

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
KOLKATA
C.P (IB) No. 197/KB/2021**

An application under section 9 of the Insolvency and Bankruptcy Code, 2016 read with rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

In the matter of:

Viom Infra Ventures Limited [CIN U35203TG2007PLC057400]

...Operational Creditor

Versus

Bahula Infotech Private Limited [CIN U72900WB2014PTC199722]

...Corporate Debtor

Date of Hearing: 01.04.2022

Date of pronouncing the order: 18.04.2022

Appearances (through Video Conferencing)

1. Mr. Shaunak Mitra, Advocate } For the Operational Creditor

2. Mr. Saurav Jain, Advocate }

1. Ms. Suparna Sardar, Advocate } For the Corporate Debtor

Coram:

Rajasekhar V.K. : **Member (Judicial)**

Balraj Joshi : **Member (Technical)**

ORDER

Rajasekhar V.K., Member (Judicial)

1. The Court convened *via* video conference.
2. This is a Company Petition filed under section 9 of the Insolvency and Bankruptcy Code, 2016 (***‘the Code’***) read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 by Viom Infra Ventures Limited (***‘Financial Creditor’***), a company incorporated under the Companies Act, 1956, having its office at NAC Campus, NAC Road Cyberabad, Kondapur (Post) Hyderabad - 500084, by Mr. Manoj Kumar Agarwal, Finance Controller, duly authorised vide Letter of Authority dated 07 July, 2021¹ for initiation of Corporate Insolvency Resolution Process (***‘CIRP’***) against Bahula Infotech Private Limited (***‘Corporate Debtor’***), a Company incorporated under the Companies Act, 2013, having its registered office at 207, Maharshi Debendra Road Kolkata - 700007.
3. The present Petition was filed on 29 July, 2021 before this Adjudicating Authority. The total amount claimed in default is Rs.12,28,74,980.61/- (Rupees Twelve Crore Twenty Eight Lakh Seventy Four Thousand Nine Hundred Eighty only) [*Principal Rs.11,65,79,678/- and Interest Rs.62,95,302.61*], inclusive of interest calculated @ 9% p.a. from 28 October, 2020 till 04 June, 2021. The date of default is **04 June, 2021**.
4. It is submitted in the Petition, Part – II that the authorised share capital of the Corporate Debtor is Rs.1,00,00,000/- (Rupees One Crore only) with paid up Capital as Rs.10,00,000/- (Rupees Ten Lakh only).
5. ***Submissions by the Ld. Advocate on behalf of Operational Creditor/Operational Creditor.***
 - 5.1 The Operational Creditor was approached by the Corporate Debtor in the year 2018, where the Corporate Debtor represented that they are in process of entering into various contracts with the Government Authorities and other entitled entities relating to the scheme of ‘Smart City Projects and Data

¹ Annexure – B, pages 47 – 51 of the Petition

Centre Projects' (***Project***). For such purpose, the Corporate Debtor was required to set up several site offices and was in requirement of various types of equipments².

- 5.2 After several discussions and negotiations the Operational Creditor agreed to grant several equipments lying with the Operational Creditor to the Corporate Debtor. Further, at the request of the Corporate Debtor, the Operational Creditor also agreed to acquire some equipment and provide the same on monthly lease/rental basis to the Corporate Debtor.
- 5.3 Subsequently, a Master Lease Agreement (***Agreement***) dated 09 July, 2018³ was entered into between the parties. Along with the said Agreement a special terms and conditions contract was also executed between the parties.⁴
- 5.4 It is pertinent to mention that from the agreed equipment list, equipment appearing from serial nos. 207 to 268 has been lying at various warehouses of the Operational Creditor and the Operational Creditor was willing and ready to deliver the same. The Operational Creditor also hired several experts who were engaged especially with the assignment of finding out fit and proper equipment as per the need of the Corporate Debtor.
- 5.5 As per the Agreement, the rental lease payable by the Corporate Debtor with respect to the equipment appearing from serial nos. 207 to 268 was to commence on and from the date of execution of the Agreement, irrespective of actual possession taken by the Corporate Debtor or not. This arrangement was made as an assurance from the Corporate Debtor, to take the delivery of all the equipments.
- 5.6 The Agreement also contemplates that in the event of termination of the Agreement on account of failure on the payment of rental lease by the Corporate Debtor, the Operational Creditor is not only entitled to the arrears of lease rental but also lease rental of another one year.

