NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH (COURT-II)

Company Petition No. (IB)-322(ND)2023

IN THE MATTER OF:

M/s SVS Marketing Sanitaryware Private Limited
Registered office at:
717, Pournami, Nellimukal, Thuvayoor South,
Pathanamthitta District, Kerala – 691551

...Applicant/Operational Creditor

VERSUS

M/s Kajaria Bathware Private Limited
Registered office at:
J-1/B-1 (Extn.), Mohan Co-Operative
Industrial Area, Mathura Road,
New Delhi – 110044

... Respondent

Section: 9 of the IBC, 2016

Order Delivered on: 01.12.2023

CORAM

SH. ASHOK KUMAR BHARDWAJ, HON'BLE MEMBER (J)

SH. L. N. GUPTA, HON'BLE MEMBER (T)

PRESENT:

For the Applicant : Adv. Jojo Jose & Adv. Sunitha John,
Adv. Anitta & Adona LLP

For the Respondent : Adv. D. Bhattacharya, Adv. Deeti Ojha

ORDER

PER: SH. L. N. GUPTA, MEMBER (T)

M/s SVS Marketing Sanitaryware Private Limited (for brevity, hereinafter referred to as the **'Applicant'/ 'Operational Creditor'**) has filed the present petition under Section 9 of the Insolvency and Bankruptcy Code, 2016 (**'IBC, 2016'**) read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 with a prayer to initiate the Corporate Insolvency Resolution Process against M/s. Kajaria Bathware Private Limited (for brevity, hereinafter referred to as the **'Respondent'**).

2. The Respondent namely, M/s. Kajaria Bathware Private Limited is a Company incorporated on 22.05.2013 with CIN U26943DL2013PTC252495 under the provisions of the Companies Act, 1956 having its registered office at J-1/B-1 (Extn.), Mohan Co-Operative, Industrial Area, Mathura Road, New Delhi – 110044, which is within the jurisdiction of this Tribunal. The Authorized Share Capital of the Respondent is Rs.35,00,00,000/- and the Paid-up Share Capital is Rs.29,41,17,640/- as per the Master Data annexed.

3. It is stated by the Applicant that it was appointed as the sole distributor of the Corporate Debtor for an exclusive area as reflected in the Distributorship Agreement which was renewed from time to time. Pursuant to discontinuance/prevention of the supply of goods to the dealers, unsold stock of Rs. 3.00 crores, which was fully paid, got accumulated in the godown of the Applicant. As of 28.02.2023, there is an operational debt of Rs.7,33,64,097.88/- in the form of unsold stock, stock interest, warehouse

charges, bad debt, and compensation/damages for the loss incurred due to the breach of the Distributorship Agreement by the Corporate Debtor by misusing their dominant position. The Respondent refused to make the payment even after receiving the statutory demand notice.

4. The particulars of the Operational Debt in terms of the total amount of default, and the date of default are mentioned in Part IV of the application, the relevant extracts of which are reproduced below for the sake of convenience:

PART- IV

PARTICULARS OF OPERATIONAL DEBT

1. TOTAL AMOUNT OF DEBT, DETAILS OF TRANSACTIONS ON ACCOUNT OF WHICH DEBT FELL DUE, AND THE DATE FROM WHICH SUCH DEBT FELL DUE:

1. Total amount of debt:

Rs. 7, 37, 54,179.45 (Rupees Seven Crore Thirty-Seven Lac Fifty-four Thousand, One hundred and seventy-Nine and Forty-five paisa only) as on 28.02.2023

2. Date from which such fell due:

15.03.2020, the date on which the Operational Debtor promised and acknowledged to take back the unsold stocks:

2.	Amount claimed to be in default and the date on which the default occurred (Attach the workings for computation of amount and dates of default in tabular form)	Rs. **7,33,64,097.88** (Rupees Seven Crore Thirty-three lacs Sixty-four Thousand and Ninety-seven and Eighty-eight paisa only) 15th march, 2020. **(Separate summary statement of account is attached)**

As per the above, the Applicant has claimed the unpaid Operational Debt of Rs.7,33,64,097.88/- excluding interest and relied upon 05.03.2020 as the date of default.

5. It is stated by the Applicant that since the Respondent did not make the due payment of its operational debt, it issued a Demand Notice dated 13.12.2022 under Section 8 of IBC 2016 that was served to the Respondent at its registered office vide speed post. The said Demand Notice was replied to by the Respondent vide letter dated 23.12.2022.

6. On issuance of the notice, the Respondent filed its reply and opposed the application on the following grounds that -

i) No Section 9(3)(b) Affidavit has been annexed with the Application by the Applicant,

ii) A Distributorship Agreement dated 15.07.2016 was executed between the Respondent and Mr. Shibu M (proprietorship concern trading as "SVS Marketing"). The said Distributorship Agreement clearly prohibited Mr. Shibu M (SVS Marketing) from transferring or assigning the same or any part thereof without the prior written consent in terms of Clause 8(iii) of the Agreement (ref: page no. 99 of the application),

iii) The claim of the Applicant is arising out of damages and therefore, is not an operational debt.

7. The Applicant filed its rejoinder and stated that the Distributorship Agreement never prohibited the transfer of business or assigning of actionable claims. It only prohibited the transfer of "obligation". It is submitted by the Applicant that there was no obligation towards the company and no obligation was never ever transferred. Further, the proprietorship was transferred into a

Private Limited Company and the promoter of both of them is one and the same i.e., SVS marketing which transferred only the "actionable claims" as defined under the term "property" as per section 3(27) of the Code.

