

**IN THE NATIONAL COMPANY LAW TRIBUNAL
COURT NO. 2, MUMBAI BENCH**

CP (IB) 3589/MB/2018

Under Section 8 & 9 of the Insolvency and
Bankruptcy Code, 2016

In the matter of

Shree Agencies

61-62, Free Press House, 6th Floor, 215, Free
Press Journal Marg, Nariman Point, Mumbai-
400021.

... Petitioner

v/s.

Borkar Colorpacks Private Limited

Alankar Building, Martaries Dias Road, Malbhat
Margao, Goa- 403601.

... Corporate Debtor

Order pronounced on: 31.08.2020

Coram: Hon'ble Smt. Suchitra Kanuparthi, Member (Judicial)

Hon'ble Shri. Chandra Bhan Singh, Member (Technical)

For the Petitioner: Adv. Bhanu Chopra, Adv. Julie Dave i/b Dhruve Liladhar &
Co.

For the Respondent: None present

Per: Suchitra Kanuparthi, Member (Judicial)

ORDER

1. This Company Petition is filed by Shree Agencies (hereinafter called "Petitioner") against Borkar Colorpacks Private Limited (hereinafter called

"Corporate Debtor") under section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter called "Code") for initiation of Corporate Insolvency Resolution Process (CIRP) read with Rule 6 of the Insolvency and Bankruptcy Board of India (Application to Adjudicating Authority) Rules, 2016 ("Rules") alleging that the Corporate Debtor defaulted in making payment to the extent of Rs. 1,70,08,674/- including interest at the rate of 18% p.a.

Contentions of the Petitioner:

2. The Petitioner is agreed by the default of consent terms dated 27.11.2017 executed between the Petitioner and Corporate Debtor. As per the consent terms, the Corporate Debtor had to pay an amount of Rs. 1,90,58,674/- to the Petitioner as per the payment schedule agreed by both the parties.
3. Earlier, the Petitioner had filed CP No. 1292 of 2017 seeking claim of Rs. 2,73,36,874.45 along with interest @ 18% p.a. Later on, both the parties entered into consent terms and the same was filed before this Tribunal. However, the Corporate Debtor having received a notice dated 27.06.2018 failed to rectify the default of payment and further continue to default in the payment as agreed in the consent terms.
4. The Petitioner, as per the consent terms, is entitled to file a fresh application under the IBC and take steps to file a petition seeking initiation of CIRP against Corporate Debtor as the Corporate Debtor has failed to rectify the breach of default after the expiry of cure period.

Contentions of the Corporate Debtor:

5. This Company Petition was heard on six occasions commencing from 26.03.2019. The last hearing was held on 30.01.2020. On all these occasions, Petitioner was present, however, the Corporate Debtor was not

present. On all the dates of hearing, an intimation had gone to the Corporate Debtor to present during the hearing and also file reply in this case. In this regard, affidavit of service has been duly presented before the court. This matter was taken up for hearing on 18.01.2019, 26.03.2019, 11.06.2019, 07.08.2019, 01.10.2019, 27.11.2019 and final hearing was on 30.01.2020.

6. It can be seen from the above paragraph that in all these hearings, the Corporate Debtor has neither presented nor has file any reply in this matter.

Findings:

7. This Bench notes that the Petitioner, M/s. Shree Agencies, has correctly filed a new Petition No. 1292 of 2017 on 11th September, 2018 pursuant to the failure of NCLT order and approved consent terms of 28.11.2017. The order relating to the consent terms of 28.11.2017 is as under:

- 1. The Learned Representatives of both the sides are present.*
- 2. Placed on record the Consent Terms. To be made part of the Order.*
- 3. An undertaking is given in the Consent Terms to comply with the Terms of Settlement, subject to the Undertaking the Petitioner seeking permission to Withdraw the Petition.*
- 4. As a consequence the Petition is disposed of as Withdrawn. To be consigned to the Records.*

8. This Bench also notes that the consent terms arrived between the Petitioner and the Corporate Debtor on 28.11.2017 was to settle an entire dispute of Rs. 1,09,58,674/- which was to be taken care of as per paragraph no.s "c" and "d" of the consent terms which is produced as below:

- c. The Corporate Debtor has further agreed to pay to the Applicant, an amount of Rs. 3,50,000 every month on or before*

the 15th day of each succeeding month commencing from 15th April 2018 to 15th March 2019, aggregating to Rs. 42,00,000/-, leaving thereby the balance Settlement Amount of Rs. 1,31,58,674/-.

d. The Corporate Debtor has further agreed to pay to the Applicant, an amount of Rs. 6,50,000/- every month on or before the 15th day of each succeeding month commencing from 15th April 2019 to 15th November, 2020, aggregating to Rs. 1,30,00,000/- leaving a balance amount of Rs. 1,58,674/- which will be paid by the Corporate Debtor to the Applicant on or before the 15th December, 2020, so that the entire Settlement Amount of Rs. 1,90,58,6741/- is fully paid to the Applicant on or before 15th December 2020.