² Detailed list of Equipments is at Page Nos.104-107 of the Petition.

³ Annexure – E of the Petition.

⁴ Pages 108 – 166 of the Petition.

- 5.7 Even after such clauses in the Agreement, the Corporate Debtor started avoiding making payment of the rental lease to the Operational Creditor from the beginning.
- 5.8 The Operational Creditor *vide* letters dated 30 October, 2018, 30 November, 2018 and 04 January, 2019 reminded the Corporate Debtor regarding lifting of the equipments and also for payment of the lease rentals.⁵
- 5.9 The Operational Creditor *vide* its letter dated 11 January, 2019, once again intimated the Corporate Debtor that they are not in a position to deploy their men and experts at the said sites of the Corporate Debtor for installing of the equipments mentioned at SI No. 207 to 268 of the Rental Schedule at page 104 – 107 of the Petition but they have already negotiated with various suppliers'/manufacturers to help in installing the same. Despite such information the Corporate Debtor failed to intimate the Operational Creditor regarding deployment of the Operational Creditors' professional men.⁶
- 5.10 *Vide* letter dated 24 December, 2018 and 01 February, 2019, the Corporate Debtor intimated the Operational Creditor that since the respective State Governments are taking time to award the contract, there is a delay on the part of the Corporate Debtor in performing the obligations as per the Agreement.⁷ Thereafter, *vide* letter dated 04 September, 2019 the Corporate Debtor further informed that they are not in a position to take the said equipments on lease and thus they had to cancel the Agreement. Moreover, through this letter the Corporate Debtor called on the Operational Creditor to waive the lease rentals.
- 5.11 Pursuant to the letter dated 04 September, 2019 of the Corporate Debtor, the Operational Creditor reminded the Corporate Debtor that cancellation of the Agreement would give rise to claim for liquidated damages and outstanding rentals.

⁵ Annexure – F of the Petition.

⁶ Annexure – G of the Petition.

⁷ Annexure – H of the Petition.

- 5.12 On finding no alternatives, the Operational Creditor *vide* letter dated 24 October, 2019 invoked Arbitration Clause and requested a Senior Advocate to act as a sole arbitrator in respect of the aforementioned dispute. Subsequently, the Ld. Arbitral Tribunal after hearing the contentions of the parties and the documents produced before the Tribunal. The Arbitral Tribunal directed the Corporate Debtor to pay a sum of Rs.27,58,58,278/- (Rupees Twenty Seven Crore Fifty Eight Lakh Fifty Eight Thousand Two Hundred Seventy Eight only) to the Operational Creditor within two months of the Arbitral Award dated 27 August, 2020, failing which payment of interest calculated at 9% per annum on the aforesaid amount until the date of payment was also payable.
- 5.13 Subsequently, the Corporate Debtor transferred a sum of Rs.15,92,78,600/- to the Operational Creditor, leaving a sum of Rs.11,65,79,678/-⁸. The Operational Creditor *vide* its letter dated 05 April, 2021 reminded to the Corporate Debtor for the payment of the dues and granted two months opportunity for the payment of the dues along with interest. The same was agreed by the Corporate Debtor *vide* their letter dated 06 April, 2021.⁹
- 5.14 On failure by the Corporate Debtor to pay the outstanding, the Operational Creditor issued a demand notice dated 07 June, 2021 under section 8 of the Code and the same was duly served on the registered office of the Corporate Debtor.¹⁰

6. Submissions by the Ld. Counsel on behalf of the Corporate Debtor

- 6.1 This instant Application suffers from incurable and material deficiencies and is frivolous in nature. The Operational Creditor has misled several facts and calculated the outstanding due without taking into consideration the entire facts.
- 6.2 The debt amount of Rs.12,28,74,980.61(including interest) is on account of the outstanding balance towards the arbitration dispute so, this application under section 9 of the Code is not maintainable.

