IN THE NATIONAL COMPANY LAW TRIBUNAL, MUMBAI BENCH COURT III

C.P. No. 1847/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

Kailas Sinari
(Proprietor of Kails Sinari & Co.)
Parisha M. Shah, Advocate
T2, 3rd Floor, Machinery House, B. Bharucha Marg, Kalaghoda, Fort, Mumbai- 400023

……**Operational Creditor**

Vs

Shivam Steels and Tubes private Limited
(CIN: U27104MH1998PTC116496)
Registered office at: 264, A to Z, Industrial Estate, Ganpatrao Kadam Marg, Lower Parel, Mumbai City, Maharashtra- 400013

…….Corporate Debtor

Order delivered on: 22.09.2021

Coram:

Hon'ble Shri H.V. Subba Rao, Member (Judicial)
Hon'ble Chandra Bhan Singh, Member (Technical)

For the Applicant: Ms. Parish Shah, Advocate

For the Respondent: Mr. Ankush Bansal

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

ORDER

1. This Company petition is filed by *Kailas Sinari* (hereinafter called "Operational Creditor") seeking to initiate Corporate Insolvency Resolution Process (CIRP) against *Shivam Steels and Tubes Private Limited.* (hereinafter called "Corporate Debtor") by invoking the provisions of Section 9 Insolvency and Bankruptcy Code, 2016 (hereinafter called "Code") read with Rule 6 of Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for resolution of a Operational Debt of Rs. 13,93,534.25/-

The brief facts of the Operational Creditor are as follows:

a. The Operational Creditor is a proprietor of the Kailas Sianri & Co, being a chartered accountant and providing financial services and assistant to his clients.

b. The Corporate Debtor approached the Operational Creditor and sought his assistance and expertise to prepare the project report and otherwise assist the Corporate Debtor to apply for a corporate loan and receive the sanction letter in furtherance of the loan (hereinafter referred to as the 'said services').

c. Accordingly, the Operational Creditor prepared the proposal and report based on the inputs and requirement provided by the said Shivam Steels and Tubes Private Limited. Furthermore, the Operational Creditor met with the officers of the Saraswat cooperative Bank Limited, being the proposed financial institution, on several occasions along with the representatives of the Corporate Debtor and assisted the Corporate Debtor to comply with ll the requisitions and demand put forth by the said Saraswat bank. Accordingly, Saraswat Co-Operative Bank Limited vide tis letter dated 03.02.2018, approved the loan in principle.

d. Therefore, in order to crystallize the fee structure and to clarify the terms and conditions of the said services to be provided by my client, the Operational Creditor and the Corporate Debtor entered into an Agreement dated 09.03.2018 (hereinafter referred to as the 'said agreement'), whereby the remuneration for the services provided by Kailas Sinari & Co. was fixed at Rs. 20,00,000/- plus GST. The aforesaid remuneration was payable in two tranches, (i) Rs. 10,00,000/- on the sanction of the entire loan amo9unt and (ii) balance Rs. 10,00,000/- at the time of first disbursement of CC account.

e. Accordingly, as per the terms of said Agreement, the Corporate Debtor in partial discharge of its liability and being satisfied with the services provided by the Operational Creditor, forwarded a sum of Rs. 10,00,000/- to the Operational Creditor on 11.04.2018, for which due credit was given to it, on the loan being sanctioned.

f. Thereafter, first disbursement was received by it on 16.05.2018 and thus, the terms of the said agreement was concluded and the Operational Creditor became entitled to his balance payment. However, despite passage of a considerable amount of time, the balance payment of Rs. 10,00,000/- with GST at the rate of 18% amounting to Rs. 3,60,000/- (which was paid to the statutory authorities by Kailas Sinari & Co.) was not being released by the Corporate Debtor.

g. The Operational Creditor started forwarding reminders to the Corporate Debtor vide letters dated 11.09.2018 and 21.02.2019, however, the Corporate Debtor did not pay any heed to the Operational Creditor and started raising baseless allegations that did not touch upon the subject matter with a view to defer the payment to be made.

h. Ultimately, the Operational Creditor raised an Invoice for its balance payment dated 19.02.2019 and bearing reference No. 150/2018-19 in accordance with the schedule for payment fixated by the parties under the said Agreement. However, the Corporate Debtor addressed a letter refusing to pay the balance sum and further refused to entertain any communications in this regard.

