



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

**CP (IB) No.131/BB/2022 &**  
**I.A. No. 508 & 509/2022**  
**U/s. 9 of the IBC, 2016**  
**R/w Rule 6 of the IBC (AAA) Rules, 2016**

**IN THE MATTER OF:**

**M/s. Boss Engineering Company (Partnership Firm)**

Registered Office at:

105-106, Elisha Lake XComplex,  
Opp. S.R. petrolpump, Kheta Talav,  
College Road, Nadiad - 387001

... Operational Creditor

**Versus**

**M/s. Khoday RCA Industries (Unit of Khoday India Limited)**

Registered Office at:

Brewery House, 7<sup>th</sup> Mile,  
Kanakapura Road,  
Bengaluru 560 062

... Corporate Debtor

**IN THE MATTER OF IA NO.508 & 509 OF 2022**

M/s. Khoday RCA Industries (Unit of Khoday India Limited)

...Applicant

Vs

M/s. Boss Engineering Company (Partnership Firm)

...Respondent

**Order delivered on: 10<sup>th</sup> January, 2024**

**Coram:**

Hon'ble Shri. K.Biswal, Member (Judicial)

Hon'ble Shri. Manoj Kumar Dubey, Member (Technical)


**PRESENT:**

For the Petitioner : Shri Pramod S.M, PCS  
For the Respondent : Shri Karan Joseph

**ORDER****Per: Manoj Kumar Dubey, Member (Technical)**

1. The present petition is filed on 06.05.2022 under section 9 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'IBC'/Code), r/w. Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules 2016, by M/s **Boss Engineering Company (Partnership Firm)** (for brevity 'Operational Creditor/Petitioner') inter alia seeking to initiate Corporate Insolvency Resolution Professional Process against M/s. **Khoday RCA Industries (Unit of Khoday India Limited)** (hereinafter referred as 'Corporate Debtor'/Respondent) on the ground that the Corporate Debtor has committed a default for a total outstanding amount of Rs. 6,96,60,088/-. The date of default mentioned in the Form 5 is 11.01.2021.
2. Brief facts of the case, which are relevant to the issue in question, and as narrated by the Petitioner are as follows:

(i). The Operational Creditor is a partnership firm, engaged in the business of trading Aseptic Pac Paper material (Goods). The Operational Creditor and the Corporate Debtor have been in business relationship since financial year 2014-2015. That Corporate Debtor through its partners/Authorised representative approached for the Operational Creditor herein for purchase of Aseptic Pac paper Material (Goods). The sales of Aseptic Pac paper material ("Goods") traded by Operational Creditor to Corporate Debtor were quite satisfactory, as per the orders issued to Operational Creditor and payment of which is assured by Corporate Debtor to Operational Creditor. Relying upon such assurance, by Corporate Debtor, Operational Creditor has executed orders. Thereafter as per norms and business practice, six invoices were raised by the Operational Creditor totalling of Rs. 2,66,58,305 become outstanding due and recoverable from Corporate Debtor from the invoices dated 12.11.2020, 19.11.2020 and 16.12.2020. The material worth Rs.2,66,47,783 against purchase



order No.KRI/BOSS/2020-21 dated 25<sup>th</sup> August, 2020 has been laid on bonded warehouse on behalf of Khoday RCA Industries.

(ii). The Operational Creditor on various occasions requested the Corporate Debtor to clear its dues but the Corporate Debtor feigned ignorance and failed to honor its payments which were legally due towards the Operational Creditor.

(iii). On 15<sup>th</sup> March, 2022, the Operational Creditor was constrained to issue Demand Notice under section 8 of the IBC as under Form 3 dated 4<sup>th</sup> March, 2022 towards the Corporate Debtor and the same was delivered to the Corporate Debtor at his registered office address on 17<sup>th</sup> March, 2022. No reply has been received from the Corporate Debtor within ten days of receiving the demand notice or copy of the invoices, and as a result the Operational Creditor is forced to file this application.

3. The notice in the present case was issued on 12.08.2022. The Learned Counsel for the Petitioner has filed copy of proof of service vide Diary No. 9950 dated 16.09.2022. On 11.10.2022, the Respondent filed its statement of objection, vide Diary No: 4311. In the statement of objection filed by the Respondent it is contended that the alleged claims pertain to Khoday RCA Industries which is a partnership firm that is a distinct and separate legal entity, and therefore, no claims lie against the company. It is further contended that the present petition is barred by Section 10A of the IBC. Moreover, the demand Notice is addressed to the registered office of the company and not Khoday RCA Industries and that the mandatory procedure under section 8 of the IBC has not been complied. Further, the Respondent has replied to the Demand Notice dated 16.04.2022.
4. The Learned Counsel for the Petitioner filed its rejoinder vide Diary No:4850 dated 14.11.2022. In the rejoinder Petitioner, has stated that the letter dated 27.03.2018 issued by the Respondent clearly mentions that the Khoday RCA Industries is a division of the Respondent and the bills raised by the Petitioner mentioned the GSTIN/UIN that belongs to the Respondent. Further, the relevant



