

**THE NATIONAL COMPANY LAW TRIBUNAL
CHANDIGARH BENCH, CHANDIGARH
(Exercising powers of Adjudicating Authority under
the Insolvency and Bankruptcy Code, 2016)**

CP (IB) No. 273/Chd/Chd/2021
**Under Section 9 of The Insolvency and
Bankruptcy Code, 2016 read with The
Insolvency and Bankruptcy (Application to
Adjudicatory Authority) Rules, 2016**

In the matter of:

Napin Impex Limited
(Earlier known as Napin Impex Private Limited)

...Petitioner/Operational Creditor

vs.

Kirtiman Cements & Packaging Industries Limited

...Respondent/Corporate Debtor

In the matter of C.P. (IB) No. 273/Chd/Chd/2021

Napin Impex Limited
(Earlier known as Napin Impex Private Limited)
Having its Registered Office at
H-1419, Basement DSIIDC, Narela
Delhi-110040

...Petitioner/Operational Creditor

vs.

Kirtiman Cement & Packaging Industries Limited
Having its registered office at
SCO 196 & 197, 3rd Floor
Sector 34A, Chandigarh- 160035

...Respondent/Corporate Debtor

Order delivered on: 20.02.2024

**Coram: HON'BLE MR. HARNAM SINGH THAKUR, MEMBER (JUDICIAL)
HON'BLE MR. UMESH KUMAR SHUKLA, MEMBER (TECHNICAL)**

Present:

For the Petitioner: Mr. Shobit Nanda, Advocate

For the Respondent: Mr. Aalok Jagga with Mr. APS Madaan, Advocates

Per: Umesh Kumar Shukla, Member (Technical)
Harnam Singh Thakur, Member (Judicial)

ORDER

The instant application has been filed by Napin Impex Limited (CIN U27106DL2004PLC12966) having registered office at H-1419, Basement DSIIDC, Narela Delhi-110040 (hereinafter referred to as “**Petitioner**”) against Kirtiman Cements & Packaging Industries Limited (CIN U26941CH1996PLC017613) having registered office at SCO 196 & 197, 3rd Floor Sector 34A, Chandigarh-160035 (hereinafter referred to as “**Respondent**”) under Section 9 of The Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as “**the Code**”), read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, seeking initiation of the Corporate Insolvency Resolution Process in respect of the Corporate Debtor. Since, the office of the Corporate Debtor, i.e., M/s Kirtiman Cements & Packaging Industries Limited is situated in the State of Punjab, this Adjudicating Authority has the jurisdiction over the matter.

2 The brief facts mentioned in the application are:

2.1 The Petitioner is an agent of ONGC Petro Additions Limited (**OPAL**) appointed vide Domestic Channel Partner Agreement for Consignment Stockist Agent (CSA) dated 11.04.2017 and vide Domestic Channel Partner Agreement for Del Credere Agent (DCA) dated 11.04.2017.

2.2 The Corporate Debtor approached the Petitioner in the year 2017 for purchasing polymer raw materials manufactured by OPAL and assured the Petitioner that it would make timely payments, i.e., within seven days (07 days) from the date of raising the bills/ invoices or debit notes by OPAL or Operational Creditor (after receipt of the consignment) to Operational Creditor of all invoices. The Corporate Debtor also agreed to abide by the terms and conditions stipulated by OPAL and executed various

annual AMS (Annual Memorandum of Understanding Scheme) including the annual AMS FY 2018-19 dated 07.04.2018 for the financial year 2018-19 and the annual AMS FY 2019-20 dated 09.04.2019 for the financial year 2019-20 with OPAL.

2.3 The Petitioner supplied polymers raw materials (POLYPROPLOYLENE-HP) between the period 21.09.2017 to 04.10.2019 under various invoices and packing lists (invoices), and the payment under those invoices was to be made to the Petitioner.

2.4 The Corporate Debtor accepted and utilized the goods supplied under the invoices, but however, failed to pay a substantial part of the outstanding invoices and paid only part payments. As of 25.10.2019, a total principal sum of Rs.1,05,07,692/- along with interest at the rate of 27% p.a. from the due date until the actual date of payment as per the Annual AMS read with price circulars dated 02.04.2018 and 11.04.2019, was due and payable by Corporate Debtor to the Petitioner. The date of default mentioned is 04.10.2019, when the last unpaid invoice was raised by the Petitioner on the Corporate Debtor.

2.5 Corporate Debtor vide email dated 30.10.2019, unambiguously and unequivocally admitted that a sum of Rs.1,11,71,649 was due and payable to the Petitioner as on 30.10.2019.