i. The Operational Creditor states that in the course of his persistent follow ups with the Corporate Debtor, the Operational Creditor learned that the said Saraswat Bank had refused to release further sums to the Corporate Debtor, because the corporate Debtor in violation of the terms of the sanction letter and the said agreement had failed to repay loans to its erstwhile financial lenders, who had in turn refused to give its NOC for the *pari passu* charge to be created on the assets secured with the erstwhile lender and proposed to be mortgaged with the said Saraswat bank under the said loan.

j. Hence, the Corporate Debtor has refused to pay the balance to the Operational Creditor under the false reason that since further disbursals have not been received by the Corporate Debtor, The Operational Creditor has made representations and hence, is not entitled to its balance payment. The Corporate Debtor, however, has not disputed its liability towards the operational creditor and has stated that on receipt of all disbursements from the Bank, the balance undisputed payment shall be released to the Operational Creditor.

k. The Operational Creditor states that as per the terms stipulated under the said Agreement, the Operational Creditor had raised invoice to the Corporate Debtor for the said Services provided by it as per the timeline that was agreed between both the parties. The first disbursal was received by the Corporate Debtor in May, 2018 and hence, the Corporate Debtor has unlawfully withheld the payments for nearly one year, which as per the Corporate Debtor's own contention is payable to the Operational Creditor.

2. Thereafter, being in losses, the Operational Creditor through its advocate sent a demand notice under Section 8 of the Code demanding payment of the unpaid operational debt due from the Corporate Debtor on 06.03.2019, bearing reference no. 33 of 2019. The Demand Notice was duly received by the Corporate Debtor which is evidence by the acknowledgment card received by the advocate for the Operational Creditor. The Corporate Debtor sent a reply on 15.03.2019 to the Demand Notice and evasively denied all the contentions and allegations put forth by the operational Creditor. The Corporate Debtor has raised these disputes as nothing but an afterthought to evade the legal consequences of its liability or at least defer the payment due to its financial position. The said reply was appropriately responded to by the Operational Creditor. Hence the Operational Creditor filed

3. The Corporate Debtor filed affidavit in reply dated 27.08.2018 along with certain emails that were exchanged between the Corporate Debtor and the Operational Creditor. The Operational Creditor also filed affidavit in rejoinder dated 22.10.2019 enclosing the copies of the sanction letter dated

31.03.2018 issued by the Saraswat Bank to the Corporate Debtor.

FINDINGS

4. The main contention of the Corporate Debtor is that the Operational Creditor has not performed his professional obligations in getting the sanction and disbursal of the entire loan amount of Rs. 42.38 Crores as mentioned in the mandate letter dated 09.03.2018 for which the Corporate Debtor has raised a dispute with the Operational Creditor and therefore the Corporate Debtor is not liable to pay the balance fees as claimed by the Operational Creditor in the above Company Petition. In order to substantiate the existence of pre-existing dispute the Corporate Debtor relied on emails dated 12.09.2018, 11.09.2018, 08.08.2018 and letter dated 21.02.2019 addressed by the Corporate Debtor to the Operational Creditor. The Corporate Debtor also devoted so much space in the affidavit in reply in attributing the motives to the Operational Creditor and suppression of the above referred emails by the Operational Creditor etc.

5. Be that as it may in the light of the above pleadings, the only issue that needs to be decided in the above Company Petition is:

   Whether there is a pre-existing dispute between the parties?

6. In order to decide the above issue, it is important to mention here the following undisputed facts between the parties:
   i. Entering into an agreement between the parties through mandate letter dated 09.03.2018 duly accepted and signed by both parties.
   ii. Sanction of loan facilities by Saraswat Bank vide sanction letter dated 31.03.2018.

iii. Both parties did not dispute the respective documents relied upon by them annexed to the respective pleadings namely affidavit in reply, rejoinder and the Company Petition.

iv. Disbursal of Rs. 12.50 crores by Saraswat Bank to Corporate Debtor under Cash Credit account.

7. Let us examine the documents relied by the parties to decide the issue of pre-existing dispute. The first and foremost document is the letter of mandate dated 09.03.2018 under which both parties entered into the contract. The said mandate letter was accepted and duly signed by the Corporate Debtor.

8. It is very clear from the above letter of mandate that the Saraswat Bank has in principle approved for sanction of Rs. 42.35 crores to the Corporate Debtor. The Corporate Debtor has agreed to pay Rs. 25,000/- plus GST to the Operational Creditor on getting in principle sanction and the total consultancy charges are fixed at Rs. 20 Lakhs + GST on the entire loan amount sanctioned out of which 10 Lakhs + GST is payable against final sanction and balance amount of Rs. 10 Lakhs + GST at the time of first disbursement of Cash Credit amount.

