In the National Company Law Tribunal
Kolkata Bench
Kolkata

CORAM: 1. Shri Jinan K.R.,
Member (Judicial)

CP(IB)No.1371/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:

Nemi Chand Khaitan, sole proprietor of **M/s. Metro Sales Corporation**, having address for correspondence is 135A, Chittranjan Avenue, Kolkata - 700007

........Operational Creditor

In the Matter of:

M/s Duncans Industries Limited, having its registered office at Duncans House, 2nd Floor, 31, Netaji Subhash Road, Kolkata-700001.

.... Corporate Debtor

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Counsels appeared:

For Operational Creditor

1. Ms. Sonal Shah, Advocate
2. Mr. Kushagra Shah, Advocate

[For Corporate Debtor

1. Mr. Rishav Banerjee, Advocate
2. Mr. A.K. Awasthi, Advocate

Date of pronouncement of order: 19th November, 2019.

ORDER

Per Shri Jinan K.R., Member (J):

1. **Nemi Chand Khaitan** who is the sole proprietor of **M/s. Metro Sales Corporation** filed this application under Section 9 of Insolvency and Bankruptcy Code, 2016 read with Rule 6 of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating Corporate Insolvency Resolution Process as against the Corporate Debtor/**M/s. Duncans Industries Ltd.** alleging that a sum of Rs. **71,01,225/- (Rupees Seventy One lakh One tousand Two Hundred and Twenty Five Only)** was due and payable by the Corporate Debtor to the Operational Creditor. Despite demand the Corporate Debtor did not pay, hence this application was filed for initiating Corporate Insolvency Resolution Process as against the Corporate Debtor.

2. The facts necessary for consideration of the issues are the following: -

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2.1. The Operational Creditor is engaged in supply of P.P. Bags, Laminated Jute Tea bags, Fish Liner and G.C. Sheets etc. The Operational Creditor has been in a business relationship with the Corporate Debtor. As per various purchase orders, Corporate Debtor purchased P.P. Bags, Laminated Jute Tea bag, fish liner and G.C. Sheets etc. from the Operational Creditor. On the basis of various orders of the Corporate Debtor, said goods were supplied to the Corporate Debtor and invoices were raised and delivered to the Corporate Debtor. As per the terms of the invoices, the Corporate Debtor was required to pay within sixty days of the receipt of the goods. The account of the Corporate Debtor with the Operational Creditor was a running and continuous one as such the Corporate Debtor used to make ad-hoc payment to the Operational Creditor. Last of the supplies of the goods by the Operational Creditor to the Corporate Debtor was on 14.10.2016. While the last of the payment received by the Operational Creditor was on 19.10.2016 for a sum of Rs. 2,92,950/- (Rupees Two Lakh Ninety Two Thousand Nine Hundred and Fifty Only). The total outstanding operational debt as on the date of filing of this application came to be Rs. 71,01,225/- (Rupees Seventy-One Lakh One Thousand Two Hundred and Twenty-Five Only). The above said amount is due and payable to the Operational Creditor by the Corporate Debtor. The Operational Creditor repeatedly demanded payment of unpaid operational debt. However, the Corporate Debtor failed to pay and hence the Operational Creditor issued a demand notice dated 09.08.2018 which has been delivered on the Corporate Debtor and the Corporate Debtor sent a reply dated 16.08.2018 contending untenable contentions. There is no pre-existing dispute. The goods supplied were received by the Corporate Debtor without any protest and

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without making any complaint. The claim of the Operational Creditor is not barred by limitation. The application was filed in time.

2.2. To strengthen the above said contentions, the Operational Creditor has produced tax invoices, challans, purchase orders collectively marked as Annexure B. A tabular statement of the outstanding operational debt due is marked as Annexure C. Ledger account maintained by the Corporate Debtor also seen produced and marked as Annexure D. In compliance of Section 9(3)(b) of the Code, affidavit also seen filed. And in compliance of Section 9(3)(c) of the Code, statement of bank account also seen produced and marked as Annexure G. Copy of invoices as well as copy of the demand notice also produced and marked as Annexure E. Upon the said contentions, Operational Creditor prays for passing an order of admission under Section 9 of the Code.

