

IN THE NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD
DIVISION BENCH
COURT - 1

ITEM No.2
C.P.(IB)/29(AHM)2022

Proceedings under Section 9 IBC

IN THE MATTER OF:

Sumilon Industries Pvt Ltd
V/s
Savitri Polyesters Pvt Ltd

.....Applicant

.....Respondent

Order delivered on: 11/09/2023

Coram:

Mr. Shammi Khan, Hon'ble Member(J)
Mr. Kaushalendra Kumar Singh, Hon'ble Member(T)

PRESENT:

For the Applicant :
For the Respondent :

ORDER

The case is fixed for pronouncement of the order. The order is pronounced in the open court, vide separate sheet.

-SD-

KAUSHALENDRA KUMAR SINGH
MEMBER (TECHNICAL)

-SD-

SHAMMI KHAN
MEMBER (JUDICIAL)

**BEFORE THE ADJUDICATING AUTHORITY
NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD BENCH
COURT-I**

CP (IB) 29 of 2022

*[Application for initiation of Corporate Insolvency Resolution Process under
Section 9 of the Insolvency & Bankruptcy Code, 2016]*

In the matter of:

Sumilon Industries Private Limited

CIN:U29199GJ1996PTC030056

6/121, Vairagi Ni Wadi,
Delhi Gate, Surat-395002

.....Operational Creditor

Versus

Savitri Polyesters Pvt. Ltd.

CIN: U17110G1997PTC031486

Registered Office at:
Plot No. 5, Bansal House,
Doctor Wadi, Bh. Krishna
Petrol Pump, Khatodara,
Udhna, Surat-395002

.....Corporate Debtor

Order pronounced on: 11.09.2023

**Coram: SHAMMI KHAN, MEMBER (Judicial)
KAUSHALENDRA KUMAR SINGH, MEMBER (Technical)**

Appearance:

For the Applicant:

For the Respondent:

ORDER

1. The instant Application is filed on 13.01.2022 by **Sumilon Industries Pvt. Ltd.** (Operational Creditor) through its C.E.O. Mr. Shabbir M. Jilal, under Section 9 of the Insolvency and Bankruptcy Code, 2016 (Code) read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 claiming to be an Operational Creditor for initiation of Corporate Insolvency Resolution Process (CIRP) against **Savitri Polyesters Pvt. Ltd.** (Corporate Debtor) for making default in payment of outstanding amount of **Rs.1,28,32,169/-** (Rupees One Crore Twenty-Eight Lakhs Thirty-Two Thousand One Hundred and Sixty-Nine only) including late payment charges amounting to Rs.63,99,495/- on earlier invoices already paid as well as on outstanding invoices.
2. The Operational Creditor i.e., **Sumilon Industries Pvt. Ltd.** was incorporated on 27.06.1996 under the provisions of Companies Act, 1956, duly registered with Registrar of Companies Ahmedabad, Gujarat with CIN: U29199GJ1996PTC030056, having registered office at 6/121, Vairagi Ni Wadi, Delhi Gate, Surat-395002.
3. The Corporate Debtor i.e. **Savitri Polyesters Pvt. Ltd.** was incorporated on 10.01.1997 under the Companies Act, 1956, duly registered with Registrar of Companies Ahmedabad, Gujarat with CIN:U17110GJ1997PTC031486, having registered office of at Plot No. 5, Bansal House, Doctorwadi B/H Krishna Petrol Pump Khatodara, Udhna, Surat, Gujarat-395002. Therefore, this Bench has jurisdiction to deal with this Application.

4. Briefly, the facts of the case as mentioned in the Application and submitted by the Ld. Counsel for the Operational Creditor are summarized hereunder:

- i. The Operational Creditor supplied certain LAC coated metallised Polyester Film to Corporate Debtor for which invoices were raised upon the Corporate Debtor and the same were received by the Corporate Debtor without any dispute.
- ii. The invoices raised upon Corporate Debtor for the period from 02.01.2018 to 05.12.2018 amounting to Rs.64,32,674/- are due and payable.
- iii. As per the invoices, the payment terms were 30 days from the date of invoice. However, the Corporate Debtor failed to make the payment within agreed terms. Therefore, late payment charges amounting to Rs.63,99,495/- on the earlier invoices already paid as well as on the outstanding invoices are also payable by Corporate Debtor. The total amount outstanding from Corporate Debtor is Rs.1,28,32,159/-.
- iv. Subsequently, Operational Creditor served a demand notice in Form 3 as well as Form 4 dated 09.10.2021 upon the Corporate Debtor which was sent to Corporate Debtor through post and the same was delivered on 16.10.2022. However, the Corporate Debtor has neither replied to the said demand notice nor made any payment towards outstanding dues and therefore, the present Petition is filed under section 9

of the Code.

