

NATIONAL COMPANY LAW TRIBUNAL

NEW DELHI BENCH-V

(IB)-631(ND) 2018

In the matter of

KOHINOOR INDIA (P) LTD

Basti Baba Khel,

Kapoorthala Road,

Jalandhar - 144021

.....Operational Creditor

V/s

CONTAINER CORPORATION OF INDIA LIMITED

Concor Bhawan,

C-3, Mathura Road,

Oppo. Apollo Hospital,

New Delhi- 110076

.....Corporate Debtor

SECTION: 9 of IBC, 2016

Order delivered on: 15 .10.2019

CORAM:

MS. INA MALHOTRA, MEMBER (JUDICIAL)

MS. SUMITA PURKAYASTHA, MEMBER (TECHNICAL)

PRESENT- Mr. Kewal Krishan Saini and Ms. Suman Saini for the
Petitioner

Mr. S.M. Zulfiqar Alam and Ms. Ranny for the Respondent

ORDER

Per Ms. Sumita Purkayastha (Member Technical)

1. The present petition has been filed invoking the provision of Section 9 of the Insolvency & Bankruptcy Code, 2016.
2. The petitioner is a company engaged inter-alia in the business of manufacturing of Bicycle Tyres and Tubes and trading of natural and synthetic rubber and allied chemicals. The petitioner participated in the online bid for the auction of rubber process oil by the corporate debtor through Matex Net Pvt Ltd on 29.03.2012. The Respondent confirmed the bid vide its letter dated 05.04.2012 and demanded 30% payment. The Petitioner remitted the amount. On 17.05.2012 the Respondent demanded the balance 70% payment and the same was remitted by the Operational Creditor on 23.05.2012. The Respondent did not deliver the goods and expressed inability to deliver the goods due to failure to obtain clearance from the environmental/regulatory authorities. Vide various correspondences the Respondent admitted liability and agreed to refund the amount. The Respondent refunded the price consideration on 08.08.2012, 31.07.2014, 01.12.2015 but

Sd/-

Sd/-

did not refund the custom component of Rs. 3,59,163/- which they advised have to be claimed from custom authorities.

The Petitioner has therefore filed this petition as an Operational Creditor praying for initiation of Corporate Insolvency Resolution Process of the Corporate Debtor i.e. Respondent for its inability to liquidate here claim of Rs. 3,59,163/- along with applicable interest @15% p.a. from 10.07.2012 till date.

Hence total claim amounts to Rs. 6,83,933/-.

3. The debt fell due on 10.07.2012 when the Corporate Debtor conveyed its inability to deliver the goods and cancelled the auction. The Corporate Debtor refunded a sum of Rs. 22,56,800/- out of total dues to the Operational Creditor. Rest of the amount of Rs. 3,59,163/- was deducted towards custom and deposited towards Custom Authority.

4. The Operational Creditor has claimed as detailed as under: -

Particulars	Amount (Rs.)
Admitted Liability	3,59,163/-
Applicable Interest @15% p.a. from 10.07.2012 till date	3,09,770/-
Total	6,68,933/-

5. The Operational Creditor issued the demand notice dated 29.04.2018 as required under Section 8 of the Code was issued, demanding a

Sd/r

Sd/r

total sum of Rs. 6,68,933/-. In view of the Corporate Debtor's failure to reduce or liquidate its liability, the present petition has been filed in the required format praying for initiation of the Corporate Insolvency Resolution Process of the Corporate Debtor. Affidavit in compliance under Section 9(3)(b) and 9(3)(c) of Code are on record to corroborate his case.

6. Pursuant to the Court notice issued to the Corporate Debtor, they appeared in court and submitted that the fact that the custom duty was deducted and deposited with the Custom Authority, then Custom Authority should return the amount and not the Corporate Debtor.
7. As per averments of the Corporate Debtor, the Corporate Debtor is the custodian under the Custom Act, 1962 and simply a facilitator in between the Operational Creditor and the Custom Department. And the entire exercise is undertaken only after the Custom approves the Auction u/s 48 of the Custom Act, 1962 and after their approval the sale proceeds is conducted u/s 150 of the Custom Act, 1962.
8. The Corporate Debtor had filed a Duty Refund with the Customs on 19.11.2015. On the other hand, the Operational Creditor vide letter dated 15.10.2016 had again requested for refund of custom duty.
9. Accordingly, both the parties had written to the Custom Department for refund of customs duty but unfortunately, the Custom Department has not acceded to the requests of neither party regarding the payment of the same.

Sd/-

10. Further, the Corporate Debtor moved an application to implead the Custom Department as a party in the case, but the said application was dismissed by this Hon'ble Tribunal vide order dated 26.09.2018 and therefore, the Corporate Debtor preferred an appeal before the Hon'ble Appellate Tribunal which directed this Hon'ble Tribunal to dispose of the matter vide order dated 11.03.2019.

11. Clause 7.0 Taxes of the Tender Document states that *"All bids invited are for the net amount accruable to Container Corporation of India Ltd. and all taxes or other levies charged under Delhi State, or local taxes/laws as applicable on the date of delivery except Customs Duty shall be payable by the bidder. These taxes are required to be paid before taking delivery by the bidder/tenderer."*

12. From the aforesaid clause, it is clear that the custom duty was not payable by the bidder i.e. Operational Creditor and was rightly deposited by the Corporate Debtor who filed the Bill of Entry and deposited the amount of Challan on 24.05.2012 being the custodian of the unclaimed/forfeited imported goods and it was admitted by the Corporate Debtor in Reply dated 17.07.2018. Accordingly, the refund was to be claimed by the Corporate Debtor within the prescribed time of one year as per Section 27 of The Customs Act, 1962 and the refund was claimed on 09.11.2015 i.e. after a delay of more than 3 years from the date of deposit and the same was rejected by Custom Authorities on 29.08.2018 being time barred. Therefore, the Corporate Debtor has accepted the debt and there is default.

Sd/-

Sd/-

13. Be that as it may, on appraisal of the arguments advanced by the Ld. Counsels, the prayer of the Operational Creditor merits consideration. Accordingly, this petition is admitted. A moratorium in terms of Section 14 of the Insolvency & Bankruptcy Code, 2016 shall come into effect forthwith staying:-

- (a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgement, decree or order in any court of law, tribunal, arbitration panel or other authority;*
- (b) transferring, encumbering, alienating or disposing of by the corporate debt or any of its assets or any legal right or beneficial interest therein;*
- (c) 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 Act, 2002;*
- (d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.*

Further:

(2) The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.

(3) The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator. (4) The order of moratorium shall have effect

from the date of such order till the completion of the corporate insolvency resolution process:

Provided that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be.”

14. The Operational Creditor has not proposed the name of any IRP. Accordingly, we appoint Mr. Surinder Kumar, an Insolvency Professional, registration no. IBBI/IPA-001/IP-P00043/2017-2018/10117 email- skjuneja65@gmail.com duly empanelled with the IBBI as the IRP. He is directed to take such steps as are mandated under the Code, more specifically under Sections 15, 17, 18, 20 and 21 and shall file his report before the Adjudicating Authority.
15. The Operational Creditor is directed to deposit a sum of Rs. 2 lakhs to meet the immediate expenses of IRP. The same shall be fully accountable by the IRP and shall be reimbursed by the CoC, to the Operational Creditor to be recovered as CIR costs.
16. Copy of the order be sent to both the parties as well as to the IRP.
17. To come up on for further consideration.


Sumita Purkayastha

Member (T)


Ina Malhotra

Member (J)