3. Respondent/Corporate Debtor entered appearance and objected to this application mainly on the ground that as per notification dated 20.01.2016, under Section 16E of the Tea Act, 1953, institution of an application of this nature is not maintainable. It further contends that the demand notice issued by the Operational Creditor was not issued as per the provision of the Code. There was no proper affirmation in the affidavit annexed to the application. The application is not maintainable as there is pre-existing dispute between the parties. The Corporate Debtor has raised disputes much prior to the purported demand notice and filing the instant application. The application filed is not in compliance with the statutory requirement as provided under Section 9(3) of the Code. Furthermore, the purported claims made by the Operational Creditor are *ex facie* barred by limitation. It is submitted that the application might be dismissed since this application is not maintainable in light of specific bar contained under Section 16G of the Tea Act, 1953 read with Section 16M of the Tea Act,

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1953. The deponent who signed the affidavit been not properly authorized to file instant application. The document annexed to the application are not admitted by the Corporate Debtor. The goods and materials supplied by the Operational Creditor were of an extremely poor and inferior quality and as such the same were returned. The fact is within the knowledge of the Operational Creditor. It is incorrect to say that a sum of Rs. 71,01,225/- (Rupees Seventy-One Lakh One Thousand Two Hundred and Twenty-Five Only) is due from the Corporate Debtor to the Operational Creditor. Upon the above said contention, the Corporate Debtor prayed for passing an order of dismissal with cost.

4. Heard both sides and perused the records
5. The transaction between the Operational Creditor and the Corporate Debtor that the Operational Creditor had supplied P.P. bags, laminated jute tea bags, G.C. Sheets etc. as per various purchase orders issued by the Corporate Debtor is an admitted fact. According to the Ld. Counsel for the Operational Creditor, the Operational Creditor is maintaining the account of the Corporate Debtor as a running and continuous account and last part payment received against the invoices delivered upon the Corporate Debtor was on 19.10.2016 and that the outstanding operational debt due is Rs.71,01,225/- (Rupees Seventy-One Lakh One Thousand Two Hundred and Twenty-Five Only). According to him, the above said amount is due and payable by the Corporate Debtor and the application filed is within the period of limitation and hence this application is liable to be admitted.

6. This application was opposed on the side of the Corporate Debtor mainly on four grounds. ***Firstly***, it is contended that the application filed under Section 9 is not maintainable in light of the specific bar contained under Section 16G of the Tea Act, 1953 read along with Section 16M of the Tea Act 1953. ***Secondly***, it contended that this application is not maintainable

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as it was filed by M/s Metro Sales Corporation, a proprietary concern. According to the Ld. Counsel for the Corporate Debtor, a sole proprietor firm is not included under sub-Section 23 of Section 3 of the Code and therefore, this application is not maintainable. However this contention was seen not pleaded in the reply affidavit. ***Thirdly***, it contends that there is pre-existing dispute prior to the date of issuance of demand notice. According to him, the goods supplied were of extremely poor and inferior quality and as such the same were returned to the Operational Creditor and therefore, this application is liable to be rejected. The ***Forth*** and the last contention is that the claim of the Operational Creditor is hopelessly barred by limitation. According to the Ld. Counsel for the Corporate Debtor, the operational debt, if any, fell due in the month of August 2012 and therefore the purported claim of the Operational Creditor, if any, is barred by limitation. He further submits that the invoices were generated on the basis of distinct purchase orders and a claim relating to the invoices issued by the Operational Creditor in response to various purchase orders is not maintainable. According to him cause of action for filing an application on the strength of default is separate and distinct in respect of each purchase orders and filing of this application claiming amount due as per various purchase orders is not maintainable.

7. Coming to the objection that the application is not maintainable in the light of specific bar contained under Section 16G of the Tea Act, 1953 read with Section 16M of the Tea Act, 1953 is found legally not sustainable. The Ld. Counsel appearing for the Operational Creditor brought to our notice the Hon'ble Supreme Court judgment in **Civil Appeal No. 5120 of 2019 in Duncans Industries Limited Vs. A.J. Agrochem** dated 04.10.2019. The Hon'ble Supreme Court upholding the judgment and order dated 26.06.2019 passed by the Hon'ble NCLAT holding that *"insolvency petition under Section 9 of the Insolvency and Bankruptcy Code, 2016 initiated by*

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the respondent Operational Creditor shall be maintainable is hereby confirmed."

8. A.J. Agrochem, the respondent in the above Civil Appeal filed an application before NCLT, Kolkata Bench for the dismissal of the application holding that filing of an application under Section 9 of I & B Code, 2016 could not be maintainable without the consent of the Central Government in terms of Section 16G of Tea Act. Aggrieved by the dismissal of the application, the Operational Creditor/A.J. Agrochem preferred an appeal before the Hon'ble NCLAT. The Hon'ble NCLAT reversed the order passed by NCLT, Kolkata Bench and held that appellant's application under Section 9 of I & B Code, 2016 would be maintainable even without consent of the Central Government in terms of Section 16G of the Tea Act, 1953. The above said order was challenged by the respondent/Corporate Debtor/Duncans Industries Ltd. before Hon'ble Supreme Court. In the above referred Civil Appeal the Hon'ble Supreme Court has confirmed the order of NCLAT. Thereby, the objection regarding the maintainability of this application without getting consent of the Central Government, is found not sustainable under law. The above said objections is therefore found devoid of any merit.

