

IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
KOLKATA
(Special bench)

CP (IB) No. 2171/KB/2019

In the matter of:

A petition under section 9 of the Insolvency and Bankruptcy Code, 2016.

In the matter of:

Darkwell Merchandise Private Limited
[CIN: U51909WB2016PTC210184]

...Operational Creditor

Versus

S K P Steel Industries Private Limited
[CIN: U27310WB1997PTC085261]

...Corporate Debtor

Order reserved on: 23.12.2021
Order pronounced on: 08.02.2021

Coram:

Shri Rajasekhar V.K. : Member (Judicial)

Appearances (through video conferencing):

For the Operational Creditor : Mr. Arik Banerjee, Advocate
: Mr. Arun Kumar Gupta, PCA

For the Corporate Debtor : Mr. Avishek Guha, Advocate

ORDER

Per Rajasekhar V.K., Member (Judicial)

1. This is a Company Petition filed under section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter, the Code) by Darkwell Merchandise Private Limited, a company incorporated under the provisions of the Companies Act, 2013 and represented by its Director, Mr. Rajkumar Kedia, authorised by a Board Resolution dated 01.12.2019 (hereinafter, the Operational Creditor) seeking to initiate Corporate Insolvency Resolution Process (hereinafter, CIRP) against S K P Steel Industries Private Limited (hereinafter, the Corporate Debtor).
2. The Corporate Debtor is a company limited by shares incorporated on 26.08.1997, having CIN: U51909WB2016PTC210184, under the Companies Act, 1956, with the Registrar of Companies, West Bengal, Kolkata. Its registered office is at Diamond Prestige, 41A AJC Bose Road, 6th Floor, Suit No. 612, Kolkata-700017, within the State of West Bengal. Therefore, this Bench has jurisdiction to deal with this petition.
3. The present petition was filed on 17.12.2019 before this Adjudicating Authority on the ground that the Corporate Debtor failed to make payment of a sum of Rs. 5,01,30,146/- (Rupees five crore one lakh thirty thousand one hundred and forty-six only) from the date of default i.e. 05.09.2019.
4. The learned Counsel for the Operational Creditor states as follows:-

IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
(*Special bench*)

Darkwell Merchandise Private Limited v. S K P Steel Industries Private Limited
CP (IB) No. 2171/KB/2019

- a. The Operational Creditor sold TMT bars to the Corporate Debtor between 30.03.2019 and 19.10.2019 and raised 61 invoices total amounting to Rs. 5,01,42,192/- (Rupees five crore one lakh forty-two thousand one hundred ninety-two only) including SGST and CGST. The bill-wise detail of invoices due and ledger statement are annexed to the petition and marked as Annexure C at pages 18 to 26.
 - b. The Corporate Debtor has made various payments on an on-account basis from time to time. Accordingly, an amount of Rs. 12,046/- (Rupees twelve thousand forty-six only) has been adjusted against invoice no. DMPL/TR/18-19/0280 and all the invoices thereafter are due. The last payment received from the Corporate Debtor was on 05.09.2019.
 - c. No credit period was agreed upon, therefore, the amounts became due on the respective dates of invoice. The invoices remain unpaid even after expiry of two months from the date of last invoice. All the sixty-one unpaid invoices including e-way bills and lorry receipts are annexed to the petition and marked as Annexure E at pages 165-348.
5. Apart from the aforementioned documents, the Operational Creditor has placed the following documents on record:
- a. An affidavit affirming that no notice has been given by the Corporate Debtor relating to dispute of unpaid debt under section 9(3)(b) of the Code; annexed to the petition at pages 12 to 14.
 - b. Statement of bank account of Operational Creditor; annexed to the petition and marked as Annexure D at pages 27 to 164.

IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
(*Special bench*)

Darkwell Merchandise Private Limited v. S K P Steel Industries Private Limited
CP (IB) No. 2171/KB/2019

- c. Demand notice dated 01.12.2019; annexed to the petition and marked as Annexure F at pages 349 and 350.
 - d. Copies of correspondences between the Operational Creditor and the Corporate Debtor; annexed to the petition and marked as Annexure G at pages 351 to 357.
6. Advance Court notice had been served on the Corporate Debtor on 19.12.2019, the Corporate Debtor filed its reply affidavit on 19.02.2020 wherein it states as follows:
- a. The petition is not maintainable because it has been affirmed by a person without showing his competency to do so. The claim in the instant petition is *ex-facie* time barred and the petition is barred under principles of acquiescence, waiver, estoppel and the principles analogous thereto.
 - b. The Corporate Debtor denied that the amount of 5,01,42,192/- (Rupees five crore one lakh forty-two thousand one hundred ninety-two only) is due and recoverable against sixty-one invoices raised between 30.03.2019 and 19.10.2019. There had been no transaction between the said period against which the Operational Creditor has received their dues.
 - c. It shall be evident from the statements of the Operational Creditor made in Part IV of the Petition that the Corporate Debtor had made various payments on an account basis from time to time and the Operational Creditor has duly received such payment. That the entire

IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
(*Special bench*)

Darkwell Merchandise Private Limited v. S K P Steel Industries Private Limited
CP (IB) No. 2171/KB/2019

payment made by the Corporate Debtor has not been adjusted against the invoices raised by the Operational Creditor as expected.

