

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

**CP (IB)/1227/MB/2018**

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.

*In the matter of*

**M/s. SK Indwel Linings Private Limited.,**  
Having its Registered Office at: F-20, Second Main Road, Anna Nagar, Chennai, Tamil Nadu-600 102.

..... **Applicant/ Operational Creditor**

**Versus**

**Gammon India Limited,** having its registered office at: - Gammon House, Veer Savarkar Marg, Prabhadevi, Mumbai- 400 025.

.....**Corporate Debtor**

**Order Delivered on :- 03.04.2024.**

*Coram:*

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

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

*Appearances (in physical mode):*

For the Operational Creditor: Shri. Sanjay Kumar Ruia, Practising  
Chartered Accountant.

For the Corporate Debtor : Adv. Bhuvan Singh a/w Adv. Phiroze Mehta  
a/w Yash Jain i/b PNM Legal.

**ORDER**

*Per: - Kuldip Kumar Kareer, Member (Judicial).*

1. This Company Petition is an application filed by M/s. **SK Indwel Linings Private Limited** (hereinafter referred to as "**Operational Creditor**") u/s 9(1) of the Insolvency and Bankruptcy Code, 2016 (hereinafter called "Code") read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating the Corporate Insolvency Resolution Process (CIRP) of **Gammon India Limited** (hereinafter referred to as "**Corporate Debtor**").
2. The Company Petition was filed on 10.05.2018 claiming an amount of operational debt to be in default of Rs.2,11,74,677/- (Rupees Two Crores, Eleven Lakhs, Seventy-Four Thousand, Six Hundred and Seventy-Seven Only), out of which the interest on outstanding claimed is Rs. 1,40,57,826/- and the remainder amount, being the principal, is Rs. 71,16,851/-. Out of the principal, a sum of Rs. 10,40,723/-, according to the Operational Creditor, is due on account of retention money and a sum of Rs. 60,76,128/- is due on account of outstanding invoices.

3. The details of transactions leading to the filing of this Application as averred by the Operational Creditor in the application are as follows:
- a) The Operational Creditor is a leading company in lining and guniting MS pipes. The Corporate Debtor engaged the Operational Creditor for its two sites namely Chotila and Wankaner. The Corporate Debtor raised three Work Orders viz. SG/VKC/G/2939/09 and SG/VKC/G/2939/09, both dated 13.08.2009 for Surendranagar, and SG/VKC/G/3071/09 for Wankaner Site. Both the parties agreed to allow a credit period of 30 days from the date of invoice generated to the Corporate Debtor as per the terms of the Work Order, and for the outstanding amount on account of retention money, the credit period is 45 days. The Corporate Debtor deducted 5% of cash on each R.A. bill as retention money, which shall be paid after 45 days of successful completion of work done by the Operational Creditor.
  - b) The Operational Creditor issued number of invoices out of which 7 invoices from 28.09.2011 to 13.03.2013 are outstanding and remain unpaid by the Corporate Debtor for a total of amount of Rs. 60,76,128/-. The Operational Creditor had executed the contract and raised invoices for three projects for a total of Rs. 8,01,56,738/- out of which total payment of Rs. 7,30,39,887/- was received; and thereafter, no payment was made by the Corporate Debtor for the balance amount of Rs. 60,76,128/-. The date of default, as stated in the application, is 28/10/2011 and the date of last payment, as averred in the application, is 20/05/2014.
  - c) The Operational Creditor served the Demand Notice dated 27<sup>th</sup> March, 2018 to the Corporate Debtor to make the payment within 10

days from the receipt of notice, failing which an application u/s 9 of the Code would be filed for initiation of CIRP of the Corporate Debtor. The Corporate Debtor has filed its reply to the Demand Notice vide Letter dated 11.04.2018 denying its liability to pay on the ground, *inter-alia*, that the debt has become time-barred. As the amount of operational debt due and payable by the Corporate Debtor to the Operational Creditor remains unpaid despite service of the Demand Notice u/s 8 of the Code, the Applicant herein is constrained to file this application.

