THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-I

C.P.(IB) No. 153/MB/2023

Under Section 9 of Insolvency & Bankruptcy Code, 2016

In the matter of

Panchmahal Steel Limited

Financial Creditor

Vs.

Kundan Industries Limited

Corporate Debtor

Order delivered on: 02.01.2024

Coram:

Shri Prabhat Kumar Hon'ble Member (Technical)	**Justice Shri V.G. Bisht** Hon'ble Member (Judicial)

Appearances

For the Petitioner	:	Mr. Nausher Kohli, Learned Counsel a/w Mr. Kaushal Parsekar, Advocate, Mr. Sohan Kinkhabwala, Advocate i/b Desai Desai Carimjee Mulla
For the Corporate Debtor	:	Mr. Akshay Petkar a/w Mr. Deep Dighe, Advocate

ORDER

Per: Prabhat Kumar, Member (Technical)

1. This Company Petition No. C.P. (I.B.)/MB/153/2023 is filed by M/s Panchmahal Steel Limited ("Operational Creditor") u/s 9 of the Insolvency & bankruptcy Code, 2016 ("Code") to seek initiation of Corporate Insolvency Resolution Process ("CIRP") in the matter of M/s Kundan Industries Limited ("Corporate Debtor").
2. The debt in default as per the Petition is Rs. 5,91,58,255/- (Rupees Five Crores One Lakh Fifty-Eight Thousand Two Hundred and Fifty Five Only) as on 31.05.2022 and interest is claimed @ 18% p.a. compounded at monthly rests thereon from 1.6.2022. It is stated in the Part IV of the Application that "*The payment of Rs. 2,50,00,000/- (Rupees Two Crores and Fifty Lakhs Only), as per Order dated 31st March, 2022, of the National Company Law Tribunal, Mumbai Bench fell due on 31 May, 2022, which is admittedly not paid by the Corporate debtor to the Operational Creditor. Since, the Corporate Debtor failed and neglected to make payment towards the same, the entire aggregate balance outstanding amount, payable by the Corporate Debtor to the Operational Creditor under the said Consent Terms, together with interest thereon at the rate of 18% p.a. from 1 October 2018 together with and GST @ 18% has accelerated and forthwith become due and payable, with effect from 31 May 2022*".

3. The Operational Creditor is inter alia engaged in the business of production of various Stainless Steel long products in India and has its manufacturing plant situated at GIDC Industrial Estate, Kalol-389 330, Dist. Panchmahals, Gujarat

   3.1. The Corporate Debtor is stated to be an old customer of the Operational Creditor and during the year 2017-2018, the Corporate

Debtor had admittedly placed numerous purchase orders with the Operational Creditor for purchasing various stainless-steel products manufactured by the Operational Creditor, (hereinafter referred to as "Goods").

3.2. The Operational Creditor states that despite receipt, acceptance and consumption of the said Goods by the Corporate Debtor, without any protest, demur or qualification whatsoever, the Corporate Debtor wilfully and malafide, failed and neglected to make the payment towards the Operational Creditor, in respect thereof. Further, the Corporate Debtor failed to make certain payments to the Operational Creditor, in respect of the goods supplied to the Corporate Debtor, prior to the year 2017-2018.

3.3. In those circumstances, by reason of the continued defaults made by the Corporate Debtor, in making payments to the Operational Creditor, and the large outstanding that had accrued by then, the Operational Creditor filed Company Petition (18) No. 4573 (MB)/2018 in the National Company Law Tribunal, Mumbai Bench, (hereinafter referred to as the said Company Petition"), to initiate corporate insolvency resolution process against the Corporate Debtor under Section 9 of the Code

3.4. Pursuant to filing of the said Company Petition, negotiations towards settlement were initiated by the Corporate Debtor with the Operational Creditor and ultimately, Consent Terms dated 2 May, 2019 were executed between the Corporate Debtor and the Operational Creditor (hereinafter referred to as the "said Consent Terms"). Under clause the said Consent Terms, the Corporate Debtor has unconditionally, unequivocally irrevocably, admitted and acknowledged their liability towards the Operational Creditor to the sum of Rs 6,00,00,000/- (Rupees Six Crores Only) and have undertook to pay the Operation Creditor, the said sum of Rs. 6 crore in 13 monthly instalments, in the manner as set out in clause 4 of the said Consent Terms, in full and final settlement of the Operational Creditor's claim in the said Company Petition.

