

IN THE NATIONAL COMPANY LAW TRIBUNAL
BENGALURU BENCH, BENGALURU
(Exercising powers of Adjudicating Authority under
the Insolvency and Bankruptcy Code, 2016)

C.P. (IB) No.18/BB/2021

Under Section 9 of the IBC, 2016
r/w Rule 6 of the I&B (AAA) Rules, 2016

In the matter of:

Excelsior Leathers Private Limited,
S-3 & S-4 Kasba Industrial Estate,
Phase -I, Kolkata - 700107

... Petitioner/Operational Creditor

VERSUS

M/s. Samar Lifestyle Private Limited,
Sy. No. 62, Site No. 13, 6th Cross,
NS Palya, BTM Layout,
Bangalore - 560076

... Respondent/ Corporate Debtor

Order delivered on: 07th June, 2022

Coram: 1. Hon'ble Shri Ajay Kumar Vatsavayi, Member (Judicial)
2. Hon'ble Shri Manoj Kumar Dubey, Member (Technical)

Present:

For the Petitioner : Shri Anupam Agarwal
For the Respondent : Shri Shashank Nagendran

ORDER

Per: Ajay Kumar Vatsavayi, Member (Judicial)

1. The present petition is filed, under Section 9 of the Insolvency and Bankruptcy Code, (hereinafter referred to as 'IBC'/Code) 2016, read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 by Excelsior Leathers Private Limited (hereinafter referred to as 'Petitioner'), with a prayer to initiate Corporate Insolvency Resolution Process (CIRP) against Samar Lifestyle Private Limited (hereinafter referred to as 'Respondent').
2. The Corporate Debtor, namely, Samar Lifestyle Private Limited is a Company incorporated on 30.04.2016 with CIN: U19100KA2016PTC092729 having its registered office at Sy. No. 62, Site No.13, 6th Cross, N S Palya, BTM Layout,

Bengaluru - 560076, which falls within the territorial jurisdiction of this Adjudicating Authority. The Nominal Share Capital of the Respondent/Corporate Debtor is Rs.1,50,00,000/- and the Paid-Up Share Capital is Rs.1,24,52,500/-.

3. The amount claimed to be in default is Rs. 1,73,79,265.16/- (Rupees One Crore Seventy Three Lakhs Seventy Nine Thousand Two Hundred Sixty Five and Sixteen Paise only).
4. It is stated that the Operational Creditor/Petitioner has supplied Leather footwear to the Corporate Debtor against several purchase orders received during November 2018 to May 2019. During the entire period, the Operational Creditor had supplied goods worth Rs. 1,63,48, 447.49 (Rupees One Crore Sixty Three Lakh Forty Eight Thousand Four Hundred Forty Seven and Forty Nine Paise only) whereas, the Corporate Debtor made payment of only Rs. 25,00,000/- (Rupees Twenty Five Lakh only). The Corporate Debtor gave another 3 cheques of Rs. 25,00,000/- (Rupees Twenty Five Lakh only) each to the Operational Creditor however, all 3 cheques when presented before the Bank were dishonoured.
5. The Operational Creditor requested for payment of the outstanding amount but after repeated reminders and emails, the Corporate Debtor did not pay the amount. The Operational Creditor therefore served a Demand notice upon the Corporate Debtor under the Code. As the Corporate Debtor failed to make payment of the debt within 10 days thereof, the Operational Creditor seeks to initiate Corporate Insolvency Resolution Process against the Corporate Debtor. Hence the application.
6. The Petitioner/Financial Creditor in support of the C.P. averments has enclosed the following documents among other documents, to the C.P:
 - i. Copy of Demand notice issued in Form 3 a/w proof of service.
 - ii. Copy of the Master data of the Operational Creditor obtained from the MCA Website.
 - iii. Copy of the Master data of the Corporate Debtor obtained from the MCA website.