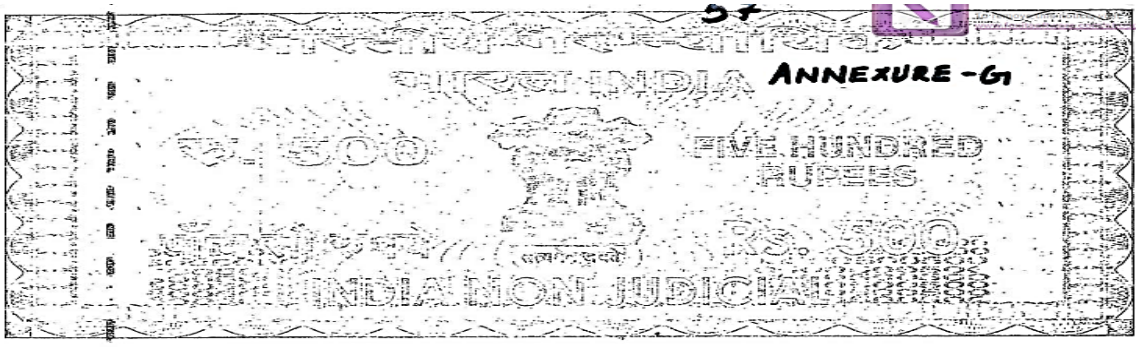
8. We heard the parties and perused the pleadings on record. The Applicant has claimed the alleged debt on account of the accumulated stock due to discontinuance/prevention of the supply of goods to the dealers of the Applicant, which it had been doing pursuant to the Distributorship Agreement dated 15.07.2016 executed between the Respondent and SVS Marketing (through its proprietor Mr. Shibu M). As per the Respondent, the said Distributorship Agreement clearly prohibited Mr. Shibu M (SVS Marketing) from transferring or assigning the same or any part thereof without the prior written consent in terms of Clause 8(III) of the Agreement. The Applicant in its rejoinder has admitted that the proprietorship was transferred into a Private Limited Company by virtue of an "*Amalgamation Agreement*" entered between M/s SVS Marketing (Proprietorship Concern) and M/s SVS Marketing Sanitaryware Pvt. Ltd. and the aforesaid Distributorship Agreement never prohibited the transfer of business or assigning of actionable claims.

9. It is in this backdrop of events, what transpires is that the Petitioner being a *'Company'* is pursuing debt on behalf of the *'Proprietorship firm'*. There are two different ways of looking at this proposition. The first view could be that the debt is "assigned" by a Proprietorship firm to a Company. In this context, when we refer to Section 5(20) of IBC 2016, the definition of 'Operational Creditor' means a person to whom an operational debt is owed

and *includes any person to whom such debt has been legally assigned or transferred.* Thus, the 'assignee of debt' is included in the definition of an Operational Creditor. When we look at this way, we find no hurdle in proceeding with the matter.

10. Another view that emerges - when we observe the way the assignment of debt in the instant case has been done by a 'Proprietorship firm' to a 'Company'. It is observed that the 'assignment of debt' has been done on the strength of an "Amalgamation Agreement". Against this backdrop, we would like to examine **Whether the amalgamation between a Sole Proprietorship Firm (i.e., M/s SVS Marketing) and a Company (i.e., M/s SVS Marketing Sanitaryware Pvt. Ltd is valid in the eyes of the law or not.**

11. Accordingly, we refer to the Amalgamation Agreement dated 25.05.2018 executed between M/s SVS Marketing (Proprietorship Concern) and M/s SVS Marketing Sanitaryware Pvt. Ltd., which read thus -



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AMALGAMATION AGREEMENT

THIS AGREEMENT is made on this the 25th day of May 2018 BETWEEN M/s SVS Marketing (Proprietary Concern) through its Proprietor Mr. SHIBU M of the First part and M/s SVS Marketing Sanitary ware Pvt. Ltd, represented by its director SANUSHA S, a company registered under the Companies Act 2013 and having its registered office at Pournami, 717, Anamukku Junction, Nellimukkal P.O, Adoor, Pathanamthitta District, Kerala of the Second part.

WHEREAS the Party of the First Part is a Proprietary Concern namely SVS Marketing which was established by Mr. SHIBU M as its Proprietor. In order to increase the business and modernize the activities of the said concern, the Proprietor now wishes to form it into a corporate entity known as SVS Marketing Sanitaryware Pvt. Ltd.

WHEREAS the Party of the Second Part is a Company namely SVS Marketing Sanitaryware Pvt. Ltd which was incorporated on 22nd day of May 2018 under the Companies Act, 2013 with Corporate Identity Number (CIN): U51909KL2018PTC053397

AND WHEREAS, SVS Marketing (Proprietary Concern) is amalgamated into and taken over by SVS Marketing Sanitaryware Pvt. Ltd with the following terms and conditions.

NOW THESE PRESENTS WITNESSETH and the parties hereby agree as follows:

1. That the business of M/s SVS Marketing ((Proprietary Concern) is taken over by SVS Marketing Sanitaryware Pvt. Ltd with all assets and liabilities and shall be entitled to the business of the SVS Marketing with all its undertakings, rights, securities and liabilities whatsoever and wherever situate and shall thenceforward be entitled to carry on the business, realize the securities without any let or hindrance from the SVS marketing (Proprietary Concern) or any one claiming through or under it.
2. That M/s SVS Marketing (Proprietary Concern) may continue its business with existing customers till the cancellation of the GST Number as per the convenience of the parties.
3. That M/s SVS Marketing Sanitaryware Pvt. Ltd will start its business with the existing customers of the M/s SVS Marketing (Proprietary Concern) from the date of allotment of GST registration on its name.
4. That the cancellation of GST of Proprietary Concern or allotment of GST Number to the SVS Sanitaryware Pvt. Ltd will not be an obstacle for the SVS Marketing Sanitaryware Pvt. Ltd Company to deal with the customers of SVS Marketing (Proprietary Concern).
5. That the receivables, sale proceeds, credits entitled by SVS Marketing (Proprietary Concern) shall be entitled and dealt by SVS Marketing Sanitaryware Pvt. Ltd as its own.
6. That all actionable claims including claims to any debt or any beneficial interest in movable property not in the possession either actual or