9. The Ld. Counsel for the Corporate Debtor argued at length attempting to prove that the applicant who preferred the Section 9 application in the instant case is M/s Metro Sales Corporation who is a sole proprietor and that sole proprietary concern being not included as per Sub-Section 23 of Section 3 of the Code filing of this application is not maintainable. It is significant to note here that such an objection was not taken in the reply affidavit. What is contended in the reply affidavit is that since the deponent who signed the affidavit being not

properly authorized to file instant application, this application is not maintainable.

10. It is submitted by the Ld. Counsel for the corporate debtor that sub-section (23) of Sec.3 of the IB Code does not include a sole proprietor and, therefore, filing of this application by a sole proprietor is not maintainable. To buttress his argument, he relied upon the judgment of the Hon'ble NCLT New Delhi Bench in **R.G. Steels vs. Berrys Auto Ancillaries (P) Ltd.** [Case No.IB-722/ND/2019 reported in MANU/NC/6782/2019].

11. Ld. Counsel for the operational creditor, on the other hand, submitted that this is an application filed by Mr. Nemi Chand Khetan a sole proprietor of the Metro Sales Corporation who is not having a separate legal entity and it was signed and verified by Nemi Chand Khetan. According to her the applicant is Mr. Nemi Chand Khetan and not the propriety concern/Metro Sales Corporation. To stress her argument she took me to Form 5. The name of the operational creditor as per Form 5, is Nemi Chand Khetan. So this application was not filed in the name of Metro Sales Corporation but filed in the name of an individual who is running the propriety concern in the name and style of Metro Sales Corporation and inclusion of this fictitious name in addition to the name of the proprietor appears to me, would not exclude him from the definition of the "person" who preferred this application. Ld. Counsel for the operational creditor also submits that an individual who happened to be a sole proprietor is not at all excluded from the definition of "Person" as per Sec.3(23) of the Code and accordingly, even if, it is filed by a sole proprietor, not in the name of proprietorship concern, an application of this nature is perfectly maintainable.

12. Hon'ble NCLT, New Delhi Bench in the above cited decision has taken note that application under Sec.9 of the Code was filed by

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R.G. Steels, a sole proprietary concern and wherein it was held that:-

"Hence, based on the above namely a Sole Proprietary concern taking into consideration the definition of a "person" is not entitled to approach this Tribunal on its own and also in view of the pre-existing dispute evident on consideration of the merits of claim made by the OC against CD, this petition stands dismissed, however, without costs".

13. The facts in the said case brought to my notice are not similar to the facts in the case in hand. This is an application filed by **Mr. Nemi Chand Khetan.** Although in the Form 5, Part I serial No.1 in column of Part 1, the name of the proprietary concern ie. Metro Sales Corporation, is also mentioned it is specifically pleaded that Mr. Nemi Chand Khetan is carrying on business in the name and style of Metro Sales Corporation. Therefore, the instant application was filed by an individual and not by the proprietary concern i.e. the Metro Sales Corporation, as is attempted to be established on the side of the corporate debtor.

14. A proprietary concern, admittedly, is not a legal entity like a partnership or a corporation and, therefore, a sole proprietor can start a business under a fictitious name and it has no separate legal entity. A proprietary concern by itself cannot sue and cannot defend a litigation. A law suit can be filed against a sole proprietor if any liability is incurred by him in his name and not as against the proprietary concern. So, only because of the fictitious name of a proprietary concern is found in the application, it cannot be held that this application is filed by a proprietary concern and, therefore, the observation of the Hon'ble NCLT New Delhi appears to me not helpful to strengthen the argument advanced on the side of the corporate debtor. In view of the above said reasons I am of the considered view that the application filed by Mr. Nemi Chand Khetan, is perfectly maintainable.

15. The next contention that there is a pre-existing dispute

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stands proved in the instant case and hence this application is liable to be rejected. It was argued on the side of the corporate debtor that the goods supplied were of extremely poor and inferior quality and, as such, the same were returned to the operational creditor. However, no supporting evidence brought to my notice on the side of the corporate debtor. From the available record in the case in hand, there is no supporting documents proving existence of a dispute prior to the date of issuance of the demand notice by the operational creditor.