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- iv. Copy of the Board Resolution dated 17.07.2020 of the Operational Creditor.
 - v. Details of the amount of debt and date from which debt fell due along with workings for computation of default in a tabular form.
 - vi. Extract of Statement of Bank Accounts of the Operational Creditor evidencing credit received from the Corporate Debtor.
 - vii. Copy of the Ledger Account of Corporate Debtor in the books of Operational Creditor for the period from 1.04.2018 to 30.06.2020
 - viii. Copies of the Purchase Orders issued by the Corporate Debtor
 - ix. Copies of the Invoices raised by the Operational Creditor on Corporate Debtor.
 - x. Copies of email communication exchanged between the Operational Creditor and the Corporate Debtor.
 - xi. Copy of the Credit notes issued by the Corporate Debtor for which amount of debt has accordingly been reduced.
 - xii. Copy of the cheque dated 28.06.2019 bearing No. 069727 issued by the Corporate Debtor to the Operational Creditor for an amount of Rs. 25 Lakhs a/w Cheque return Memo dated 02.07.2019
 - xiii. Copy of the relevant accounts from the Banks/financial institutions maintaining accounts of the Operational Creditor confirming that there is no payment of the relevant unpaid operational debt by the Operational Debtor.
2. The Respondent while opposing the Company Petition has filed the Statement of Objections to the petition contending as follows:
- i. It is stated that the present petition is frivolous, vexatious and filed with the sole intention of rushing the Corporate Debtor into accepting the outrageous claims of the Petitioner. The Petitioner being well aware that the present petition is not maintainable, has wrongly invoked the jurisdiction of the Tribunal under the I & B Code, 2016.
 - ii. The Corporate Debtor is a private limited company, established in the year 2016. The Company is engaged in the business of tanning, dressing of leather and manufacturing of various leather items. The

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Company is very much functional and has around 157 employees on its roll.

- iii. The Corporate Debtor is a fully operational company, with many dependent on it for their livelihood. The total turnover of the company during 2019-20 financial year was INR 60,35,41,700/-. All this clearly shows the malafide intention of the Petitioner in preferring this petition under the provisions of the Code and it is clearly not a fit case for insolvency.
- iv. The Petitioner and Corporate Debtor have been in business with each other since the year 2017. As against the purchase orders raised and goods supplied by the Operational Creditor, the Corporate Debtor has been making regular payments. The Petitioner is aware that the Corporate Debtor is solvent and is in position to make the necessary payments.
- v. It is stated that, in relation to its leather business, the Corporate Debtor has entered into various agreements with different group entities of the Petitioner. In this arrangement, many payments have been made and received by the Corporate Debtor to and from the group entities of the Petitioner. The Petitioner is well aware of these transactions. In fact, after taking into account the details of the goods supplied by the Corporate Debtor to the group entities of the Petitioner, the Petitioner owes around INR 60, 70, 135/- to the Corporate Debtor and its affiliates.
- vi. It is stated that for the goods supplied by the Petitioner, the Corporate Debtor has already paid around approximately 30,05,56,034/- between the year 2018 to 2019. The Corporate Debtor and the group entities of the Petitioner along with the Petitioner have been trying to reconcile the accounts and settle the matter. The amounts claimed by the Petitioner have been disputed by the Corporate Debtor. When the Corporate Debtor disputed these amounts claimed by the Petitioner and tried to adjust the said amount as against the amount owed by the group entities of the Petitioner, the Petitioner chose to invoke the provisions of the Code and make false claims as against the Corporate Debtor.

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- vii. Even after the issuance of the Demand notice by the Petitioner in Form 3 of the Code, the Corporate Debtor immediately approached the Petitioner and sought to reconcile the accounts inter-se and settle the matter. The Petitioner also agreed to reconcile the same. However, in the meantime, the Petitioner, only to coerce this Corporate Debtor to make payments as per its demand, has filed the present petition.
- viii. It is further stated that the Petitioner and the Corporate Debtor have been in talks to reconcile the accounts so that the final amounts can be settled and paid. This fact has been even admitted by the Petitioner before this Hon'ble Tribunal which itself shows that the Corporate Debtor is fully solvent and it is not a case of insolvency.
- ix. It is stated that the Corporate Debtor is ready and willing to reconcile all the accounts with the Petitioner and its group entities and has even approached the Petitioner on several occasions in this regard. However, the Petitioner has chosen to file this frivolous petition under the Code. Further by virtue of this petition, the Petitioner is seeking to ruse the Corporate Debtor in not only claiming baseless principal amount, but also frivolous interest on the same. The parties have never agreed to any rate of interest. The Petitioner is only seeking to coerce the Corporate Debtor in making undue payments, under the threat of a petition under this code.
- x. The documents/claims made by the Petitioner in the present petition are all false and baseless. From the correspondence exchanged between the parties, it is evident that there is a pre-existing dispute in respect of this amount and the Petitioner is well aware of this and has sought to suppress before this Hon'ble Tribunal. The Hon'ble Supreme Court of India has held that so long as there is a dispute, which includes communications exchanged between the parties prior to the issuance of the demand notice, and such dispute is not illusory such a claim cannot be entertained in a petition under the code. By suppressing various material facts, the Petitioner cannot be allowed to invoke the jurisdiction of this Hon'ble Tribunal by way of the code.

