

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOCHI BENCH, KERALA
CP (IB)/45/KOB/2021
(Under Section 9 of Insolvency and Bankruptcy Code 2016)**

Order delivered on 11.03.2022

Coram:

Hon'ble Mr. Ashok Kumar Borah, Member (Judicial)
Hon'ble Mr. Anil Kumar. B, Member (Technical)

Sulpa International,
Through its Proprietor,
Partha Sarathi Sarkar,
Jolly and Coop Housing Society Limited,
House No.7, Ghatta Village Road,
Near Maitry Park,
ST Stand, Chembur,
Mumbai-400 071

... Applicant/Operational Creditor

Vs.

M/s Savute Textiles Private Limited
Registered Office,
Aninilayam, PRA 68
Friends Nagar,
Palachuvadu,
Kakkanad
Ernakulam,
Kerala-682038.

...Respondent/Corporate Debtor

Parties/Counsel present (through video conferencing)

For the Operational Creditor : Shri Vinod P.V&Reetha D (Advocates)

For the Corporate Debtor : Shri. Aswin Gopakumar,
Shri. AnwinGopakumar,
Shri. Aditya Venugopalan,
Shri. Anant Merathia,
Shri. Ranghasayee,
Ms. Dhanish and
Ms. Priyanka Varma (Advocates)



ORDER

1. The applicant, Sulpa International, which is a proprietorship concern of Mr. Parth Sarthi Sarkar, had earlier filed a Section 9 application as IBA/29/KOB/2020 on 05.06.2020 to initiate Corporate Insolvency Resolution Process against the Corporate Debtor, Savute Textiles Private Limited. This Tribunal, based on the settlement agreement entered into between the parties, had dismissed the said application as withdrawn on 03.12.2021 granting liberty to reopen the original application in the event of failure of the Corporate Debtor to make the payment within the stipulated timeline. Since the Corporate Debtor defaulted in the payments, the applicant filed an application IA(IBC)/127/KOB/2021 to restore the Original Application No. IBA/29/KOB/2020. However, this Tribunal disposed of the said IA on 31.08.2021 declining to reopen the IBA/29/KOB/2020 and directed the Operational Creditor that as per clause 8 of the MOU applicant reserves the right to initiate fresh proceedings under IBC, hence the question of filing a restoration application does not arise. Hence the present application has been filed under Section 9 of IBC.

2. The brief facts of the case are that the Corporate Debtor is a manufacturer of linen and linen blended fabrics and the Operational Creditor has supplied Linen Fabric to the Corporate Debtor against various purchase orders issued during the month of February to April 2018 and sales were made during the period March 2018 to June 2018. Out of the total invoiced amount of Rs. 1,55,27,465/- Corporate Debtor has only paid Rs.32,71,879/-. As on 09th December, 2018 an amount



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of Rs. 1,46,33,008/- was due from the Corporate Debtor which includes Rs. 1,22,55,586/- towards principal and Rs. 23,77,442/- towards interest. Since the Corporate Debtor was unable to pay its debts, the Operational Creditor issued a demand notice dated 09.12.2019 under Section 8 of the Insolvency and Bankruptcy Code, 2016. Further to the issue of demand notice, corporate Debtor has made a payment of only Rs. 3,00,000/- on 1st February 2020. Thus, an amount of Rs. 1,43,33,008/- was due from the Corporate Debtor. Hence, an application under Section 9 of IBC was filed before this Tribunal, the Corporate Debtor agreed to settle the dues of the Operational Creditor in installments and entered into a Memorandum of Understanding on 28.11.2020. The Corporate Debtor has admitted the debt and also agreed to pay Rs. 1,26,55,586/- against the principal dues along with interest at the rate of 12% annum commencing from 45th day from the date of their respective invoices.

3. Pursuant to the settlement, the Corporate Debtor has issued post-dated cheques towards the installments. After executing the MOU, the Corporate Debtor has only made a payment of Rs. 10 Lakh and defaulted in all other installments to date.
4. Accordingly, the applicant issued a demand notice by speed post on 18.09.2021 to the Corporate Debtor claiming an amount of Rs. 1,57,72,977/- under Section 8 of the Insolvency and Bankruptcy Code, 2016. The Demand notice was sent to the corporate office and registered office and also by email to the Corporate Debtor on



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01.10.2021. The demand notice sent to the Corporate Office was delivered on 23.09.2021. Since no payment has been made by the Corporate Debtor, despite the receipt of the demand notice, the present application has been filed under Section 9 of the IBC to initiate CIRP proceedings against the Corporate Debtor.

