

**IN THE NATIONAL COMPANY LAW TRIBUNAL,**  
**KOLKATA BENCH, KOLKATA**

**CP (IB) No.998/KB/2018**

In the matter of:

An application for initiation of Corporate Insolvency Resolution Process 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;  
And

In the Matter of:

Shri Shyam Industries Private Limited, having its registered office at 39, Dr. M.N. Ghosh Road, Ranigunj, West Bengal - 713 347.

.....Operational Creditor

And

In the Matter of:

Prosperity Steels Limited, having its registered office at 400, G.T. Road (South), P.S. Shibpur, Howrah - 711 102, West Bengal.

..... Corporate Debtor

Date of Hearing: 30<sup>th</sup> September 2019

Order Delivered on 4<sup>th</sup> October 2019

**Coram:**

**Madan B Gosavi, Member (J)**

**Virendra Kumar Gupta, Member (T)**

For the Operational Creditor : Mr. Shaunak Mitra, Advocate

For the Corporate Debtor : 1. Mr. Jishnu Saha, Advocate  
2. Mr. Debduitta Chakraborty, Advocate  
3. Mr. S. Manot, Advocate

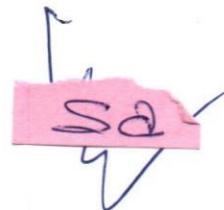
**ORDER**

**Virendra Kumar Gupta, Member (Technical)**

This petition has been filed under Sec.9 of the Insolvency & Bankruptcy Code, 2016 by the operational creditor, viz., Shri Shyam Industries Private

pd





Limited for initiation of corporate insolvency resolution process against the corporate debtor, viz., Prosperity Steels Limited. The amount of default has been claimed at Rs.1,58,66,670.42 which includes interest of Rs.10,76,008.42. The default has been claimed to have occurred on 6/10/2017.

2. Ld. Counsel for the operational creditor appeared and stated that between 22/9/2017 till 5/4/2018 operational creditor supplied different quantity and quality of pig iron as per agreed specification and rate. All such goods were received and accepted by the corporate debtor, however, out of total amount of supplies, which stood at Rs.1,47,90,662/-. corporate debtor made a payment of Rs.15,75,000/- through RTGS on 11/5/2018.

3. Ld. Counsel contended that notice of demand was delivered and was fully complied with the requirements of Rules and Regulations of Insolvency & Bankruptcy Code, 2016. Thereafter, he drew our attention to page 53 which contained two emails of the corporate debtor dated 13/5/2018 and 15/5/2018 wherein, as claimed, the corporate debtor had acknowledged the debt and promised to make payment.

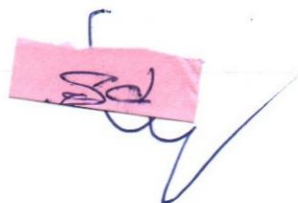
4. Ld. Counsel for the operational creditor also submitted that in the reply to the notice issued under Sec.8 of Insolvency & Bankruptcy Code, 2016, the corporate debtor raised frivolous issues to deny the existence of debt by making frivolous pleas, such as, supplies were never made or were not supported by the documentary evidences to show that goods were supplied. Ld. Counsel further drew our attention at page 69 to 73 of the paper book to show that the transactions between the parties had been confirmed by the corporate debtor. Ld. Counsel referred to para (i) at page 5 of reply of the corporate debtor to show that in the said para, the corporate debtor had accepted issuance of mails dated 13/5/2018 and 15/5/2018, hence, there could not be any dispute as regards to



supplies made by the operational creditor and also regarding default committed by the corporate debtor in making payment of amount due to the operational creditor.

5. Ld. Counsel appearing on behalf of the corporate debtor submitted that the corporate debtor was running a foundry and materials were procured from Neo Metaliks Limited or Tata Metaliks Limited, however, due to financial/commercial reasons orders were placed on the operational creditor. Ld. Counsel further submitted that ad hoc payments were used to be made and no reconciliation was done, however, when the notice under Sec.8 of Insolvency & Bankruptcy Code, 2016 was received, a detailed examination/verification was made and it was noted that the balance confirmation certificate by the accounts office has been issued in a routine manner without verifying the proof of quantities delivered to the corporate debtor. It was argued that weighment certificates/documents to show that goods were really been delivered were not produced. Ld. Counsel submitted due to these reasons it was a case of preexisting dispute though corporate debtor had acknowledged a sum of Rs.54,53,360/- as actually due and payable. Ld. Counsel thereafter, argued that once an offer to make the payment had been made, hence, within the meaning of Insolvency & Bankruptcy Code, 2016 the corporate debtor could not be said to be in default and, therefore, this petition was not maintainable. To emphasis on this fact, Ld. Counsel submitted that whatever was the remaining balance which was not accepted as payable was disputed.

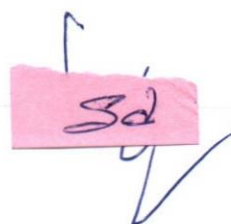
6. Ld. Counsel contended that the corporate debtor was ready to settle the matter by paying an amount of Rs.1,32,16,662/- which was communicated through email dated 9/8/2019. It was also contended in the subject email it was requested that the corporate debtor was running short of funds and require



some time to arrange the same. Based upon this email, Ld. Counsel for the operational creditor submitted that this email was an acknowledgment of liability in an unambiguous manner and also proved the fact that allegation made in the reply affidavit were frivolous, after thought and misconceived. It was also contented that operational creditor had not reversed tax input credit as alleged and, therefore, no credence could be given to the corporate debtor in this regard.