3.5. However in complete breach of its binding obligations under the said Consent Terms, the Corporate Debtor defaulted in its payment obligations and failed to make payment from seventh instalment onwards. Clauses 7 and 8 of the said Consent Terms inter alia set out the consequences of default, acceleration of outstanding settlement amount, interest thereon and right of Operational Creditor to re-initiate corporate insolvency solution process.

3.6. In these circumstances, the Operational Creditor issued its Demand Notice dated 18 December 2019, to the Corporate Debtor, (hereinafter referred to as the "said Demand Notice"), under Section 8 of the Code, in respect of the amounts due and payable by the Corporate Debtor, as on 30 November 2019. In response to the said Demand Notice, the Corporate Debtor, by their letter dated 27 December 2019, acknowledged and admitted their defaults in making payments to the Operational Creditor under the said Consent Terms and without raising any dispute whatsoever, requested for a further time of 30 (thirty) days to make the overdue payments.

3.7. However, despite of the said promise and assurance, no payment of the outstanding amount had been made by the Corporate Debtor to the Operational Creditor. In those circumstances, by reasons of the Corporate Debtor's wilful defaults, and malafide, the Corporate Debtor failed and neglected to make payment to the Operational

Creditor. In light thereof, the Operational Creditor filed another Company Petition (IB) No. 1489 (MB)/2020 in the National Company Law Tribunal, Mumbai Bench, (hereinafter referred to as the "said 2nd Company Petition") to initiate corporate insolvency resolution process against the Corporate Debtor.

3.8. Vide an Order dated 7 March, 2022 passed by the National Company Law Tribunal, Mumbai Bench in the 2nd Company Petition, this Tribunal recorded that the Operational Creditor had under the said Consent Terms, received only a sum of Rs. 2,75,00,000/- (Rupees Two Crores and Seventy Five Lakhs Only) from the Corporate Debtor. In respect of the balance amount of Rs. 3,25,00,000/- (Rupees Three Crores and Twenty Five Lakhs Only), this Tribunal directed the Corporate Debtor to pay the same by 30 March, 2022 to the Operational Creditor,

3.9. However, inspite of the clear wordings of the said Order dated 07 March, 2022, the Corporate Debtor, once again defaulted in paying the admitted amount of Rs. 3,25,00,000/- (Rupees Three Crores and Twenty Five Lakhs Only) by 30 March, 2022 and instead only paid an amount of Rs. 1,00,00,000/- (Rupees One Croze Only) to the Operational Creditor. This was duly brought to the attention of this Tribunal on the next date of the matter ie. on 31 March, 2022, when this Tribunal was informed of the default committed by the Corporate Debtor.

3.10. At that time, the Corporate Debtor agreed and undertook to make balance payment of Rs. 2,50,00,000/- to the Operational Creditor by 31 May 2022. This Tribunal recorded this obligation of the Corporate Debtor and disposed of the 2nd Company Petition. However no payment of the said sum of Rs. 2,50,00,000/-or any part thereof was made by the Corporate Debtor to the Operational Creditor

3.11. As on 31 May, 2022, the total amount of unpaid operational debit, admittedly due and payable by the Corporate Debtor to the Operational Creditor, is an aggregate sum of Rs. 5,91,58,255/- (Rupees Five Crores Ninety One Lakh Fifty Eight Thousand Two Hundred and Fifty Five Only). The same in subject to further interest thereon at the rate of 18% pa. compounded at monthly rests from 01 June 2022 until the date of actual payment.