5. Respondents filed their counter and stated that a Memorandum of Understanding has been signed by the parties herein on 28.11.2020, and the date of repayment was from 31.12.2020. Further, the date of default as mentioned in Form 5 filed by the Applicant is also 31.12.2020. Therefore, the Applicant and the Corporate Debtor have mutually agreed upon these terms and the same Memorandum of Understanding has been submitted before this Tribunal, and the same has been recorded in the order dated 03.12.2020. Thereby there is no dispute with respect to the fact that the 1st installment of the repayment schedule starts on 31.12.2020 for an amount of Rs. 20,00,000/-. No alternative or the previous date of default as all the prior agreements has been superseded by the Memorandum of Understanding.
6. As per Section 10A of the Code, any application initiating the Corporate Insolvency Resolution Process of the Corporate Debtor for the default occurring between 25.03.2020 to 25.03.2021 cannot be filed under the Code. The date of default being 31.03.2020 falls within the ambit of the covid default this application is not maintainable before this Tribunal. The clarification on the 'covid default' was provided by the



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Hon'ble Supreme Court in the case of **Ramesh Kymal Vs. M/s. Siemens Gamesa Renewable Power Pvt. Ltd., in CA No. 4050/2020** where a Section 9 Application was held not maintainable.

7. In **Amrit Kumar Agarwal Vs. Tempo Appliances (P.) Ltd. Order dated 25.11.2020** Hon'ble NCLAT, New Delhi, stated that a settlement agreement and default arising thereof does not come under the purview of the Code and alternate remedies are to be preferred as the Code is not a recovery mechanism.
8. By initiating the instant Application, it can be inferred that the Applicant is merely appropriating this Tribunal as a money recovery forum. The Hon'ble Supreme Court held that the Insolvency and Bankruptcy Code is not to be appropriate as a recovery mechanism and in the matter of **Transmission Corporation of Andhra Pradesh Limited Vs. Equipment Conductors and Cables Limited, (2019) 12 SCC 697**, the Hon'ble Supreme Court referred to its earlier judgment in the case of **Mobilox Innovations Private Limited Vs. Kirusa Software Private Limited, (2018)1SCC 353**.
9. The defaults committed by the Respondent are clearly due to the Covid-19 pandemic which is beyond the control of the Respondent and the Applicant herein cannot approach this Tribunal treating the same as a recovery forum as held in **Neelkanth Township and Construction Pvt. Ltd., Vs. Urban Infrastructure Trustees Limited (Order dated 11.08.2017)**



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10. We have heard the arguments advanced by Shri. Vinod P.V, the learned counsel for the Operational Creditor and Shri. Ananth Merathia the learned counsel for the Corporate Debtor. The main argument advanced by the learned counsel for the Corporate Debtor is that a Memorandum of Understanding has been agreed upon between the parties on 28.11.2020. The date of default is 31.12.2020. Since the date of default is between 25.03.2020 to 25.03.2021, Section 10 A of the I&B Code, 2016 is applicable. Therefore, no application can be filed for initiating the Corporate Insolvency Resolution Process against the Corporate Debtor. The present application was filed on 20.12.2021 as the settlement agreed between the parties in IBA/29/KOB/2020 has failed. The Corporate Debtor had admitted the debt and also agreed to pay Rs. 1,26,55,586/- against the principal dues along with interest at the rate of 12% annum commencing from 45th day of the date of their respective invoices. Thus it is evident that the Corporate Debtor has admitted and acknowledged the debt, and the Corporate Debtor has agreed and entered into a Memorandum of Understanding on 28.11.2020. While initiating this fresh application the applicant had sent a Demand Notice under Section 8 of the I & B Code and no dispute has been raised against the filing of the present application. Moreover, in the MoU there is a clause to initiate fresh proceedings in case of failure in the settlement. The Corporate Debtor cannot now contend that this application has been filed during the Covid-19 period. Hence, Section 10 A of the I& B Code cannot be invoked in the present



application. The Application which has been filed in the prescribed form is complete in all respects.

