

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOCHI BENCH
KOCHI**

CP (IBC)/37/KOB/2022

*(Under Section 9 of Insolvency and Bankruptcy Code, 2016 read with Rule
6 Of Insolvency and Bankruptcy (Application to Adjudicating Authority)
Rules, 2016)*

In the matter of:

The Bangalore Sales Corporation, No.134/1, 3rd Floor, 9th Cross, 4th Main,
Chamrajpet, Bengaluru- 560 018. Email: anirudhsuresh@aristolegal.com;

... Operational Creditor

-Versus-

Sark Spice Products Pvt Ltd., TAK Industrial Complex, Eara North P.O.,
Neelamperoor, Alleppey, Kerala- 686 534. Email: chairman@sarkspiceindia.com.

... Corporate Debtor

Coram:

Shri. P. Mohan Raj : Member (Judicial)

Shri. Satya Ranjan Prasad : Member (Technical)

Parties/ Counsel present (through video conference):

For Operational Creditor : Mr. Anirudh Suresh
Mr. Nirmal V. Nair, Advocate

For Corporate Debtor : M/s. Indialaw LLP, Advocate

Order reserved on: 24.11.2022

Order pronounced on: 23.12.2022

ORDER

1. Under consideration is Petition No. CP(IB)/37/KOB/2020 filed invoking Section 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 6 of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. The relief sought is to initiate Corporate Insolvency Resolution Process (hereinafter referred as CIR Process) against M/s. Sark Spice Products Pvt. Ltd. for the default amount of **Rs. 1,72,15,532/- (Rupees**

One Crore Seventy-Two Lakh Fifteen Thousand Five Hundred Thirty-Two Only) in respect of credit facility availed from the Operational Creditor.

2. The facts as narrated in the application and explained by the Operational Creditor are summarized hereunder:
 - i. The Corporate Debtor issued a Purchase Order dated 19.08.2019 pursuant to which the Operational Creditor provided the said goods vide Invoice dated 21.08.2019. The said invoice along with the e-way bill was dispatched to the Corporate Debtor through email as well as along with the said goods, which has been accepted by the Corporate Debtor without any dispute or demur. As the bill amounts were not paid, several requests were made by the Operational Creditor to the Corporate Debtor to make the payment, to which the Corporate Debtor gave false assurances but never made the payment. In view of the above, the Operational Creditor levied an interest @ 24% per annum after giving a credit period of 90 days as agreed between the parties and as stated in the invoice.
 - ii. Since Corporate Debtor adopted delaying tactics the Operational Creditor through its authorised representative issued a statutory demand notice directing the Corporate Debtor to clear the outstanding dues of Rs.1,72,15,532/- (Rupees One Crore Seventy-Two Lakh Fifteen Thousand Five Hundred Thirty-Two Rupees Only) that is in default within 10 days of the receipt of the demand notice. This was sent through registered post, by email to the registered email address of the Company as well as the email address of its directors as available on the Ministry of Corporate Affairs website. But the Respondent/Corporate Debtor failed to make the payment.

3. On 07.09.2022 the Respondent filed his reply statement and stated that the Corporate Debtor is not liable to pay the amount as claimed by the Operational Creditor. The Corporate Debtor, Sark Spice Products Pvt. Ltd, is a company engaged in the business of manufacturing and exports of spices and condiments since 1990. The Corporate Debtor also availed various credit facilities from the banks for exports. Mr. Abraham Kuruvila is the Managing Director of the Respondent. For the purpose of determining the amount in default, it is relevant in the present case to submit that another company namely, Kalpaka Processing Co. (Kalpaka), a proprietary concern of Mr. Abraham Kuruvila is also engaged in similar business jointly with the Corporate Debtor and is also located in the same premise where the Corporate Debtor is located. On 27.02.2021 an agreement was entered into between the Corporate Debtor, Green Natural, Mr. Surajpal and Mr. Vivek Jain. This was admitted by the Operational Creditor which varies the terms of an original purchase order with respect to terms of payment and transferring liability of 90 Lakhs from invoice amount to a third party, Green Natural Extracts Private Limited, (Green Natural) nominated by the Operational Creditor. Therefore, by consent, the contract containing the invoice terms was modified and hence, the Operational Creditor cannot claim default based on the original invoice. The Operational Creditor has intentionally concealed the facts of the execution of the Agreement in the application. Therefore, the application is liable to be rejected for concealing the fact and for fraudulently initiating the CIRP against the Respondent. It is also stated that the Operational Creditor had never raised any demand for payment until initiating a proceeding under IBC. The first demand notice was issued under Section 8 of IBC on 13.05.2022, and for the sake of issuing demand notice, on the same date i.e., 13.05.2022 an email was sent to Respondent, which is the first email received from Applicant after 21.08.2019. The silence of the Operational Creditor from 19.11.2019 to 13.05.2022 itself is an admission that there was no default on 19.11.2019. The invoice terms stand modified by a subsequent agreement dated