3. In response to the objections of Respondent, the Petitioner has filed its rejoinder interalia stating as follows:
- i. The Petitioner denies each and every statement, averment and submission made in the affidavit in reply by the Respondent which is contrary to in consistent with what is stated in the rejoinder as the same are specifically denied.
 - ii. The Corporate Debtor has filed the reply to this Hon'ble bench with unclean hands and has deliberately tried to mislead the Court by representing wrong facts and circumstances. The allegations made by the Respondent are baseless and not maintainable as the Petitioner is an Operational Creditor and admittedly, have provided goods to the Corporate Debtor. The Corporate debtor had approached the Petitioner for supply of Leather Footwear and that the Invoices; raised upon the CD from November 2018 to May 2019 have been unpaid till date.
 - iii. It is stated that the debt arisen and is due to the Petitioner under the meaning and terms of IBC. Further there is also a default in accordance to the IBC i.e., non-payment of debt which is due and payable but has not been paid.
 - iv. It is stated the Respondent made payment of upto Rs. 25,00,000/- only towards collectively amounting to Rs. 1,63,48,447/-. The debts of Rs. 1,38,48,447/- still stand due and Respondent is in default of satisfying the same. It is evident that the part payment made by the Corporate Debtor proves that it owes the claimed amount to the Operational Creditor and hence it is deemed to be an admission on the part of the Corporate Debtor.
 - v. It is stated that the arrangements entered upon with the Petitioner are in individual capacity. Further the Petitioner is a separate legal entity and in no way is concerned for its group entities. It is further stated that payment 'to' or 'from' a group entities does not concern the Petitioner. The Operational Creditor is not getting any payment towards it dues which have resulted for default of non-payment towards receipt of goods by the Corporate Debtor.
 - vi. It is stated that the Corporate Debtor not raised any dispute in as much as there is no suit or arbitration pending for such debts and

default. There is no plausible contention which requires investigation on pre-existing dispute and that the 'dispute' is not a patently feeble legal argument or an assertion of fact unsupported by evidence. There is no genuine dispute truly existing and that CD is making frivolous submissions. Submissions of Respondent are not backed by any documents evidence. Further there is no suit, arbitration, any proceeding or application pending before any competent court of law or authority prior to the issuance of demand notice that can be relied upon to hold that there is a dispute raised by the Corporate Debtor.

- vii. The allegation of the Respondent is itself showing their malafide intention only to create hindrance in the admission of this C.P as they are themselves not challenging the debt due and defaults as occurred under the provisions of IBC.

4. The Petitioner has filed its written submissions by reiterating the facts in the synopsis and in the rejoinder and the same is taken on record. The Petitioner further stated as follows:

- i. It is stated that as on date of filing of the present application, the claim amount was of Rs. 1,73,79,265.16/- which includes an amount of Rs. 1,37,92,413.68/- being pending invoice amount plus interest @ 18% p.a. amounting to Rs. 35,86,851.48/-. During the pendency of this proceedings, the Corporate Debtor had made a payment of Rs.12,00,000/- on 22nd December 2021 and Rs. 6,00,000/- on 8th February 2022. Hence, as the unpaid operational debt continues to remain due and outstanding and also as the same is admitted by the Corporate Debtor and as there is no dispute regarding the same.
- ii. The claim of pre-existing dispute by Corporate Debtor is only illusory and ought to be dismissed. The Corporate Debtor had also issued three cheques worth Rs. 25,00,000/- each in partial discharge of its debt due to the Operational Creditor. However, all the three cheques were returned dishonoured when presented for payment by the Operational Creditor which shows that the Corporate Debtor is insolvent and is not in a position to discharge

its liabilities. All the due procedures as mentioned in the Insolvency and Bankruptcy Code, 2016 to initiate the CIRP against the Corporate Debtor has been duly followed by the Operational Creditor.