**4. Reply filed by the Corporate Debtor:**

- a. The Application preferred by the Applicant vide Form 5, does not mention when the alleged debt fell due. Further, there is a variance in amounts of invoices mentioned in Form 5 at page no.5 therein and the invoices which have been annexed to the petition from pages no. 71 to 79.
- b. In so far as Form 26AS is concerned, it is a document which is issued by the tax authority and not a document which is executed between the parties. Therefore, the Form 26AS does not prove that the Respondent/Corporate Debtor owes any debt to the Operational Creditor.
- c. The Corporate Debtor states that there is no document annexed by the Operational Creditor to show that the Corporate Debtor has agreed to pay interest.
- d. The present petition filed u/s 9 of the Code is barred by the law of limitation. As per Petitioner's own admission in Form 5 on page no.04 therein, the last payment was received by the Corporate Debtor on 20.05.2014 and whereas, the present

petition has been filed on 17<sup>th</sup> April, 2018 which is after the prescribed period of limitation. The invoices in respect of the alleged debt as annexed to the petition at page 5 are of 2011 and 2013, and since the present petition has been filed on 17.04.2018, it is barred by the law of limitation.

- e. It is the contention of the Corporate Debtor that the Affidavit-in-Rejoinder of the Operational Creditor in which the Letter dated 12.09.2016 was annexed, was never served upon the Corporate Debtor by the Applicant; and the Corporate Debtor contends that they came to know for the first time about the said letter on 11.01.2024 when the matter was argued by/on behalf of the Operational Creditor and reference was made to the said letter annexed in the rejoinder. Counsel for the Corporate Debtor says that when the Corporate Debtor came to know about the said letter for the first time on 11.01.2024, they immediately asked the Applicant to serve a copy of the same and thereafter, the complaint regarding the forgery and fabrication of the above letter was lodged by the Corporate Debtor with the local police authorities without any delay on 12.01.2024. Since the date fixed for oral arguments by Corporate Debtor was 12.01.2024, the Corporate Debtor was unable to file a rejoinder to contest the veracity of the said letter. However, the Corporate Debtor has placed its written submissions on record to show that the above referred letter is forged and fabricated by the Applicant/Operational Creditor.

**5. Rejoinder on behalf of the Operational Creditor**

- a. There is no variance or discrepancy in the outstanding invoices as mentioned in Form 5 and the invoices annexed to the Petition. The invoices are raised on the basis of work done and are certified by the Corporate Debtor. Therefore, the contention of the Corporate Debtor that the amounts are varying, is nothing but a mere tactic adopted by the Corporate Debtor to mislead this Tribunal.
- b. The Operational Creditor submits that the TDS deducted by the Corporate Debtor is an admission of its liability to pay arising out of the invoices remaining due and unpaid. To buttress the aforesaid submission, the Operational Creditor has relied upon the ruling of the Adjudicating Authority in M/s. Consolidated Shipping Line (India) Private Limited v/s. M/s. M+R Logistics (India) Private Limited [NCLT Chennai Bench, vide Order dated 01<sup>st</sup> March, 2018 in CP/724/IB/CB/2017].
- c. The Operational Creditor states that the Operational Creditor being a registered MSME, is entitled to interest on late payments u/s 16 of MSMED Act, 2006. Therefore, notwithstanding the fact that there is no agreement in respect of the interest, the Applicant/Operational Creditor is statutorily entitled to claim interest from the Corporate Debtor on unpaid invoices.
- d. In the present case, the debt fell due on the invoices raised between 2011 and 2013. However, the payments were continued to be received by the Operational Creditor from the Corporate Debtor until 20/05/2014, when the last payment was received. The Operational Creditor even got a confirmation

letter dated 12.09.2016 from the Corporate Debtor confirming to clear off the outstanding dues. The present petition has been filed in April, 2018 and hence, the petition is said to be within the period of limitation as it is filed within 2 years of the last cause of action having been arisen in the year 2016.

### **ASSESSMENT AND FINDINGS**

6. We have heard the submissions of the learned practising Chartered Accountant appearing on behalf of the Applicant/Operational Creditor and we have also heard the learned Advocates defending the Corporate Debtor in this matter. We have perused and examined the material available on record.
  
7. The Operational Creditor in this case claims that seven of its invoices, raised as per the terms and conditions of the Work Orders issued by the Corporate Debtor, have fallen due and remained unpaid. The details of such invoices are given in the table below:

<b><u>Sr. No.</u></b>	<b><u>Work Order No.</u></b>	<b><u>RA Bill No.</u></b>	<b><u>Date</u></b>	<b><u>Amount (in INR)</u></b>
1.	8809/119	8	28/09/2011	43,96,623/- (Partly Paid)
2.	8809/119	9	30/09/2011	11,88,620/-
3.	8809/119	10	31/10/2011	89,054/-
4.	8809/119	2	15/11/2011	15,840/-
5.	8809/119	11	12/03/2013	1,43,484/-
6.	8809/136	3	13/03/2013	21,533/-
7.	8732/241		13/03/2013	2,20,973/-
			<b>TOTAL</b>	<b>60,76,127/-</b>

The Applicant has further claimed that an amount of Rs. 10,40,723/- (excluding interest) has been defaulted by the Corporate Debtor in respect of the amount due towards the retention money. The Applicant has claimed a total interest on arrears of invoices and the retention money of Rs. 1,40,57,826/- computed at the rate of 18% p.a. as per the provisions of Section 16 of The Micro, Small and Medium Enterprises Development Act, Act, 2006 ('MSMED Act'). Thus, the total claim of operational debt alleged to be in default amounts to Rs. 2,11,74,677/-.