construct belonging to the SVS Marketing (Proprietary Concern), whether such debt or beneficial interest be existing or accruing, conditional or contingent shall be vest with the SVS Marketing Sanitaryware Pvt. Ltd hence forth. **AND FOR THAT WE**, the Party of the First part as Assignors, have this day do hereby sells, assigns, transfers and set over to the said M/s SVS Marketing Sanitaryware Pvt. Ltd. all our rights, title and interest in and upon the actionable claims existing or may accrue in future against all parties, together with all sums which are not or may at any time hereafter become due to us by virtue of the said actionable claim, and all our interest in the property charged therewith. **AND WE** M/s SVS Marketing (Proprietary Concern), the Assignors, do further authorise and empower by virtue of these presents, the said M/s SVS Marketing Sanitaryware Pvt. Ltd to do and perform all acts, matters and things touching the realisation of the said actionable claims and all sums now or which may hereafter become due to us in like manner to all intents and purposes as WE could personally do. **AND** be it further known that the said M/s SVS Marketing Sanitaryware Pvt. Ltd, its successors and assigns shall hereafter be entitled to recover and enforce payment of the sum accruing due (principal and interest) on the above said actionable claims. That the parties are entitled to enter into a further agreement regarding the assignment/transfer of actionable claim if necessary.

7. That the SVS Marketing Sanitaryware Pvt. Ltd shall be entitled to Sue, Proceed or initiate any civil or criminal or revenue proceedings against any of the Operational debtors, borrowers, mortgagors, sellers, purchasers, buyers or any other persons or who owes anything to SVS Marketing (Proprietary Concern) as its own credit or asset.
8. That the SVS Marketing (Proprietary Concern) shall sell and the SVS Marketing Sanitaryware Pvt. Ltd shall purchase and take over the entire business of SVS Marketing (Proprietary Concern) with all its undertakings, rights, assets and liabilities whatsoever with effect from the 25th day of May 2018.
9. That the entire staff of SVS Marketing (Proprietary Concern) shall be taken over and maintained by the SVS Marketing Sanitaryware Pvt. Ltd with effect from the aforesaid date of taking over on the same terms and conditions as those are at present prevailing.

IN WITNESS WHEREOF the parties hereto executed these presents on this the 25th day of May 2018.

M/s SVS Marketing (Proprietary Concern) office at Pournami, 717, Anamukku Junction, Nellimukkal P.O, Adoor, Pathanamthitta District, Kerala through its Proprietor Mr. SHIBU M	For SVS MARKETING Proprietor
M/s SVS Marketing Sanitaryware Pvt. Ltd, office at Pournami, 717, Anamukku Junction, Nellimukkal P.O, Adoor, Pathanamthitta District, Kerala Represented by its director SANUSHA S	Director

Witnesses

1. Name: LINJU P BABU

   Signature:

2. Name: PR RAJENDRAN NAIR

   Signature:

SVS MARKETING SANITARYWARE PRIVATE LIMITED

12. We are conscious of the fact that the provisions relating to Compromise/Arrangement/Amalgamation/De-Merger are provided under Sections 230-232 of the Companies Act 2013, which read thus:

COMPROMISES, ARRANGEMENTS AND AMALGAMATIONS

230. Power to compromise or make arrangements with creditors and members.— (*1*) Where a compromise or arrangement is proposed—

(*a*) between a company and its creditors or any class of them; or

(*b*) between a company and its members or any class of them,

the Tribunal may, on the application of the company or of any creditor or member of the company, or in the case of a company which is being wound up, of the liquidator, order a meeting of the creditors or class

of creditors, or of the members or class of members, as the case may be, to be called, held and conducted in such manner as the Tribunal directs.

Explanation.—For the purposes of this sub-section, arrangement includes a reorganisation of the company's share capital by the consolidation of shares of different classes or by the division of shares into shares of different classes, or by both of those methods.

(*2*) The company or any other person, by whom an application is made under subsection (*1*), shall disclose to the Tribunal by affidavit—

(*a*) all material facts relating to the company, such as the latest financial position of the company, the latest auditor's report on the accounts of the company and the pendency of any investigation or proceedings against the company;

(*b*) reduction of share capital of the company, if any, included in the compromise or arrangement;

(*c*) any scheme of corporate debt restructuring consented to by not less than seventy-five per cent. of the secured creditors in value, including—

(*i*) a creditor's responsibility statement in the prescribed form;

(*ii*) safeguards for the protection of other secured and unsecured creditors;

(*iii*) report by the auditor that the fund requirements of the company after the corporate debt restructuring as approved shall conform to the liquidity test based upon the estimates provided to them by the Board;

(*iv*) where the company proposes to adopt the corporate debt restructuring guidelines specified by the Reserve Bank of India, a statement to that effect; and

(*v*) a valuation report in respect of the shares and the property and all assets, tangible and intangible, movable and immovable, of the company by a registered valuer.

(*3*) Where a meeting is proposed to be called in pursuance of an order of the Tribunal under sub-section (*1*), a notice of such meeting shall be sent to all the creditors or class of creditors and to all the members or class of members and the debenture-holders of the company, individually at the address registered with the company which shall be accompanied by a statement disclosing the details of the compromise or arrangement, a copy of the valuation report, if any, and explaining their effect on creditors, key managerial personnel, promoters and non-promoter members, and the debenture-holders and the effect of the compromise or arrangement on any material interests of the directors of the company or the debenture trustees, and such other matters as may be prescribed:

Provided that such notice and other documents shall also be placed on the website of the company, if any, and in case of a listed company, these documents shall be sent to the Securities and Exchange Board and stock exchange where the securities of the companies are listed, for placing on their website and shall also be published in newspapers in such manner as may be prescribed:

Provided further that where the notice for the meeting is also issued by way of an advertisement, it shall indicate the time within which copies of the compromise or arrangement shall be made available to the concerned persons free of charge from the registered office of the company.

