IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH- I
KOLKATA

CP(IB) No.729/KB/2020

Under section 9 of the Insolvency and Bankruptcy Code, 2016 read with rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

In the matter of:
Bansal Industries, having its office at C/o Goel Brothers, Go Gaon Ring Road- 2, Raipur- 492001, in the State of Chhattisgarh, through its sole proprietor, Mr. Shishir Agarwal

.....Operational Creditor

-Versus-

Kumar Brother Enterprises Private Limited, a company incorporated under the Companies Act, 1956 and being a company within the meaning of Companies Act, 2013 and having Corporate Identification No- U74900BR2013PTC020543and its registered office at Maurya Market, Dharamshala Road, Sasaram, Rohtas-821115, in the State of Bihar.

.... Corporate Debtor

Date of hearing:25May 2022

Date of pronouncement: 28 June 2022

Coram:

Shri Rajasekhar V.K.	:	Member (Judicial)
Shri Balraj Joshi	:	Member (Technical)

Appearances (via video conferencing/physical):

For Operational Creditor	:	Mr. Abhinav Kardekar, Advocate Mr. Ayush Singh Solanki, Advocate
For Corporate Debtor	:	Mr. Yash Vardhan Deora, Advocate

ORDER

Rajasekhar V.K., Member (Judicial):

1. This Court convened through hybrid mode.

2. This is a Company Petition filed under section 9 of the Insolvency and Bankruptcy Code, 2016 ***("the Code")*** by Mr Shishir Agrawal, on behalf of **Bansal Industries*("Operational Creditor")*,**seeking to initiate Corporate

Insolvency Resolution Process ***(“CIRP”)*** against **Kumar Brothers Enterprises Private Limited*(“Corporate Debtor”).***

Submissions on behalf of the Operational Creditor:

3. The case of the Operational Creditor is thaton account of its supply of metal sheet and water tank structure to the Corporate Debtor, a total amount of ₹69,94,228/- (Rupees sixty-nine lakh ninety-four thousand two hundred and twenty-eight only) as operational debt is due from the Corporate Debtor to the Operational Creditor.The invoices became due and payable from the respective date of issuance.The Operational Creditor is also entitled to interest amounting to ₹19,04,930/-, thereby making the total amount due to be ₹88,99,158/- (Rupees eighty-eight lakh ninety nine thousand one hundred and fifty-eight only).

4. The Operational Creditor sent a demand notice dated 15 July 2019 under section 8 of the Code. The same was not accepted by the Corporate Debtor and was returned. Thereafter, the demand notice was sent by the Operational Creditor vide email dated 17 August 2019 to the Corporate Debtor’s official email address. The Corporate Debtor has not issued any reply to the said demand notice and there are no pre-existing disputes regarding the said operational debt.

Submissions on behalf of the Corporate Debtor:

5. The Corporate Debtor submits that no Operational Debt is due and payable on part of the Respondent to the Applicant as per the provisions of the said Code. The corporate debtor is carrying on business of solar, battery, power generation and civil construction and has also executed various projects of Govt of Bihar. Since 2013 to 2016, the Corporate Debtor had turnover of Rs. 18 crores.

6. In January 2017, Public Health EngineeringDepartment, Govt of Bihar floated a tender forconstruction of Rural Pipe Water Supply Scheme for a Wardhaving one hundred households. Thereafter, the Govt of Biharalso

floated tenders for Solar Power Based Pump and Motor forproviding drinking water to 150 household arid 200 households.The Corporate Debtor duly participated in thetender and the Govt of Bihar duly allotted the said work in favour of the Corporate Debtor. The Corporate Debtorsuccessfully completed the said project.

7. During the execution of the project, the Corporate Debtorapproached the OperationalCreditor for supply of water tankstructure duly hot dip galvanised min. 80 micron of 10,000 litres of 8-meter height as per the design including nut bolts, foundation bolts etc. TheOperational Creditor agreed to supply the aforesaid goods on the mutual agreement that the Corporate Debtor would repay the price of the goods upon the recovery ofpayment from the Govt of Bihar. On such understanding and/or agreement, theCorporate Debtor issued 3 purchase orders dated 20 January 2018; 21February 2018 and21May 2018 for supply. of the aforesaid goods total worth ₹1,99,04,755/- in favour of theOperational Creditor and out of which admittedly, the Corporate Debtor has paid a sum of ₹1,60,00,000/-.