2.6 The Petitioner issued a demand notice dated 25.02.2020 to the Corporate Debtor and its directors, through speed post on 27.05.2020 and vide email dated 01.06.2020, and received undated replies from the Corporate Debtor, wherein unfounded issues were raised by the Corporate Debtor to evade its liability, in contrast to its own admitted accounts dated 30.10.2019.

3 The Corporate Debtor in its reply dated 22.08.2022, filed via diary no. 01413/2, submitted that the petition is not maintainable, as the name of the supplier mentioned in the invoices appended at page 43 onwards by the Petitioner is ONGC Petro Additions Limited (OPAL), Gujarat. The alleged supply of the goods is not by the Petitioner, but by a third party.

3.1 It is further submitted by the Corporate Debtor that the Petitioner cannot be permitted to espouse a third party's, cause of action, or on behalf of OPAL without any authority. The Corporate Debtor has referred to the Domestic Channel Partner Agreement (Annexure- H and I), as relied upon by the Petitioner: -

3.1.1 As per Clauses 4 (c) and (d), the Petitioner is only permitted to store and market the goods of the Manufacturer/Supplier, i.e., OPAL. Further, the Petitioner has been categorically debarred to act as an agent or representative except if specifically authorized to act on behalf of then Supplier Company. Neither any authority letter has been placed on record, nor is the case of the Petitioner that it is acting on behalf of the Company.

3.1.2 As per Clause 4 (c) at page no. 221, it is clearly mentioned that in the concluding 5 lines of Para No. 4 (a) that CSA/Petitioner shall not have any lien or interest on the stocks of OPAL. Consequently, the goods alleged to have been supplied, are not under the ownership of the Petitioner.

3.1.3 As per Clause 8 (d), at best, the Petitioner could treat itself as a Collection Agent, but that too, it is restricted for collection of customer statutory forms and documents, and not the sale proceeds.

3.1.4 As per Clause 4 (b & c) at Page No. 220, it is clearly mentioned that the power of sale of goods is available to both, i.e., CSA/ Petitioner or OPAL, i.e., Manufacturer.

It is clearly mentioned that even though the Petitioner may have the right to sell and issue invoices, that does not exclude the Company to effect sales on its own behalf. Consequently, invoices will be raised by sales effected by the Petitioner, and if sales are not effected by the Petitioner and are effected by the Company/OPAL, invoices will be issued by the said company. In the case of the former, the Petitioner may claim to be an Operational Creditor, but in the latter case, the Petitioner, if collected any money in terms of Clause 8(d) at page 223, has to remit it to the Company and is excluded to be claimed as supplier or Operational Creditor.

3.2 The Corporate Debtor avers that the reply at Page 261 to the demand notice dated 25.05.2020, reveals that there is a dispute between the Petitioner and M/s OPAL and hence, the present petition is not maintainable.

3.3 It is alleged by the Corporate Debtor that the amount claimed is actually less than the threshold limit of Rs. one crore, but has been marginally increased to Rs.1,05,07,692/- including interest and there is no provision for claiming interest and cannot form part of the Operational Debt.

3.4 It is further alleged by the Corporate Debtor that the demand notice dated 25.05.2020, is under Form-3, which is issued, where claim is without invoices. Whereas in case its claim would have been on the basis of invoices, notice under Form-4 would have been issued, and the invoices relied upon by the Petitioner could only be considered in case notice in Form-4 would have been issued.

3.5 It is submitted by the Corporate Debtor that the amount of default does not match with the supporting Annexures, and no material has been put forward to support the claim. Also, the date of default has been incorrectly mentioned, without any supporting calculations of the amount in default.

4 The Petitioner in its rejoinder dated 22.12.2022, filed vide diary no. 01413/3 reiterated the stand taken in the petition. The short written submissions dated 23.02.2023 along with checklist under Section 9 of the Code have been filed by the Petitioner vide diary no. 01413/5. Similarly, Ld. Counsel for the Corporate Debtor had filed short written submissions dated 01.03.2023, vide diary no. 01413/4.

5 During the course of the hearing, it was contended by the Ld. Counsel for the Petitioner that the Corporate Debtor had attempted to raise various baseless objections to aver that the petitioner is not an operational creditor.

5.1 The Corporate Debtor admitted that a sum of Rs.1,11,71,649 was due and payable to the Petitioner by him as on 30.10.2019. In the demand notice dated 25.05.2020, the Corporate Debtor admitted its liability towards the Petitioner and stated that:

“... We do not want to have any dispute of any kind with you. We stand by our responsibilities and we want to work with you further by clearing all your doubts and dues by settling the accounts...” (emphasis supplied)

5.2 The Corporate Debtor has neither disputed the supply nor the quality of goods supplied under the invoices attached with the Petition, nor disputed the fact that these invoices are due and outstanding. The Corporate Debtor itself requested OPAL to be registered through the Petitioner, as stated in Annexure E of the petition:

“With the above submission we Kirtiman Cements and packaging industries request OPAL to kindly register us as a customer through our DCA Napin Impex Limited”

The Corporate Debtor made all the payments to the Petitioner till date and no payment was ever made by the Corporate Debtor to OPAL.