4. The Corporate Debtor has filed the reply stating that there existed prior dispute in relation to debt arising from supply of goods; the corporate debtor has already paid amounts in excess of principal component of debt and section 9 can not succeed to claim the interest amounts placing reliance on the decision of Hon'ble NCLAT in the case of ***Rohit Motawat vs. Madhu Sharma Proprietor Hind Chem Corporation & Anr.*** {***Comp. Appeal (AT) (Ins.) No. 1152 of 2022***}. The Corporate Debtor has also relied upon decision in the case of Hon;be NCLAT in case of "***Trafigura India Private Limited vs. TDT Copper Ltd. Company Appeal (AT) (Ins.) No.742 of 2020*** and "***Amrit Kumar Agrawal vs. Tempo Appliances Pvt. Ltd.- Company Appeal (AT) (Ins.) No.1005 of 2020*** to contend that the debt arising from settlement agreements can not be made basis for initiation of CIRP.
5. Heard Learned Counsel. Perused the material available on record.

5.1. The Respondent had filed an IA 4958/2023 after this Company Petition was reserved on 25.10.2023 for recall and set aside of the order dt. 25.10.2023, passed in Company Petition bearing CP (IB) No. 153 of 2023 and to provide the Applicant herein an opportunity of being heard before passing the final order in the main Company Petition. This Application was heard on 31.10.2023 and this Bench recalled the order dt. 25.10.2023 and allowed the Applicant herein to make their submissions in the main Company Petition. Thereupon, the CP was de-reserved and got reserved again on 08.11.2023 after hearing both the parties. Accordingly, this order disposes of IA 4958/2023 also.

5.2. It is undisputed fact that the Corporate Debtor had entered into consent terms agreeing to pay a sum of Rs. 6,00,00,000/- (Rupees Six Crores Only) to the Operational Creditor, out of which a sum of Rs. 3,75,00,000/- (Rupees Three Crores Seventy-Five Lacs Only) has already been paid. The clause 8 of Consent terms clearly provides that the Operational Creditor shall be at liberty to initiate the CIRP in case of default and the Corporate Debtor shall be barred from raising any dispute at any stage in respect of amounts then claimed by the Operational Creditor. The Consent terms explicitly proves that there was no dispute, whatsoever, in relation to the debt settled under the consent terms. Hence, the ground of pre-existing dispute is devoid of any merit.

5.3. As regards contention that the petition u/s 9 can not lie for claim of interest, we find that the facts in case of Rohit Motawat (Supra) are distinguishable. In the present case, the amount of Rs. 6.00 crores having been admitted as total debt payable in terms of settlement became a composite amount of debt and the present petition has been filed for default in payment of such composite debt. It is undisputed fact that this Tribunal had dismissed earlier two company petitions for initiating of CIRP in the matter of Corporate Debtor on the ground of this settlement only and no such ground was raised therein. On the contrary, the Corporate Debtor had admitted to pay a sum of Rs. 2,50,00,000/- during proceedings in C.P. (IB) No. 1489 (MB)/2020 as recorded in Order dated 31.03.2022, which clearly shows that this admission became the basis of dismissal of the said petition. Accordingly, we have no hesitation to hold that the default in payment of settlement amount, even if it includes the interest component also, can be sustained, as the settlement amount itself becomes the principal amount when admitted as lump sum obligation.

5.4. The Hon'ble NCLAT in the case of ***M/s. Ahluwalia Contracts (India) Ltd. vs. M/s. Jasmine Buildmart Pvt. Ltd.*** {***Company Appeal (AT) (Insolvency) No. 345 of 2023 & I.A. No.1164 of 2023***} has distinguished the decision in the case of Trafigura India Private Limited (Supra) and Amrit Kumar Agrawal (Supra) and held that Settlement during earlier Section 9 proceeding was only mode of payment to the operational debt and it allowed the appeal of the Operational Creditor reversing the Order passed by Coordinate Bench of this Tribunal where the Petition filed on ground of breach of settlement terms was held not maintainable. The Hon'ble NCLAT held that "*In the present case, as noted above, the nature of the operational debt was payment of RA Bills submitted by Operational Creditor and Settlement Agreement was entered for payment but payment having not been made in pursuance of the Settlement Agreement, liability of the Corporate Debtor to make the payment continues and Operational Creditor was well within its right to file Section 9 Application"*.

