IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-IV

CP (IB)2230/MB/C-IV/2019
Under section 9 of the I&B Code, 2016
In the matter of

Benteler Trading Internation GmbH
...Operational Creditor
v/s.
ARK Industries Private Limited
[U27200MH2004PTC148690]
...Corporate Debtor

Order pronounced on : 23.09.2021

Coram:

Shri Rajesh Sharma	Smt. Suchitra Kanuparthi
Hon'ble Member (Technical)	Hon'ble Member (Judicial)

For the Petitioner: Mr. Amir Arsiwala, Advocates

For the Respondent: Mr. Akshay Jain, CEO

ORDER

Per: *Suchitra Kanuparthi, Member (Judicial)*

1. This is a Company Petition filed under section 9 of the Insolvency & Bankruptcy Code, 2016 **(IBC)** by **Benteler Trading International GmbH** ("the Operational Creditor"), seeking to initiate Corporate Insolvency Resolution Process (CIRP) against **ARK Industries Private Limited** ("the Corporate Debtor"). The Operational Creditor claiming a sum of USD1,249,134.61 as on 13.12.2016.

BRIEF FACTS OF THE CASE

2. The Petitioner and the Corporate Debtor executed supply agreement Nos. A. 16S0173 dated 16.05.2016, B405.092 dated 25.05.2016, A16S0200 dated 02.06.2016, 8197 dated 25.07.2016 pursuant to which the Petitioner undertook to sell the Corporate Debtor certain steel products as expressly defined in the Contract. These contracts executed between the parties for sale of brass scrap honey, copper scrap berry, copper scrap berry candy and clove berry/candy. The payment terms provide credit period of 180 days from the bill of lading. The Petitioner had acquired the same from steel producer (supplier). The Contract contained general conditions of sale. The parties further executed debt acknowledgement and settlement agreement dated 13.03.2017, wherein at clause 1 the Corporate Debtor acknowledged the debt of USD 2,157,764.35 and obligation to pay the purchase price for certain products. Clause 1 is reproduced hereunder :-

> ***1. Acknowledgement of Existing Obligations***
>
> *1.1 ARK hereby acknowledges vis-à-vis BTI by means of a declaratory acknowledgement of debt (deklaratorischesAnerknntnis) in the meaning of Sec.781 German Civil Code (BGB) that as of the day this Agreement is signed, 12.00 A.M. it owes to BTI the following Existing Obligations being due for payment (zurZahlungfallig) in the total amount of ES$2,157,764.35 (US Dollars Two Million One*

Hundred, Fifty Seven Thousand Seven Hundred and Sixty Four and Thirty-Five Cents only) divided into principal obligations resulting from ARK's obligations to pay the purchase price in exchange of the receipt of certain products (hereinafter the "Principal Obligations") and ancilliary obligations resulting from contractual penalties (hereinafter the "Ancillary Obligations"), both defined as the "Existing Obligations" and as further detailed in Appendix-1.

3. The Petitioner vide letter dated 08.06.2017 informed the Corporate Debtor that they had breached the debt acknowledgement and settlement agreement and all previous obligations became due and payable and if the Corporate Debtor failed to pay the money, the Petitioner will initiate insolvency proceedings under the Code.

4. The Petitioner shipped above said quantities under sale contract No. B405.089 in eleven separate shipments and raised a commercial invoice upon the Corporate Debtor for USD96,477.67, which was due to be paid on 13th December 2016. The said invoice was paid on 31.07.2017. The list of unpaid invoices is reproduced hereunder: -

S.No.	**Contract No.**	**Invoice No.**	**Invoice Date**	**Amount in USD**
1.	B405.089	940077810	16.06.2016	94,477.67

2.	B405.089	940081095	01.07.2016	104,318.07
3.	B405.089	940081579	01.07.2016	97,954.11
4.	B405.089	940082919	01.07.2016	95,866.73
5.	B405.089	940084870	10.07.2016	99,888.76
6.	B405.089	940079637	20.06.2016	130,675.79
7.	B405.089	940084872	31.10.2017	124,498.64
8.	B405.089	940084871	06.01.2017	130,398.82
9.	B405.089	940079639	22.06.2016	95,987.42
10	B405.089	940081580	01.07.2016	100,722.67
11.	B405.092	940083548	13.07.2016	71,762.24
12.	B405.092	940083549	13.07.2016	66,144.32
13.	B405.092	940083554	13.07.2016	68,618.88
14.	B405.092	940083555	09.01.2017	67,013.76
15.	B405.092	940076978	11.12.2016	86,475.84
16.	B405.099	940091291	01.08.2016	105,448.27
17.	B405.100	940088763	01.08.2016	96,266.64

5. The Corporate Debtor has received the invoices which were due and payable and neglected to pay the same. The parties further agreed to grant extension of time as per the defined payment schedule attached in Appendix 1.