5.3 According to the Ld. Counsel for the Petitioner, under the terms of DCA, it is the Petitioner's right to recover the payments for all supplies made through the

Petitioner and the impugned invoices specifically stipulate that the Petitioner is a partner for the supplies made to the Corporate Debtor. As per Section 5(20) of the Insolvency and Bankruptcy Code, an Operational Creditor also includes an assignee of Operational Debt.

5.4 The Ld. Counsel for the Petitioner also submitted that, as per the Annual AMS Scheme signed by the Respondent with OPAL, read with the price circular dated 09.04.2018 and 11.04.2019 issued by OPAL, the Corporate Debtor is liable to pay interest at the rate of 27 percent per annum on the outstanding sums. Thus, the amount claimed exceeds the threshold limit and has submitted its ledger in support of the same.

5.5 The Ld. Counsel for the Petitioner has placed reliance upon the authority in ***Madras Chemicals & Polymers vs. Vijay Aqua Pipes Pvt. Ltd. Company Appeal (AT) (CH) (INS) 298/2021***, where the Hon'ble NCLAT had held that a Del Cadre Agent (DCA) would qualify as an operational creditor.

6 On the other hand, the Ld. Counsel for the Corporate Debtor contended that it is not the case of the petitioner that the present petition has been filed by OPAL, but by a third party. The petitioner has placed reliance upon Domestic Channel Partner Agreement, in which the Corporate Debtor is not a party and same reveals that there is no authority of third party on behalf of the party, who supplied goods and it is clear from the petitioner's documents that the petitioner is neither an operational creditor, nor is entitled to maintain the present petition.

6.1 The petition is contrary to Section 4 of the Code, where the threshold limit is Rs. one crore, and the amount claimed has been marginally increased to Rs. 1,05,07,692/, in order to clear the above mentioned bar after levying a higher

abnormal interest at the rate of 27%, which cannot form part of the Operational Debt, nor the same can be taken into consideration for the purpose of Section 4.

6.2 It is also contended by the Ld. Counsel for the Corporate Debtor that the collection of amount does not entitles the Petitioner to file the present petition for claim, and step into the shoes of Operational Creditor, as there cannot be any estoppel against the law. Moreover, while issuing notice dated 25.05.2020, the applicant has chosen Form-3, which means that the Petitioner admits that the claim is without invoices, whereas, in case if his claim would have been on the basis of invoices, then notice under Form-4 would have been issued. Applicant having chosen Form-3, admits that its claim is without the support of invoice.

6.3 The Ld. Counsel for the Corporate Debtor referred to paragraphs 4 and 5 of its reply to the demand notice dated 25.05.2020, wherein it was mentioned that there had been a dispute between the Petitioner and OPAL. Moreover, reference has been made to Regulation 2(b) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process of Corporate Persons) Regulations, 2016, page 5-11 of the reply, and also submitted that the e-way bill, along with the forms and provisions of GST, clearly depicts that Section 9 petition can be filed only by the actual supplier of the goods.

6.4 The Ld. Counsel for the Corporate Debtor has placed reliance upon the following judgments:

- I. ***Neeraj Bhatia Vs. Davinder Ahluwalia CA(AT) (INS) No. 142 of 2017***, wherein it has been held that if guarantor makes the payment, it cannot be treated to have been substituted nor fall within the meaning of financial creditor.

- II. ***IRK Raju Vs. Immaneni Eswara Rao bearing CA (AT) (INS) No. 1058 of 2019***, where NCLAT dealt with the second amendment dated 17.08.2018 w.e.f. 06.06.2018, where the word “repayment” was substituted with “payment” in Section 5(21), which defines operational debt, in order to avoid claim of repayments and restrict applicability of IBC to direct suppliers and to avoid indirect claimants.
- III. ***Neeraj Jain vs. Cloud Walker Streaming Technology Pvt. Ltd., CA (AT) (INS) 1354 of 2019*** (para no. 42 to 45), wherein it has been held by the Hon’ble NCLAT that it is not the discretion of the operational creditor to send demand notice in Form 3 or in Form 4.
- IV. ***Overseas Packaging Industries Pvt. Ltd. vs. Sify Technologies Pvt. Ltd. CA (AT) (INS) No. 240 of 2019***, where Hon’ble NCLAT dealt with the argument of operational creditor that even though invoice was issued in the name of Perfect IT Solution, but IBC proceedings are maintainable against Sify Technologies Limited being its agent and held that such disputed questions cannot be decided, as invoice was not issued in the name of Corporate Debtor. IBC is not a substitute of recovery proceedings. Applicant on the basis of above will have to lead evidence to show his entitlement to recover amounts from respondents. In summary jurisdiction, the same cannot be established.
- V. ***Embee Software Private Ltd. vs. Solicon Pvt. Ltd., CA (AT) (INS) No. 780 of 2019***, in which Hon’ble NCLAT held appellant not to be an operational creditor as respondent did not issue any purchase order to the appellant nor availed its services. Adjudicating Authority is not required to determine the claim of applicant like money claim in a suit.