5. The Respondent has filed its written submissions by reiterating the facts stated in the statement of objection and the same is taken on record. Further, the Respondent also submitted as under:

- i. It is stated that even after the issuance of the Demand notice by the Petitioner in Form 3 of the Code, the Corporate Debtor immediately approached the Petitioner and sought to reconcile the accounts inter-se and settle the matter. The Corporate Debtor also made a payment of INR 18,00,000/- after filing of this petition which clearly shows the bonafide intent of the Corporate Debtor to reconcile the accounts of the parties.
- ii. It is further stated that out of INR 1,73,79,265.16 claim of the Petitioner, interest claimed is INR 35,86,351.48. This is an arbitrary and unilateral amount claimed by the Petitioner. No claim under the Code can be made for interest on any amount due.
- iii. The Respondent has also relied on the following judgements:
 - a) *Prowess International Pvt. Ltd. v. Parker Hannifin India Private Limited in Company Appeal (AT) (Insol.) No. 89 of 2017 by the Hon'ble NCLAT, New Delhi*
 - b) *Wanbury Limited v. Panacea Biotech Ltd. in CP No. 8/2016 by National Company law Tribunal Chandigarh Bench*
 - c) *Steel India v. Theme Developers (P) Ltd., 2020 in Company Appeal (AT) (Insolvency) No. 1014 of 2019 by Hon'ble NCLAT, New Delhi*

6. Heard Shri Anupam Agarwal, learned Counsel for the Petitioner and Shri Shashank Nagendran learned Counsel for the Respondent and have also perused the pleadings carefully including the Written Submissions filed and Judgements relied on.

7. The Hon'ble Supreme Court of India, in *Mobilox Innovations Private Limited Vs. Kirusa Software Private Limited*, (2017) 1 SCC Online SCC 353 observed as under:

"25. Therefore, the Adjudicating Authority, when examining an application u/s 9 of the Act will have to determine:

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- (i) Whether there is an "operational debt" as defined exceeding Rs. 1 Lakh? (See Section 4 of the Act)
- (ii) Whether the documentary evidence furnished with the application shows that the aforesaid debt is due and payable and has not yet been paid?
- (iii) Whether there is existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before the receipt of the demand notice of the unpaid operational debt in relation to such dispute?

If any one of the aforesaid conditions is lacking, the application would have to be rejected.

Apart from the above, the Adjudicating Authority must follow the mandate of Section 9, as outlined above, and in particular the mandate of Section 9(5) of the Act, and admit or reject the application as the case may be, depending upon the factors mentioned in Section 9 (5) of the Act."

8. As per the above enunciation of law, in an application u/s 9 of the IBC, 2016 the following issues are to be determined by this Adjudicating Authority in order to decide whether the application is required to be admitted or not.
 - i. Whether the C.P is filed within the period of limitation?
 - ii. Whether the Demand Notice issued u/s 8 of the IBC, 2016 was duly delivered on the Respondent/Corporate Debtor?
 - iii. Whether the Petitioner proved the debt and default thereon?
 - iv. Whether there was any pre-existing dispute between the parties?
9. The claim of the Petitioner is based on Annexure-II (H), Tax Invoices issued during the period from 16.11.2018 to 15.05.2019 and the C.P was filed on 30.07.2020, hence the same is within the period of limitation. Further, the Demand notice issued by the Petitioner/Operational Creditor on 17.06.2020 was duly served on the Respondent/Corporate Debtor on 27.06.2020 and the proof of service was filed by the Petitioner at Page 28 of the C.P.
10. The Respondent/Corporate Debtor has not disputed the principal amount of the debt and default thereon, but only contended that, since the Petitioner was due and liable to pay certain amounts to its group companies and the said due amounts are to be adjusted out of the due payable by the

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Respondent to the Petitioner and thereafter the net outstanding would be less than the threshold limit of Rs. 1 crore.