extract obtained from the official portal of the GST pertaining to GSTIN/UIN 29AAACK6734C1ZN was annexed. It was stated that the GST Registration Number of Khoday RCA Industries is 29AAACK6734C2ZM. Moreover, upon extracting and examining the contents from the official portal of the GST, it is found that Khoday RCA Industries is the trade name and Khoday India Limited is the legal name of the business. It is also stated that the reply to Demand Notice was dated after 10 days of the issuance of Demand Notice, and this reply does not tantamount to any notice of pre-existing dispute. Moreover, the Petitioner has been continuously corresponding with respect to the dues with the management of Khoday India Limited and the Respondent is very well aware of all communications in question.

5. On 25.09.2023, the Petitioner was directed to explain regarding the maintainability of the petition considering the date of default of 11.01.2021 disclosed in Form no. 5 filed with petition; which falls in the period covered under section 10A of IBC. The Petitioner filed an affidavit vide diary no: 5347 dated 18.10.2023, placing reliance on the Black's Law Dictionary, 6<sup>th</sup> Edition, giving definition of "Running Account" as under:

*"An open unsettled account, as distinguished from a stated and liquidated account. Running accounts mean 'mutual accounts' and 'reciprocal demands' between the parties, which accounts and demands remain open and unsettled".*

It was stated that the default in question cannot be attributed to a specific date of default since the account maintained with the Respondent was a running account. Consequently, it does not fall within the purview of Section 10A of the Code. The Petitioner also referred to the invoices and corresponding Bank statements showing the running books of accounts of the Corporate Debtor, stating that these documents demonstrate the outstanding debt/amount due from the Corporate Debtor. It was contended that the Operational Creditor has maintained a business relationship with the Corporate Debtor for a considerable period of time, and a running account of the Corporate



Debtor's reflect the same. Moreover, invoices were issued by the Operational Creditor upon supply of goods to the Corporate Debtor, as per the latter's demand. Payments were indeed made by the Corporate Debtor, albeit with some delays, on a running account basis.

6. While considering the application for initiation of CIRP of the Corporate Debtor under Section 9 of IBC, 2016, the Adjudicating Authority is required to take in to account whether the debt arising out of the invoices fell during the exclusion period which falls within the ambit of Section 10A of the IBC. It is observed that the demand notice under Section 8 of the IBC, in Form No.3 dated 04.03.2022, clearly states that the date of default was 11.01.2021. Further, the demand was raised on 6 invoices dated 12.11.2020, 19.11.2020 and 16.12.2020 which falls during the exclusion period under Section 10A of IBC (i.e., 25.03.2020 to 24.03.2021). Moreover, in the Form No.5 which is the Statutory Form to be enclosed with the application under section 9 of the IBC, the Petitioner has disclosed the date of 11.01.2021 as the date of default. In this regard, it is pertinent to refer to the judgment by the Hon'ble Supreme Court in the case of *Ramesh Kymal Vs Siemens Gamesa Renewable Power Pvt Ltd (2021) 3 SCC 224, dated 09.02.2021* in which it was observed that once the appellant has specified a particular date as the 'Date of Default' in the demand notice issued under section 8(1); the matter under section 9 has to be Operational Creditorreed on that basis only. The Hon'ble Apex Court rejected the attempt to prepone the Date of default, for the reason that it was contrary to the disclosure made in the Demand Notice issued in pursuance of the provision of section 8(1) and section 9 of the IBC. The Hon'ble Apex Court further held that the intention of the Legislature is to bar the institution of any application for the commencement of the CIRP in respect of a default which has Operational Creditorcurred on or after 25.03.2020 till 22.03.2021.
7. It is noted that in the petition as per Form No. 5, Part IV, the principal amount of outstanding bills for which material was already delivered became due on and from the dates of issue of invoices. The dates of



Invoices are 12.11.2020 bearing GSTT/53, 19.11.2020 bearing GSTT/54, 19.11.2020 bearing GSTT/55, 16.12.2020 bearing GSTT/58, 16.12.2020 bearing GSTT/59 and 16.12.2020 bearing GSTT/60. Further, it is seen that from the affidavit in petition under Section 9 (3)(b) of IBC, the 6 invoices dated 12.11.2020, 19.11.2020 and 16.12.2020 are pending for payment. All the 6 invoices for which the application is filed fall under the period specified under section 10A of IBC; and accordingly the 'date of default' has been disclosed as 11.01.2021 as stated above; which falls in the exclusion period of Section 10A of IBC. Accordingly, the Petition under Section 9 of the IBC is not maintainable.