8. Counsel for the Corporate Debtor submits that the present petition should be dismissed for want of limitation as the invoices in respect of which the debt is claimed to be in default, have become time barred. Learned Counsel for the Corporate Debtor contends that even if the last payment of rupees one lakh made on 20.05.2014 is considered for the purpose of computing limitation period, yet the present petition is time barred as it has been filed on 10.05.2018, which is after three years from the above-date. As regards the renewal of limitation period u/s 18 of the Limitation Act, 1963 on account of acknowledgement of debt by the Corporate Debtor vide Letter dated 12.09.2016, as stated by the Operational Creditor in its rejoinder, the learned Counsel for the Corporate Debtor states that the above-mentioned Letter dated 12.09.2016 was not issued by the Corporate Debtor. Counsel for the Corporate Debtor contends that the Operational Creditor has forged and fabricated the above letter with an ill-motive to extend the period of limitation.

9. We have carefully examined and weighed the above submissions and have also gone through the records.
10. On perusal of the three Letters of Intent annexed by the Petitioner at Exhibit 'E' to the Petition, and more particularly, the clause 7 therein, which deals with 'Measurements & Payments', we find that the quantities which have been approved and accepted by the Corporate Debtor and the Employer (that is to say, the person who had given the works contract to the Corporate Debtor in respect of which the sub-contract work was given to the Operational Creditor) shall only be considered for payment. The aforesaid clause further states that the Operational Creditor will raise monthly R.A. Bills (i.e. running account bills) in respect of the work completed by it during the month; however, the payments shall be released within 30 days by par cheques after certification of the Operational Creditor's bills upon making necessary and due deductions in the said bill(s) as applicable. In the present case, we observe that there is nothing on record to show that the R.A. Bill Nos. 8, 9, 10 and the invoice at serial no.7 in the table above of Rs.2,20,973/-, have been certified by the Corporate Debtor. Hence, the same cannot be considered for the purpose of computing default, as the operational debt accruing in respect of those invoices have not been established by the Applicant to be due and payable by the Corporate Debtor. Even otherwise, all the above invoices have become time barred and are not enforceable as an operational debt.
11. As regards the invoices vide R.A. Bills No. 2, 11 and 03, these invoices bear the stamp of the Corporate Debtor and therefore, ostensibly, these invoices seem to have been certified. However, there is no date of

certification available and neither has the Applicant produced any document on record to show as to when the invoices (including the above-referred invoices) have been certified by the Corporate Debtor and/or the Employer. As discussed hereinabove, the payments in respect of the R.A. Bills shall be released within 30 days after certification of the Operational Creditor's bills. Even if we were to consider the aforesaid invoices as having been certified, the Applicant has failed to show as to exactly when these invoices were certified by the Corporate Debtor. Hence, we conclude that the Applicant here again has failed to establish that the operational debt in respect of the aforesaid invoices had become due and payable.

12. Even if we were to presume the date of invoices to be the date of their certification, then too the invoices relied upon by the Operational Creditor have become time-barred as the present petition has been filed after a period of more than three years from the date when invoices became due and payable but remained unpaid. Even if the last payment of rupees one lakh made by the Corporate on 20.05.2014 is considered for the purpose of computing limitation period, the present petition is time barred as it has been filed on 10.05.2018, which is after three years from the above-date. Therefore, no question arises of default in respect of an operational debt which has either become time barred or which has not been proved to be due and payable.