- d. It shall appear from the communications referred to by the Corporate Debtor dated 16.08.2019 and 18.11.2019 that the process of reconciliation of accounts was underway and without reconciliation, the actual amount payable to the operational creditor, if any, could not have been determined.
- e. It shall appear from the communication dated 20.09.2019 addressed by the Operational Creditor to the Corporate Debtor that a substantial amount of Rs. 4,20,80,660/- had been paid. It is, therefore, evident that the Corporate Debtor had never intended to withhold payments or deprived the Operational Creditor from their legitimate dues.
- f. It shall further appear from the contemporaneous communications in between the parties that there were certain difficulties as regards cash flow of the Operational Creditor on account of recessionary trends in the steel industry at national level and beyond. In view of such difficulties, there were immaterial delays in honouring the dues of the Operational Creditors. In such circumstances, in hot haste and in lackadaisical manner, the Operational Creditor proceeded to institute the instant application.
- g. The demand notice allegedly delivered is denied and disputed. The service of demand notice has not been properly effectuated as required under law. There were several disputes and differences as

IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
(*Special bench*)

Darkwell Merchandise Private Limited v. S K P Steel Industries Private Limited
CP (IB) No. 2171/KB/2019

regards the quality and configuration of the said TMT bars as claimed to have been supplied by the Operational Creditor. In view of such deviation from the agreed standard and quality of goods, the actual payable dues were not capable of being ascertained.

7. The main defences taken by the Corporate Debtor here are that
 - i. the petition is not maintainable since it is time barred and the same has been affirmed by a person without showing his competency,
 - ii. Operational Creditor's account was under reconciliation and actual amount could not be determined,
 - iii. the service of demand notice has not been effectuated properly,
 - iv. the goods supplied and delivered were of inferior quality and the the actual payable dues were not capable of being ascertained.
8. With regard to the Corporate Debtor's first defence, all the invoice under which the dues are being claimed and the petition is based on, have been raised between 30.03.2019 and 19.10.2019 and the present petition was filed on 17.12.2019, which is well within the time limit. [The petition is not time barred.] Further, it is for the Corporate Debtor to substantiate as to how the petition is barred under principles of acquiescence, waiver, estoppel and the principles analogous thereto. This has not been discharged by the Corporate Debtor.
9. So far as the objection with respect to the competence of the person affirming the petition is concerned, from perusal of the records, it appears that one Mr. Rajkumar Kedia has affirmed the petition. The Board

IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
(*Special bench*)

Darkwell Merchandise Private Limited v. S K P Steel Industries Private Limited
CP (IB) No. 2171/KB/2019

Resolution dated 01.12.2019, authorising him to do several acts including affirming the petition to be filed before the Adjudicating Authority amongst other fora, is annexed to the petition at page 360. Therefore, this objection of the Corporate Debtor is also baseless.

10. The Corporate Debtor then objects that the delivery of demand notice dated 01.12.2019 has not been effectuated properly, however, from perusal of the said demand notice, it is apparent that the same was delivered to the Corporate Debtor on 02.02.2019 and the receipt of the same has been acknowledged by the Corporate Debtor by putting its seal and signature.
11. Further, the Corporate Debtor argues that the goods supplied and delivered were of inferior quality. However, the Corporate Debtor did not bring on record any proof to support such contention. On the contrary, the Operational Creditor has produced on record, referred to and relied upon invoices issued, ledger account maintained by the Operational Creditor pertaining to account of the Corporate Debtor, copies of the letters of the amount outstanding and acknowledgment of the same by the Corporate Debtor dated 10.07.2019, 13.08.2019, 16.08.2019, 20.09.2019, 15.10.2019, 15.11.2019 and 18.11.2019, copy of the Bank Statements showing non-payment by the Corporate Debtor to Operational Creditor after 05.09.2019, statutory notice under section 8 dated 01.12.2019, and an affidavit in terms of section 9(3)(b) affirming that no notice of dispute has been received by the Operational Creditor to prove its case.
12. The Corporate Debtor has, for the first time, raised the issue regarding quality of goods supplied and delivered to it in Reply Affidavit filed in opposition to the Petition under consideration. Such issue at the belated

IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
(*Special bench*)

Darkwell Merchandise Private Limited v. S K P Steel Industries Private Limited
CP (IB) No. 2171/KB/2019

stage that too without any supportive evidence, in my considered opinion, is not tenable. If the Corporate Debtor had any dispute about the quality of goods sold and delivered it ought to have replied to the Statutory Demand Notice. It is also not the case of the Corporate Debtor that it has not received the Demand Notice.