6.5 Additionally, the Ld. Counsel for the Corporate Debtor stated that the Petitioner's reliance on the authority in ***Madras Chemicals vs. Vijay Aqua*** by the Hon'ble NCLAT is not applicable to the present case because it is based on different facts:

a) Para 14 of the judgment shows that the invoice was issued by the supplier, wherein in the terms of payment, it is mentioned "payment in respect of this invoice should be made only in favour of Madras Chemicals and Polymers."

Thus, del credere agent was entitled to the invoice amount, unlike the present case, where invoice does not contain any such stipulation.

b) Similarly, clause 15 of the Del Credere Agency Agreement mentioned in the judgment conferred the right to claim payment on behalf of the supplier to the agent, on the basis of which the agent was treated as the operational creditor.

Whereas, in the present case, there is no authority or right specifically extended by the supplier in favour of the Petitioner, as neither in the invoice nor in the agreement dated 11.04.2017.

c) The Hon'ble NCLAT in ***Rahul Gupta vs. Mahesh Madhvan: bearing CA (AT) (INS) 3 of 2018***, dealt with a similar situation and held that the direct payment made by sub-tenant to the operational creditor will not create a relationship of operational creditor and corporate debtor between them.

Analysis and finding

7 After hearing both the parties and a careful perusal of the records produced before us, we would delve into the issues involved in the case:

7.1 The first issue for consideration is “Whether the petition is within the period of limitation?”

The date of default as mentioned in the petition is 04.10.2019, i.e. the date, when the last unpaid invoice was raised. The petition is filed on 23.11.2021, which is within the period of limitation. Further, the issue of limitation has not raised by either of the parties.

7.2 The next issue for consideration is “Whether the petitioner qualifies as an operational creditor under Section 9 of the Code?”

7.2.1 The petitioner has placed reliance on the Del Credere Agreement dated 11.04.2017 entered into between OPAL and him and the letter dated 04.09.2017 of the Corporate Debtor for the purpose of his claim.

7.2.2 Firstly, we would examine the relevant clauses of the Del Credere agreement to understand the relationship of the petitioner and main supplier: OPAL.

(i) The agreement confers upon the Petitioner the right to market and distribute OPAL’s products in Clause 4 titled as ‘Procedure’ as below:

“4. PROCEDURE

*b. Company shall make available to the DCA a format of indent/ order for securing order from the Customer. The Customer shall fill in and sign the indent/ order and submit the same to the Company through the DCA along with the relevant proof of payment of adequate value. Subject to the production and availability of the said Products, Company at its discretion shall raise necessary challans and invoices and other documents on the customers for the sale of the said Product. **The DCA shall be solely responsible for collection of all payments to Company in respect of bills/invoices raised by the Company against the above Indents.** The DCA shall keep Company indemnified at all times from any loss arising out of non-realisation of payments or non-fulfillment of statutory obligations by customers”*

(ii) Clause 5 and 7 and of the Agreement, titled as 'Security Deposit' and 'Realisation' respectively discuss collection mechanism and liabilities of DCA in the event of non-payment by the parties as below:

"5. SECURITY DEPOSIT

d. Should the DCA fail or otherwise neglect to remit the sale proceeds of the Products or fails to collect from the customer the statutory forms and documents under various applicable Acts and Rules of India, Company shall without prejudice to its other remedies available at Law be entitled to adjust from the Cash deposit and/ or enforce the Bank Guarantee in full or in part and/ or commission of DCA, as the case may be and realize the amount due to it along with applicable interest. The DCA shall not in any way create any impediments in such enforcement of the Bank Guarantee or adjustment of deposits."

