IN THE NATIONAL COMPANY LAW TRIBUNAL, MUMBAI BENCH COURT III

C.P. No. 2034/IBC/MB/2019

Under Section 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudication Authority) Rule 2016)

In the matter of

MR. NARENDRA SAKARIYA

Having registered office at: No. 45- Old No.21, Megh Synergy, Halls Road, Kilpauk, Chennai, Tamil Nadu-600010, India

……Operational Creditor

Vs

KELVOLT (INDIA) PRIVATE LIMITED
(CIN: U29253MH2009PTC195793)

Registered office at: F 345, Solaris- I, Saki Vihar Road, Powai, Andheri (East), Mumbai, Maharashtra- 400072

…….Corporate Debtor

Reserved for order on: **27.07.2022**

Order pronounced on**: 10.08.2022**

Coram:

Hon'ble H.V. Subba Rao, Member (Judicial)

Hon'ble Anuradha Sanjay Bhatia, Member (Technical)

For the Applicant: Ms. Nikita Hinger.

For the Respondent: None appeared.

Per: Shri H.V. Subba Rao, Member (Judicial)

1. The above Company Petition is filed by Mr. Narendra Sakariya Limited hereinafter called as Operational Creditor seeking to initiate of Corporate Insolvency Resolution Process (CIRP) against M/s. Kelvolt (India) Private Limited called as Corporate Debtor by invoking the provisions of Section 9 Insolvency and Bankruptcy code (hereinafter called "Code" read with rule 6 of Insolvency & Bankruptcy (Application to Adjudication Authority) Rules, 2016 for a Resolution of Operational Debt of Rs. 15,03,161/-.

BRIEF SUBMISSIONS OF THE PETITIONER ARE AS UNDER;

2. That Mr. Narendra Sakariya is a Proprietor of Madras Steels & Tubes (Sole Proprietorship Firm). Madras Steel & Tubes is the supplier and trader of Gl pipes, MS pipes, ERW pipes etc and has supplied the goods being steel Products being the G.I. Pipe & M.S. ERW as demanded by the Corporate Debtor for which the purchase order has been received in the name of Madras Steel & Tubes from the Corporate Debtor, who is the Authorised Dealer involved in offering a wide range of Air Ventilation System.

3. That the Corporate Debtor has failed to make the payment for the outstanding invoices from February 04, 2014 to May 09, 2014 amounting to Rs. 7,01,815/- (Rupees Seven Lakhs One Thousand Eight Hundred Fifteen Only) the copy of the Purchase Order received by the Proprietorship Firm of the Operational Creditor from the Corporate Debtor and the invoices issued by the Proprietorship Firm of the Operational Creditor for the same alongwith the Delivery Challan and the Copy of the Ledger of Corporate Debtor in the books of accounts of Proprietorship Firm of the Operational Creditor.

4. That the Corporate Debtor is also liable to pay an interest on the outstanding due amounting to Rs. 8,01,346/- (Rupees Eight Lakhs One Thousand Three Hundred Forty Six Only) @ 24% per annum as

per the terms of the invoices from their due date of invoices till the date of demand notice, the copy of the computation showing the details of the outstanding due and the date of default along with the calculation.

5. That after giving several reminders the Proprietorship Firm of the Operational Creditor issued Statutory Demand Notice in Form 3 along with Form 4 dated March 28, 2019 as required under section 8 of the Insolvency & Bankruptcy Code, 2016 has been sent by the Indian Post on March 29, 2019 through the Speed Post along with the copy of the Track Report available from the website of India Post as the Proof of Service. The Demand Notice has also been forwarded via E-mail on the registered mail-id mentioned in the Company's Master data on website www.mca.gov.in and also to the concerned persons of the Corporate Debtor on March 28, 2019.

6. That the copy of the Statement of Bank Account of Proprietorship Firm (Madras Steel & Tubes) of Operational Creditor with State Bank of India from April 01, 2019 to April 19, 2019 where deposits are made or credits are received normally by the Operational Creditor in respect of Corporate Debtor, reflects that no amount has been received by the Operational Creditor from the Corporate Debtor post the issue of Demand Notice.

7. That the Operational Creditor had reminded several times and again reminded the Corporate Debtor to clear the outstanding due but the said remained unpaid. However, post the issue of Demand Notice the Corporate Debtor had formally replied to the Demand Notice through Advocate Govind Singh on 14th April, 2019, without taking any substantial objection between the parties to the transaction in question for which, the reply sent is vague, ambiguous, and up-

through nearly to raise false and fabricated dispute to escape the provision of Insolvency and Bankruptcy Code, 2016.