13. Finally, the Corporate Debtor contended that the amount payable could not be quantified since the same was under reconciliation and has relied on its letters dated 16.08.2019 and 18.11.2019. We have perused the said letters, although the Corporate Debtor has written to the Operational Creditor that the “*we are in a process of reconciling the accounts to determine the dues payable to you, if any*”, the Corporate Debtor has also not expressly denied that the amount is not due from it at all. The Corporate Debtor has in fact conceded that the amount is due and it is unable to pay the same due to financial constraint by saying that “*In response to your various letters we would like to inform you that we are facing a financial crisis due to recessionary trend in the industry*” in its letter addressed to the Operational Creditor, dated 18.11.2019.

14. From the records it is apparent that the TMT Bars were supplied and delivered and a debt towards it is due because of the non-payment.

15. The petition made by the Operational Creditor is complete in all respects as required by law. It clearly shows that the Corporate Debtor is in default of a debt due and payable, and the default is in excess of the minimum amount of one lakh rupees as stipulated under section 4(1) of the Code at the relevant time. Therefore the default stands established and there is no reason to deny the admission of the petition. In view of this, this

IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
(*Special bench*)

Darkwell Merchandise Private Limited v. S K P Steel Industries Private Limited
CP (IB) No. 2171/KB/2019

Adjudicating Authority admits this petition and orders initiation of CIRP against the Corporate Debtor.

16. The Operational Creditor has proposed the name of Mr. Uday Narayan Mitra, registration number IBBI/IPA-001/IP-P00793/2017-18/11360, residing at 72/1, Dawnagazi Road, Bally, Kolkata-711201, West Bengal, email: udaynarayanmitra@yahoo.co.uk, as the Interim Resolution Professional (IRP) of the Corporate Debtor. The proposed IRP has given his written communication in Form 2 as required under rule 9(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

17. It is, accordingly, hereby ordered as follows:-

- a. The petition bearing CP (IB) No. 2171/KB/2019 filed by Darkwell Merchandise Private Limited, the Operational Creditor, under section 9 of the Code read with rule 6(1) of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating CIRP against S K P Steel Industries Private Limited (CIN: U27310WB1997PTC085261), the Corporate Debtor, **is admitted**.
- b. There shall be a moratorium under section 14 of the IBC.
- c. The moratorium shall have effect from the date of this order till the completion of the CIRP or until this Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 of the IBC or passes an order for liquidation of Corporate Debtor under section 33 of the IBC, as the case may be.

IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
(*Special bench*)

Darkwell Merchandise Private Limited v. S K P Steel Industries Private Limited
CP (IB) No. 2171/KB/2019

- d. Public announcement of the CIRP shall be made immediately as specified under section 13 of the Code read with regulation 6 of the Insolvency & Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.
- e. Mr. Uday Narayan Mitra, registration number IBBI/IPA-001/IP-P00793/2017-18/11360, residing at 72/1, Dawnagazi Road, Bally, Kolkata-711201, West Bengal, email: udaynarayanmitra@yahoo.co.uk, is hereby appointed as the IRP of the Corporate Debtor to carry out the functions as per the Code subject to his possessing of a valid Authorisation of Assignment in terms of regulation 7A of the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016. The fee payable to IRP or, as the case may be, the RP shall be compliant with Regulations, Circulars and Directions issued by the Insolvency & Bankruptcy Board of India (IBBI). The IRP shall carry out his functions as contemplated by sections 15, 17, 18, 19, 20 and 21 of the Code.
- f. During the CIRP period, the management of the Corporate Debtor shall vest in the IRP or, as the case may be, the RP in terms of section 17 of the IBC. The officers and managers of the Corporate Debtor shall provide all documents in their possession and furnish every information in their knowledge to the IRP within a period of one week from the date of receipt of this Order, in default of which coercive steps will follow.
- g. The IRP/RP shall submit periodical reports to this Adjudicating Authority with regard to the progress of the CIRP in respect of the Corporate Debtor.

IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
(*Special bench*)

Darkwell Merchandise Private Limited v. S K P Steel Industries Private Limited
CP (IB) No. 2171/KB/2019

- h. The Operational Creditor shall deposit a sum of Rs. 2,00,000 (Rupees two lakh only) with the IRP to meet the expenses arising out of issuing public notice and inviting claims. These expenses are subject to approval by the Committee of Creditors (CoC).
 - i. In terms section 9(5)(i) of the Code, Court Officer of this Court is hereby directed to communicate this Order to the Operational Creditor, the Corporate Debtor and the IRP by Speed Post, email and WhatsApp immediately, and in any case, not later than two days from the date of this Order.
 - j. Additionally, the Operational Creditor shall serve a copy of this Order on the IRP and on the Registrar of Companies, West Bengal, Kolkata by all available means for updating the Master Data of the Corporate Debtor. The said Registrar of Companies shall send a compliance report in this regard to the Registry of this Court within seven days from the date of receipt of a copy of this order.
18. **CP (IB) No. 2171/KB/2019** to come up on 28.04.2021 for filing periodical report.
19. Certified Copy of this order may be issued, if applied for, upon compliance of all requisite formalities.

Rajasekhar V.K.
Member (Judicial)

08.02.2021

SR (LRA)