

**IN THE NATIONAL COMPANY LAW TRIBUNAL,  
MUMBAI BENCH, COURT - II**

**C.P. No. 877/IBC/MB/2022**

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*

**State Bank of India**

**Through Assistant General Manager, Mr.**

Having registered office at: State Bank Bhavan, Madam Cama Road, Fort, Mumbai – 400021

And having Branch at : Korte Herentalsestraat 3, B-2018, Antwerpen 1, Belgium.

..... Applicant/Operational Creditor

Vs

**M/s MKM Diamonds Private Limited**  
(Formerly known as Eurostar Diamonds India Private Limited.

Having Registered Office at : 1304/1305, A-Wing, the Capital, Plot – C 70, Bandra Kurla Complex, Bandra East, Mumbai – 400051.

.....Corporate Debtor

**Order delivered on:- 01.09.2023**

*Coram:*

**Mr. Anil Raj Chellan**  
**Member (Technical)**

**Kuldip Kumar Kareer**  
**Member (Judicial)**

***Appearances:***

For the Operational Creditor : Adv. Girish Utangale

For the Corporate Debtor : PCS, Dr. K. S. Ravichandran

**ORDER**

***Per :- Kuldip Kumar Kareer, Member Judicial***

1. This Company petition is filed by State Bank of India, through the Assistant General manager Rajesh Kumar Dwivedi (hereinafter called “**the Operational Creditor**”) seeking to initiate Corporate Insolvency Resolution Process (**CIRP**) against M/s MKM Diamonds Private Limited (hereinafter called “**Corporate Debtor**”) alleging that the Corporate debtor committed default in making payment to the Petitioner. This petition has been filed by invoking the provisions of Section 9 Insolvency and bankruptcy code (hereinafter called “**Code**”) read with Rule 4 of Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 on the ground that the Corporate Debtor has failed to make payment of a sum of Rs. 21,28,72,302.48/- (Rupees Twenty-One Crore Twenty-Eight Lakhs Seventy Two Thousand Three Hundred and Two and Forty Eight Paise) as on 15.02.2017

**The submissions by the Operational Creditor: -**

2. The State Bank of India, Antwerp granted certain credit facilities to Eurostar Diamond Traders NV, Antwerp. During the course of business, said Eurostar Diamond Traders NV had drawn two invoices bearing invoice no, 9001602957 dated 03.10.2016 and invoice no. 9001602984 dated 05.10.2016

respectively on Eurostar Diamonds India Private Limited now known as MKM Diamonds Private Limited, (Corporate Debtor).

3. The Corporate Debtor duly accepted the said bills drawn upon them by Eurostar Diamond Traders NV, Antwerp thereby endorsing their signatures and agreed to pay the said invoice amount on the respective due dated being 31.01.2017 and 02.02.2017 respectively to State Bank of India, Antwerp. Accordingly, the said bills were discounted by the Applicant herein and paid the amount of the said bills to Eurostar Diamond Traders NV. The Copies of the said invoices are annexed to the petition.
4. Under the said terms of the invoices, the Applicant was to be paid a total amount of Rs. 16,77,17,132.21/- (Rupees Sixteen Crore Seventy-Seven Lakh Seventeen Thousand One Hundred and Thirty-Two and Twenty One Paise) both of which became due on 15.02.2017.
5. There was a clear understanding between the parties specifically on the part of the Corporate Debtor as the Corporate Debtor had accepted the invoices and on account of such acceptance, the Applicant Bank discounted the said bills and remitted the amount to Eurostar Diamond Traders NV, Antwerp.
6. It is pertinent to note that, an initial payment of Rs. 1,58,10,599.10/- had been made by the Corporate Debtor on 15.05.2017 in respect to the invoice no. 9001602957 dated 03.10.2016 and in respect of the invoice no. 9001602984 dated 05.10.2016 an initial payment of Rs. 2,98,16,200/- had been made by the Corporate Debtor on 26.09.2017.
7. Thus, from the above, it is clear that the Corporate Debtor was well aware about the outstanding dues and admits its obligation to pay the amounts in respect of the said invoices to the Applicant. The Corporate Debtor has failed and neglected to pay the remaining amount in respect of the said

invoices to the Applicant.