8. Therefore, this Tribunal is of the considered opinion that this Petition is not a fit case for admission since the default falls within the Section 10A of the IBC, 2016. Therefore, the instant petition **CP (IB) No. 131/BB/2022** is hereby liable to be **dismissed** as not maintainable. However, this order shall not preclude the Petitioner from pursuing other remedies in accordance with law, if so advised.

#### **I.A.No.508 of 2022**

1. The present application has been filed on 15.11.2022 by Khoday India Limited against Boss Engineering Company U/s.60(5) of the IBC, 2016 and Rule 11 of the NCLT Rules, 2016, seeking to dismiss the above petition CP(IB) No: 131 of 2022 with exemplary penalties.

2. It is stated in the application that the purchase order dated 25.08.2020 has not been issued by the applicant company, but by a third party, an independent legal entity. The company is a third party to the debt alleged by the Petitioner. Further, there is no privity of contract between the Petitioner and the company. There is no debt owed to the company, and as such the company is not a Corporate Debtor within the meaning of IBC. In response to the Demand Notice dated 04.03.2022 issued by the Respondent, a reply notice dated 16.04.2022 was sent by raising the dispute.



3. The Respondent has filed its objection vide diary no: 20.01.2023 by contending that purchase order constitutes of the website's name of Khoday India Limited and the Khoday RCA Industries has been continuously corresponding with respect to the dues with the management of Khoday India Limited. The Petitioner was constantly following up with persons involved in the management of Khoday India Limited. The Petitioner has received reassurances of payment by Mr. Padmanabh Khoday, who constitutes a part of management of the company and the same is evident from the official website of the company i.e. Khodayindia.com. The Petitioner has been continuously corresponding with respect to the dues with management of Khoday India Limited. It was further contended that reply to Demand Notice was beyond 10 days of the notice and the reply to the notice does not tantamount to any pre-existing dispute as contemplated under section 9(5)(ii)(d) of the Code.

4. The Respondent has filed its additional objection vide diary no: 1285 dated 06.03.2023 by contending that a few of the bills were raised on Khoday RCA Industries, Bengaluru (unit of Khoday India Ltd., Bengaluru) for which payment has been received from Khoday India Limited., Bengaluru and there was no direct billing with Khoday India Limited., Bengaluru for bills raised by Boss Engineering Company. All bills were raised on Khoday RCA Industries, Bengaluru; and the payments received from Khoday India Ltd were credited against the bills raised by Khoday RCA Industries, (a unit of Khoday India Ltd, Bengaluru). The Respondent supplies materials to government depots of Karnataka State Beverages Corporation Ltd and the bills issued for the same also mentions as "Khoday RCA Industries – Distillery Division of Khoday India Limited." Further, it is stated that prior to implementation of the regime of GST, the E-Sugam Form that were used also to demonstrate that the transaction of the Petitioner has always been with the Khoday India Limited. Moreover, Khoday India Limited submitted its financial statements to the Registrar of Companies, Bengaluru for the FY 2020-2021, where the Respondent stated on page no. 120 that: "*The manufacturing unit known as "City Factory" belonging to Khoday Eshwara & Sons (Registered Partnership Firm) had been let on lease to the company since*



*the year 2002, with economic benefits accruing to the company.”* This is being referred to as the RCA division of the Company. Further, for the sake of argument that even if Khoday India Limited takes the stand that payment was remitted on behalf of Khoday RCA Industries, and Khoday RCA Industries and Khoday India Limited, were two different entities; the details of remittances made by Khoday India Limited on behalf of Khoday RCA Industries for the invoices raised in the FY 2020-2021 and the payment for which was also made by Khoday India Limited in the FY 2020-2021 was not included in details of related party transactions in the Financial Statements of Khoday India Limited for the FY 2020-2021.

6. It is seen that in this application, the prayer is for the dismissal of the CP (IB) No. 131/2022. Since CP (IB) No.131 of 2022 is not maintainable. There is no need to adjudicate on the lines of argument taken in this I.A and this I.A. 508 of 2022 becomes infructuous.

7. Hence **I.A. 508 of 2022 is dismissed as infructuous.**

#### **I.A.No. 509 of 2022**

1. The present Application has filed on 15.11.2022 by M/s. Khoday India Limited against Boss Engineering Company U/s.191,193,199 and 200 read with sections 195 and 340 of the Code of Criminal Procedure Code, 1973 read with section 424 of the Companies Act, 2013, seeking to direct penal action against the partner and authorised signatory of the Petitioner – Mr. Kiran Oza for perjury. In view of the order passed in CP(IB)131 of 2022 and IA 508 of 2022 the instant application is becomes **infructuous**; and is disposed of accordingly.

**-Sd-**

**(MANOJ KUMAR DUBEY)  
MEMBER (TECHNICAL)**

**-Sd-**

**(K.BISWAL)  
MEMBER (JUDICIAL)**