5.5. In view of the foregoing decision of Hon'ble NCLAT in the case of M/s Ahluwalia Contracts (India) Ltd., we have no hesitation to hold that the present petition arising from default in consent terms, having been taken on record by this Tribunal on earlier occasions, is maintainable.

6. Since the present petition is complete and is within limitation period; and there exists an operational debt of more than Rs. 1.00 crores and the same is in default without any dispute, we find it fit case for commencing the CIRP in terms of section 9 of the Code.

7. We consider it to appropriate to clarify that the appointed Interim Resolution Professional shall independently verify the claim of the

Operational Creditor in the present petition and our observation shall not be construed as admitting the amount of debt claimed in default to the extent stated in the petition.

8. The Operational Creditor has not proposed the name of any Insolvency Professional to act as the Interim Resolution Professional. Accordingly, this Bench appoints Mr. Sunil Kumar Agarwal having registration no. IBBI/IPA/001/IP-P01390/2018-2019/12178, Mob:9586644998, Email: anil91111@hotmail.com to take charge of the Respondent company assets, affairs, and books of account and to conduct the affairs of the Respondent Company's / Corporate Debtor's as per the provisions of the Insolvency & Bankruptcy Code, 2016 of the Corporate Debtor.

ORDER

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

   a. The Petition bearing **CP (IB) 153/MB/2023** filed by**, Panchmahal Steel Limited (L27104GJ1972PLC002153),** the Operational Creditor, under section 9 of the IBC read with rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating Corporate Insolvency Resolution Process (CIRP) against**, Kundan Industries Limited CIN:U28900MH1995PLC092326** the Corporate Debtor, is **admitted**.

   b. There shall be a moratorium under section 14 of the IBC, regarding the following:

      (i) 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;

(ii) Transferring, encumbering, alienating or disposing of by the Corporate Debtor any of its assets or any legal right or beneficial interest therein;

(iii) 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 Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest (SARFAESI) Act, 2002;

(iv) The recovery of any property by an owner or lessor where such property is occupied by or in possession of the Corporate Debtor.

c. Notwithstanding the above, during the period of moratorium:-

i) The supply of essential goods or services to the Corporate Debtor, if continuing, shall not be terminated or suspended or interrupted during the moratorium period;

ii) The provisions of sub-section (1) of section 14 of the IBC shall not apply to such transactions as may be notified by the Central Government in consultation with any sectoral regulator;

d. 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 IB Code.

e. Public announcement of the CIRP shall be made immediately as specified under section 13 of the IBC read with regulation 6 of the Insolvency & Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

f. Mr. Sunil Kumar Agarwal having registration no. IBBI/IPA/001/IP-P01390/2018-2019/12178, Mob:9586644998, Email: anil91111@hotmail.com is hereby appointed as Interim Resolution Professional (IRP) of the Corporate Debtor to carry out the functions as per the IBC. He shall be paid a consolidated remuneration of Rs. 1,50,000/- (Rupees only) for the period from the commencement of CIRP till the Constitution of CoC as fee, in addition to the expenses incurred in relation to CIRP process. The fee payable to IRP or, as the case may be, the RP shall be compliant with such Regulations, Circulars and Directions issued/as may be 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 IBC.

g. During the CIRP Period, the management of the Corporate Debtor shall vest in the IRP or 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.

h. The Operational Creditor shall deposit a sum of Rs.3,00,000/- 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). The Operational Creditor shall be liable to bear all expenses of CIRP, incurred till constitution of CoC, to the extent such expenses are not ratified by CoC.

i. The Registry is directed to communicate this Order to the Financial Creditor, the Corporate Debtor and the IRP by Speed Post and email immediately, and in any case, not later than two days from the date of this Order.

j. IRP is directed to send a copy of this Order to the Registrar of Companies, Maharashtra, Mumbai, 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.

Sd/-	**Sd/-**
Prabhat Kumar Member (Technical)	**Justice V.G. Bisht** Member (Judicial)