8. Due to non-payment of the dues by the Corporate Debtor, the Applicant addressed a Demand Notice dated 09.10.2020 thereby demanding the unpaid debt due from the Corporate Debtor. The Corporate Debtor vide its reply to the demand notice dated 05.11.2020, stated that certain amounts in respect of the said two invoices raised by Eurostar Diamond Traders NV, Antwerp were set-off by the Respondent on instructions of the Eurostar Diamond Traders NV. The Corporate Debtor, without the consent of the Applicant could not set-off the amount in respect of the said invoices against other transactions. Therefore, the Corporate Debtor does not get discharged from its obligation to honour the bill in favor of the Applicant.
9. Hence, in view of above facts, the Applicant has humbly prayed that the Petition be admitted and Insolvency proceedings to be initiated against the Corporate Debtor.

**Reply filed by the Corporate Debtor: -**

10. The Corporate Debtor had filed their Affidavit in Reply (“**Reply**”) and denied each and every statement, contention and allegation made by the Petitioner.
11. At the outset, it is submitted by the Corporate Debtor that no amount is due to the Applicant from the Corporate Debtor on any account. The Applicant cannot be regarded as the Operational Creditor nor the Respondent can be called as the Corporate Debtor of the Applicant. According to Section 3(8) of the Code, a Corporate Debtor means a Corporate Person who owes a debt to any person. The Respondent herein does not owe any Operational Debt to the Applicant. The Applicant has failed to establish its case that it

owes any debt or any default in payment of such debt has been made by the Respondent.

12. The Respondent has raised the issue of maintainability on the ground of limitation. The Applicant has relied upon two invoices i.e. 9001602957 dated 03.10.2016 and 9001602984 dated 05.10.2016. the said invoices are payable on 31.01.2017 and 02.02.2017 respectively to State Bank of India Antwerp (para no. 3 of the Petition at pg. no. 10.) The Applicant has filed the present petition on 08.08.2022. Therefore, in respect of each date of initiation, the petition is barred by limitation as the Applicant has filed the present petition after the expiry of 3 years from the date of default occurred. The date of default mentioned in part IV of the petition is 15.02.2017 and hence barred by limitation. There is no justification on the part of the Applicant as to how the date of default is treated as 15.02.2017.

13. The Applicant has also failed to prove as to how the largest commercial Bank in India falls under the definition of Operational Creditor. The Operational debt is defined as a claim in respect of payment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority. Further, as per Regulation 7(2) (i) and 7 (2) (ii) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 existence of debt owed to the Operational Creditor may be proved either by way of contract entered in to between the Operational Creditor and Corporate Debtor or an invoice demanding payment for goods or services supplied to the Corporate debtor. However, in the present case, no invoice for supply of any goods or services has been issued by the Applicant in order to be entitled for claiming as an Operational Creditor. The

Applicant i.e. State Bank of India is neither an Operational Creditor nor has any privity of contract or right of claim against the Respondent. The Respondent has not entered into an obligation enforceable in the nature of a contract with the Applicant.

14. The Respondent Company is commercially solvent going concern. The Respondent never had any dealing nor has availed any loan or facilities from the Applicant and the Applicant State Bank of India, Mumbai has nothing to do with the invoices referred to in this Application and the same is evident from the documents, as referred to by the Applicant in its petition.
15. The Applicants in their own averment has submitted that it has provided financial facility to a foreign entity under some contractual arrangement and the same has not been brought on record. No effective adjudication of such claims has been brought on record in which facilities were provided by the Applicant to a foreign entity without the presence of the foreign entity.
16. If there existed any contractual arrangement between the Applicant and the foreign entity, both being foreign entities cannot have claims to entitlement as the Adjudicating Authority does not have the jurisdiction. Further, as per the books of accounts between the foreign entity and the Respondent, nothing is due to the foreign entity.
17. Even prior to the date of the invoices, the Applicant allegedly entered in a financial arrangement with the foreign entity and the same is not a party, there has not been any communication or correspondence between the Applicant and the Respondent about any contractual arrangement imposing any binding obligation upon the Respondent.

18. The Applicant for the first time had come up with a demand notice under Section 8 of the Code on 09.10.2020. The Respondent sent preliminary reply on 16.10.2020 and a detailed reply on 05.11.2020 to the demand notice thereby rebutting the entire claim.
  
19. The Respondent further submits that no tripartite agreement amongst the Applicant, the Foreign entity and the Respondent on the discounting facility allegedly availed by the foreign entity was ever executed. The invoices were raised by the foreign entity is located at Antwerp and the payment instructions were also made by them. No money is due against those invoices. There was no understanding between the parties with respect to the bills discounting facility nor the Respondent was a party to such financial arrangements.
  