13. Counsel for the Operational Creditor has relied upon the Letter dated 12.09.2016 purportedly issued by the Corporate Debtor as an acknowledgment of debt u/s 18 of the Limitation Act, 1963 and contends that since the present petition has been filed within 3 years from

the afore-mentioned date, the present petition is within the period of limitation. Per contra, the learned Counsel for the Corporate Debtor has vehemently denied the execution of the aforesaid letter and contended that the said letter is forged and fabricated by the Applicant only to bring the present petition within limitation. We wish to state that the proceedings before the Adjudicating Authority under the IBC, 2016 are only summary in nature and therefore, we cannot give a conclusive finding as to the authenticity of the Letter dated 12.09.2016. However, we wish to observe as follows:

(i) The Operational Creditor brought the said letter for the first time on the record of the Tribunal by way of an Affidavit-in-Rejoinder. The Applicant/Operational Creditor has neither referred to the said letter anywhere in the Petition/Application, nor annexed the copy of the said letter to the Petition/Application. Further, we observe that there is no mention of such letter in the Demand Notice dated 27<sup>th</sup> March, 2018 issued by the Operational Creditor to the Corporate Debtor u/s 8 of the Code. If the said letter was genuinely a part of the correspondence between the Applicant and the Corporate Debtor, it would have been mentioned or at least annexed to the Application of the Applicant. However, since the above-said letter was neither mentioned or annexed to Demand Notice u/s 8 nor was it mentioned or annexed to the Application u/s 9, but directly brought on record by way of rejoinder when the Applicant learnt through the reply of the Corporate Debtor that the petition is time barred, we have a reason to believe that the Letter dated 12.09.2016 is nothing but an afterthought and a crude attempt of the Applicant to bring the instant application within the period of limitation.

(ii) After having carefully examined and comparing the said letter with the previous letter heads of the Corporate Debtor, we find that the word "GAMMON HOUSE" at the bottom of the said letter does not appear in any of the letter heads of the Corporate Debtor which are a part of the record in the above-captioned matter. The letter heads available on record show that at the bottom the Corporate Debtor has always mentioned "GAMMON INDIA LIMITED" instead of "GAMMON HOUSE". Further, the format of the address at the bottom of the letter head of the said letter is different from the other letters of the Corporate Debtor available on record and the same is apparent on plain comparison between the two. Thus, we have a reason to doubt the genuineness of the said letter.

(iii) The said letter does not bear any reference number or stamp of the company. Also, the name and designation of the person signing the letter has not been mentioned. In the letters addressed by the Applicant to the Corporate Debtor which are available on record, we find that the Applicant has always addressed the Corporate Debtor as "Gammon (India) Ltd" and the same pattern "For Gammon (India) Ltd" has been repeated while signing the said letter. On the contrary, in the letters issued by the Corporate Debtor to the Operational Creditor, the name and pattern used by the Corporate Debtor while signing the letter is "For Gammon India Limited". Hence, this is another reason to doubt the authenticity of the said letter and a reason to believe the case of the Corporate Debtor that the said letter has been forged and fabricated by the Operational Creditor. However, at the cost of repetition, we make it hereby clear that the aforesaid findings in relation to the authenticity of the said letter are only prima facie and not final or conclusive.

(iv) In view of the aforesaid findings in relation to the authenticity of the said letter, we are unable to appreciate it and consider as an acknowledgment of debt u/s 18 of the Limitation Act, 1963.

14. The Operational Creditor has claimed the retention money of Rs. 10,40,723/- in principal from the Corporate Debtor. However, the Operational Creditor has failed to substantiate the claim with any documentary evidence. As per Clause No.09 of the three Letters of Intent, 5% of cash shall be deducted by the Corporate Debtor from each R.A. as cash retention and the same would be returned **without interest** after 45 days of successful completion of sub-contract work. However, in the present matter, the Operational Creditor has not adduced any document or evidence to show that the Applicant has successfully completed the sub-contract work so as to claim the amount retained by the Corporate Debtor. The Application is also silent about the invoices in respect of which the retention money is due and payable. Further, the parties herein have agreed that the retention money will be paid without interest after 45 days of successful completion of sub-contract work and thus, the claim of the Applicant of Rs. 18,06,888/- cannot be entertained. Also, as the invoices are either time barred or the Applicant has failed to establish the debt due and payable in respect of the invoices, there is no question of considering interest on the amount of interest on the outstanding invoices.

**Conclusion:**

15. In view of the foregoing analysis, findings and discussion, we hold that the Operational Creditor has failed to establish the operational

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debt due and payable by the Corporate Debtor. Even otherwise, the instant petition is barred by limitation. Accordingly, **the above-captioned petition u/s 7 of the Code is hereby dismissed** with no order as to costs. Let the file be consigned to records.

**Sd/-**

**ANIL RAJ CHELLAN**  
**(MEMBER TECHNICAL)**

**Sd/-**

**KULDIP KUMAR KAREER**  
**(MEMBER JUDICIAL)**