"7. REALISATION

- a. The DCA undertakes to remit to Company the value of the Products immediately on realization. The DCA guarantees and undertakes that the buyers of the said products will fulfill their obligation to Company in respect of the sales affected. The DCA further guarantees the payment of the said price due and payable for the said Products and in the event of default by the buyers or the customers in paying the prices within the due date, the DCA undertakes to pay the same and/ or Company shall have the right to realize the price for the said Products from the cash deposit/ invoke the Bank Guarantee.*
- b. The DCA shall submit daily accounts to Company of the collections received by it under this Agreement. The DCA shall send/ transfer the sale proceeds collected as per the instructions of Company.*
- c. If the sale proceeds are not received by Company within its due date from the customers, such outstanding shall be payable by the DCA together with interest and charges at such rates, as may be decided by Company from time to time, as if the said amount is due and payable by the DCA."*

(iv) Clause 15 the Agreement, titled as 'Term' defines the period of the agreement as below:

"15. TERM

This Agreement shall come into effect from 11/04/2017 and subject to the terms and conditions herein contained, shall remain in force and effect till close of business on 10/04/2020, unless the same is terminated by Company in accordance with clause 16 herein. Upon expiry, the agreement may be renewed by Company for such further period on mutually acceptable terms and conditions.

The reading of the above mentioned clauses indicates that the whole procedure, beginning from the placing of the order, the issue of invoices from the main supplier, i.e., OPAL and the payments made from the buyers/ customers, was all routed

through the Petitioner. The Petitioner received orders from the buyers/ customers, forwarded them to the main supplier and provided the goods supplied by the main supplier to the buyers/ customers, received payments from them, and remitted the payment back to the main supplier. Further, the provision '*The DCA shall be solely responsible for collection of all payments to Company in respect of bills/ invoices raised by the Company against the above Indents*' clearly establishes the right of the Petitioner to collect/ receive payments for the Company in relation to the goods supplied. Further, the agreement is valid at the time of issue of the invoices.

7.2.3 It is noted that in the letter dated 04.09.2017, the Respondent- Corporate Debtor had requested OPAL to register it as a customer through their DCA-Napin Impex Limited. This letter would have the legal effect of a tripartite agreement between the main supplier, i.e. OPAL, the Petitioner/ Operational Creditor and the Respondent/ Corporate Debtor, giving the Petitioner the right to process orders and collect payment on OPAL's behalf.

7.2.4 Pursuant to the above mentioned request letter, invoices were generated in the name of OPAL and the goods were supplied by the Petitioner, and the payment was made by the Respondent/ Corporate Debtor to the Petitioner for the goods so supplied, and the payment was remitted to OPAL by the Petitioner, which is evidenced from the books of ledger of the Petitioner.

7.2.5 Further, where there is no express contract between the parties to determine their rights and liabilities, reference has to be made to their conduct inter se in order to determine their position. In the present case, it is evident from the conduct of the parties that against the goods supplied by the Petitioner to the Corporate Debtor based on their request letter dated 04.09.2017, the payment was being made by the

Corporate Debtor to the Petitioner, as evidenced from the books of ledger of the Petitioner. This establishes an implied contract between Operational Creditor and Corporate Debtor. In these circumstances, Corporate Debtor is estopped by its own act and conduct to raise issue that petitioner is not an operational creditor.

7.2.6 Moreover, it is contended by the Ld. Counsel for the Corporate Debtor that there is a dispute between OPAL and the Petitioner, but this contention is devoid of legal force, because Corporate Debtor has not received any demand for the claimed amount from OPAL. For the sake of arguments, even if there is any dispute between OPAL and the Petitioner, then the Corporate Debtor is not aberrate to that. Apart, in view of Clause 4(b & c) at page no. 220 of DCA, it is clearly mentioned that power of sale of goods is available to both, i.e., CSA/ Petitioner or OPAL, i.e., Manufacturer. It clearly shows that the Petitioner has the right to sell goods irrespective of the fact that invoices were issued by OPAL.

7.2.7 Since it is a common practice in business where companies appoint Del Credere Agents in order to boost their sales, the rights of the del credere agents cannot be jeopardised, because of the mere fact that the invoices are generated in the name of the principal company.

7.2.8 Further, the Hon'ble NCLAT in ***Madras Chemicals & Polymers vs. Vijay Aqua Pipes Pvt. Ltd. (supra)***, had categorically held that where the corporate debtor had failed to pay the principal amount for certain goods to the del credere agent, such an amount would qualify as an operational debt and a CIRP application under Section 9 of the Code would be maintainable.

7.2.9 In view of the above, we are of the considered view that petitioner is not a collection agent, but qualifies to be an operational creditor.