8. After completing the project of the Govt of Bihar, the Corporate Debtor sent reminders for release of the outstanding amount on various occasion. As on today, there is pending an outstanding amount of ₹4,28,00,000/-(Rupees four crore twenty-eight lakh only) from the Govt of Bihar.The Govt of Bihar withheld the dues and outstanding amount without any reasons. The OperationalCreditor has knowledge regarding the contract between the Corporate Debtor and Govt of Bihar and it was an understanding between the parties herein that after the disbursement of the money from the Govt of Bihar, the Corporate Debtor would release the outstanding amount to the Operational Creditor.

9. Inspite of the aforesaid agreement, the Operational Creditor issued notice under the provisions of the Insolvency and Bankruptcy Code, 2016. The Corporate Debtor chose not to reply the said notice as the Operational Creditor has acted contrary to the understanding between the parties and the

Operational Creditor is well aware that the Govt of Bihar has still not cleared the bills of the Corporate Debtor.

10. The Corporate Debtor has already taken steps to initiate appropriate action against Govt of Bihar for recovery of money by impleading the Operational Creditor also as a party, so that immediately upon receipt of the money from the Govt of Bihar, the Corporate Debtor can release the dues of the Operational Creditor.

11. The present proceeding is not maintainable and/or tenable as the Operational Creditor has agreed that the Operational Creditor is entitled to recover the money from the Corporate Debtor only after the recovery of the dues and/or outstanding from the Govt of Bihar. The goods were sold and delivered by the Operational Creditor to the Corporate Debtor on the basis of such understanding In any event, the Corporate Debtor has paid a total sum of ₹1,60,00,000/- out of ₹1,99,04,755/- to the Operational Creditor and hence, the Operational Creditor has paid a substantial amount and has also released payments to the Operational Creditor as and when the Operational Creditor received money from the Govt of Bihar.

12. There are complex questions of fact involved in the present transactions between the Operational Creditor, Corporate Debtor and the Govt of Bihar and the same cannot be resolved in the present summary proceeding before this Adjudicating Authority. The disputes between the parties requires to be effectively adjudicated in a full-fledged trial before the civil court and hence, this Hon'ble Tribunal has no jurisdiction to entertain, try and determine the dispute.

13. It is further claimed by the Corporate Debtor that the petition is barred by limitation.

Rejoinder on behalf of the Operational Creditor:

14. The petition filed by the Petitioner is not barred by the laws of limitation.It is further submitted that the claim of the Operational Creditor is not a disputed

claim. The Corporate Debtor had at no point of time raised any dispute/ issue regarding the quality, quantity of the materials supplied by the Applicant. The Corporate Debtor had also failed to explain in its reply the nature of the pre-existing dispute. It is further submitted that the Respondent even failed to reply to the Demand Notice dated 15 July 2019 regarding the pre-existing dispute and is now belatedly making false statements. The Corporate Debtor has simply used this defence, for the sake of it, without any factual basis regarding the same.

15. It is further submitted that the Operational Creditor has filed the petition since the Corporate Debtor failed to pay for the goods supplied by the Operational Creditor to it. Theclaim is an **'Operational Debt'** within the meaning ofsection 5(21) of the Code. Therefore, the petition filed by the Operational Creditor is not devoid of cause of action.

16. It is submitted that there exists no mutual understanding between the parties, as alleged in the Reply-Affidavit. The Operational Creditor never agreed to receiving payment only after the Corporate Debtor received payment from the Govt of Bihar. It is submitted that such an allegation is baseless. The Corporate Debtor issued purchase orders in favour of the Operational Creditor and the parties herein are bound by their commercial relations. There is no mutual understanding between the parties, as it is a pure commercial transaction.