27.02.2021. Therefore, the amount in default and date of default is wrong and cannot be considered for this Application.

4. It is further stated that Mr. Suraj Pal Singh had made an order for the purchase of curcumin from the Respondent and also from its sister concern Kalpaka Processing, a proprietary concern of the Managing Director. The invoice value towards the Corporate Debtor was Rs.1,08 Crores. There was a credit period of 90 days. At no point of time was an interest agreed to by the parties including in the purchase order. There was no demand for interest at 24% from the date of invoice till the date of filing, which was just introduced in the Section 8 demand notice issued on 13.05.2022. On 27.02.2021, the Operational Creditor Mr. Suraj Pal Singh and Mr. Anees Ahmed, proprietor of Green Natural visited the Respondent and informed that Mr. Suraj Pal Singh and Mr. Vivek Jain of Bangalore Sales Corporation, the Applicant herein, is liable to pay 90 Lakhs to Green Natural Extracts Private Limited, therefore, out of the invoice amount, 90 lakhs to be paid to Green Natural. Accordingly, an agreement was executed between Respondent and Green Natural on 27.02.2021. Mr. Vivek Jain, OC and Mr. Suraj Pal were signed as a witness to the said agreement. Subsequently, through various online transfer, Rs. 25 Lakhs was paid to Green Natural and for the balance, Green Natural granted time for payment.
5. It is stated that the agreement which was executed on 27.02.2021 is for the benefit of the Operational Creditor and also to save Mr. Suraj Pal Singh. It is stated that by virtue of the above agreement, the original terms of the contract as per purchase order and invoice terms stand modified to the extent of payment of 90 lakhs causing an amendment to the original contract. Therefore, as of 27.02.2021, the amount due to Operational Creditor stand reduced to Rs.1,08,10,800 Cores less 90 Lakhs i.e., Rs. 18,10,800/- The agreement was executed at the instance of the Operational Creditor. The Respondent has no contractual relationship with Green

Natural. The Respondent also does not require to doubt the genuineness of such arrangement as it is being done at the instance of Suraj Pal and the Operational Creditor. It is also stated that the agreement provides that in any event if Mr. Suraj Pal Singh and Mr. Vivek Jain initiate any recovery proceedings, then Green Natural is required to compensate and return the money to the Operational Creditor. This clause was inserted as an abundant caution to protect the interests of the Corporate Debtor. It is a fact that no recovery proceeding was initiated till date by Suraj Pal Singh and Mr. Vivek Jain against the Respondent which shows the continuity and binding nature of the Agreement. Even if they initiate recovery proceedings, it is a matter to be dealt by the Civil Court and not under IBC. Further, once the debt is transferred to a third party, the Applicant cannot claim it under Section 9 Application as his operational debt, and Adjudicating Authority does not require to look into the terms and compliance of such agreement, which transferred the debt, which is beyond the jurisdiction of this Tribunal under Section 9. Therefore, the claim of the Operational Creditor as of 27.02.2021 is only Rs.18.10 Lakhs. There is no demand notice or ledger balance issued by Operational Creditor to Corporate Debtor showing interest prior to initiation of CIRP. If interest is calculated on this amount, even then, the amount due is less than the threshold limit of one crore. Therefore, the Application is liable to be rejected as it is less than the threshold limit of 1 Crore.