11. It is the settled law that a Creditor cannot claim the debt due by another group company/sister concern of the Corporate Debtor, from the Corporate Debtor. Similarly, the Respondent/Corporate Debtor cannot claim adjustment of any debt due by the Petitioner to any of its group companies or sister concerns. The Respondent/Corporate Debtor vide email dated 19.02.2022 categorically admitted that an amount of Rs. 1,32,87,754.69/- (Rupees One Crore Thirty Two Lakhs Eighty Seven Thousand Seven Hundred and Fifty Four and Sixty Nine paise only) was outstanding as on 31.03.2020 to the Petitioner. Both the sides have also agreed that an amount of Rs. 18,00,000/- was paid by the Respondent/Corporate Debtor to the Petitioner/Operational Creditor after filing the C.P., i.e., during Dec. 2021 and Feb. 2022 as stated above. Even after deducting the said amount still the due is more than Rs. 1 Crore, hence we hold that the debt and default thereon are proved. Further, except contending that the Petitioner is due and liable to pay an amount of Rs. 60,70,135/- (Rupees Sixty Lakhs Seventy Thousand One Hundred and Thirty Five only) to its group companies/sister concern, the Respondent/Corporate Debtor is not able to show any pre-existing dispute. Hence, this contention also holds infavour of the Petitioner.
12. The application filed in the prescribed Form No.5 is found to be complete.
13. In the circumstances and for the aforesaid reasons and since the C.P is complete, the same is liable to be admitted. Accordingly, the C.P is **admitted** and moratorium is declared in terms of Section 14 of the Code. As a necessary consequence of the moratorium in terms of Section 14, the following prohibitions are imposed, which must be followed by all and sundry:
 - (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
 - (b) any court of law, tribunal, arbitration panel or other authority;

- (c) Transferring, encumbering, alienating or disposing of by the Corporate Debtor any of its assets or any legal right or beneficial interest therein;
 - (d) 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;
 - (e) The recovery of any property by an owner or lessor, where such property is occupied by or in the possession of the Corporate Debtor;
 - (f) It is further directed that the supply of essential goods or services to the Corporate Debtor as may be specified, shall not be terminated or suspended or interrupted during the moratorium period;
 - (g) The provisions of Section 14(3) shall however, not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator and to a surety in a contract of guarantee to a Corporate Debtor;
 - (h) The order of moratorium shall have effect from the date of this order till completion of the Corporate Insolvency Resolution Process or until this Bench approves the Resolution Plan under sub-section (1) of Section 31 or passed an order for liquidation of Corporate Debtor under Section 33 as the case may be;
14. Since the Petitioner has not suggested any IRP and left the matter to the Adjudicating Authority to appoint suitable IRP, we are inclined to appoint **Shri.Suresh Kannan**, Insolvency Professional, bearing Registration No. **IBI/PA-001/IP-P-01434/2018-2019/12277** having registered address 4th Floor, 4/1, Krishna Reddy Colony, Domlur Layout, Bengaluru-560071 and e-mail: sureshkannan10@gmail.com appearing at **Sl.No.21** of the panel of IPs for appointment as IRP or Liquidator, approved for NCLT, Bengaluru Bench by Insolvency and Bankruptcy Board of India from 1st January 2022 to 30th June 2022, is appointed as the Insolvency Resolution Professional. The Law Research Associate of this Tribunal has checked the credentials of Shri Suresh Kannan and there is nothing adverse against him. Therefore, **Shri.Suresh Kannan**

appointed as the Insolvency Resolution Professional of the Corporate Debtor. He shall file his written consent within one week from the date of the receipt of this order. The IRP is directed to take the steps as mandated under Sections 15, 17, 18, 20 and 21 of IBC, 2016.

15. The Interim Resolution Professional shall after collation of all the claims received against the Corporate Debtor and the determination of the financial position of the Corporate Debtor, constitute the Committee of Creditors and shall file a report, certifying constitution of the Committee to this Adjudicating Authority on or before the expiry of thirty days from the date of his appointment, and shall convene first meeting of the CoC within seven days for filing the report of Constitution of the Committee. The Interim Resolution Professional is further directed to send regular progress reports to this Adjudicating Authority every fortnight.
16. A copy of the order shall be communicated to both the parties. The learned Counsel for the Petitioner shall deliver a copy of this order to the Interim Resolution Professional forthwith. The Registry is also directed to send a copy of this order to the Interim Resolution Professional at his e-mail address forthwith.

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(MANOJ KUMAR DUBEY)
MEMBER (TECHNICAL)

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(AJAY KUMAR VATSAVAYI)
MEMBER (JUDICIAL)