(*4*) A notice under sub-section (*3*) shall provide that the persons to whom the notice is sent may vote in the meeting either themselves or through proxies or by postal ballot to the adoption of the compromise or arrangement within one month from the date of receipt of such notice:

Provided that any objection to the compromise or arrangement shall be made only by persons holding not less than ten per cent. of the shareholding or having outstanding debt amounting to not less than five per cent. of the total outstanding debt as per the latest audited financial statement.

(*5*) A notice under sub-section (*3*) along with all the documents in such form as may be prescribed shall also be sent to the Central Government, the income-tax authorities, the Reserve Bank of India, the Securities and Exchange Board, the Registrar, the respective stock exchanges, the Official Liquidator, the Competition Commission of India established under sub-section (*1*) of section 7 of the Competition Act,

2002 (12 of 2003), if necessary, and such other sectoral regulators or authorities which are likely to be affected by the compromise or arrangement and shall require that representations, if any, to be made by them shall be made within a period of thirty days from the date of receipt of such notice, failing which, it shall be presumed that they have no representations to make on the proposals.

(*6*) Where, at a meeting held in pursuance of sub-section (*1*), majority of persons representing three-fourths in value of the creditors, or class of creditors or members or class of members, as the case may be, voting in person or by proxy or by postal ballot, agree to any compromise or arrangement and if such compromise or arrangement is sanctioned by the Tribunal by an order, the same shall be binding on the company, all the creditors, or class of creditors or members or class of members, as the case may be, or, in case of a company being wound up, on the liquidator and the contributories of the company.

(*7*) An order made by the Tribunal under sub-section (*6*) shall provide for all or any of the following matters, namely:—

(*a*) where the compromise or arrangement provides for conversion of preference shares into equity shares, such preference shareholders shall be given an option to either obtain arrears of dividend in cash or accept equity shares equal to the value of the dividend payable;

(*b*) the protection of any class of creditors;

(*c*) if the compromise or arrangement results in the variation of the shareholders' rights, it shall be given effect to under the provisions of section 48;

(*d*) if the compromise or arrangement is agreed to by the creditors under sub-section (*6*), any proceedings pending before the Board for Industrial and Financial Reconstruction established under section 4 of the Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986) shall abate;

(*e*) such other matters including exit offer to dissenting shareholders, if any, as are in the opinion of the Tribunal necessary to effectively implement the terms of the compromise or arrangement:

Provided that no compromise or arrangement shall be sanctioned by the Tribunal unless a certificate by the company's auditor has been filed with the Tribunal to the effect that the accounting treatment, if any, proposed in the scheme of compromise or arrangement is in conformity with the accounting standards prescribed under section 133.

(*8*) The order of the Tribunal shall be filed with the Registrar by the company within a period of thirty days of the receipt of the order.

(*9*) The Tribunal may dispense with calling of a meeting of creditor or class of creditors where such creditors or class of creditors, having at least ninety per cent. value, agree and confirm, by way of affidavit, to the scheme of compromise or arrangement.

(*10*) No compromise or arrangement in respect of any buy-back of securities under this section shall be sanctioned by the Tribunal unless such buy-back is in accordance with the provisions of section 68.

(*11*) Any compromise or arrangement may include takeover offer made in such manner as may be prescribed:

Provided that in case of listed companies, takeover offer shall be as per the regulations framed by the Securities and Exchange Board.

(*12*) An aggrieved party may make an application to the Tribunal in the event of any grievances with respect to the takeover offer of companies other than listed companies in such manner as may be prescribed and the Tribunal may, on application, pass such order as it may deem fit.

Explanation.—For the removal of doubts, it is hereby declared that the provisions of section 66 shall not apply to the reduction of share capital effected in pursuance of the order of the Tribunal under this section.

XXXX XXXX XXXX XXXX XXXX

232. Merger and amalgamation of companies.— (*1*) Where an application is made to the Tribunal under section 230 for the sanctioning of a compromise or an arrangement proposed between a company and any such persons as are mentioned in that section, and it is shown to the Tribunal—

(*a*) that the compromise or arrangement has been proposed for the purposes of, or in connection with, a scheme for the reconstruction of the company or companies involving merger or the amalgamation of any two or more companies; and

(*b*) that under the scheme, the whole or any part of the undertaking, property or liabilities of any company (hereinafter referred to as the transferor company) is required to be transferred to another company (hereinafter referred to as the transferee company), or is proposed to be divided among and transferred to two or more companies,

the Tribunal may on such application, order a meeting of the creditors or class of creditors or the members or class of members, as the case may be, to be called, held and conducted in such manner as the Tribunal may direct and the provisions of sub-sections (*3*) to (*6*) of section 230 shall apply *mutatis mutandis*.

(*2*) Where an order has been made by the Tribunal under sub-section (*1*), merging companies or the companies in respect of which a division is proposed, shall also be required to circulate the following for the meeting so ordered by the Tribunal, namely:—

(*a*) the draft of the proposed terms of the scheme drawn up and adopted by the directors of the merging company;

(*b*) confirmation that a copy of the draft scheme has been filed with the Registrar;

(*c*) a report adopted by the directors of the merging companies explaining effect of compromise on each class of shareholders, key managerial personnel, promoters and non-promoter shareholders laying out in particular the share exchange ratio, specifying any special valuation difficulties;

(*d*) the report of the expert with regard to valuation, if any;

(*e*) a supplementary accounting statement if the last annual accounts of any of the merging company relate to a financial year ending more than six months before the first meeting of the company summoned for the purposes of approving the scheme.