6. It is stated that on 01.07.2019, Mr. Suraj Pal Singh entered into an agreement with Kalpaka for contract manufacturing. In June 2020, as per his advice, Kalpaka placed order for 2000 kg of turmeric on credit from Sai Lalith Fragrance (“Sai Lalith”), EOU at MPEZ-SEZ Chennai. Kalpaka obtained a procurement certificate from customs on 25.06.2020. However, materials were not delivered. On enquiry, Sai Lalith on 24.11.2020 through letter signed by Lalitha Muralidharan, confirmed that goods were dispatched at the instruction of Mr. Suraj Pal Singh. It has come to the

knowledge of this Respondent, that using the procurement certificate, Suraj Pal Singh took delivery and diverted the goods. Later, Muraleedharan of Sai Lalith Fragrance confirms that goods might have been delivered to Bangalore Sales, the Applicant. On 11.12.2020, Kalpaka wrote to Customs Preventive Commissioner with respect to the diversion of goods, including mentioning the confirmation regarding the diversion of goods to Applicant in 2020 itself. Thereafter, the summons was issued by customs for evasion of duties. The liability arising out of the said duty evasion is approximately Rs. 63 lakhs. Respondent already paid Rs. 5 Lakhs to customs on 29.04.2022. Both Sai Lalith and Kalpaka are also pursuing a criminal complaint against the theft. Kalpaka was doing export for Corporate Debtor; Corporate Debtor was the manufacturer of Kalpaka. In view of duty evasion and customs issue, all orders were cancelled causing huge losses to Corporate Debtor and Kalpaka. It is also stated that the settlement of dues of the Operational Creditor and Kalpaka are closely interconnected with the issue of customs regarding the diversion of goods by Suraj Pal Singh in connivance with the Operational Creditor. If the issue was not within the knowledge of the Operational Creditor, there was no necessity for the Operational Creditor to sign as a witness to the Agreement dated 27.02.2021 and give time to Mr. Abraham Kuruvila to make payment for the balance of Rs. 63 Lakhs to the Operational Creditor only after settling the issues at customs. Therefore, the Operational Creditor is taking the liability of Mr. Suraj Pal Singh with respect to customs issues. The customs issue is yet to be resolved and the Respondent is liable for paying the entire customs duty. Any further amount to be paid to Applicant either from Respondent or Kalpaka shall have a bearing on the resolution of the dispute at customs.

7. It is stated that this application is filed with the sole intention of recovery of money using the tool of IBC and the threat of insolvency. The series of documents produced by the Financial Creditor shows the business

association between Mr. Suraj Pal Singh and Mr. Vivek Jain and all acts were done for the benefit of each other.

8. On 04.11.2022 the Operational Creditor filed his rejoinder and stated that the present application filed under Section 9 of the IBC, 2016 has nothing to do with Kalpaka Processing Co. which is a proprietorship concern of the Director of the Corporate Debtor. As already stated in the counter reply to the legal notice dated 10.06.2022 the Operational Creditor provided services and raised 2 invoices on Kalpaka Processing Co. amounting to Rs.1,58,15,800/- out of which Rs. 70 lakhs were paid by Kalpaka Processing Co. That the Corporate Debtor has sent a fabricated document in the Reply to the statutory demand notice dated 21.05.2022 claiming that the said 70 lakhs was paid from the account of Kalpaka Processing Co against the outstanding of the Corporate Debtor and at the same time, the Corporate Debtor has admitted the debt towards the Operational Creditor.
9. It is stated that the Operational Creditor is unaware of the transaction between 3rd parties. It is a settled position in law that such documents cannot be relied upon as evidence without an Affidavit under Section 65 B of the Indian Evidence Act. It is further stated that the Operational Creditor was doing business with both entities of Mr. Suraj Pal Singh i.e., Hitarth Biotech Pvt Ltd and Meenakshi Bionaturals and has procured the goods during the ordinary course of business. It is stated that all these transactions are not relevant to the instant application filed under Section 9 of the IBC, 2016 since these transactions were between 3rd parties and Kalpaka Processing Co, and not the Corporate Debtor.
10. It is further stated that the Deed of Agreement dated 27.02.2021 was between Green Naturals Extracts Pvt Ltd, Corporate Debtor and Mr. Suraj Pal Singh for resolving balances among themselves. It is a settled position in law that illegal contracts cannot be enforceable and therefore the reliance of the Corporate Debtor on the Agreement is baseless and devoid of any