20. Further, with respect to Para 8(5) and (6), of the petition, the Respondent submits that the Applicant has no locus to question any arrangement between the sellers and buyers of goods in accordance with their commercial wisdom. The initial payments have been made upon on receipt of the instructions from the Foreign Entity. The Respondent denies if the prior consent of the Applicant ought to have been obtained before the set-off of the amount in respect of the said invoices. No third or any other party, has any role as to the commercial determination of terms of contract between the Foreign Entity and the Respondent. The request letter dated 31.03.2018 and 18.05.2018 by Foreign Entity to set-off for invoices 9001602957 and 9001602984 is annexed to the Reply. The Respondent submits that a copy of letter of intimation by the Foreign Entity for setting off the amount for the invoice No. 9001602957 is enclosed in the reply.

21. Further, as regard invoice No 9001602984, the initial payments were made to the Applicant. However, by a letter of intimation, Eurostar Diamond Traders NV had requested to remit the balance amount to Barclays Bank PLC, London. Copy of letter dated 17.05.2018 for change of bank details is enclosed in the reply. The Respondent further submits that the remittance of payment to the Applicant was made in accordance with the FEMA guidelines by the RBI. There exists a record for the Respondent with the Applicant bank for years.
22. Further, it has been submitted by the Respondent that State Bank of India, Malad branch, Mumbai has already issued "No Dues Certificate" to the Respondent showing closure of the credit facilities and timely repayment of facility by the Respondent. It further shows that no amount is payable by the Respondent to the Bank.
23. Hence, under such circumstances where this Adjudicating Authority has no jurisdiction to adjudicate dispute between two foreign parties, wherein no information has been provided by the Applicant against the foreign party and adjustments made thereto and as there do not exist any Operational Debt, the Respondent humbly prays the petition to be dismissed.

**Rejoinder filed by the Operational Creditor:**

24. In the rejoinder, the Petitioner submits that that the respondent falls in the category of the Corporate Debtor since the respondent is liable for debt to the Applicant within the meaning of the section 3, (6), (85) and (11) of Code. The Respondent Corporate Debtor being the drawee of the Bills is jointly and severally liable to pay the dues along with the drawer under the

said bills. Therefore, since the Respondent has committed default, the present petition is maintainable.

25. The Respondent has accepted the bills and duly admitted its obligations to pay to Applicant under the said bills/invoices. The Respondent being the drawee of the said bills/invoices is bound and liable to pay the amount due under the said bills to the Applicant on demand being the holder of the said bills.
26. Further, the Applicant denies as to claim of the applicant being barred by limitation, as alleged by the Respondent. Two bills dated 03.10.2017 and 05.10.2017 were payable on their maturity dates viz., 13.02.2017 and 17.02.2017 respectively. The Respondent were to make total payments of Rs. 21,28,72,302.48/- under the said two bills duly accepted by the respondent. The Respondent has made the part payments of Rs. 4,51,55,170.28 on 15.05.2017 and 04.04.2018 leaving balance of Rs. 16,77,17,132.21 as on date of filing of application. Hence, the limitation period would start from 26.09.2017. As per the Hon'ble Supreme Court the extension of limitation on account of Covid- 19 is from 15.03.2020 to 28.02.2022. Hence, after excluding this period, the present application was filed on 08.08.2022, though it could be filed till 26.09.2022. Hence, the present application is filed much within time and not barred by limitation.
27. The Applicant have sanctioned the Bills Discounting Facilities to the sister concern of the Respondent and the said two Bills which were drawn by the sister Company are duly accepted by the Respondent and having confirmed their obligation and liability to pay to the Applicant by making endorsement on the instruments itself and also having made part payments under the said

bills, the Respondent certainly falls within the meaning of Corporate debtor under the Code and the Applicant also falls under the meaning of Operational Creditor.

28. The Applicant states that the Affidavit in reply has been affirmed and signed by one Mr. Paresh Kantilal Mehta one of the Directors of the Respondent. The declaration dated 18.05.2018 in the reply is of the sister concern of the Respondent Company the drawer of the import bills M/s Eurostar Diamond Traders NV, is signed and executed by one Mr. Kaushik Kantilal Mehta. Hence, it is clear that the sister company M/s Eurostar Diamond Traders NV at Belgium draws bills in favour of the Respondent being the drawee and acceptor of said bills for the delivery of rough diamonds. The Respondent has accepted the liability to pay to the applicant by making endorsement on the said bills and agree to pay on demand the amount due under the said bills for sale of rough diamonds.

29. Hence, upon the presentation of the import Bills, the Respondent who is the acceptor of the said import bills, comes out with novel idea that the balance amount due under the said bills have been mutually set off by both of them being family concern whereby the Respondent says that at the request of the drawer of the bills the balance amount is mutually amongst themselves stands duly paid by way of set off. This is nothing but a fraud played by both parent Company and its sister concern the Respondent herein as both the companies are being run by one family, one at Belgium and one in India, Mumbai.