(*3*) The Tribunal, after satisfying itself that the procedure specified in sub-sections (*1*) and (*2*) has been complied with, may, by order, sanction the compromise or arrangement or by a subsequent order, make provision for the following matters, namely:—

(*a*) the transfer to the transferee company of the whole or any part of the undertaking, property or liabilities of the transferor company from a date to be determined by the parties unless the Tribunal, for reasons to be recorded by it in writing, decides otherwise;

(*b*) the allotment or appropriation by the transferee company of any shares, debentures, policies or other like instruments in the company which, under the compromise or arrangement, are to be allotted or appropriated by that company to or for any person:

Provided that a transferee company shall not, as a result of the compromise or arrangement, hold any shares in its own name or in the name of any trust whether on its behalf or on behalf of any of its subsidiary or associate companies and any such shares shall be cancelled or extinguished;

(*c*) the continuation by or against the transferee company of any legal proceedings pending by or against any transferor company on the date of transfer;

(*d*) dissolution, without winding-up, of any transferor company;

(*e*) the provision to be made for any persons who, within such time and in such manner as the Tribunal directs, dissent from the compromise or arrangement;

(*f*) where share capital is held by any non-resident shareholder under the foreign direct investment norms or guidelines specified by the Central Government or in accordance with any law for the time being in force, the allotment of shares of the transferee company to such shareholder shall be in the manner specified in the order;

(*g*) the transfer of the employees of the transferor company to the transferee company;

(*h*) where the transferor company is a listed company and the transferee company is an unlisted company,—

(*A*) the transferee company shall remain an unlisted company until it becomes a listed company;

(*B*) if shareholders of the transferor company decide to opt out of the transferee company, provision shall be made for payment of the value of shares held by them and other benefits in accordance with a pre-determined price formula or after a valuation is made, and the arrangements under this provision may be made by the Tribunal:

Provided that the amount of payment or valuation under this clause for any share shall not be less than what has been specified by the Securities and Exchange Board under any regulations framed by it;

(*i*) where the transferor company is dissolved, the fee, if any, paid by the transferor company on its authorised capital shall be set-off against any fees payable by the transferee company on its authorised capital subsequent to the amalgamation; and

(*j*) such incidental, consequential and supplemental matters as are deemed necessary to secure that the merger or amalgamation is fully and effectively carried out:

Provided that no compromise or arrangement shall be sanctioned by the Tribunal unless a certificate by the company's auditor has been filed with the Tribunal to the effect that the accounting treatment, if any, proposed in the scheme of compromise or arrangement is in conformity with the accounting standards prescribed under section 133.

(*4*) Where an order under this section provides for the transfer of any property or liabilities, then, by virtue of the order, that property shall be transferred to the transferee company and the liabilities shall be transferred to and become the liabilities of the transferee company and any property may, if the order so directs, be freed from any charge which shall by virtue of the compromise or arrangement, cease to have effect.

(*5*) Every company in relation to which the order is made shall cause a certified copy of the order to be filed with the Registrar for registration within thirty days of the receipt of certified copy of the order.

(*6*) The scheme under this section shall clearly indicate an appointed date from which it shall be effective and the scheme shall be deemed to be effective from such date and not at a date subsequent to the appointed date.

(*7*) Every company in relation to which the order is made shall, until the completion of the scheme, file a statement in such form and within such time as may be prescribed with the Registrar every year duly certified by a chartered accountant or a cost accountant or a company secretary in practice indicating whether the scheme is being complied with in accordance with the orders of the Tribunal or not.

(*8*) If a transferor company or a transferee company contravenes the provisions of this section, the transferor company or the transferee company, as the case may be, shall be punishable with fine which shall not be less than one lakh rupees but which may extend to twenty-five lakh rupees and every officer of such transferor or transferee company who is in default, shall be punishable with imprisonment for a term which may extend to one year or with fine which shall not be less than one lakh rupees but which may extend to three lakh rupees, or with both.

Explanation.—For the purposes of this section,—

(*i*) in a scheme involving a merger, where under the scheme the undertaking, property and liabilities of one or more companies, including the company in respect of which the compromise or arrangement is proposed, are to be transferred to another existing company, it is a merger by absorption, or where the undertaking, property and liabilities of two or more companies, including the company in respect of which the compromise or arrangement is proposed, are to be transferred to a new company, whether or not a public company, it is a merger by formation of a new company;

(*ii*) references to merging companies are in relation to a merger by absorption, to the transferor and transferee companies, and, in relation to a merger by formation of a new company, to the transferor companies;

(*iii*) a scheme involves a division, where under the scheme the undertaking, property and liabilities of the company in respect of which the compromise or arrangement is proposed are to be divided among and transferred to two or more companies each of which is either an existing company or a new company; and

(*iv*) property includes assets, rights and interests of every description and liabilities include debts and obligations of every description.

13. On perusal of the abovementioned provisions of law, we find that the Compromise and Arrangement under Section 230-232 of the Companies Act 2013 entered into by and between a company and its members or any class of them.

14. In the instant case, Mr. M. Shibu Proprietor of M/s SVS Marketing (A Proprietorship Concern) is a member/shareholder in M/s SVS Marketing Sanitaryware Pvt. Ltd. as is evident from the following extracts of the Balance Sheet of the Applicant Company annexed by the Respondent at page no. 165 of the Reply:

(ii) Shareholding of Promoters

Sl. No.	Shareholder's Name	Shareholding at the beginning of the year			Share holding at the end of the year			
		No. of Shares	% of total Shares of the company	%of Shares Pledged/ encumbered to total shares	No. of Shares	% of total Shares of the company	%of Shares Pledged/ encumbered to total shares	% change in share holding during the year
1	Shibu Mohanan	14500	96.67%	0	14500	96.67%	0	0
2	Sarucha Shibu	500	3.33%	0	500	3.33%	0	0
	Total	15000	100%	0	15000	100%	0	0

15. Since the Sole Proprietorship Firm has no separate legal entity of its own, and it is known only through its Proprietor Mr. Shibu M, who (as we have seen in the table given in Para 12 above) is a member/shareholder in the Applicant Company, the provision of Section 230 of the Companies Act 2013 can be resorted to by Mr. Shibu M and the Applicant Company namely, M/s SVS Marketing Sanitaryware Pvt. Ltd. for the purpose of "Compromise and Arrangement" by filing an appropriate Petition before NCLT by following the due procedure prescribed by law.

