

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH (Court-II)
KOLKATA**

C.P. (IB)/12(KB)2021

An application under Section 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

In the matter of:

Lal Behari Singh

....Operational Creditor

-Versus-

M/s Carnation Industries Limited [CIN L27209WB1983PLC035920], having its registered office at 9/C Kumar Para Road 2nd Floor, Liluah, Howrah – 711 204.

....Corporate Debtor

**Date of hearing: 7/02/2023
Order Pronounced on : 12/09/2023**

Coram:

Smt. Bidisha Banerjee, Member (Judicial)

Shri Balraj Joshi, Member (Technical)

Appearances (via video conferencing / Physically)

Mr. K.C. Garg, Adv. : For Operational Creditor

Ms. Sunita Agarwal, Adv.

Mr. Kamran Hussari, Adv.

Md. Dilawar Khan, Adv.

ORDER

Per Balraj Joshi, Member (Technical)

1. The Court convened through hybrid mode.

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2. This is a Company Petition filed under section 9 of the Insolvency and Bankruptcy Code, 2016 (*'the Code'*) read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 by Mr. Lal Behari Singh, proprietor of Lalji Enterprise (*'Operational Creditor'*) for initiation of Corporate Insolvency Resolution Process (*'CIRP'*) against Carnation Industries Limited (*'Corporate Debtor'*).
3. The present Petition was filed on **12 January, 2021** before this Adjudicating Authority. The total amount of default is Rs.10,05,566/- (Rupees Ten Lakh Five Thousand Five Hundred Sixty Six only) [*Principal – Rs.6,72,629/- and Interest – 3,32,937/-*] inclusive of interest calculated @24% p.a. from the month of 01 April, 2017 till the payment is made; the ***date of default*** is stated to be as on **01 April, 2017**.
4. In part II of the Petition the authorized share capital of the Corporate Debtor is Rs.7,00,00,000/- and paid up share capital is Rs.3,45,71,600/-.Part – IV of the Petition deals with the particulars of the Operational Debt.
5. ***Submissions by the Ld. Counsel appearing on behalf of the Operational Creditor.***
 - 5.1 The Operational Creditor supplied Bricks Fire, Fire Clay and other products to the Corporate Debtor and subsequently raised Invoices and Challans for the same which were also acknowledged by the Corporate Debtor. The Operational Creditor and the Corporate Debtor had been running a continuous account.
 - 5.2 Several invoices were raised by the Operational Creditor upon the Corporate Debtor, total of which amounted to Rs.7,72,629/- (Rupees Seven Lakh Seventy Two Thousand Six Hundred Twenty Nine) Only as on 19 May 2018, out of which the Corporate Debtor has paid Rs.1,00,000/- (Rupees One Lakh) Only on 19 May 2018 as the Corporate Debtor made cumulative payments with regard to the invoices raised against them.
 - 5.3 The last payment which was received by the Operational Creditor from the Corporate Debtor was on 19 May 2018.

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- 5.4 The Corporate Debtor had failed and neglected to pay a sum of Rs.6,72,629/- Rupees Six Lacs Seventy-Two Thousand six hundred and twenty-nine) and interest thereon @ 24% per annum.
- 5.5 Thereafter the Operational Creditor through its Advocate, sent a demand letter dated 17 November, 2018 to the Corporate Debtor. The Corporate Debtor accepted and admitted its liability vide letter dated 24 November, 2018 with regard to the outstanding amount and stated that it requires 45 days' time to clear the outstanding dues to the Operational Creditor.
- 5.6 The Operational Creditor had sent a Form 3 Demand Notice dated 06 January, 2020, to the Corporate Debtor, demanding an amount of Rs.10,05,566/- (Rupees Ten Lakh Five Thousand Five Hundred Sixty Six only. The Corporate Debtor replied to the Form 3 Demand Notice vide letter dated 20 January, 2020 wherein they raised certain disputes for the very first time just in order to evade their liability to pay the operational debt owed to the Operational Creditor.
- 5.7 The said reply letter by the Corporate Debtor was received by the Operational Creditor and the same was duly replied by the Operational Creditor vide letter dated 3rd February, 2020.
6. ***Submissions by the Ld. Counsel appearing on behalf of the Corporate Debtor.***
- 6.1 Goods supplied by the Operational Creditor were never delivered on time; details of which are as follows;

<i>Purchase Order No</i>	<i>Needed by date</i>	<i>Delivery date</i>
23133	03 March, 2017	07 March, 2017 & 10 march, 2017
23329	22 March, 2017	04 April, 2017
24025	16 May, 2017	20 May, 2017
24523	26 June, 2017	28 June, 2017
24863	26 July, 2017	No delivery date given
24887	01 August, 2017	03 August, 2017
24910	27 July, 2017	05 August, 2017
25770	26 June, 2017	18 November, 2017
26147	13 November, 2017	21 November, 2017
26926	28 April, 2018	01 June, 2018

With regard to the aforesaid late deliveries by the Operational Creditor, the Corporate Debtor suffered loss