6. The Petitioner issued notice and demand notice on 24.01.2018 calling upon the Corporate Debtor to pay the entire amount of USD1,249,134.61 which covers the principal obligations of USD

1,043,713.46 and the ancillary obligations of USD 205,421.15 as of 24th January 2018.

REPLY ON BEHALF OF THE CORPORATE DEBTOR

7. The Corporate Debtor filed its Affidavit in reply and claim that the Petitioner has suppressed material information from this Tribunal and therefore is devoid of merits and suffers from infirmities and illegalities on the grounds mentioned below:-

    i. Interest cannot be claimed: The Corporate Debtor pointed that there was no agreement between the parties to claim interest.

    ii. Invoices cannot be relied upon: The Corporate Debtor contented that the invoices raised by the Petitioner were not received by the Corporate Debtor. These invoices doesn't contained any acknowledgement or certification of the Corporate Debtor.

    iii. Stamp Duty has not been paid on the debt acknowledgement and settlement agreement in pursuance of the provisions of Section 18 of Maharashtra Stamp Act (hereinafter referred to as an Act). Section 18 of the Act is as follows:-

"Section 18

(1) Every instrument chargeable with duty executed only out of this State may be stamped within three months after it has been first received in this State.

(2) Where any such instrument cannot, with reference to the description of stamp prescribed therefore, be duly stamped by a private person, it may be taken within the said period of three months to the Collector, who shall stamp the same, in such manner as the State Government may by rule prescribe, with a stamp of such value as the person so taking such instrument may require and pay for."

iv. The Corporate Debtor relied on the judgement of Hon'ble Supreme Court in SMS Tea Private Limited Vs. Chandmari Tea & Company Private Limited, reported in (2011) 14SCC 66, that the Court before admitting any document into evidence or acting upon such document, examined by the instrument is duly stamped and whether it is instrument which is compulsorily registrable.

v. The debt acknowledgement and settlement agreement have an arbitration clause.

vi. Existence of prior dispute: The Corporate Debtor pointed that vide email dated 16.11.2016 & 22.07.2017, the

Corporate Debtor has raised dispute regarding inadequate quality of goods delivered and has enclosed details of law suffered by them.

vii. A Demand Notice is bad in law: The Corporate Debtor contended that it is mandatory as per provisions of the Code that the Demand Notice u/s 8 of the Code should be served on the Corporate Debtor and not on his Directors. Service of any document upon the Director, cannot be considered as service upon the Company.

viii. The Corporate Debtor also raised certain technical objections regarding the Power of Attorney of Mr. Sandip Nag, and his authorization as the same was executed on non-judicial stamp papers and that the Power of Attorney was not accompanied by Board Resolution.

ix. In view of the aforesaid, the Petition is deserves to be dismissed.

REJOINDER ON BEHALF OF THE CORPORATE DEBTOR

8. The Petitioner has filed its rejoinder thereby denying the issues/allegations raised by the Corporate Debtor in its affidavit in reply. The Corporate Debtor failed to pay an amount due to the Petitioner due to certain differences between the parties regarding

quality of goods delivered by the Petitioner. The differences regarding quality/late delivery claims were mutually settled by the parties in the date acknowledgement and settlement agreement dated 13.03.2017. Under the said agreement the Corporate Debtor accepted the debt owed to the Petitioner and accepted repayment schedule. Relevant clauses of the Agreement are as follows:

i. The Recital of the Agreement state that the Corporate Debtor has acknowledged all its existing obligations, which consist of Principal obligations and Ancillary obligations. An excerpt of the Recital is quoted below:

"Whereas ARK (i.e. the Corporate Debtor) owes to BTI (i.e. the Applicant) payments for the deliveries of certain products as defined below as existing obligations under Sec.1 and in Appendix 1 of this Agreement (hereinafter "**Existing Obligations**")

Whereas ARK wishes to acknowledge all existing obligations. Whereas the parties intend to agree a repayment plan for the sake of regularizing their business co-operation"

ii. The clause 1 of the Agreement is extracted below:

1.1 ARK hereby acknowledges vis-à-vis BTI by means of a declaratory acknowledgement of debt (deklaratorischesAnerknntnis) in the meaning of Sec.781 German Civil Code (BGB) that as of the day this Agreement is signed, 12.00 A.M. it owes to BTI the following Existing Obligations being due for payment (zurZahlungfallig) in the total amount of ES$2,157,764.35 (US Dollars Two Million One Hundred, Fifty Seven Thousand Seven Hundred and Sixty Four and Thirty-Five Cents only) divided into principal obligations resulting from ARK's obligations to pay the purchase price in exchange of the receipt of certain products (hereinafter the "Principal Obligations") and ancilliary obligations resulting from contractual penalties (hereinafter the "Ancillary Obligations"), both defined as the "Existing Obligations" and as further detailed in Appendix-1.