7.3 The next issue for consideration is “Whether the operational debt exceeds the threshold limit of Rupee One crore?”

7.3.1 The corporate debtor in its reply has raised the issue of threshold limit of Rs. one crore and has submitted that the amount claimed actually is less than Rs. one crore, but has marginally been increased to Rs.1,05,07,692/- only to attempt to clear the above bar. It is further submitted by him that there is no provision of claiming the interest and consequently, the interest portion cannot fall part of the operation debt nor the same can be taken into consideration for the purpose of Section 4.

7.3.2 Since Corporate Debtor has raised the issue that interest cannot form part of the debt for the purpose of threshold limit of Rupee one crore, it would be pertinent to go through legal definition of debt in section 3(11) of IBC, which reads as under:

“3(11) ‘debt’ means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt.”

7.3.3 Since the word "claim" is mention in definition of debt in Section 3(11), we need to refer to definition of claim under Section 3(6) of IBC, which is as follows:

"3. (6) ‘claim’ means:

(a) a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured or unsecured;

(b) right to remedy for breach of contract under any law for the time being in force, if such breach gives rise to a right to payment, whether or not such right is reduced to judgment, fixed, matured, unmatured, disputed, undisputed, secured or unsecured.”

7.3.4 Based on the analysis of section 3(6) and 3(11), the interest would form part of the debt, if it accrues based on some agreement or judgment.

7.3.5 The Principal Bench comprising of three members, of NCLAT, Delhi, in the matter of **Mr. Prashat Agarwal, Member of Suspended Board of Bombay Rayon Fashions Ltd. Vs. Vikash Parasrampururia, Company Appeal (AT) (Ins) No. 690 of 2022** has held as below:

“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 (hereinafter referred to as the ‘IBC’), provided that the interest was perspicuously stipulated in an invoice or an agreement.”

7.3.6 In view of the provision of IBC and NCLAT judgement, we are of the view that interest would form part of the debt for the threshold limit of Rs. one crore. After forming the view that interest needs to be added to work out the threshold limit of Rs. one crore, next question arises whether the Corporate Debtor is liable to pay interest at the rate of 27 per cent per annum? We note that in this regard, the Price Circular for Polymers DTA Sales dated 11.04.2019, issued by OPAL stipulate as below:

“8. Delayed Payment Charges

If payment is not received as per the payment terms, interest will be charged as below:

- i. for cash sale @36 % per annum for the delayed period from the Date of Invoice*
- ii. For Credit sale:
In case Cheque/ E-payment:
First 15 days after IFC: 21% per annum (After IFC Period)
16 days to 30 days: 24% per annum (From the date of invoice)
>30 days: 27% per annum (From the date of invoice)”*

7.3.7 In view of clear stipulation in the price circular of OPAL, which is binding on the parties, we are of opinion that the issue of interest is undisputed and the Corporate Debtor is liable to pay interest at the rate of 27% per annum from the date of the invoice raised, if the delay is more than 30 days. Having decided that interest forms part of the debt and Corporate Debtor is liable to pay interest as per the price circular dated 11.04.2019 agreement, we are of the opinion that the operational debt exceeds the threshold limit of Rs. one crore.

7.4 The next issue for consideration is “Whether the demand notice issued by the Petitioner under Form-3 is valid?”

7.4.1 As per Rule 5 of The Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, the Petitioner, while filing a petition under Section 9 of the Code, shall deliver a demand notice to the Corporate Debtor under Section 8 of the Code. Rule 5 of The Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 prescribes as follows:

*“5. Demand notice by operational creditor (1) An operational creditor shall deliver to the corporate debtor, the following documents, namely:
(a) a demand notice in Form 3; or
(b) a copy of an invoice attached with a notice in Form 4.”*

7.4.2 This issue has been examined in detail by the Hon’ble NCLT, New Delhi, in ***Tudor India Pvt. Ltd. vs. Servotech Power Systems Ltd.***, where the Adjudicating Authority observed:

“19. To check whether the issuance of Demand Notice basing on Invoices in Form 3 instead of Form 4, will jeopardize the rights of the parties or will cause prejudice to any of the party, it is necessary to compare title, subject and contents of Form 3 with Form 4. That when one compares the title of the Form 3 (“FORM OF DEMAND NOTICE / INVOICE DEMANDING PAYMENT UNDER THE INSOLVENCY AND BANKRUPTCY CODE, 2016”) with Form 4 (“FORM OF NOTICE WITH WHICH INVOICE DEMANDING PAYMENT IS TO BE ATTACHED”), one finds that the term ‘invoice’ is mentioned in the Titles of both Form 3 and Form 4.

