

**IN THE NATIONAL COMPANY LAW TRIBUNAL
COURT NO. 5, MUMBAI BENCH**

CP 2278 (IB)/MB/2019

Under Section 9 of the I&B Code,
2016

In the matter of

Mr. Ashwin Shantilal Shah

... Petitioner

v/s

Sakura Signs Private Limited

... Corporate Debtor

Order Dated: 29.09.2020

Coram: Hon'ble Smt. Suchitra Kanuparthi Member (Judicial)
Hon'ble Shri Chandra Bhan Singh, Member (Technical)

For the Petitioner: Mr. Tarannum Shaikh, Adv., Mr. Amit A. Tungare,
Adv.

For the Corporate Debtor: Ms. Radhikha Ingole, Adv.

Per: Chandra Bhan Singh, Member (Technical)

ORDER

1. This Company Petition is filed by Mr. Ashwin Shantilal Shah, Operational Creditor/ Petitioner, seeking to set in motion the Corporate Insolvency Resolution Process (**CIRP**) against Sakura Signs Pvt. Ltd., Corporate Debtor, alleging that the Corporate Debtor committed default in making payment of Rs. 21,17,607/- which includes interest at the rate of 18% p.a., by invoking the provisions of Section 8 and 9 of the Insolvency & Bankruptcy Code (hereinafter called 'Code') read with Rule 5 and 6 of Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

2. The Petitioner Mr. Ashwin Shantilal Shah is the Sole Proprietor of the M/s Shantinath Roadways.

Submissions made by the Petitioner:

3. The Counsel for the Petitioner submits that the Petitioner carries on the business of construction and development of infrastructure projects in the proprietary name of "M/s Shantinath Roadways" and the Corporate Debtor is in the business of manufacturing and supplying road safety sign boards, electronic LED advertising boards and allied material and components.
4. It is further submitted by the Counsel for the Petitioner that the Petitioner required the material manufactured by the Corporate Debtor for his business. So, the Petitioner had ordered for supply of the various goods on different occasions from the Corporate Debtor for which the Corporate Debtor raised several following invoices:
 - a. Proforma Invoice No. 4 dated 11.06.2016 of Rs. 2,47,725/-
 - b. Proforma Invoice No. 6 dated 19.12.2016 of Rs. 10,22,862.50/-
 - c. Tax Invoice No. SSPL/2016-17/60047 dated 19.12.2016 of Rs. 2,88,880.20/-
 - d. Tax Invoice No. SSPL/2016-17/60048 dated 19.12.2016 of Rs. 1,77,444/-
5. The Counsel for the Petitioner submits that the Petitioner never ordered anything under the description mentioned in the Proforma Invoices No. 4 and 6 dated 11.06.2016 and 19.12.2016 and hence, the Petitioner requested Corporate Debtor to make correct changes in both Proforma Invoices No. 4 and 6 dated 11.06.2016 and 19.12.2016 but the Corporate Debtor never responded to this request of the Petitioner. Instead of sending corrected copy of Proforma Invoice No. 6 dated 19.12.2016, the Corporate Debtor sent another copy of Proforma Invoice No. 6 of revised amount of Rs.

10,02,760/- on both 23.12.2016 and 24.12.2016 with different description of item bearing the same Proforma Invoice No. 6 dated 19.12.2016. The said revised Proforma Invoice was sent without any list and therefore stands incomplete. No purchase orders for further supply were placed by the Petitioner after the above incidents and hence, the Petitioner requested the Corporate Debtor to refund the sum of Rs. 15,00,000/- paid in advance by the Petitioner for the further supply of the material.

6. It was then submitted by the Counsel for the Petitioner that the Corporate Debtor promised the Petitioner that it would give credit to the Petitioner in case the Petitioner would place Purchase Orders in near future or else refund the amount before the financial year ending on 31.03.2017. In second week of April, 2017, the Petitioner again requested the Corporate Debtor to refund the amount of Rs. 15,00,000/- as the Petitioner did not order till April and had no intent to order in near future also, but the Corporate Debtor failed and neglected to refund the said amount.
7. The Counsel for the Petitioner then submits that the Petitioner, vide letter dated 26.04.2019, requested the Corporate Debtor to confirm the debit balance in the ledger maintained by the Petitioner but the Corporate Debtor refused to confirm the debit balance.
8. Despite several requests made by the Petitioner, the Corporate Debtor failed to refund the above said advance amount. Thus, on account of non-payment of outstanding amount, the Petitioner issued Demand Notice upon the Corporate Debtor on 02.05.2019 under Section 8 of the Code, demanding a sum of Rs. 21,17,607/-. The Corporate Debtor filed reply dated 18.06.2019 to the demand notice issued by the Petitioner through which the Corporate Debtor denied all the claims made by the Petitioner and stated that the advance paid by the Petitioner was made after the completion of the work done by the Corporate Debtor. Moreover, the Petitioner is liable to

pay Rs. 2,37,005/- towards the payment of government tax and GST.