17. It is submitted that the non-receipt of payments from the Govt of Bihar has no bearing on the present petition. The Operational Creditor is only concerned with the payments pending against its invoices by the Corporate Debtor and is not concerned about any outstanding third-party payments of the Corporate Debtor.

18. It is further submitted that the Operational Creditor cannot delay its payment cycle, waiting for the Corporate Debtor to receive payments from the Govt.

The Operational Creditor has entered into a commercial transaction with the Corporate Debtor and the Corporate Debtor ought to abide by the same.

19. It is further submitted that the Corporate Debtor chose not to reply to the Demand Notice issued by the Operational Creditor as the Corporate Debtor had neither paid the outstanding sum nor there existed any dispute regarding the outstanding payment.

20. It is submitted that this Adjudicating Authority has the jurisdiction to decide the present petition, considering the very fact that there exists debtor-creditor relationship between the parties and that the Operational Creditor has furnished all documents evidencing supply of goods to the Corporate Debtor and non-payment against the said goods by the Corporate Debtor.

21. It is further submitted that the terms of payments stipulated in the invoices issued by the Operational Creditor is 'Immediate', meaning the due date of the invoice is the same as the invoice date. Therefore, debt fell due on the respective invoice date of each invoice. It is submitted that the ledger submitted by the Corporate Debtor depicts the correct data and outstanding payments by the Corporate Debtor.

22. It is submitted that the Operational creditor cannot be expected to wait until the inspection of the total project by the Govt officials for receiving its genuine dues. The Operational Creditor has performed its obligations by supplying the goods ordered by the Corporate Debtor under the purchase orders. The Corporate Debtor, in order to run away from its obligations towards the Operational Creditor is making excuses and acting unreasonably to deprive the Operational Creditor of its long outstanding payments.

23. It is further submitted that the Corporate Debtor is now belatedly disputing the contents of the demand notice dated 15 July 2019, whereas it failed to do so when an opportunity was given to it for doing the same within 10 days of receipt of the notice. Such act of the Corporate Debtor only goes to show the

malicious and callous attitude of the Corporate Debtor attempting to detract the procedure before this Adjudicating Authority.

Analysis and Findings:

24. Heard the Ld. Counsel for the Operational Creditor and the Ld. Counsel for the Corporate Debtor and perused the records.

25. The Corporate Debtor has claimed that the Corporate Debtor had utilised the goods supplied to it by the Operational Creditor for various projects allotted to it by the Govt of Bihar and to that effect, there was an understanding between the parties herein that the Corporate Debtor would release the outstanding amount to the Operational Creditor after thedisbursement of the money from the Govt of Bihar. The Corporate Debtor has produced various documents relating to its work with the Govt of Bihar, a substantial part of such documents are in *Bhojpuri*language.This Adjudicating Authority instructed the Corporate Debtor to produce translated copies of the said documents, which the Corporate Debtor failed to produce. As such, the documents produced in *Bhojpuri* language have not been relied upon. The Corporate Debtorhas failed to produce any other proof in support of its above-mentioned contention. In absence of the same, mere verbal claim of the Corporate Debtor is untenable. Further, the said contention also makes it clear that there is clearly an amount due from the Corporate Debtor to the Operational Creditor.

26. On perusal of the record, it is seen that the date of default has not been explicitly mentioned in the petition or the demand notice. However, it has been mentioned that the operational debt fell due from the issuance of the invoices. The details of the transactions as provided in the computation table annexed to the petition provide that the first date of default would be 04 December 2018.

27. Further to be noted is that the petition has been filed by the proprietorship itself. In this regard, we would like to hold that under section 2(f) of the Code, the provisions of the Code will also be applicable to proprietorships. Further,

it is to be noted that while section 3(23) of the Code does not explicitly cover proprietorship firms, it does so implicitly since the definition of 'person' under section 3(23) is an inclusive one and not exhaustive.

28. While the Corporate Debtor has taken the plea of pre-existing disputes in the reply-affidavit, the Corporate Debtor has not explained the nature of the said disputes. As such, the said plea is not maintainable.