9. The Bench also notes that the consent terms as per paragraph "g" clearly enumerates the manner in which the matter would be treated and interest rate would be charged consequent to a default. Paragraph "g" of the consent terms is reproduced as below:

g. The Corporate Debtor undertakes not to commit any default under the payment schedule provided under clauses (a) to (d) above. If the Corporate Debtor commits any two consecutive defaults under the said payment schedule, then any balance amount remaining out of the principal amount of Rs. 1,90,58,674/- at the time when such two consecutive defaults are committed, shall immediately become due and payable by the Corporate Debtor, along with interest @ 18 % p.a. on such balance amount, from the date of default to the date of realization of such balance amount.

10. This Bench also notes that the consent terms itself at Para "i" mentions about the legal remedy available to the Petitioner in the event of default. This includes filing a fresh application under IBC, 2016. Para "i" is reproduced as below:

i. Upon any default, the Applicant will be at liberty to pursue any legal remedy available to it, including not limited to filing a fresh Application under the Insolvency and Bankruptcy Code, 2016 in lieu of these Consent Terms. Provided that, before taking any steps, the Applicant shall give written notice calling upon the Corporate Debtor to rectify the breach within 60 days of such default (the "Cure Period") and only upon the Corporate Debtor failing to rectify such breach in the Cure Period, the Applicant shall be at liberty to proceed further.

11. This Bench therefore has no iota of doubt in arriving to the conclusion that default has been committed and both debt and default has been proved to be beyond of doubt by the Petitioner.
12. This Bench feels that it is clear as daylight that the Corporate Debtor has violated the consent terms as approved by NCLT by its order dated 28.11.2017.
13. This Bench is also of the view that the Corporate Debtor is well aware that he had no defense in the matter and therefore on all these occasions, when this matter was taken up for hearing, the Corporate Debtor side never bothered to be present nor had submitted any reply to the Petitioner. It is for this reason that on the last date of hearing, i.e., 30.01.2020, this Bench was constrained to hear the matter ex-parte after giving numerous opportunities to Corporate Debtor to be present.
14. This Bench concurs the detailed claim/debt due of Rs. 1,70,08,674/- from the Petitioner as per the particulars of claim submitted by the Petitioner. Further, as per the consent terms, an interest rate of 18% per annum is admissible till the receipt of payment. The particulars of claim submitted by the Petitioner is extracted below:

Sr. No.	Particulars	Amount (Rs.)
1.	Amount due under the Consent Terms dated 27 th November, 2017.	1,90,58,674/-
TOTAL AMOUNT DUE UNDER AFORESAID CONSENT TERMS (A)		1,90,58,674/-
Subtract part payment made towards payment as on 15 th December, 2017.		17,00,000/-
Subtract part payment made towards payment as on 19 th May, 2018.		3,50,000/-
TOTAL AMOUNT OF PART PAYMENT (B)		20,50,000/-
TOTAL DEBT DUE: (A-B)		1,70,08,674/-

15. In Part 3 of the Petition, the Petitioner has not proposed any name of IRP. Therefore, this Bench in terms of Section 16 (3)(a) and Section 16 (4) of the IBC, 2016 and on the basis of panel of Insolvency Professional(s) provided by IBBI, appoints Mr. Ajay Vijaykumar Agrawal, bearing Registration No. IBBI/IPA-001/IP-P00046/2017-18/10120, having email address ajayamarca@yahoo.com as the IRP to carry on the CIRP of the Corporate Debtor Company.

16. This Bench, having been satisfied with the Petition filed by the Petitioner which is in compliance of provisions of Section 8 & 9 of the Insolvency & Bankruptcy Code, admits this Petition declaring Moratorium with the directions as mentioned below:

- (a) that this bench hereby prohibits the institution of suits or continuation of pending suits or proceedings against the Corporate Debtor including execution of any judgement, decree or other in any

court of law; 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.

- (b) 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.
- (c) 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.
- (d) that the order of moratorium shall have effect from the date of pronouncement of this order till the completion of the CIRP 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.
- (e) that the public announcement of the CIRP shall be made immediately as specified under Section 13 of the Code.
- (f) that this Bench hereby appoints Mr. Ajay Vijaykumar Agrawal, bearing Registration No. IBBI/IPA-001/IP-P00046/2017-18/10120, having email address ajayamarca@yahoo.com as Interim Resolution Professional to carry the functions as mentioned under the Code.

17. Accordingly, this Petition is admitted.

18. The Registry is hereby directed to communicate this order to both the parties and to the Interim Resolution Professional immediately.

SD/-
Chanda Bhan Singh
Member (Technical)

SD/-
Suchitra Kanuparthi
Member (Judicial)