Submissions made by the Corporate Debtor:

9. The Counsel for the Corporate Debtor submits that the Petitioner being in the business of development and infrastructure projects had appointed Corporate Debtor as a sub-contractor to carry out the work assigned to the Petitioner under the tender by State Government/Municipal Corporation. It is submitted that upon instructions, the Corporate Debtor issued the Proforma Invoice dated 11.06.2016. The work for the road signs was started and Performa invoice was raised, and work was started. Pursuant to which, a Purchase Order, via telephonic order, was placed with the Corporate Debtor towards the initial/ first Phase of the project Proforma Invoice no. SSPL/2016-17/60047 for supply of material viz. Median Marker of 3M and Cat eyes of 3M Make dated 19.12.2016 for Rs. 2,88,880.20 and Proforma Invoice no. SSPL/2016-17/60048 for supply of material viz. ACP Sheets dated 19.12.2016 for Rs. 1,77,444/-. The Invoice No. 6 was issued for supply of material viz ACP sheets dated 19.12.2016 for Rs. 10,02,760/-.
10. The Counsel for the Corporate Debtor then submitted that as alleged by the Petitioner that the Petitioner suggested changes in Performa Invoices and same was rejected by Corporate Debtor, but Petitioner failed to refer on what basis changed where suggested. It was submitted that all the quotations of the required material were submitted to Petitioner beforehand and Petitioner was well aware of the same. Hence, there was no question of the change in the Invoices. All the payment received from the Petitioner was on regular interval and for the work done by the Corporate Debtor on the site assigned by the Petitioner.
11. It is further submitted by the Counsel for the Corporate Debtor that there was no communication by the Petitioner to Corporate Debtor to

stop the work or further supply of material as stipulated in the Petition. In fact, on completion of the work, the receipt was issued by the site engineer of the Petitioner on 08.02.2019.

12. The Counsel for the Corporate Debtor then submits that the advance that was paid by the Petitioner of Rs. 19,66,324.20 was made after the completion of work on site. In fact, it was submitted that the Petitioner failed to make the payment of Rs. 2,37,005/- towards the government tax and GST. It was also submitted that the Corporate Debtor had several times requested the Petitioner to provide their GST number but till date it is not informed to the Corporate Debtor and because of this reason, Corporate Debtor is unable to issue invoice to the Petitioner.
13. The Counsel for the Corporate Debtor further submits that the total work done and material supplied to the Petitioner was for Rs. 20,38,336/- including the GST of 12.5% and the Petitioner have only paid Rs. 15,00,000/-. Therefore, total outstanding to be paid by the Petitioner is of Rs. 5,38,336/- as per the computation.

Findings:

14. Upon perusal of the averments made, documents and written submissions filed by both the Counsels, it can be said that the Petitioner had advance the money of Rs. 19,66,324.20/- towards purchase of goods from the Corporate Debtor. The Corporate Debtor supplied goods just under two tax invoices dated 19.12.2016 and the other two Proforma Invoices No. 4 and 6 were malafide. The materials with regard to supply of thermo plastic paints and ACP sheets etc. were never required and ordered by the Petitioner nor delivered by the Corporate Debtor as required under the Proforma Invoices No. 4 and 6 dated 11.06.2016 and 19.12.2016. The confirmation of accounts for the period from 01.04.2016 to 31.03.2017 and Ledger Account statement of the Corporate Debtor maintained by the Petitioner from the financial year 2016-17 to

2019-20 clearly show that there were two purchase orders and invoices against them. The Petitioner made the advance payment to the Corporate Debtor vide several cheques amounting to Rs. 19,66,324.20/- and after adjusting the amount of the above said two invoices, an amount of Rs. 15,00,000/- still remains payable by the Corporate Debtor to the Petitioner. The contention of the Corporate Debtor that he had been assigned the sub contract to carry out the work under tender of State government/ Municipal Corporation is untenable as he has not produced any copy of the sub contract executed between the parties.

15. Therefore, it can be said that the Petitioner has paid an amount of Rs. 15,00,000/- in advance for the supply of the goods and is entitled to claim the said amount back in the absence of the delivery of goods by the Corporate Debtor. Hence, there is a clear establishment of advance paid by the Petitioner and default in refunding that advance by the Corporate Debtor. Owing to the inability of the Corporate Debtor to pay its outstanding amount, this is a fit case to be admitted u/s 9 of the I&B Code.
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 G. Marathe, having Registration No. IBBI/IPA-001/IP-P01262/2018-19/12170 as an Interim Resolution Professional to carry out 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/-

Chandra Bhan Singh
Member (Technical)

SD/-

Suchitra Kanuparthi
Member (Judicial)