9. It is also very clear that Saraswat Bank vide its letter dated 31.03.2018 sanctioned the following loan facilities to the Corporate Debtor:

(Rs. In Lakh)

Type of Facility	**New Applied**	**New Recommend**	**Total Sanctioned**
Cash Credit	500.00	500.00	500.00

Term Loan I (P&M)	642.00	642.00	642.00
Term Loan II- Loan against Property	524.06	524.06	524.06
Total Funded	1666.06	1666.06	1666.06
Letter of Credit Cum Buyer's Credit	1500.00	1500.00	1500.00
Total N-Funded	1500.00	1500.00	1500.007
Total Fb+NFB	3166.06	3166.06	3166.06

10. It is also an admitted fact by the Corporate Debtor that an amount of 18.75 Crores (12.50 Crores as Cash Credit and Rs. 6.25 Crores as Term Loan) has been remitted by the bank to the Corporate Debtor directly. The contention of the Corporate Debtor is that the Operational Creditor could not arrange the sanction and disbursement of the entire amount of Rs. 42.38 Crores as mentioned in the letter of mandate due to the non-cooperation/in action on the part of the Operational Creditor therefore they are not obliged to pay remaining amount.
11. In support of the above contention the Corporate Debtor relied upon the above referred emails and from the perusal of the above referred emails annexed by the Corporate Debtor to their affidavit in reply makes it very clear that the Corporate Debtor while confirming and admitting the letter of mandate dated 09.03.2018 throwing blame on the Operational Creditor in not able to arrange the full amount of loan from Saraswat Bank. From the careful perusal of the mandate letter makes it very clear that the Corporate Debtor is bound to pay 20 Lakhs + GST in 2 installments namely 10 lakhs + GST against final sanction

and balance amount of Rs. 10 Lakhs + GST at the time of first disbursement of Cash Credit account.

12. It is the admitted case of the Corporate Debtor in his reply that an amount of Rs. 12.50 crores was disbursed under cash credit account as <u>first installment</u>. As rightly contended by the Operational Creditor, the Operational Creditor being a Chartered Accountant is a mere facilitator in rendering professional service to the Corporate Debtor for processing the required papers for obtaining the loan. The Operational Creditor has no role as a professional with regard to the actual amount of sanction and disbursement of loan by the Financial institution as it is subject to eligibility requirements of Corporate Debtor and also prerogative of the financial institution. As rightly contended by the Operational Creditor no proportionate fees depending on the amount of sanction is agreed between the parties in the mandate letter. The mandate letter merely says that the Operational Creditor has agreed to pay 20 lakhs in 2 tranches. First tranche of Rs. 10 lakhs + GST on getting approval of the loan facility and second tranche of Rs. 10 Lakhs + GST on getting first disbursement into the cash credit account. After compliance of getting approval and disbarment of first installment into the cash credit account of the Corporate Debtor, the Operational Creditor will automatically become *functus officio* and the Corporate Debtor has no moral or legal right to insist the Operational Creditor for sanction and disbursement of the entire amount according to their business needs irrespective of their eligibility as it is beyond the scope and control of the Operational Creditor. Non-disbursement of remaining loan amount by bank is always subject to so many compliances by Corporate Debtor for which

Operational Creditor cannot be held responsible. At times it is due to breaches committed by Corporate Debtor as well.

13. In view of the above observations and findings, this Bench feels that there is no pre-existing dispute between the parties in the above Company Petition and the theory of pre-existing dispute introduced by the Corporate Debtor is only an after though to avoid payment of lawful professional charges due to the Operational Creditor and the claim of the Operational Creditor deserves to be admitted. The plea of pre-existing dispute raised by Corporate Debtor is only a feeble defence that requires no further investigation whatsoever as per settled proposition of law. Accordingly, the above company petition is admitted by passing the following:

ORDER

a. The above Company Petition No. (IB) -1847(MB)/2019 is hereby allowed and initiation of Corporate Insolvency Resolution Process (CIRP) is ordered against Shivam Steels and Tubes Private Limited.
b. Since the Operational Creditor has not suggested the name of any person to perform the duties of the Interim Resolution Professional (IRP) in the petition, this Bench is appointing the IRP from the list furnished by the Insolvency and Bankruptcy Board of India (IBBI). This Bench hereby appoints **Mr. Jagdish Ratanlal Ahuja** (pcsjrahuja@gmail.com), Insolvency Professional, Registration No: IBBI/IPA-002/IP-N00401/2017-2018/11175 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.2 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.

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 allowed.

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

Sd/-

CHANDRA BHAN SINGH
MEMBER (TECHNICAL)

SD/-

H.V. SUBBA RAO
MEMBER (JUDICIAL)