16. However, as regards "Merger or Amalgamation" under Section 232 of the Companies Act 2013, the parties that are eligible to seek Merger or Amalgamation can file an application before NCLT, but this does not mean that the Amalgamation can take place between "a Proprietorship Firm" and "a Company" as the Section 232 (a) of the Companies Act 2013 specifically deals with the *Merger and Amalgamation of two or more companies only.* In this context, at the cost of repetition, we refer to Section 232(a) of the Companies Act 2013, which reads thus:

> **232. Merger and amalgamation of companies.**— (*1*) Where an application is made to the Tribunal under section 230 for the sanctioning of a compromise or an arrangement proposed between a company and any such persons as are mentioned in that section, and it is shown to the Tribunal—
>
> (*a*) that the compromise or arrangement has been proposed for the purposes of, or in connection with, a scheme for the reconstruction of the company or companies involving merger or the amalgamation of any two or more companies; and

17. The term 'Company' is defined under Section 2(20) of the Companies Act 2013, wherein "*Company means a Company incorporated under this Act or any previous company law*". Thus, neither the "Sole Proprietorship Firm" nor "its individual Proprietor" is a "Company" in terms of Section 2(20) of the Companies Act 2013. Hence, the *Merger and Amalgamation of a* "Sole Proprietorship Firm" and "a Company" is not possible under Section 232 of the Companies Act 2013. **Hence, we find that an amalgamation of "a Sole Proprietorship Firm" with "a Company" is not permissible under the law.**

18. Further, this issue had also cropped up before this Adjudicating Authority in the matter of Amalgamation of "Central Railside Warehouse Company Ltd. with Central Warehousing Corporation", (CA)-(CAA) 128/(ND)/2021, where the merger of "a Company" with "a Corporation" was

sought to be made under Section 230-232 of Companies Act, 2013 and this Adjudicating Authority sought an opinion of RD (North) Delhi on the issue. The RD opined that those entities namely, a "Company" and a "Corporation" cannot be merged, as one of them did not fall under the definition of a "Company" as defined under Section 2(20) of the Companies Act 2013. Accordingly, the Applicants withdrew the Scheme. However, it is worthwhile to peruse the Affidavit filed by RD in the matter, which is reproduced below:

BEFORE THE HON'BLE NATIONAL COMPANY LAW TRIBUNAL

BENCH AT NEW DELHI

COMPANY APPLICATION NO. CA/128/ND/2021

IN THE MATTER OF SECTION 230 TO 232 OF

THE COMPANIES ACT, 2013

AND

IN THE MATTER OF SCHEME OF AMALGAMATION

BETWEEN

CENTRAL RAILSIDE WAREHOUSE COMPANY LIMITED
4/1 INSTITUTIONAL AREA, AUGUST KRANTI MARG, NEW DELHI – 110016.

(TRANSFEROR COMPANY/ APPLICANT COMPANY)

WITH

CENTRAL WAREHOUSING CORPORATION
4/1 INSTITUTIONAL AREA, AUGUST KRANTI MARG, NEW DELHI – 110016.

(TRANSFEREE CORPORATION/ NON-APPLICANT CORPORATION)

ADDITONAL AFFIDAVIT/ SUBMISSION OF REGIONAL DIRECTOR NORTHERN REGION, MINISTRY OF CORPORATE AFFAIRS, NEW DELHI.

I, Dr. Raj Singh, Regional Director (NR), having my office at B-2 Wing, 2nd Floor, Pt. Deendayal Antyodaya Bhawan, CGO Complex, New Delhi-110003, do hereby solemnly affirm and sincerely state as follows:-

NOTARY Debajyoti Behuria Advocate Regn. No. 19716 Period: 24/02/2020 to 24/02/2025 GOVT. OF INDIA

1. I am the Regional Director (Northern Region), Ministry of Corporate Affairs, New Delhi and in pursuance of the notification of the Ministry of Corporate Affairs Dated 19.12.2016 in S.O. 4090 (E), I am authorized to swear this Affidavit for & on behalf of the Central Government.

2. The Deponent has filed an affidavit dated 11.04.2022 after examining the Application filed by the Petitioner Company stating specifically that :-

> *".....above application filed by the Petitioner Company and the Corporation (for merger of the Company with the Corporation) under the provisions of section 230- 232 of the Companies Act, 2013 is not maintainable since both of the Petitioners are not falling under the definition of Company as defined under the provisions of section 2(20) of the Companies Act, 2013."*

Subsequently the Hon'ble National Company Law Tribunal (NCLT) vide order dated 21.04.2022 has directed the Deponent to examine whether the merger of a Company and the Corporation is possible u/s 230(1)(b) of the Companies Act, 2013 in the light of the revised application filed by the Petitioners. To examine the issue as raised by the Hon'ble Tribunal, the Deponent has called for the copy of the revised application along with the scheme as filed by the Petitioners, which has been forwarded by them on 29.04.2022, the copy of the revised Application along with the scheme is enclosed herewith, marked as **Annexure-A**. On examination of the contents of the revised Application and scheme, the submission of the Deponent is as under: -

NOTARY Debajyoti Behuria Advocate Regn. No. 19716 Period: 24/02/2020 to 24/02/2025 GOVT. OF INDIA

19. Hence, in our considered view, both/or all the entities involved in the Amalgamation Scheme under Section 230-232 of the Companies Act 2013 have to be necessarily "Companies" as defined under Section 2(20) of the Companies Act 2013. In the instant case, the applicant has merged its "proprietorship firm" with a "company" in disregard to and without resorting to the provisions of Section 230-232 of the Companies Act 2013.