merits. Secondly, the Applicant only agreed not to initiate legal proceedings against the Corporate Debtor if payment were made within 3 months, and since the payments were not made as per the stipulated time frame, the Operational Creditor is not bound by such a clause in the Agreement. Mr. Abraham Kuruvilla in his capacity as the proprietor of Kalpaka Processing Co has agreed to discharge Rs. 63 lakhs to the Applicant and this clause has no relevance in the instant application filed under Section 9 of the IBC, 2016 against the Corporate Debtor. The Operational Creditor is not a party to the contract and is a mere witness and is therefore not bound by the terms of the Agreement which is otherwise illegal and non-enforceable *per se*.

11. It is stated that the Operational Creditor has nowhere agreed in the Agreement that the outstanding of the Corporate Debtor shall be paid to Green Naturals Extracts Pvt Ltd instead of making payments to the Operational Creditor and even if the Agreement is interpreted in such a manner, the time frame of 3 months has expired as stipulated in the Agreement. There is no proof of payment attached by the Corporate Debtor since they have cleverly provided post-dated cheques to Green Naturals Extracts Pvt Ltd and taken this document dated 07.07.2022 to back their imaginary and illustrious story stated in their reply to the Application. The allegations that such payments were made based on the instructions of the Operational Creditor are also false. The ledger account statement of the Applicant with Green Naturals Extracts Pvt Ltd shows that the books of accounts are clear between them and there is no balance between them. Therefore, the computation provided by the Corporate Debtor is false and contravenes to their statements made in the reply to the statutory demand notice.

12. It is stated that the interest clause is stated on the invoice subsequent to the Purchase Order raised by the Corporate Debtor which clearly stipulates interest at 24% will be liable if payment is not made within 90 days. It is also stated that the Corporate Debtor in the Reply to the legal notice has raised

false allegations that Rs. 70 lakhs paid from the account of Kalpaka Processing Co against the dues of the Corporate Debtor without placing on record any debit note or credit note as per GST law or without placing on record any document or email showing acceptance of such payments from the Applicant towards the dues of the Corporate Debtor. The Corporate Debtor in the reply to the statutory demand notice has admitted that there is the balance of Rs. 40 lakhs.

13. It is stated that Mr. Abraham Kuruvilla in his capacity as the proprietor of Kalpaka Processing Co has agreed to discharge 63 lakhs to the Applicant in the Agreement and this clause has no relevance in the instant application filed under Section 9 of the IBC, 2016 against the Corporate Debtor in which Abraham Kuruvilla is the Managing Director. The Operational Creditor is not a party to the contract and is a mere witness and is therefore not bound by the terms of the Agreement nor did the Corporate Debtor make payments within the stipulated time frame mentioned in the Agreement.

14. Points for consideration are:

- i. Whether the Respondent is liable to pay the claim amount to the Petitioner even after the execution of agreement dated 27.02.2021?
- ii. Whether pre-existing dispute exist between the parties?
- iii. Whether petition filed by the petitioner partnership firm as such is maintainable?

Point No.1

15. The petitioner/Operational Creditor carrying on business in spices. In response to the purchase order dated 21.08.2019 placed by Respondent/Corporate debtor the petitioner supplied goods and raised invoice dated 21.08.2019 for a sum of Rs. 1,08,10,800/- When the respondent not paid the amount within 90 days as per the invoice condition

the petitioner claims 24% interest. The petitioner before filed the petition issued section 8 IBC 2016 statutory notice dated 13.05.2021 to the corporate debtor. On receipt of notice respondent sent reply notice dated 21.05.2021 denying its liability as claimed by the petitioner and raised dispute.