*.....
25. Holding the aforesaid presumption still true, if invoices are attached with Form 3 instead of Form 4, then what remains is only the incorrect label. Further, the applicability of which Form needs to be sent, is a procedural law...*

*.....
29. Accordingly, we hold that in a situation where an Operational Debt arises out of the provision of goods and services and pursuant to that Invoices are raised, there is no illegality in choosing the Form 3 as provided in Rule 5(1)(a) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for sending the Demand Notice provided that the Unpaid Invoices forming part of the transaction are annexed therewith. Hence, issuance of Demand Notice in Form 3 annexed with invoices by the Operational Creditor in the present case would be in order in terms of the Rules.”*

In view of the above, we are of the considered opinion that the demand notice issued by the petitioner is valid.

7.5 The next issue for consideration is “Whether the operational debt was disputed by the corporate debtor?”

It is deposed by way of an affidavit filed under section 9(3)(b) of the Code vide diary no. 01413 by the operational creditor that no notice is given by the corporate debtor relating to any dispute of unpaid operational debt and there is no pre-existing dispute between the parties.

8 We have gone through the contents of the application filed in the Form 5 as well as the petition and find the same to be complete in all respects. The material on record clearly goes to show that the respondent committed default in payment of the claimed operational debt even after demand issued by the petitioner. As discussed above, there is a total admitted operational debt (in default) of Rs.1,05,07,692/- (Rupees One Crore Five Lac Seven Thousand Six Hundred and Ninety Two only), which is still pending and amounts to default. The debt is evidenced from the documents such as Del Credere Agreement entered between OPAL and Petitioner (Annexure-I), Request Letter dated 04.09.2017 (Annexure-E), Ledger account maintained by the Petitioner (Annexure-B), Price Circular dated 02.04.2018 and 11.04.2019 issued by OPAL (Annexure-G), which are attached with the main petition. We are of the considered opinion that the petitioner has proved the operational debt, which is more than Rupees one crore and its default and there is no pre-existing dispute between the petitioner and corporate debtor.

9 In the given facts and circumstances, the present petition being complete and having established the default in payment of the Operational Debt for the default amount being above the threshold limit, the petition is admitted in terms of Section 9 of the IBC for initiation of the CIR Process of the Corporate Debtor: Kirtiman Cements & Packaging Industries Limited. We also appoint Interim Resolution Professional and direct the moratorium to take effect as below:

9.1 In Part III of Form No. 5, the name of Mr. Narendra Singh Chhabra as Interim Resolution Professional (IRP) has been proposed by the Petitioner. The Law Research Associate of this Tribunal has checked the credentials of Sh. Narendra Singh Chhabra and there is nothing adverse against him. In view of the above, we appoint Mr. Narendra Singh Chhabra, Registration No. IBBI/IPA-001/IP-P-02145/2020-2021/13312, E-mail: chhabra.ns@gmail.com, Mobile No. 9632740077, the Interim Resolution Professional with the following directions: -

- i. The term of appointment of Mr. Narendra Singh Chhabra shall be in accordance with the provisions of Section 16(5) of the Code, subject to his written consent to be filed within 7 days of this order;
- ii. In terms of Section 17 of the Code, from the date of this appointment, the powers of the Board of Directors shall stand suspended and the management of the affairs shall vest with the Interim Resolution Professional and the officers and the managers of the Corporate Debtor shall report to the Interim Resolution Professional, who shall be enjoined to exercise all the powers, as are vested with Interim Resolution Professional and strictly perform all the duties as are enjoined on the Interim Resolution Professional under Section 18 and other relevant provisions of the Code, including taking control and custody of the assets, over which the Corporate Debtor has ownership rights recorded in the balance sheet of the Corporate Debtor, etc. as provided in Section 18 (1) (f) of the Code. The Interim Resolution Professional is directed to prepare a complete list of the inventory of assets of the Corporate Debtor;

- iii. The Interim Resolution Professional shall strictly act in accordance with the Code, all the rules framed thereunder by the Board or the Central Government and in accordance with the Code of Conduct governing his profession and as an Insolvency Professional with high standards of ethics and moral;
- iv. The Interim Resolution Professional shall cause a public announcement within three days as contemplated under Regulation 6 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 of the initiation of the Corporate Insolvency Resolution Process in terms of Section 13 (1) (b) of the Code read with Section 15 calling for the submission of claims against Corporate Debtor;
- v. It is hereby directed that the Corporate Debtor, its Directors, personnel and the persons associated with the management shall extend all cooperation to the Interim Resolution Professional in managing the affairs of the Corporate Debtor as a going concern and extend all cooperation in accessing books and records as well as assets of the Corporate Debtor;
- vi. The Suspended Board of Directors is directed to give complete access to the Books of Accounts of the corporate debtor maintained under Section 128 of the Companies Act. In case, the books are maintained in the electronic mode, the Suspended Board of Directors are to share with the Resolution Professional all the information regarding Maintaining the Backup and regarding Service Provider kept under Rule 3(5) and Rule 3(6) of the Companies Accounts Rules, 2014 respectively as effective from