7. We have considered the submissions made and have also perused the materials on record. It is an admitted fact that outstanding sum is on account of supplies of goods during the period from September 2017 till April 2018. The value of supply is around R.1.50 crore. From perusal of emails dated 13/5/2018, 15/5/2018 and 9/8/2019, it is apparent that the corporate debtor has admitted the debt and sought time to make the payment. As far as claims of the corporate debtor with regard to weighment certificate etc. are concerned, are of the view that no such dispute was raised earlier and no material has been produced before us in this regard, hence, not valid.

8. Further, the claims made by the corporate debtor in regard to the non-delivery of required materials appear to be an after thought just to avoid the proceedings under Sec.9 of Insolvency & Bankruptcy Code, 2016 because of the very nature of such claims which do not fit into ordinary logic. Having, stated so, the other fact which needs due consideration is that in its reply affidavit the corporate debtor has offered to pay a sum of Rs.54 lakh approximately and subsequently Rs.1,32,16,662/- which itself makes this petition admissible. Legal contention has been made because of this offer that the corporate debtor cannot be said to be in default. For consideration of this plea we re-produce the



definition of the term “debt” and “default” as defined in Sec.3(11) and Sec.3(12) of Insolvency & Bankruptcy Code, 2016 respectively as under:-

*“Debt” means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not [paid] by the debtor or the corporate debtor, as the case may be.”*

*“Default” means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not [paid] by the debtor or the corporate debtor, as the case may be.”*

Corporate debtor, in the present case, is having a liability and obligation to pay the dues of operational creditor. It is not in dispute that said liability and obligation has not been discharged, hence, default can be said to have occurred. We are further of the view that no exception has been curbed out both in Clause 3(11) and 3(12) in regard to offer to make payment, i.e., in a situation where debtor make an offer to payment either both or any part of debt due and payable, then such offer would take out the debtor from the occurrence of event of default. In this view of the matter, we hold that there is no merit in such contention raised by the corporate debtor. For our such view, we get further strength from the decision of the Hon’ble Supreme Court in the case of B.K. Educational Services Private Limited vs Parag Gupta and Associates [2018 SCC OnLine SC 1921] wherein in para 41 the Hon’ble Apex Court observed as under:-

*“The definition of “default” in Sec.3(12) uses the expression “due and payable” followed by the expression “and is not paid by the debtor or the corporate debtor.....” “Due and payable” in Sec.3(12), therefore, only refers to the whole or part of a debt, which when referring to the date on which it becomes “due and*

*payable”, is not in fact paid by the corporate debtor. The context of this provision is therefore actual non-payment by the corporate debtor when a debt has become due and payable.”*

9. In view of above discussion, we hold that this petition is liable to be admitted. Ld. Counsel further submitted that the operational creditor had also proposed the name of the IRP Shri Jitendra Lohia, who is qualified to work and there were no disciplinary proceedings pending against him. He further contended that the requisite consent of proposed IRP was also annexed with the application.

10. The petition is otherwise complete in all respects. Accordingly, we admit the same and order as under:-

**ORDER**

- i. The application filed by the Operational Creditor under section 9 of the Insolvency & Bankruptcy Code, 2016 for initiating Corporate Insolvency Resolution Process against the Corporate Debtor, Prosperity Steels Limited is hereby admitted.
- ii. We declare a moratorium and public announcement in accordance with Sections 13 and 15 of the IBC, 2016.
- iii. Moratorium is declared for the purposes referred to in Section 14 of the Insolvency & Bankruptcy Code, 2016. The IRP shall cause a public announcement of the initiation of Corporate Insolvency Resolution Process and call for the submission of claims under Section 15. The public announcement referred to in clause (b) of sub-section (1) of Section 15 of Insolvency & Bankruptcy Code, 2016 shall be made immediately.
- iv. Moratorium under Section 14 of the Insolvency & Bankruptcy Code, 2016 prohibits the following:

sd


sd

- 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 of 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 Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 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.
- v. The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated, suspended, or interrupted during moratorium period.
- vi. The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.
- vii. The order of moratorium shall have effect from the date of admission till the completion of the corporate insolvency resolution process.
- viii. Provided that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of Section 31 or passes an order for liquidation of corporate debtor under Section 33, the



moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be.

- ix. Necessary public announcement as per Section 15 of the IBC, 2016 may be made.
  - x. Shri Jitendra Lohia, having registration No.IBBI/IPA-001/P00170/2017-18/10339 e mail id [jitulohia@knjainco.com](mailto:jitulohia@knjainco.com) is appointed as Interim Resolution Professional for ascertaining the particulars of creditors and convening a Committee of Creditors for evolving a resolution plan.
  - xi. The Financial Creditor to pay a sum of Rs.3,00,000/- (Rupees three lakh) to IRP as advance fee as per Regulation 33(2) of IBBI (Insolvency Resolution Process for Corporate Persons) Regulation 2016 which shall be adjusted from final bill.
  - xii. The Resolution Professional shall conduct CIRP in time bound manner as per Regulation 40A of IBBI (Insolvency Resolution Process for Corporate Persons) Regulation, 2016.
  - xiii. Registry is hereby directed under section 7(7) of the I.B.Code, 2016 to communicate the order to the Financial Creditor, the Corporate Debtor and to the I.R.P. by Speed Post as well as through e-mail.
11. List the matter on 26/11/2019 for the filing of the progress report.
  12. Certified copy of the order may be issued to all the concerned parties, if applied for, upon compliance with all requisite formalities.

  
(Madan B Gosavi)  
Member (J)

  
(Virendra Kumar Gupta)  
Member (T)

Signed on 4<sup>th</sup> October 2019