16. The corporate debtor states that the Managing director of the company Abraham Kuruvilla, he is also running a similar business of the corporate debtor, as proprietary concern in the same premises under the name and style of Kalpaka Processing co. The corporate debtor taken a plea due to some difficulty in operating its Bank accounts, the corporate debtor paid a sum of Rs.70,00,000/-on four instalments through the Bank account of proprietary concern Kalpaka after giving credit of Rs.70,00,000/- then the balance amount payable is only Rs. 38,10,000/-in such a circumstance the amount payable is less than the threshold amount to in file this petition hence prayed for dismissal.
17. It is admitted case of both side the Operational creditor having business transaction both with the corporate debtor and Kalpaka proprietary concern. Petitioner side admitted the receipt of Rs.70,00,000/- from kalpaka proprietary concern and plead that the said amount was paid by the Kalpaka proprietary concern for the amount payable by it for the goods supplied, the payment made by the proprietary concern is nothing to do with the claim amount of the petition payable by the corporate debtor. The corporate debtor and proprietary concern are different entities, amount paid by oneentity cannot be credited into the account of other entity, the reason stated by the corporate debtor for the payment made through the Bank account of proprietary concern is not satisfactory. In the absence of any convincing evidence the contention of the corporate debtor regarding the payment of Rs. 70,00,000/- towards the due amount is not proved.
18. The another contention taken by the respondent is the corporate debtor also having business transaction with Mr. Surajpal, the representative of sister

concern Meenakshi Bio naturals of the petitioner. The said Surajpal and corporate debtor entered into business transaction in respect of 200kg curcumin. In this business transaction it is alleged that the Surajpal misused the procurement certificate of the corporate debtor and made the Managing director of company Abraham Kuruvilla made liable to pay penalty of Rs.63 lakhs for violations of customs Act. The Surajpal owe a sum of Rs. 1,06,20,000/- to M/S Green Natural Extracts Private Limited. Then on 27.02.2021 agreement was entered among Green Natural Extracts Private Limited by its Managing Director Ahamed and Surajpal. The Surajpal committed default in payment of Rs.1,06,20,000/- by allowing to dishonour two cheques issued in favour of Green Natural Extracts Private Limited. The criminal proceeding under section 138 of Negotiable Instrument Act is already initiated. The said agreement was executed in the presence of the petitioner and the petitioner also signed in the agreement as witness. As per the 27.02.2021 agreement the corporate debtor agreed to pay a sum of Rs. 90,00,000/- out of Rs.1,06,000/-payable by Surajpal Green Natural Extracts Private Limited within three months' time. Thus, the part of debt of the corporate debtor Rs.90,00,000/-out of Rs.1,72,15,532/-was assigned to the Green Natural Extracts Private Limited The corporate debtor has paid a sum of Rs.25,00,000/- towards the agreement dated 27.02.2021 the same was acknowledge by the Green Natural Extracts Private Limited by letter dated 07.07.2022.

19. The petitioner/operational creditor of course not party to the agreement but he signed as attesting witness. The petitioner admitted the transfer of debt of the corporate debtor of Rs.90,00,000/- to Green Natural Extracts Private Limited. The defence taken by the petitioner is it was agreed by the parties, the amount should be paid in three months but the corporate debtor, failed to make payment of Rs.90,00,000/- since the payment was not made within three months the agreement became invalid.

20. The respondent accepted the agreement dated 27.02.2021, but he said the agreement executed on condition to make payment within three months. Once the debt of corporate debtor is assigned by the creditor by written instrument, then the creditor/assignor lost its right over the debt. When the debtor failed to make payment then the assignee alone can proceed against the debtor. In the absence any written re-assignment the contention of the petitioner that the debt reverted to the petitioner when the debtor failed to make payment within three months' time is not sustainable.

21. From the above passage out of Rs.1,72,15,532/- debt after deducting the assigned amount of Rs.90,00,000/- the balance amount payable by the corporate debtor is Rs.82,15,532/- this is below the threshold Amount fixed under section 4 of IBC 2016. The Respondent stated that respondent is not liable to pay the amount of Rs.1,72,15,532/- to the Petitioner even after the execution of assignment agreement dated 27.02.2021. In the circumstances it answered that the respondent is not liable to pay the entire claim amount, after the agreement dated 27.02.2021, thus this point is answered.

Point No.2

22. The petitioner claims a sum of Rs.1,08,10,532/- as principal amount and a sum of Rs.64,00,732/- towards interest. The respondent denies the liability of any interest and said there was no agreement for payment of interest. Further on the respondent side argued that since already Rs.90,00,000/- debt was transferred to Natural Extracts Private Limited and the said agreement also acted upon. the remaining amount payable to the operational creditor is Rs.82,15,532/- if the interest is taken into account otherwise the balance amount payable is Rs.18,10,800/- both the amount comes below the threshold amount.