20. However, keeping all this analysis aside, when we re-visit the Amalgamation Agreement placed on record, we find that though the heading of the Agreement starts with the word Amalgamation, but no characteristics of Amalgamation are found present/followed in executing said document. Merely what ought to have been an "assignment deed" is executed and named as an "Amalgamation Agreement". Therefore, in the interest of justice, we would not like to reject the Application and still examine the "debt" of the Applicant on its merits.

21. On careful perusal of the Application, it is observed that the Applicant has given the following breakup of the amount claimed as debt:

S. No.	Particulars/Details of Outstanding	Period	Outstanding (INR)
1.	Unsold stock value as on 17.03.2023	01.04.2020 to 21.03.2023	2,18,74,198.00
2	Stock Interest @ 18% till 17.03.2023	Till 21.03.2023	2, 7,672,378.52
3.	Warehouse charges	As on 28.02.2023	84,41,968.35
4	Bad debts	Till 21.03.2023	1,57,65,634.58
	Total		73,754,179.45
	Total Claim of the Operational Creditor in INR		**73,754,179.45**

22. In terms of the breakup of the amount claimed (ibid), we would first like to examine whether the “unsold stock valuing Rs. 2,18,74,109/- as of 17.03.2023” can be considered as an Operational Debt. The Applicant has relied upon the Judgement in “**M/s Consolidated Construction Consortium Limited Vs. M/s Hitro Energy Solutions Private Limited**”, wherein the Hon'ble Supreme Court while defining the term "operational debt" held that a claim "in respect of provision of" goods of services would include not only those who supply goods or service to the Corporate Debtor but also those who receive the goods or services from the Corporate Debtor. Whereas the Respondent in its Written Submissions has stated that under the Distributorship Agreement with the Applicant, the Respondent had no obligation to purchase the unsold inventory, which is reflected in every invoice and the relationship with the Applicant was solely that of the seller and a purchaser on principal-to-principal basis. The claims of the Applicant are at best the claims for damages and specific performance. It is the settled law that no pecuniary liability in regard to a claim for damages arises till a competent court adjudicates upon the claim for damages and holds that the defaulting party has committed a breach and incurred a liability to compensate the non-defaulting party for the loss. An alleged default or breach gives rise only to a right to sue for damages and not to claim any debt.

23. In order to examine the aforesaid contentions of the parties, we consider it appropriate to refer to one of the invoices, which is reproduced overleaf:

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TAX INVOICE

Whether Tax is Payable On Reverse Charge Basis:- No
TAN NO: DELK13931B

GSTIN No: 08AAFCK4818G1ZH
State Code: 08
PAN No: AAFCK4818G

	Invoice Date		Memo Type	Invoice No.
	16.08.2018		Debit	8551801905

BUYER(BILLED TO):
SVS MARKETING
POURNAMI, 717, ANAMUKKU Jn.
NELLIMUKAL, PO-ADOOR, PTA
NELLIMUKAL
DISTT-PATHANAMTHITTA,,KERALA

GSTIN No. : 32CHYPS5903D1Z2 State Code. : 32

Place Of Supply: KERALA State Code: 32

Remarks :
Total Boxes:-30

Transporter Gati Kintetsu Express Private Limit
L.R.No. : 248923993
Vehicle.No. SURFACE/ROAD
FREIGHT: Free on board

SHIPPED TO :
POURNAMI, 717, ANAMUKKU Jn.
NELLIMUKAL, PO-ADOOR, PTA
DISTT-PATHANAMTHITTA,
NELLIMUKAL, KERALA -691551
04734-284344
GSTIN No. : 32CHYPS5903D1Z2 State Code. : 32

Sr. No.	Description Of The Goods	Code	HSN	Qty.	Rate	Value	Discount	Taxable Value
01	SL BASIN MIXURE WITHOUT POP- UP	1311010-ND-CP	84818020	5	1860.00	9300.00	1979.04	7320.96
02	TALL PILLAR TAP	511002-CP	84818020	5	1740.00	8700.00	1851.36	6848.64
03	TALL PILLAR TAP	811002-CP	84818020	5	2040.00	10200.00	2170.56	8029.44
04	WALL MIXER -NON TELEPHONIC SHOWER	1211021-CP	84818020	5	2040.00	10200.00	2170.56	8029.44
05	WALL MIXTURE 2 IN 1 WITH FLANGES	1211019-CP	84818020	10	2300.00	23000.00	4894.40	18105.60
06	WALL MIXTURE 2 IN 1 WITH FLANGE-QT	111019-CP	84818020	10	2680.00	26800.00	5703.04	21096.96
07	BATH SPOUT	111016-CP	84818020	10	710.00	7100.00	1510.88	5589.12
08	WALL MIXER 2 IN 1	411019-CP	84818020	10	2860.00	28600.00	6086.08	22513.92
09	SINK COCK -WALL MOUNTED WITH SWIVL SPOUT	411025-CP	84818020	10	1270.00	12700.00	2702.56	9997.44
10	WALL MIXER 3 IN 1	411018-CP	84818020	10	3130.00	31300.00	6660.64	24639.36
11	LONG BODY BIB TAP WITH WALL FLANGE	311033-CP	84818020	10	800.00	8000.00	1702.40	6297.60
12	WALL MIXER 3 IN 1	511018-CP	84818020	10	3190.00	31900.00	6788.32	25111.68
13	WALL MIXER 2 IN 1	511019-CP	84818020	10	2920.00	29200.00	6213.76	22986.24
14	PILLAR TAP	811001-CP	84818020	20	1360.00	27200.00	5788.16	21411.84
15	SINK COCK -WM WITH SWIVEL SPOUT	111025-CP	84818020	20	1120.00	22400.00	4766.72	17633.28
16	LONG NOSE BIB TAP WITH FLANGE	1211033-CP	84818020	15	680.00	10200.00	2170.56	8029.44
17	ANGULAR VALVE WITH FLANGE	1211003-CP	84818020	15	470.00	7050.00	1500.24	5549.76
18	PILLAR TAP WITH FLANGE-QT	811001-CP	84818020	15	1360.00	20400.00	4341.12	16058.88
19	WM & CRUTCH FOR HAND SHOWER ARRANGMENT	411020-CP	84818020	10	3270.00	32700.00	6958.56	25741.44
	Page: 1 of 2	Total =>		560		651550.00	138649.84	512900.16