5. The Corporate Debtor has filed its reply on 06.06.2022 the averments of the Corporate Debtor in the reply are stated below:-

- i. The Corporate Debtor states that the present application is liable to be dismissed as the same is filed by Mr. Shabbir M. Jilal without any authorization.
- ii. The certificate of Bank of Baroda annexed by operational Creditor which reflects payment made by Corporate Debtor in last 3 years is false as it does not contain following transactions:-
 - a) Transaction receipt reference 00250755 dated 18.08.2019 for Rs.5,62,617/- paid to Operational Creditor.
 - b) Transaction receipt reference 080236 dated 15.10.2018 for Rs.5,16,852/- paid to the Operational Creditor.
 - c) Transaction receipt reference 001055978 dated 11.03.2019 for Rs.5,61,147/- paid to the Operational Creditor.

Copies of transaction receipts downloaded from BOB portal are annexed to reply as Annexure-A. Further, an entry dated 11.03.2019 amounting to Rs.5,41,147/- is wrongly entered in the certificate. Therefore, the present application is to be dismissed as the same is filed on the basis of false certificate obtained from the bank.

- iii. The amount of claim relates to period from 04.09.2017 to 05.12.2018 and the present application is filed on 11.01.2022 which is beyond the limitation period of 3 years. Hence, it is not maintainable. The Operational Creditor intentionally to mislead the Hon'ble Tribunal has not specified the date on which the default occurred. Further, each invoice was a separate contract for which payments are made separately for each bill and no running account is maintained in respect of transactions between the parties.
- iv. The Operational Creditor in its ledger account has made entries of Rs.40,67,672/- for interest of bills during 02.01.2018 to 05.12.2018 and for Rs.23,31,823/- for interest on bills already paid from 04.09.2017 to 24.01.2018. The entries for interest have been made after passing Board Resolution authorizing issuance of demand notice under IB Code, 2016. The entries for interest are not only fraudulent and after thought but are also against the principles laid under section 128 of Companies Act, 2013. The entries are made only to inflate the claim amount to match the threshold limit of Rs. 1.00 Crore.
- v. The Operational Creditor has claimed an amount of Rs.63,99,495/- towards late payment charges. The Debit note for said charges was never served upon Corporate Debtor. However, the claim was made in demand notice and the amount was included as

amount in default in the application. The Operational Creditor has not made any provision for entry towards accrued interest for the years ended 31.03.2018 to 31.03.2021 and has fraudulently made entries for past years on 02.08.2021.

- vi. The interest clause mentioned in the invoices was never invoked by the Operational Creditor and no debit was issued till 02.08.2021. The Operational Creditor has not provided any proof for debit note for interest being served upon the Corporate Debtor. Thus, Operational Creditor is not entitled to claim any interest.

- vii. The claim for interest is not arising out of supplies of goods or services and do not form part of Operational Debt under IBC Code, 2016. This has been established by Hon'ble NCLT Delhi Bench in CBRE South Asia Private Limited Vs. M/s. United Concepts and Solutions Private Limited In (IB) -797(ND) 2021 vide order dated 19/01/2022. The relevant extract of order is reproduced below for ready reference.

12. That from the above discussion, it can be inferred that the "interest" can be claimed as the Financial Debt, but neither there is any provision nor there is any scope to include the interest to constitute as the Operational Debt.

14. That in the light of the above discussion, we are of the view that the Interest amount cannot be clubbed with the Principal amount of debt to arrive at the minimum threshold of Rs.1 Crore for complying with

the provision of Section 4 of IBC, 2016.

- viii. In view of the above the application should be dismissed on the grounds that the same is filed without proper authority, defective, barred by limitation and that the claim amount towards unpaid invoices is below Rs.1 Crore.
6. The Operational Creditor has filed its rejoinder on 25.11.2022, the averments of the Operational Creditor in the rejoinder are stated below:-
- i. The Operational Creditor states that the Corporate Debtor has not read the Board Resolution properly. The Authorized Signatory of the Operational Creditor is duly authorized to issue demand notice as well as to file the present application.
 - ii. The Corporate Debtor has not attached Annexure-A (Copies of transaction receipts downloaded from BOB Portal) to the Reply. The Bank Certificate issued by Banker has been attached to Petition produced before this Hon'ble Court. There might be some clerical mistake in the Bank Statement. Therefore, the Operational Creditor has requested its Bank viz. Bank of Baroda to issue fresh certificate vide letter dated 05.01.2022. However, the Operational Creditor has given credit of all the money received from the Corporate Debtor and the present claim is in respect of only outstanding amount which the Corporate Debtor has failed to pay. There is no existing dispute as to quality or quantity of the goods supplied; the

Corporate Debtor has only raised technical objections which are otherwise not maintainable.