BRIEF SUBMISSIONS OF THE CORPORATE DEBTOR ARE AS UNDER;

1. Affidavit in Reply was filed by Mr. Santosh R. Vishwakarma and submit that he is the Director of the Corporate Debtor and to place on record the true and correct facts. He denied everything that is stated in the said petition and do not admit anything that is contrary to or inconsistent with what is stated herein below, Nothing stated in the said Petition should be deemed to be admitted by the corporate debtor or me for want of non-traverse.

2. That, he vehemently deny each and every allegation, contention and averment made by Operational Creditor in the petition in *extenso* as if the same is set out herein should be deemed to be admitted except to the extent expressly admitted hereinafter. That the amount claimed by the operational creditor is not proper and the amount claimed by the operational creditor is false. Further, he says that the operational debt as claimed by the Operational Creditor is frivolous and made as an attempt to damage image and goodwill of the Corporate Debtor in the market. Also, he states that despite of several reminder the Operational Creditor has failed and neglected to take steps to comply to replace the disputed material with in 48 as per the Work Order but the operational creditor fail to comply the same.

3. It is pertinent to note that the Company Petition filed by the Operational Creditor in May,2019 is barred by Limitation as 3 years have already elapsed from the date on which the alleged debt fell due i.e. 09/05/2014.

4. That, the Operational Creditor has claimed an amount of Rs. 15,03,161/ in the company petition filed in this Hon'ble Tribunal which is completely unfounded and without any basis and not in accordance with the terms and condition agreed between the parties under the Purchase order issued by corporate debtor and the tax invoice issued by the Operational Creditor. That the supply Rate contract does not prescribe any amount of interest that is required to be paid to the operational Creditor. The supply Rate contract (Purchase Order) has been Marked and annexed in the company petition.

5. That the Company Petition filed by the Operational Creditor for the alleged claim is wholly devoid of merits and is liable to be dismissed at the threshold:

    a. The Operational Creditor is guilty of *suppressio veri suggestio falsi* and has failed to place on record complete and correct facts with respect to the said Supply Rate Contract issued by the Corporate Debtor to the Operational Creditor which clearly shows an existence of dispute.

    b. The Operational Creditor was engaged for Supply of Material at project site of Mumbai and UP under the said Supply Rate Contract. In the instant case, the Operational Creditor has allegedly claimed amounts under invoices qua the said supply rate contract.

    c. The Operational Creditor has failed to place on record complete and correct Facts with respect to the General Terms and Conditions of the Said Supply Contract by which the relationship between both the parties is governed. The terms and condition clearly stipulate that"

If any defective material should be replace with in 48 hours" and It is well within the knowledge of the Operational Creditor and if he failed the corporate debtor also had the right to cancel the Purchase order and the decision of the corporate debtor shall be final and binding upon the operational creditor.

d. Further, the operational creditor has also claimed interest under the said Invoices. It is pertinent to note that the said supply contract or the said Invoices make no provisions for claiming interest in case of non-payment by the corporate debtor in any manner whatsoever. In this regard, the Hon'ble National Company Law Appellate Tribunal in its Judgment delivered on July 27,2018 in company appeals (AT) (Insolvency) Nos. 144,145,146,147 and 148 of 2018 filed against Gammon India Ltd., has held that:

"*4..... The 'debt' includes interest, but such submission cannot be accepted in deciding all claims If in the terms of any agreement interest is payable to the operational or Financial Creditor then debt will include interest, otherwise, the principal amount is to be treated as the debt which is the liability in respect of the claim which can be made from the corporate debtor.*

6. In the present appeals, as we find that principal amount has already been paid and as per agreement no interest was payable, the application filed under Section 9 on the basis of entitlement of interest, were not maintainable. If for delayed payment appellants(s) claim any interest, it will be open to them to move before a court of competent jurisdiction, but initiation of CIRP is not an answer."

7. There is an existence of a prior dispute between the Operational Creditor and Corporate Debtor as regards non-payment of the said

Invoice raised by them for non- compliance of the Quality requirement as per the terms and condition of the Supply Contract which is well within the Operational Creditor's knowledge.

8. Clarity on the expression "existence of dispute" is put to rest and confusion regarding the meaning of term "dispute" as the Hon'ble Supreme Court of India has held that the term "dispute" is an inclusive one and cannot be restricted to a pending suit or arbitral proceedings. The Hon'ble Supreme Court has held that it is trite law that an email/correspondence exchanged between the parties prior to the demand notice stating that there was non payment of dues on the ground of breach of the agreement satisfied the test of an "existing dispute" within the meaning of the Code.