- 6.2 As per section 37 of Indian Contract Act, 1872 it is an obligation on the parties to the contract to perform or to offer the performance of their respective promises. Operational Creditor had failed to perform his respective obligation which is again in contravention of section 37 of Indian Contract Act, 1872.
- 6.3 The Corporate Debtor has immediately on receipt of material raised the dispute about the inferior quality in series of conversation but no action was taken by the Operational Creditor.
- 6.4 Besides Operational Creditor had always assured that he will take the proper step to compensate the loss incurred by Corporate Debtor. The Operational Creditor having failed to discharge its obligation to compensate the loss to Corporate Debtor which has incurred as because of supply of defective material and also with late delivery despite several assurance. Hence, Operational Creditor is not entitled to claim the balance of Rs. 6.72.629/- (Six Lac Ninety Seventy Two Thousand Six Hundred Twenty Nine only).
- 6.5 On the contrary, the Operational Creditor is liable to compensate Corporate Debtor for the loss and damages suffered by Corporate Debtor for supply of such defective materials which resulted in damage to the furnace of Corporate Debtor and had also led to lesser output, quality deviation in finished products and increase of cost in the production.
- 6.6 The Corporate Debtor has suffered substantial loss and damage in view of the inferior and deficient quality of materials supplied by the Operational Creditors.

Analysis & Findings

7. We've heard the Ld. Counsel appearing on behalf of the Operational creditor. The Ld. Counsel appearing for the Corporate Debtor last appeared on 07 November, 2022. The matter was thereafter listed on 09 December, 2022, 27 December, 2022 and 07 February, 2023 but none appeared on behalf of the Corporate Debtor. Be that as it may, we have also taken into record of the Reply filed by the Corporate Debtor.

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8. It has been submitted by the Operational Creditor that it was a running and continuous account to which certain payments have been made and the last payment being made on 19 May, 2018 which is discernible from the bank statements annexed with the petition at Annexure-E. Notice under Section 8 of IBC, 2016 was sent by the Operational Creditor on 06 January, 2020 claiming the above amount. The same has been replied by the Ld. Counsel for the petitioner on 03 February, 2020.
9. It is relevant to mention here that Advocate's notice was also sent on 17 of November, 2018 pursuant to which by a letter dated 24 November, 2018 (page 95 of the petition) the Corporate Debtor has admitted delay in payment and had requested for time of 45 days to clear the amount due which as per the letter dated 17 February, 2018 was Rs. 11,08,582/-.
10. In the reply affidavit, the Corporate Debtor has tried to conjure up some weak defence in a bid to raise the issue of pre-existing dispute. However, considering that no communication has been exchanged between the parties on this accord before hand. No proof of any such pre-existing dispute could be seen. This petition has been filed on 12/01/2021, whereas the date of default considering the nature of the transactions and the account being a 'running & continuous account', could be taken as the date of the last payment which was 19 of May, 2018. As such, the petition should have been filed by 18 May, 2021. Therefore, this petition is well within limitation.
11. In view of the above facts and circumstances, we are satisfied that the present petition made by the Operational Creditor is complete in all respects as required by law. The Petition establishes that the Corporate Debtor is in default of a debt due and payable and that the default is more than the minimum amount stipulated under section 4 (1) of the Code, stipulated at the relevant point of time. Further, no disputes were ever raised by the Corporate Debtor.
12. It is, accordingly, hereby ordered as follows:-
 - a. The application bearing **CP (IB) No. 12/KB/2021** filed by Mr. Lal Behari Singh, proprietor of Lalji Enterprise, the Operational Creditor, under section 9 of the Code read with rule 6(1) of the Insolvency & Bankruptcy

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(Application to Adjudicating Authority) Rules, 2016 for initiating CIRP against Carnation Industries Limited, 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.
- 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 Anubrata Gangoly** registration number **IBBI/IPA001/IP-P02662/2022-2023/1407**, email: ca.a.gangoly@gmail.com, Mobile no. 9836688828, is hereby appointed as Interim Resolution Professional (IRP) of the Corporate Debtor to carry out the functions as per the Code subject to submission of a valid Authorisation of Assignment in terms of regulation 7A of the Insolvency and Bankruptcy Board of India (Insolvency Professional) Regulations, 2016. The fee payable to IRP or the RP, as the case may be, shall be compliant with such Regulations, Circulars and Directions 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 Code.
- f. During the CIRP period, the management of the Corporate Debtor shall vest in the IRP or the RP, as the case may be, in terms of section 17 of the Code. 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 one week from the date of receipt of this Order, in default of which coercive steps will follow.

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- g. The IRP/RP shall submit to this Adjudicating Authority periodical reports with regard to the progress of the CIRP in respect of the Corporate Debtor.
 - 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 of section 7(5)(a) 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 and email 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.
13. **CP (IB) No. 12/KB/2021** to come up on **11.10.2023** for filing the periodical report.
14. A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

Balraj Joshi
Member (Technical)

Bidisha Banerjee
Member (Judicial)

The Order is pronounced on 12th day of September, 2023

SA (LRA)/ZIA(STENO)