11.08.2022, especially the name of the service provider, the internet protocol of the Service Provider and its location, and also address of the location of the Books of Accounts maintained in the cloud. In case accounting software for maintaining the books of accounts is used by the corporate debtor, then IRP/ RP is to check that the audit trail in the same is not disabled as required under the notification dated 24.03.2021 of the Ministry of Corporate Affairs. A reference is made to the provisions of Section 128(5) of the Companies Act 2013, whereby every company should maintain its books of accounts for not less than eight financial years immediately preceding a financial year. Minutes and statutory records are the principal documents of the company that should be maintained and preserved since inception.

- vii.* In view of the above mandatory provisions, the suspended directors of the board will ensure that the books of accounts for the eight previous financial years preceding the date of this order be made available to the IRP/ RP within 15 days of the initiation of the CIRP order. The statutory auditor is also directed to share the records maintained by him in the course of the audit of the accounts of the corporate debtor for the period of three years prior to the date of initiation of this CIRP order within the same period of 15 days.
- viii.* In case of any non-cooperation by the Suspended Board of Directors or the statutory auditors, he may take the help of the police authorities to enforce this order. The concerned police authorities are directed to extend help to the IRP/ RP in implementing this order for retrieval of relevant information from the systems of the corporate debtor, the IRP/ RP may

take the assistance of Digital Forensic Experts empanelled with this Bench for this purpose. The Suspended Board of Directors is also directed to hand over all user IDs and passwords relating to the corporate debtor, particularly for government portals, for various compliances. The Interim Resolution Professional is also directed to make a specific mention of non-compliance, if any, in this regard in his status report filed before this Adjudicating Authority immediately after a month of the initiation of the CIRP.

- ix.* The Resolution Professional is directed to approach the Government Departments, Banks, Corporate Bodies and other entities with request for information/ documents available with those authorities/ institutions/ others pertaining to the corporate debtor, which would be relevant in the CIR proceedings. The Government Departments, Banks, Corporate Bodies and other entities are directed to render the necessary information and cooperation to the Resolution Professional to enable him to conduct the CIR Proceedings as per law.
- x.* The Interim Resolution Professional shall, after collation of all the claims received against the Corporate Debtor and the determination of the operational position of the Corporate Debtor constitute a Committee of Creditors and shall file a report, certifying constitution of the Committee to this Tribunal on or before the expiry of thirty days from the date of his appointment, and shall convene first meeting of the Committee within seven days of filing the report of constitution of the Committee; and

- xi.* The Interim Resolution Professional is directed to send a regular progress report to this Tribunal every fortnight.

9.2 In terms of Section 14 of the code, we also order moratorium as below:

(i) Moratorium under section 14 (1) for prohibiting all of the following, namely:

(a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgement, decree or order in any court of law, tribunal, arbitration panel or other authority;

(b) transferring, encumbering, alienating or disposing off by the 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 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 (54 of 2002);

(d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

(ii) It is hereby clarified that notwithstanding anything contained in any other law for the time being in force, a licence, permit, registration, quota, concession, clearance or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues

arising for the use or continuation of the license, permit, registration, quota, concession, clearances or a similar grant or right during the moratorium period;

(iii) The provisions of sub-section of section 14(1) shall not apply to such transactions, agreements or other arrangement, as may be notified by the Central Government in consultation with any financial sector regulator or any other authority; and also to a surety in a contract of guarantee to a corporate debtor.

(iv) The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period, except where such corporate debtor has not paid dues arising from such supply during the moratorium period or in such circumstances, as may be specified.

(v) 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 Bench approves the resolution plan under sub-section (1) of Section 31 or passes an order for liquidation of the corporate debtor under Section 33 as the case may be.

10 We direct the Operational Creditor to deposit a sum of ₹1,00,000/- (Rupees One Lakh Only) with the Interim Resolution Professional, to meet out the expenses to perform the functions assigned to him in accordance with Regulation 6 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Person) Regulations, 2016. The amount, however, is subject to adjustment

by the Committee of Creditors, as accounted for by the Interim Resolution Professional on the conclusion of CIRP.

11 A copy of the order shall be communicated to both parties. The learned counsel for the petitioner shall deliver a copy of this order to the Interim Resolution Professional forthwith. The Registry is also directed to send a copy of this order to the Interim Resolution Professional at his email address forthwith.

12 The petition is admitted accordingly.

-Sd-
(Umesh Kumar Shukla)
Member (Technical)

-Sd-
(Harnam Singh Thakur)
Member (Judicial)

February 20, 2024
ASG