- iii. The Operational Creditor states that contents of para 4.1 of reply are completely misconceived as the present claim is within limitation in view of order dated 10.01.2022 passed by **Hon'ble Supreme Court** in **Suo Moto Writ Petition No. 03/2020** wherein period from 15.03.2020 to 28.02.2022 is excluded for the purpose of limitation and litigants would have limitation of further period of 90 days w.e.f. 01.03.2022. Further, with respect to para 4.2 the Operational Creditor states that the Corporate Debtor has maintained a running account of Corporate Debtor and has taken credit of amounts paid. Therefore, contention of Corporate Debtor that every invoice is a separate contract is not applicable.
- iv. The Operational Creditor with respect to para no. 5,6 and 7 of reply states that it is well settled position that the claim of Operational Creditor for interest alone is not maintainable. However, when the claim is for outstanding amount of the goods supplied along with interest thereon is considered as "Operational Debt". *The Hon'ble National Company Law Appellate Tribunal ('NCLAT') in the case of Mr. Prashant Agarwal, Member of Suspended Board of Bombay Rayon Fshions Ltd. Vs. Vikash Parasrampuriah and anr., held that under section 4 of the Insolvency & Bankruptcy Code('IBC'), an operational creditor can club the 'interest' with the principal amount to arrive at the threshold limit of Rs.*

1 Crore, which is the default limit for filing of applications under Part II of the Insolvency and Bankruptcy Code, 2016.

- v. Further, the Operational Creditor states that invoice raised mentions interest @24 % p.a. would be chargeable in case of delay in payment. Thus, the interest amount claimed is on the basis of written consent between the parties. The Corporate Debtor has never disputed the invoices or interest clause in these invoices.
 - vi. The Operational Creditor states that present Petition is complete in all respects; the default amount is more than threshold limit and there is not existing dispute as to the default amount, therefore the present Petition may be admitted.
7. We have heard the learned counsel for both the parties and have perused the material available on record. It is noted that the Operational Creditor supplied certain LAC coated metallised Polyester Film to the Corporate Debtor for which the invoices for the period from 02.01.2018 to 05.12.2018 amounting to Rs.64,32,674/- is outstanding. Further, late payment charges for the invoices that have already been paid for the period from 04.09.2017 to 24.01.2018 amounting to Rs.23,31,823/- and for the invoices that are outstanding for the period from 02.01.2018 to 05.12.2018 amounting to Rs.40,67,672/- are also outstanding. It is also noted that the Operational Creditor has placed on record the invoices along with the delivery challans duly confirmed by Corporate Debtor

which indicates that said items were delivered to and accepted by the Corporate Debtor. The said invoices became due within 30 days from the date of invoice. However, the Corporate Debtor failed to make payment within agreed terms. As a consequence the Operational Creditor sent demand notice in FORM-3 and FORM-4 dated 09.10.2021 demanding payment of unpaid operational debt of Rs.1,28,32,169/-. On perusal of demand notice it is observed that date of default is not mentioned in the said demand notice. The Corporate Debtor has not replied to the said demand notice. Therefore, the Operational Creditor has filed present Application claiming an amount of Rs.1,28,32,169/-.

8. The amount claimed by Operational Creditor in Part-IV is above pecuniary threshold limit of Rs.1 Crore as envisaged under Section 4 of the Code, 2016. The date of default is not mentioned by Operational Creditor in demand notice as well as in application. Therefore, we consider the date of default to be 04.01.2019 i.e. 30 days from the date of last invoice dated 05.12.2018. In this case period of limitation would expire on 04.01.2022 which is covered by order passed by **Hon'ble Supreme Court in Suo Moto Writ Petition No. 03/2020** for extending the period of limitation from 01.03.2022 in view of the pandemic Covid-19. The present application is filed on 13.01.2022. Hence, application is well within limitation. The last payment made by the Corporate Debtor as per the Bank Certificate dated 18.10.2021 issued by Bank of Baroda was on 04.06.2019, the said fact is also reflected from the ledger of Operational Creditor at pg no.122, even after making such payment the amount claimed by Operational

Creditor is still outstanding. Further, even if we consider that an amount of Rs.5,62,617/- (paid on 18.09.2018), Rs.5,16,852/- (paid on 15.10.2018) and Rs. 20,000/- (5,61,147-5,41,147) (paid on 11.03.2019) is paid by Corporate Debtor still the outstanding amount is beyond the threshold limit thus, debt and default is proved.