29. The Operational Creditor has sent the demand notice to the Corporate Debtor dated 15 July 2019 by registered post and thereafter,*vide* email dated 17 August 2019, giving the corporate Debtor ample opportunity to either clear its outstanding dues or notify the Operational creditor of pre-existing disputes. Further, it has provided affidavit under section 9(3)(b) of the Code wherein it is mentioned that the Operational Creditor had sent to the Corporate Debtor a demand notice dated 15 July 2019 and that the Corporate Debtor had not replied to the said demand notice.

30. The instant petition is therefore complete. This Adjudicating Authority is satisfied that there is an Operational Debt due from the Corporate Debtor to the Operational Creditor and that the Corporate Debtor has defaulted in the payment of the same.

31. The Operational Creditor has not proposed the name of any interim Resolution Professional.

32. It is, accordingly, hereby ordered as follows:-

    a. The application bearing **CP (IB) No. 729/KB/2020** filed by **Bansal Industries**(Operational Creditor), under section 9 of the Code read with rule 6(1) of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating CIRP against the Corporate Debtor being **Kumar Brothers Enterprises Private Limited**, CIN: U74900BR2013PTC020543, is **admitted**.

    b. There shall be a moratorium under section 14 of the IBC.

c. The moratorium shall have effect from the date of this order till the completion of the CIRP or until this Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 of the IBC or passes an order for liquidation of Corporate Debtor under section 33 of the IBC, as the case may be.

d. Public announcement of the CIRP shall be made immediately as specified under section 13 of the Code read with regulation 6 of the Insolvency &Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

e. **Mr. Sagar Jain,** registration number **IBBI/IPA-001/IP-P02074/2020-2021/13209,** address: C/o Jain Saraogi and Co. ,1st Floor, 1, Crooked Lane, ,Kolkata,West Bengal ,700069 email: **ip.sagarjain@jainsaraogi.com**is hereby appointed as Interim Resolution Professional (IRP) of the Corporate Debtor to carry out the functions as per the Code. He has a Authorisation for Assignment in terms of regulation 7A of the Insolvency and Bankruptcy Board of India (Insolvency Professional) Regulations, 2016 valid upto 28 November 2022. The fee payable to IRP or, as the case may be, the RP shall be compliant with such Regulations, Circulars and Directions as may be issued by the Insolvency & Bankruptcy Board of India (IBBI). The IRP shall carry out her functions as contemplated by sections 15, 17, 18, 19, 20 and 21 of the Code.

f. During the CIRP period, the management of the Corporate Debtor shall vest in the IRP or the RP, as the case may be, in terms of section 17 of the IBC. The officers and managers of the Corporate Debtor shall provide all documents in their possession and furnish every information in their knowledge to the IRP within one week from the date of receipt of this Order, in default of which coercive steps will follow.

g. The IRP/RP shall submit to this Adjudicating Authority periodical reports with regard to the progress of the CIRP in respect of the Corporate Debtor.

h. The Operational Creditor shall deposit a sum of ₹3,00,000/- (Rupees three lakh only) with the IRP to meet the expenses arising out of issuing public notice and inviting claims. These expenses are subject to approval by the Committee of Creditors (CoC).

33. In terms of section 7(5)(a) of the Code, Court Officer of this Court is hereby directed to communicate this Order to the Operational Creditor, the Corporate Debtor and the IRP by Speed Post, email and WhatsApp immediately, and in any case, not later than two days from the date of this Order.

34. Additionally, the Operational Creditor shall serve a copy of this Order on the IRP and on the Registrar of Companies, West Bengal, Kolkata by all available means for updating the Master Data of the Corporate Debtor. The said Registrar of Companies shall send a compliance report in this regard to the Registry of this Court within seven days from the date of receipt of a copy of this order.

35. **CP (IB) No. 729/KB/2020** to come up on **17 October 2022** for reporting progress.

36. A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

BALRAJ JOSHI

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Date: 2022.06.28 20:46:14 +05'30'

Balraj Joshi
Member (Technical)

Rajasekhar V K

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Rajasekhar V.K.
Member (Judicial)

Suman M(LRA)