1.2 All eventual known or unknown, present or future defences and objections of ARK against BTI, in particular but not limited to those based on quality and/or late delivery claims, shall hereby be excluded.

1.3 BTI hereby expressly accept this acknowledgement of debt.

9. The parties agreed that the Corporate Debtor shall be granted payment extension to enable the Corporate Debtor to pay all existing obligations as per new repayment plan schedule. Clause II of the Agreement is as follows :

> *"2.1 in order to enable ARK to pay all existing obligations, the parties agree that ARK shall be granted a payment extension until such dates as defined in the payment schedule. "*

10. The parties are also agreed that the further interest under the head of ancillary obligations at the rate of 11% will be paid by the Corporate Debtor. The Petitioner further pointed that the payment received from the Corporate Debtor post the parties entered into agreement. Thus, contention that the agreement is not binding on the Corporate Debtor is absolutely baseless. The Petitioner pointed out that the Corporate Debtor has not disputed the underlying transaction of the invoice raised under the said transaction.

FINDINGS

11. The Petitioner executed four contracts with the Corporate Debtor for sale of brass scrap honey, copper scrap berry, copper scrap berry candy and clove berry/candy. Under terms and conditions appearing in the sale contract. The payment terms provided credit

period of 180 days from the date of billing. The details of the contracts and the invoices due are given in the table above.

12. The Petitioner had received some payments from the Corporate Debtor and the balance amounts still stand outstanding and payable by the Corporate Debtor. The parties further executed a debt acknowledgement and settlement agreement dated 13.03.2017 wherein the Corporate Debtor acknowledged the due payment of USD2,157,764.35. The agreement further contained a schedule repayment plan. The Corporate Debtor failed to pay the aforesaid amount, therefore, the Petitioner claim an amount of USD1043,713.46 as on the date of default 13.12.2016 and further mentioned that the last tranche of monies received from the Corporate Debtor was on 31.10.2017. The Corporate Debtor filed the reply raising defense that the interest was not agreed to be paid and that there was a pre-existing dispute by way of email dated 16.11.2016 and 22.07.2017 but however, these disputes have been raised before the execution of debt acknowledgement and settlement agreement as such the disputes raised have been subsumed in the debt acknowledgement and settlement agreement dated 13.03.2017.

13. In view of the admission of liability under the said agreement, this Bench is of the view that the Petitioner has demonstrated that there is debt in view of the delivery of goods to the Corporate Debtor and that the Corporate Debtor has defaulted in payment of said amount even after execution of debt and settlement agreement. The document of Acknowledgement & Debt & Settlement Agreement dated 13.03.2017 is impounded and sent to Sub-Registrar of Assurances, Mumbai to levy the adequate stamp duty payable to the said agreement. The IRP is directed to present the Agreement to the Sub-Registrar of Assurances and then present the claim. Hence the Petition is admitted.

14. This Bench having been satisfied with the Application filed by the Operational Creditor which is in compliance of provisions of section 9 of the Insolvency and Bankruptcy Code admits this Application declaring Moratorium with the directions as mentioned below:

    I. 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.

II. 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.

III. 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.

IV. That the order of moratorium shall have effect from **23.09.2021** 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.

V. That the public announcement of the corporate insolvency resolution process shall be made immediately as specified under section 13 of the Code.

VI. That this Bench hereby appoints Mr. Subhash Laxminarayan Nathuramka, B 602, Silver Sands, Building No.11, Piramal Nagar, Goregoan Nagar, Goregaon (West) having Registration No. IBBI/IPA-001/IP-P00472/2017-2018/10815,email-id snathuramka@gmail.com as interim resolution professional to carry the functions as mentioned under the Insolvency & Bankruptcy Code.

15. The Registry is hereby directed to communicate this order to both the parties as well as IRP immediately.

Sd/-	**Sd/-**
RAJESH SHARMA	**SUCHITRA KANUPARTHI**
Member (Technical)	**Member (Judicial)**

/Rohit/