23. The Petitioner termed the 27.2.2021 agreement is illegal and unenforceable agreement. He is not party to the agreement but signed as witness. He admits that he signed as witness after knowing the contents. According to

him since the amount was not paid by the respondent within three months' time the agreement became or invalid. But in the absence, any such a recital or condition in the agreement, this contention is not acceptable. Once the part of debt is assigned it will not revert back automatically, unless reassignment/ re-transfer agreement is entered.

24. On the petitioner side relies upon NCLAT citations that interest can be claimed and it is part of operational debt, if the provision is made in the invoice, then it is binding upon the parties. There is no pale of controversy, but the question is the mere mentioning of interest clause in the invoice is enough or the same must be acknowledged or counter signed by the other party by endorsing the invoice. In this case the penal interest clause of 24% mentioned in the invoices, but those invoices were not endorsed or counter signed by the respondent. In this situation the Karnataka High court observed in **Jyothi Limited v. Boving Fouress Limited [(2001) 3 Comp LJ 413 (Karn)]** as follows:

Interest cannot be awarded merely on the basis of a term in a bill or invoice, unless the creditor proves that such provision is based on a contract or agreement on the part of the purchaser to pay interest. This is because a credit bill or an invoice is a unilateral demand by the supplier and is neither a bilateral agreement nor a promise by the purchaser to pay interest. Interest can be awarded on the basis of a provision in a bill/ invoice, if it is supported by an agreement or promise to pay interest by the purchaser. Such agreement may be established with reference to correspondence, or by countersigning of the bill by the purchaser, or by acceptance by the purchaser of the term in the bill relating to interest. Where in the absence of an agreement or contract for payment of interest on the value of goods supplied, a notice of demand is sent by the supplier requiring payment of the value of goods supplied with interest thereon and a reply is sent by the purchaser in general terms seeking time to pay the bill amount, such reply cannot be construed as an admission to pay interest. Either

an agreement to pay interest or a specific admission or promise to pay interest or an order or decree granting interest by a court or tribunal empowered to award interest, is a condition precedent to hold that interest is a debt due, for the purpose of a winding up petition. In the absence of a contractual or legal liability, nor act as an estoppel in regard to a subsequent denial by the company in legal proceedings.

In view of this citation in the absence of an agreement or contract for payment of interest on the value of goods supplied, the interest claimed merely on the basis of invoices is not sustainable.

From the available materials it is crystal clearly that there is pre-existing dispute. It appears that the trouble started when the issue pertaining to custom department-imposed penalty of Rs.63 lakhs upon the Managing Director of the corporate debtor. In the circumstances it is answered that pre-existing dispute exist between the parties.

Point No.3

25. The Petitioner/Operational creditor is a partnership firm, it is represented by one of the partners and filed the petition. In the petition the status of the partnership firm is not stated whether the firm is registered with registrar of firm or not. This petition is filed in respect of due amount payable by the respondent arising out of commercial contract.
26. The point regarding maintainability of petition by partnership firm without registering with registrar firm or without filing certificate of firm registration is not addressed by both parties. But from the records it is established that no registration certificate is filed or no where in the petition it is stated that the petitioner partnership firm is registered with registrar of firms. Section 69(2) bars the unregistered partnership firm or any of the partners of said unregistered firm to file any suit against any third parties. The word "court" is defined in section 3 of Indian Evidence Act 1872, "Court" includes all

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Judges and Magistrates and all persons, except arbitrators, legally authorized to take evidence. As per this definition this Tribunal also comes under the purview of court. The proceedings before the Tribunal is a suit attracts section 69(2) of Partnership Act 1932.

27. In the circumstances, in view of the answers arrived to the points the petition is Dismissed.
28. The Registry is directed to send e-mail copies of the order forthwith to all the parties and their Ld. Counsel for information and for taking necessary steps.
29. Certified Copy of this order may be issued, if applied for, upon compliance of all requisite formalities.
30. File be consigned to records.

Satya Ranjan Prasad
Member (Technical)

P. Mohan Raj
Member (Judicial)

Signed on this 23rd day of December, 2022

Rajasree