**Total Discount includes Cash Discount 4.00 %	Ins&Handl.Ch arges	1 % 5128.98	5128.98
Grand Total In Words : SIX LAKH ELEVEN THOUSAND TWO HUNDRED SEVENTY FOUR Rupees Only	Freight		
	Sub Total		518029.14
	IGST	18.00 % 93245.22	93245.22
Terms & Conditions: 1.Goods once supplied would not be exchanged or taken back.	Round Off		0.36-
	Grand Total		611274.00

For, Kajaria Bathware Private Ltd

Subject To Gailpur Distt.Alwar(Rajasthan) Jurisdiction E.&O.E.

Authorised Signatory

On perusal of the above, it is evident that the invoice contained a clause as per which "*Goods once supplied would not be exchanged or taken back*".

24. However, it is still contended by the Applicant that the Respondent had acknowledged that it will make a payment towards the bill of Rs. 2.48 Crore, which is pleaded to be an admission towards the liability of Rs. 2.48 Crore towards the Unsold stock amount. In this regard, the Applicant has referred to the following communication received from the Respondent:

Kerovit
By Kajaria

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ANNEXURE-U

Dear SVS Marketing,

Forwarding this letter, as per the discussion with the representative of SVS Marketing in the presence of AVP Mr. Dhirendra Joshi at Calicut dated 04-12-2018. Kerovit's all materials on your godown which is our technician inspected (worth value: 2.48 Crore) are bill to the Company. Kerovit's sanitarywares are bill in the name of Kajaria Sanitary ware Pvt. Ltd, Morbi and Kerovit's faucets are bill in the name of Kajaria Bathware, Rajasthan.

The payment of the billed materials will be remitted on before 31st March 2019.

Thanks and Regards

Jose Strong Abraham
AGM
Kajaria Bathware Pvt Ltd

KAJARIA BATHWARE PVT. LTD. * COCHIN * Kerovit

25. Per Contra, the Respondent has denied the issuance of such a letter by stating that it is a forged document since it is not only undated but also is not an attachment/part of any e-mail communication.

26. In our view, the Respondent had supplied the Goods and the Applicant had made payments towards the Goods as Distributor of the Respondent. The chain of transaction ends here itself. Moreover, the invoice itself stipulates

that *"Goods once supplied would not be exchanged or taken back."* Further, the letter on which Applicant has relied is an un-dated one and no particulars are available as to when, and how the letter was sent. Even otherwise, once agreeing to purchase the goods and subsequently, denying the purchase will not constitute an "Operational Debt" since there is neither any flow of goods/services nor any payment of consideration from one party to another in this chain. Hence, we find that there is no existence of any operational debt or default committed by the Respondent towards the so-called unpaid stock.

27. Since no operational debt and default have been proved with respect to unsold stock, the question of going into the "stock interest" component does not arise.

28. The Applicant has further claimed "Bad Debts amounting to Rs. 1,57,65,634.48/-". The applicant has contended that due to the discontinuance of supply without informing the Distributor (Applicant), the Applicant could not supply products to their dealers on time, for which they started to block payments of the Applicant. Thus, the Applicant has sought to recover an amount of Rs. 1,57,65,634.58/- as bad debts in the market.

29. In our considered view, if the goods have been supplied by the Applicant to its dealers, and if they had not paid the Applicant in time, the Applicant cannot shift the burden of the alleged default by dealers to the Respondent and claim the same as an Operational Debt. At the most, the claim of the Applicant against the Respondent in respect of causing bad debts could be of compensatory in nature, subject to such a Clause existing in the Distributorship Agreement, but it cannot be claimed as an Operational Debt.

30. Other than the aforesaid three components of the amount claimed, the Applicant has claimed an amount of Rs.84,41,968/- as “Warehouse Charges”. Though this amount itself is less than the minimum threshold limit of Rs 1 Crore, however, since we have heard the matter on merits, we would like to examine whether the same could be claimed by the Applicant under the IBC proceedings. The Applicant has stated that it had paid Rs.1,59,282.42/- per month altogether as warehouse charges to four individual landlords in order to store the unsold stock. Accordingly, the Applicant has claimed an amount of Rs. 84,41,968.35/- as warehouse charges from the Respondent.

31. In the instant case, from the record it is observed that the Applicant has neither rendered any warehousing services nor is the beneficiary of those services from the Respondent. Since in the context of the alleged transaction of warehousing services, there is no relation with regard to the transaction of any goods or services by and between the parties herein, the same cannot be claimed as an Operational Debt.

32. We have examined the various components of the claim of the Applicant and find that there is no operational debt subsisting for which CIRP be initiated against the Respondent. **Hence, the Application is misconceived and is accordingly, dismissed.**

33. However, nothing expressed herein shall be construed as an opinion before any other forum in respect of the rights of both parties to agitate before any other forum.

Sd/-
(L. N. GUPTA)
MEMBER (T)

Sd/-
(ASHOK KUMAR BHARDWAJ)
MEMBER (J)