30. The Respondent vide its letter dated 31.03.2018 (pg. 30 of reply) addressed to HDFC Bank has also confirmed to pay to the Applicant amount under

the said import bills. This makes it clear that the Respondent was aware of its liability to pay the amount to the Applicant under the said import bills, but decided to set off certain amounts inter se between two family companies and agreed and confirmed to pay the balance amount to the Applicant.

31. The Respondent cannot escape from its liability to pay and say that at the request of their sister company, they mutually decided to set off the claim amount for which they were jointly and severally liable to pay. The Respondent has also admitted the fact that they have made part payments to the Applicant.
32. Since the drawer and the acceptor are jointly and severally liable to pay under the import bills, the Respondent is liable to pay and the same is an Operational Debt and the same has been remained unpaid in spite of several demands. In view of the said facts, the Petition is liable to be admitted and Corporate Insolvency Resolution Process is to be initiated against the Corporate Debtor.

### **FINDINGS**

33. During the course of arguments, it has been contended by the Counsel for the Operational Creditor that the factum of existence of an operational debt and its default committed by the Corporate Debtor has been established on record it has further been pointed out by the Counsel for the Operational Creditor that the invoices dated 03.10.2016 were endorsed to the State Bank of India, ANTWERP by the seller namely Eurostar India Diamonds India Pvt. Ltd. The said endorsement in the favour of the Operational creditor was duly accepted by the Corporate Debtor in as much as the

Respondent/Corporate Debtor made part payments towards the outstanding amounts of the aforesaid invoices. Therefore, according to the Counsel for the Operational Creditor it is a fit case for admission u/s 9 of the Code, 2016.

34. On the other hand, the Counsel for the Corporate Debtor has argued that the so called debt on the basis on which the instant Application has been filed is not based on any contract of supply of goods. Therefore, the transaction is not covered under the definition of operational debt. The Counsel for the Operational Creditor further argued that this Authority has no jurisdiction to entertain the present Application as the entire transaction of sale between the alleged seller and the Corporate Debtor took place in Belgium. The Counsel for the Corporate Debtor has further contended that even the provisions of the India Contract Act, 1872 cannot be said to be applicable to the transaction in question as the transaction has not been contracted in India.
35. The counsel for the Corporate Debtor has further argued that the Corporate Debtor has paid the entire amount against sale invoices no. 9001602984 as is evident from the set of certificate dated 18.05.2018 issued by Namesh Diyora Associates Charter Accountants attach with the counter statement filed by the Corporate Debtor. According to the Counsel for the Corporate Debtor since the payment has been made to the seller by way of set off, nothing remains due to be paid under the invoices in question and therefore, on this ground also, the application is liable to be dismissed.
36. The Counsel for the Corporate Debtor has further argued that even otherwise the Application is barred by time. The invoices were issued on 31.01.2017 and 02.02.2017 whereas the present Application has been filed

in the year 2022 more particularly on 12.07.2022 which is palpably barred by time and is liable to be dismissed on this ground also.

37. We have weighed the contentions raised by the Counsel for the parties and have also carefully gone to the records.

38. So far as the contention raised on behalf of the Corporate Debtor that the debt in question does not fall within the definition of Operational debt is concerned, it is pertinent to mention that undisputedly the Corporate Debtor purchased goods from Eurostar Diamonds India Pvt. Ltd. by way of two invoices dated 03.10.2016 and 06.10.2016 issued by Eurostar Diamonds India Pvt. Ltd. It is also not disputed that the said invoices were endorsed in favour of the Applicant Bank and the endorsement of the said invoices were duly accepted and approved by the Corporate Debtor. From these facts, it is evident that the entire transaction was a transaction of sale between the Eurostar Diamonds India Pvt Ltd. and the Corporate Debtor and the seller only endorsed that the payment be made directly to the Applicant Bank which entered into the shoes of the seller so far of the payment of the invoices is concerned. Therefore, it is evident that the payment due emanated from the transaction of sale of goods which is out and out covered under the definition of Operational debt. In this regard, a reference can also be laid down by the Hon'ble NCLAT in Minions Ventures Pvt. Ltd. V/s TDT Coper Ltd. 2013 ibclaw.in 209 NCLAT whereby it has been held if the Appellant as a financier discounted the invoice and deposited the amounts into an escrow/nodle account and the seller transferred its right to receive the money under the invoices in favour of the financier who, having entered into the shoes of the seller became the Operational Creditor. In the light of the law laid down in the cited case, the facts of which squarely apply to the instant case, it cannot be said that the

debt in question is not an Operational debt or that Application u/s 9 is not maintainable.