9. In the circumstances aforesaid, the Corporate Debtor respectfully submits that it is apparent that the conduct of the Operational Creditor in filing such insolvency application against the Corporate Debtor is in mala fide as the Company Petition suffers from laches and is barred by limitation.

FINDINGS

1. Heard the counsel appearing for the Petitioner and perused the material available on record. Before going into the merits of the matter, it is appropriate to mention here that the Corporate Debtor except filing his reply did not appear before the Bench.

2. The Operational Creditor submitted his arguments on 14.07.2022. Since, the Corporate Debtor was not present on that date, the matter was adjourned from 14.07.2022 to 27.07.2022 with a specific direction that the Corporate Debtor shall appear and address their arguments on 27.07.2022 failing which the argument of the

Corporate Debtor would be treated as heard and appropriate order will be passed. Accordingly, the matter was taken up on board on 27.07.2022. However, the Corporate Debtor neither appeared nor addressed any arguments as directed by this Bench. Hence, having no other alternative, this Bench reserved the matter for orders.

3. Let us come to the merits of the matter. The Corporate Debtor filed a written reply with usual denials raising the plea of limitation and pre-existing disputes. It is the contention of the Corporate Debtor that the subject matter of invoices pertains to June 2014 and the above Company Petition being filed on 29.05.2019 is barred by limitation.

4. In this context, it is appropriate to mention here that the Operational Creditor has filed an Additional Affidavit along with original print out of their statement of account along with bank/transaction statement given by the Chief Manager Union Bank of India. The payment of Rs. 1 lac on 18.08.2016 made by the Corporate Debtor is clearly reflecting in the above statement of account. Since, there is a payment made by the Corporate Debtor on 18.08.2016 the period of limitation would get extended for another three years from 18.08.2019 and the above Company Petition being filed on 29.05.2019 is well within limitation and the contention of the Corporate Debtor on that score is liable to be rejected.

5. The next issue raised by the Corporate Debtor is with regard to the payment of interest. It is his contention that the Operational Creditor is not entitled for interest. It is relevant to mention here that there is a stipulation in the invoices raised by the Operational Creditor for payment of interest @ 24% per annum if the payment was not made on due date by the Corporate Debtor. Therefore, the

contention with regard to the entitlement of the Operational Creditor for interest is also liable to be rejected.

6. The next issue is with regard to the pre-existing dispute. It is observed that the Corporate Debtor did not issue any reply to the Demand Notice nor filed any documents evidencing pre-existing disputes between both parties prior to the Demand Notice and therefore, the plea of pre-existing disputes mentioned by the Corporate Debtor in their reply is only for name sake and is only an afterthought to prevent the admission of the Company Petition.

7. For the aforesaid reasons, this Bench is of the considered view that there is no substance in any of pleas raised by the Corporate Debtor and the above Company Petition deserves to be admitted.

8. Accordingly, the above Company Petition is admitted by passing the following:

ORDER

a. The above Company Petition No. (IB) 2034 (MB)/2019 is hereby allowed and initiation of Corporate Insolvency Resolution Process (CIRP) is ordered against M/s. Kelvolt (India) Private Limited.

b. This Bench hereby appoints Mr. Kedarram R Laddha (**ip@kpsjca.com**), Insolvency Professional, Registration No: IBBI/IPA-001/IP-P00586/2017-2018/11115 as the interim resolution professional to carry out the functions as mentioned under the Insolvency & Bankruptcy Code, 2016.

c. The Operational Creditor shall deposit an amount of Rs.3 Lakhs towards the initial CIRP costs by way of a Demand Draft drawn in

favour of the Interim Resolution Professional appointed herein, immediately upon communication of this Order. The IRP shall spend the above amount only towards expenses and not towards his fee till his fee is decided by COC.

d. 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.

e. 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.

f. 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.

g. That the order of moratorium shall have effect from the date of pronouncement of this order 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.

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

i. During the CIRP period, the management of the corporate debtor will vest in the IRP/RP. The suspended directors and employees of the corporate debtor shall provide all documents in their possession and furnish every information in their knowledge to the IRP/RP.

j. Registry shall send a copy of this order to the Registrar of Companies, Mumbai, for updating the Master Data of the Corporate Debtor.

Accordingly, this Petition is admitted.

The Registry is hereby directed to communicate this order to both the parties and to IRP immediately.

Sd/-	**Sd/-**
ANURADHA SANJAY BHATIA **MEMBER (TECHNICAL)**	**H.V. SUBBA RAO** **MEMBER (JUDICIAL)**

--Rajeev--