16. Operational creditor evidently issued demand notice on 9/8/2018. It is only in the reply notice dated 16/8/2018, the corporate debtor raised a vague plea that goods supplied were extremely poor and inferior quality. Even in the reply affidavit, there is no supporting averments or documents proving that there were any correspondence in between the operational creditor and the corporate debtor proving existence of a dispute. Other than the reply to notice sent on 16/8/2018 nothing is available to prove that the corporate debtor has returned the goods because of the goods delivered were of inferior quality as alleged. In the absence of supporting evidence I can rightly come to a conclusion that corporate debtor has failed in proving a pre-existing dispute as alleged. This objection on the side of the corporate debtor is therefore found devoid of any merit.

17. One another argument was advanced to prove that a claim on the basis of various purchase orders cannot be maintainable and that the claim, if any, is barred by limitation. Admittedly, the business transactions in between the operational creditor and the corporate debtor was on the basis of various purchase orders issued from 20/12/2013 onwards. The last of the supplies were made on 14/10/2016. From the evidence available on record it is certain that upon placing of orders for the purchase of specified goods the operational creditor used to deliver goods on credit generating invoices

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and the operational creditor maintained accounts with the corporate debtor a running and continuous one.

18. An attempt was made on the side of the corporate debtor to prove that the payment was made on invoice basis and not on ad hoc basis. However, the ledger extract produced on the side of the operational creditor adds strength to the submission of the operational creditor that they are maintaining a running and continuous account and the payment made by the corporate debtor was on *ad hoc* basis and the last payment received by the operational creditor was on 19/10/2016. There is no supporting evidence to hold that the corporate debtor used to pay bill wise and not on ad hoc as attempted to prove on the side of the corporate debtor.

19. The claim in the instant case is based on delivery of goods on the strength of various purchase orders, and corresponding invoices and on the basis of default on the side of the corporate debtor to pay the balance operational debt found liable to pay by the corporate debtor. The cause of action to file this application accrues from the date of last part payment according to the Ld. Counsel for the applicant. That was on 19/10/2016. The period of limitation being run from the said date the filing of this application on 9/10/2018 is within the period of limitation. The said objections are also found not sustainable under law.

20. None of the objections on the side of the corporate debtor are found sustainable under law. Therefore, this application is fit one for passing an order of admission. Though, there is no affidavit in conformity with Sec.9(3)(b) of the IB Code seen filed on the side of the operational creditor it has come out in evidence that there was no pre-existing dispute relating to the operational debt demanded by the operational creditor. A statement of bank account is produced in conformity with Sec.9(3)(c) of the Code, that there is no payment of unpaid operational debt. It reveals from the record that the applicant

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has not proposed the name of Insolvency Professional and therefore, compliance of section 9(5) (I) (e) doesn't arise.

21. In view of what stated above this application is liable to be admitted and accordingly admitted upon the following:-

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, **M/s Duncans Industries Limited**, is hereby admitted.

ii. I hereby 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:

v. 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;

vi. Transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;

vii. Any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including

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any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);

viii. The recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

ix. 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.

x. 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.

xi. The order of moratorium shall have effect from the date of admission till the completion of the corporate insolvency resolution process.

xii. 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.

xiii. Necessary public announcement as per Section 15 of the IBC, 2016 may be made.

xiv. Mr. Tuhin Kumar Chatterjee, IP Registration No. IBBI/IPA-002/IP-N00663/2018-19/12108, email id tuhinkc2@gmail.com , contact no. 8240578484 is appointed as Interim Resolution Professional for ascertaining the particulars of creditors and convening a Committee of Creditors for evolving a resolution plan.

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xv. The Operational Creditor shall deposit a sum of Rs. 3,00,000/ (Three Lacs) in the ESCROW Account in SBI to be operated through the Registrar, NCLT, Kolkata Bench, for the purpose of meeting the preliminary expenses for initiating the CIR Process by the IRP within one week of the date of this order which can be adjusted after constitution of the CoC.

xvi. The Resolution Professional shall conduct CIRP in time bound manner as per Regulation 40A of IBBI (Insolvency Resolution Process for Corporate Persons) Regulation, 2016.

22. Registry is hereby directed to communicate the order to the Operational Creditor, the Corporate Debtor and to the I.R.P. by Speed Post as well as through e-mail.

23. List the matter on **08.01.2020** for the filing of the progress report.

24. Certified copy of the order may be issued to all the concerned parties, if applied for, upon compliance with all requisite formalities.

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19/11/19.

(Jinan K.R.)
Member(J)

Signed on this, the 19th day of November, 2019.

Deeksha(steno)