 02.12.2020. Since the default has occurred, as claimed by the Petitioner in the Demand Notice under Section 8 and Petition under Section 9, after the statutorily determined cut-off date of 25.03.2020, the Petition is clearly barred by the operation of Section 10A of the Code. Thus, the present petition deserved to dismissed in view of Section 10A of the Code.
11. The Corporate Debtor further submits that the purported amount claimed by the Petitioner is untenable in terms of the Tripartite Agreement dated 07<sup>th</sup> June 2019. The Tripartite Agreement was entered for effectively completing the Government Contract Works awarded to the one Mr. Uday Kumar, Marketing (Purchaser), by the Director of Agriculture, Government of Karnataka, Bangalore, on the basis of fulfilment of obligations by Petitioner (Seller) and Corporate Debtor (Supplier).
12. Accordingly, in order to secure the performance of the parties of the Agreement, the Government of Karnataka was to release payment to all the three parties in the ratio of 95:2:3 among the Petitioner (Seller), Corporate Debtor (Supplier) and Purchaser. However, the Government of Karnataka is yet to release Rs. 1,99,51,185/- amount in respect of the said Agreement. In view thereof, unless the amount could have been remitted by the State of Karnataka, invoices raised by the Petitioner could not have been due and outstanding. Further, in terms of the Tripartite Agreement, the Corporate Debtor was not liable to pay the Petitioner from his own pockets. On the

contrary, the Petitioner was to realise the amount due towards the purported invoices raised by it, only when the State of Karnataka would have remitted the amount in terms of said Agreement.

13. Furthermore, as per the Agreement there is no question of claiming interest on the purported outstanding amount raised. Thus, the Corporate Debtor cannot be made responsible for the payment of outstanding amount along with interest and the same is untenable under the Agreement.

**Finding:**

14. We have heard the Counsel for the parties and gone through the record.
15. It has been contended by the Counsel for the Petitioner that it is evident from the record that the Corporate Debtor was supplied goods following agreement dated 7<sup>th</sup> June, 2019 between 18<sup>th</sup> May 2019 to 17<sup>th</sup> June 2019 and the Principle sum of Rs. 4,08,28,550/- was outstanding against the Corporate Debtor. It has further been contended by the Counsel for the Petitioner that the Corporate Debtor is further liable to pay an interest @18% p.a. amounting to Rs. 59,93,094/- for non-payment within the time frame. A notice dated 2<sup>nd</sup> November, 2020 was also served upon the Corporate Debtor, however, despite that the Corporate Debtor has failed to make the payment of outstanding dues and in the given circumstances, the Petition u/s. 9 deserves to be admitted.
16. On the contrary, the Counsel for the Corporate Debtor has argued that the Petitioner u/s. 9 is not maintainable and is hit by the provisions of Section 10A of the Code. According to the Counsel for the Corporate Debtor, it is apparent from the record that the account of the party was a running account and the last tranche of payment of Rs. 24,77,000/- was made by the Corporate Debtor on 29<sup>th</sup> July 2020. That being so, the date of default should be 29<sup>th</sup> July 2020 which clearly falls within the ambit of Section 10A of the Code. In this regard, the Counsel for the Corporate Debtor has referred to the definition of default given under Section 3 (12) of the Code

which provides that the default means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not repaid by the debtor or the corporate debtor, as the case may be.

17. Since the Corporate Debtor paid an amount of Rs. 1,74,63,868/- till 29<sup>th</sup> July 2020 and thereafter no payment was made, for all intent and purpose, the date of default should be 29<sup>th</sup> July 2020. It is further been argued by the Counsel for the Corporate Debtor that in this case the Operational Creditor has wrongly charged interest @18% p.a. for delayed non-payment. The Operational Creditor has raised interest upto 25<sup>th</sup> March 2020 which further implies that the date of default is 25<sup>th</sup> March 2020 which also falls within the period envisaged u/s. 10A of the Code. Even otherwise, there was no contract between the parties with regard to charging of any interest in case of delayed non-payment. Therefore, the Operational Creditor has lodged an inflated claim.
18. Lastly, it has been agitated by the Counsel for the Corporate Debtor that there was a Tri-Partite Agreement between the Operational Creditor, the Corporate Debtor and one Mr. Uday Kumar, Marketing (Purchaser) of the Director of Agriculture, Government of Karnataka, Bangalore. As per Clause 9 of the said agreement, the purchaser was to ensure the release of the payment into an escrow account from where the money was to be distributed in accordance with the ratio mentioned in the said agreement. According to the Counsel for the Corporate Debtor, the Corporate Debtor was not liable to pay the Operational Creditor from its own pocket and the money was to be remitted when State of Karnataka had released the same. Therefore, the claim lodged against the Corporate Debtor is against the spirit of the Contract/ Agreement and on this ground also, the Petitioner u/s. 9 is liable to be dismissed.
19. Having thoughtfully considered the aforesaid rival contention of the parties, we are of the considered view that it is not disputed in this case that the Operational Creditor supplied goods to the Corporate Debtor during the period from 18.05.2019 to 17.06.2019 through invoices annexed with the

Petition. The supply of the goods is not disputed by the Corporate Debtor and it is the admitted case of the Respondent-Corporate Debtor that he made a total payment of Rs. 1,74,63,868/- to the Petitioner from time to time and the last payment of Rs. 24,77,000/- was made on 29.07.2020. After adjusting the payment made by the Corporate Debtor, a sum of Rs. 4,08,28,550/- was outstanding against the Corporate Debtor as principle amount.