11. Since all the conditions are fulfilled in the instant case, we find that the application submitted by the Operational Creditor is complete in all respects. Hence, it is a fit case for admission and to initiate CIRP against the Corporate Debtor.

12. In view of the above, the instant application filed by the Operational Creditor against **M/s Savute Textiles Private Limited** (Corporate Debtor) deserves to be **admitted**.

13. The application, therefore, is **ADMITTED** and moratorium is declared for prohibiting all of the following in terms of Section 14(1) of the Code as amended:

- a) 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;
- b) Transferring, encumbering, alienating or disposing off by the corporate debtor 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.



14. It is further directed that the services to the Corporate Debtor if continuing, shall not be terminated or suspended or interrupted during the moratorium period. The moratorium shall however not apply to such transactions as may be notified by the Central Government in consultation with any financial regulator and to a surety in a contract of guarantee to a corporate debtor.

- a) The order of moratorium shall have effect from the date 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.
- b) That the public pronouncement of the Corporate Insolvency Resolution Process shall be made immediately as specified under Section 13 of IBC.

15. The Operational Creditor has suggested the name of Mr. Vijay Nirmal Kumar Jain for appointment as the Interim Resolution Professional. However, his name does not appear in the list published by the IBBI in respect of Kochi Bench for the period from 01.01.2022 to 30.06.2022, in case the application is admitted. Hence this Bench appoints **Mr. BABU ABRAHAM KALLIVAYALIL**, Registration No. **IBBI/IPA-001/IP-P-02247/2020-2021/13406**, (Email:babucentralcouncil@gmail.com) Office at **II FLOOR, MANCHU COMPLEX, P. T. USHA ROAD, KOCHI, above Bapus Baby Shop, Ernakulam, Kerala, 682011** from the panel of IP's for appointment as IRP for the Kochi Bench for the period from 01.01.2022 to 30.06.2022, as the Interim Resolution Professional, to carry out the functions as mentioned under the IBC. The fee payable to IRP/RP shall comply with the IBBI Regulations/Circulars/Directions issued in this regard. The Insolvency Resolution Professional is directed to submit the copy of AFA (Authorization for Assignment) issued by the Insolvency Professional Agency within 2 days from the date of receipt of this order.



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16. We direct the Operational Creditor to deposit a sum of Rs. 2 lakh (Two Lakh) with the Interim Resolution Professional namely **Mr. BABU ABRAHAM KALLIVAYALIL** within three days from the date of receipt of this order, in order to meet out the initial expense to perform the duties assigned to the IRP in accordance with Regulation 6 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Person) Regulations, 2016. This amount may not be construed as the fee paid to the IRP.
17. The Registry is directed to immediately communicate this order to the Operational Creditor, the Corporate Debtor, and the Interim Resolution Professional.
18. Registry is also directed to send a copy of this Order to the Registrar of Companies, Kerala, for updating the Master Data of the Corporate Debtor. The Registrar of Companies shall send a compliance report in this regard to this Registry within seven days from the date of receipt of the order.

Dated this, the 11th day of March, 2022

sd/-
(Anil Kumar. B)
Member (Technical)

sd/-
(Ashok Kumar Borah)
Member (Judicial)

Certified to be True Copy

[Signature]
Deputy Registrar

National Company Law Tribunal
Kochi Bench

14/03/2022

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Memo No.CP(IB)45/KOB/2021/.....

Date: 14.03.2022

1. Advocate Vinod PV, India Law LLP, 2nd floor, Pulickal Building, Ernakulam North, 682018 (**Counsel for applicant**)
2. Advocate Awin Gopakumar, Veritiae Legal, XXVI/117, Lisie Hospital Road, Ernakulam, Cochin-682018 (**Counsel for respondent**)
3. Mr. BABU ABRAHAM KALLIVAYALIL, Office at II FLOOR, MANCHU COMPLEX, P. T. USHA ROAD, KOCHI, above Bapus Baby Shop, Ernakulam, Kerala, 682011. (**Interim Resolution Professional**)
4. The Registrar of Companies, Kerala (**By hand**)