39. It has further argued on behalf of the Corporate Debtor that since the entire payment has been made to the seller through HDFC Bank by way of set off as depicted in the charter account certificate dated 18.05.2018 nothing remains payable in respect of the invoices in question. Even this contention raised on behalf of the Corporate Debtor is not tenable. In this context, it is worth mentioning that after the invoices in question were assigned to the Applicant Bank and the said assignment was duly endorsed by the Corporate Debtor who also admittedly made part payments towards the said invoices as has been candidly admitted in para A (vi) of the counter statement filed by the Corporate Debtor in our considered view, once the Corporate Debtor had agreed to the arrangement of making payment directly to the Applicant Bank instead of the seller, it was left with no right to wriggle out of this arrangement and directly make the remaining payment to the seller without the knowledge and consent of the Applicant Bank. Therefore, the plea raised on behalf of the Corporate Debtor that it has made the remaining payment of the invoices in question to the seller directly by way of the set off is totally misconceived and unacceptable which deserves to be out rightly rejected.

40. It has also been contended on behalf of the Corporate Debtor that this Adjudicating Authority has no jurisdiction to entertain and try the present Petition as the alleged sale transaction took place out side India. Even this contention is devoid of any force or substance considering the fact that the Corporate debtor accepted the arrangement and agree to pay the amount of the invoices to the Applicant Bank and also made part payments under the

arrangement. Accordingly, even this contention raised on behalf of the Corporate Debtor is held to be untenable.

41. Lastly, it has been argued on behalf of the Corporate Debtor that the instant Application u/s 9 of the Code is palpably barred by time. In this regard it has been pointed out that the due date of the two invoices was 03.10.2016 and 05.10.2016. The due date of the invoices was 31.01.2017 and 02.02.2017 respectively. Admittedly part payment of Rs. 1,58,10,599.10/- was made by the Corporate Debtor in 15.05.2017 in respect of invoice dated 03.10.2016. The Corporate Debtor further made a payment of 2,98,16,200/- on 26.09.2017. It cannot be disputed that any part payment made within the period of limitation amounts to an acknowledgment on the part of the debtor. That being so, the limitation period began to run in respect of the two invoices on 15.05.2017 and 26.09.2017 respectively when the part payments were made by the Corporate Debtor. Taking that into account, the instant Application u/s 9 should have been filed within a period of three years from 15.05.2017 and 26.09.2017 i.e. up to 14.05.2020. It cannot be disputed that on 14.05.2020 lockdown had been due to Covid pandemic. The Hon'ble Supreme Court in the suo-moto writ petition no. 3 of 2020 decided on 10.01.2022 has held that the period from 15.03.2020 till 28.02.2022 shall stand excluded for the purpose of limitation as may be prescribed under any general law or special laws in respect of all judicial or quasi-judicial proceedings. Consequently, the period from 14.05.2020 to 28.02.2022 shall stand excluded from Taking into consideration, the aforesaid order of the hon'ble Supreme Court, if a period from 15.03.2020 till 28.02.2022 is excluded from reckoning, the instant Petition which was filed in 12.07.2022 cannot be said to be barred by limitation by any stretch of imagination. Therefore, the plea that the Application is barred by time also deserves to be repelled.

42. No other points have been raised on behalf of the Corporate debtor.
43. On the basis of the fore going discussion, we are of the considered view that the Operational Creditor has been able to establish the existence of an Operational debt and its default having been committed by the Corporate debtor. The Application is also within time. Therefore, the Application deserves to be admitted. It is ordered accordingly, in the following terms.

### **ORDER**

- a. **The above Company Petition No. (IB) -877 (MB)/2022 is hereby admitted** and initiation of Corporate Insolvency Resolution -Process (CIRP) is ordered against MKM Diamonds Private Limited.
- b. This Bench hereby appoints **Ms. Dipti Amit Thite**, Insolvency Resolution Professional, having Registration No: **IBBI/IPA002/IPN01087/2021-2022/13629** as the Interim Resolution Professional having email id :- **dipti@csdiptithite.com** to carry out the functions as mentioned under the Insolvency & Bankruptcy Code, 2016.
- c. The Operational Creditor shall deposit an amount of Rs.5 Lakh towards the initial CIRP cost 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 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 concerned Registrar of Companies 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/-**

**ANIL RAJ CHELLAN  
(MEMBER TECHNICAL)**

**Sd/-**

**KULDIP KUMAR KAREER  
(MEMBER JUDICIAL)**