20. So far as charging of interest is concerned, there is no clause of levying the interest in any of the invoices relied by the Petitioner and it is simply even mentioned that the payment of the bill amount is to be made within Seven days from the date of the bill. Even if the Corporate Debtor was not obliged to pay any interest, the amount of Rs. 4,08,28,550/- is still outstanding which is over and above the threshold limit of Rs. 1 crore. Therefore, even if the interest amount is not taken into consideration, the petition can still be admitted.
21. As regards the argument advanced by the Counsel for the Corporate Debtor that the date of default in this case should be treated as 29<sup>th</sup> July 2020 when a part payment of Rs. 24,77,000/- was made by the Corporate Debtor is concerned, in our considered view, the same is not tenable. It is clearly mentioned in the invoices that the payment is to be made within a period of 7 days from the date of the bill. Therefore, the payment becomes due after a period of 7 days from the date of each bill.
22. It is well settled that the date of default is always a date when whole or in part of the debt has not paid despite having become due and payable. Therefore, as per the terms and conditions between the parties specified in the invoices, the payment of each of the invoice became due after 7 days of the date of the invoice. The last invoice is of 17<sup>th</sup> June 2019. Therefore, the date of default in this case can be taken to be somewhere in June 2019. The contention raised on behalf of the Corporate Debtor that the date of default should be when the last part payment was made i.e. on 29<sup>th</sup> July 2020 cannot be accepted being a fallacious argument. Therefore, it cannot

be said that the present petition is hit by the provisions of Section 10A of the Code.

23. It has also been argued on behalf of the Corporate Debtor that as per the Tripartite Agreement dated 7<sup>th</sup> June 2019, the Corporate Debtor was to make the payment to the petitioner only when the payment had been released to the Corporate Debtor by the Government of Karnataka and therefore, the invoice raised by the Petitioner cannot be said to become due and outstanding in terms of the Tripartite Agreement since a payment of ₹1,99,51,185/- has not been released by the Government of Karnataka. Even the aforesaid contention of the Counsel for the Corporate Debtor seems to be devoid of any force or any substance. In this regard, it is pertinent to point out that in response to the Demand Notice dated 2<sup>nd</sup> November 2020 by the Operational Creditor, a reply dated 10<sup>th</sup> November 2020 was sent on behalf of the Corporate Debtor. In the said reply, no averment with regard to terms and conditions of the Tripartite Agreement has been made.
24. On the contrary, in reply dated 10<sup>th</sup> November 2020, the Corporate Debtor has set up a case of absolute denial while stating that no amount was due or payable by the Corporate Debtor. Apart from that in the Tripartite Agreement dated 7<sup>th</sup> June 2019, there is absolutely no conditions that the payment of sale of goods to the Corporate Debtor would be released by the latter only after the payment has been released by the Government of Karnataka. Therefore, the contention raised on behalf of the Corporate Debtor is liable to be repelled.
25. As the corollary to the aforesaid discussion, we are of the considered view that the petitioner has been able to establish that there has been the operational debt against the Corporate Debtor on account of sale of goods in respect of which the latter has committed the default. Therefore, the present petition deserves to be admitted. Accordingly, petition is admitted in the following terms:

**ORDER**

- a. The above Company Petition No. 1417/IBC/MB/2020 is hereby allowed and initiation of Corporate Insolvency Resolution Process (CIRP) is ordered against **M/s Aadinath Polyfab Private Limited**.
- b. **Mr. Ashutosh Baliarsing**, having registration No. IBBI/IPA-003/IP-N00284/2020-2021/13394, having email Id- [ashutoshsb@gmail.com](mailto:ashutoshsb@gmail.com), having Mobile Number- 9820308642, is hereby appointed as Interim Resolution Professional to conduct the Insolvency Resolution Process as mentioned under the Insolvency & Bankruptcy Code, 2016.
- c. The Operational Creditor shall deposit an amount of Rs. 5 Lakhs towards the initial CIRP costs by way of a Demand Draft drawn in favour of the Interim Resolution Professional appointed herein, immediately upon communication of this Order.
- d. That this Bench hereby prohibits 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; transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein; 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 Financial Assets and Enforcement of Security Interest Act, 2002; the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the Corporate Debtor.
- e. That the supply of essential goods or services to the Corporate Debtor, if continuing, shall not be terminated or suspended or interrupted during moratorium period.

- f. That the provisions of sub-section (1) of Section 14 shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.
- g. That the order of moratorium shall have effect from the date of pronouncement 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 or passes an order for liquidation of corporate debtor under section 33, as the case may be.
- h. That the public announcement of the corporate insolvency resolution process shall be made immediately as specified under section 13 of the Code.
- i. During the CIRP period, the management of the corporate debtor will vest in the IRP/RP. The suspended directors and employees of the corporate debtor shall provide all documents in their possession and furnish every information in their knowledge to the IRP/RP.
- j. Registry shall send a copy of this order to the Registrar of Companies, Mumbai, for updating the Master Data of the Corporate Debtor.
- k. Accordingly, CP No. 1417/IBC/MB/2020 is **admitted**.

**SD/-**

**Anuradha Sanjay Bhatia**  
**Member (Technical)**

**SD/-**

**Kuldip Kumar Kareer**  
**Member (Judicial)**