9. The claim of the Operational Creditor stands established as there is a default in payment of the amount due to the Operational Creditor. The existing default amount is of more than **rupees one crore** which meets the threshold limit as per section 4 of the Code and is well within the limitation for filing the present Application.
10. In view of the facts as discussed hereinabove, it is held that, the Corporate Debtor has defaulted in the payment of its debts. Accordingly, we admit this Application and order as under:-

(i) The Application bearing **CP(IB)/29/(AHM)/2022** filed by **Sumilon Industries Private Limited** (Operational Creditor) under Section 9 of the Insolvency and Bankruptcy Code, 2016 (Code) read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating CIRP against **Savitri Polyesters Private Limited** (Corporate Debtor) is admitted and the moratorium is declared for prohibiting all of the following in terms of Section 14(1) of the Code.

(a) *the institution of suits or continuation of pending suits or proceedings against the Respondent/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 Respondent/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 Respondent/Corporate Debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;*
- (d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the Respondent/Corporate Debtor.*

(ii) The order of moratorium shall have effect from the date of this order till the completion of the Corporate Insolvency Resolution Process or until this Adjudicating Authority approves the Resolution Plan under sub-section (1) of the Section 31 or passes an order for liquidation of Respondent/Corporate Debtor Company under Section 33 of the IBC, 2016, as the case may be.

(iii) We hereby appoint **Nandish Sunilbhai Vin** having Registration No. IBBI/IPA-001/IP-P02117/2020-21/13270 E-mail Id ip.nandish.vin@gmail.com to act as an IRP under section 13(1) (c) of the Code. He shall conduct the Corporate Insolvency Resolution Process as per the provisions of Insolvency and Bankruptcy Code, 2016 r.w. Regulation made thereunder.

- (iv) The IRP shall perform all his functions as contemplated, *inter-alia*, by sections 17, 18, 20 & 21 of the Code. It is further made clear that all personnel connected with Corporate Debtor, its Promoter or any other person associated with management of the Corporate Debtor are under legal obligation under Section 19 of the Code to extend every assistance and co-operation to the Interim Resolution Professional. Where any personnel of the Corporate Debtor, its Promoter or any other person, is required to assist or co-operate with IRP, do not assist or Co-operate, the IRP is at liberty to make appropriate application to this Adjudicating Authority with a prayer for passing an appropriate order.
- (v) This Adjudicating Authority directs the IRP to make public announcement of initiation of Corporate Insolvency Resolution Process (CIRP) and call for submission of claims under Section 15 as required by Section 13(1) (b) of the Code.
- (vi) The IRP is expected to take full charge of the CD's assets, and documents without any delay whatsoever. He is also free to take police assistance in this regard, and this Court hereby directs the Police Authorities to render all assistance as may be required by the IRP in this regard.
- (vii) The IRP or the RP, as the case may be shall submit to this Adjudicating Authority periodical report with

regard to the progress of the CIRP in respect of the Corporate Debtor.

- (viii) It is further directed that the supply of goods/services to the Corporate Debtor Company if continuing, shall not be terminated or suspended, or interrupted during the moratorium period.
- (ix) The IRP shall be under a duty to protect and preserve the value of the property of the 'Corporate Debtor Company' and manage the operations of the Corporate Debtor Company as a going concern as a part of the obligation imposed by Section 20 of the Insolvency & Bankruptcy Code, 2016.
- (x) The Operational Creditor is directed to pay an advance of **Rs.1,00,000/- (Rupees One Lakh Only)** to the IRP within two weeks from the date of receipt of this order for the purpose of smooth conduct of the Corporate Insolvency Resolution Process (CIRP) and IRP to file proof of receipt of such amount to this Adjudicating Authority along with First Progress Report within 30 days.
- (xi) The Registry is directed to communicate a copy of this order to the Operational Creditor, the Corporate Debtor and to the Interim Resolution Professional and the concerned Registrar of Companies, after completion of necessary formalities, within seven working days and upload the same on the website immediately after pronouncement of the order. The Registrar of Companies shall update its website by

updating the Master Data of the Corporate Debtor in MCA portal specific mention regarding admission of this Application and shall forward the compliance report to the Registrar, NCLT.

- (xii) The Registry is further directed to send a copy of this order to the Insolvency and Bankruptcy Board of India for their record.

11. Accordingly, **CP(IB) 29 of 2022** is allowed and stands admitted. A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

-SD-

KAUSHALENDRA KUMAR SINGH
MEMBER (TECHNICAL)

-SD-

SHAMMI KHAN
MEMBER (JUDICIAL)

Arati-LRA