⁸ Bank Statement - Annexure – K of the Petition.

⁹ Annexure – L of the Petition.

¹⁰ Annexure – M of the Petition.

- 6.3 Under section 5 (21) of the Code, '*Operational Debt*' means a claim in respect of the provisions of the goods or services including employment or a debt in respect of the [payment] of dues arising under the law for the time being in force and payable to the Central Government, any State Government or any local authority; In the present case at hand, the dues have arisen due the non-compliance of the arbitration award passed by the Learned Arbitrator.
- 6.4 It is hereby stated that the Corporate Debtor has undergone severe financial crisis due to various reasons apart from the already existing pandemic scenario. The Operational Creditor has been aware of the Corporate Debtor's current scenario, yet the Operational Creditors have filed the instant petition claiming the entire debt due to apply undue pressure which will ultimately be of no good as the company is in no state to repay back. The Corporate Debtor never denied repayment of the loan. The Operational Creditor is taking undue advantage of the law by circumventing the law to coerce the Corporate Debtor and destroy its reputation.
- 6.5 It is stated that the purpose of the Insolvency and Bankruptcy Code is not to be used as a weapon but is rather a mechanism for resolution of the Insolvency of a Corporate Body. In the present case, the Corporate Debtor is not an Insolvency Body doing business with dignity and is trying its level to revive the company. The Operational Creditor has been aware of the situation of the Corporate Debtor and its attempts to clear the debt due.
- 6.6 This application is just creating an undue pressure on the Corporate Debtor alongside other entire crisis already lying at hand, which is the uncalled for. The Corporate Debtor is trying to resolve its financial problem and clear the dues of the Operational Creditors as soon as possible. The Corporate Debtor is unable to repay the alleged amount claimed by the Operational Creditor. The Corporate Debtor is not in a good condition to pay any amount.

7. Issue

- 7.1 Is there any pre-existing dispute between the parties?
- 7.2 Can CIRP be initiated based on Arbitral Award?

Analysis and Findings

8. Heard the Ld. Counsel for the Financial Creditor and the Ld. Counsel for the Corporate Debtor and perused the concerned documents annexed to the Petition.
9. In a section 9 application, the rudimentary point of defence is the existence of the dispute and/or a suit or arbitration prior to the receipt of the demand notice under section 8 of the Code.¹¹ However, in this instant case neither any dispute was brought to the notice of the Operational Creditor nor there is any pendency of any suit/arbitration proceedings. Further, As envisaged under section 9(3)(b) of the Code, an affidavit has been filed by the Operational Creditor. Thus, from the available record, it is apparent that the Corporate Debtor had neither raised any dispute with respect to the services of the Operational Creditor,¹² nor challenged the Arbitral Award dated 27 August, 2020.
10. In this case, the ‘Operational Debt’ is concerned, all that has to be seen is whether the debt can be said to be disputed, and we can construe from the record that there is no section 34 petition challenging the arbitral award. Hence, the debt is not disputed.
11. Further, the Hon’ble Supreme Court in ***K. Kishan v. Vijay Nirman Company Private Limited***¹³ held that in order to initiate CIRP in case of arbitral award under section 9, the debts needs to be undisputed. The Hon’ble Supreme Court also held that the CIRP could not be initiated on basis of Arbitral Award, on the following grounds;
- (a) When a counterclaim exceeding the claim awarded was rejected by the Arbitral Tribunal on merits, and such rejection is also a matter of challenge before the Courts; and
 - (b) When a challenge had also been filed against the Arbitral Award.

¹¹ Mobilox Innovations (P) Limited v. Kirusa Software (P) Limited, (2018) 1 SCC 353

¹² Annexure – N of the Petition.

¹³ (2018) 17 SCC 662

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

- a) The application bearing CP (IB) No. 197/KB/2021 filed by Viom Infra Venture Limited, the 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 Bahula Infotech Limited, the Corporate Debtor, 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. Anneel Saraogi**, registration number **IBBI/IPA-001/IP-P01320/2018-2019/12009**, email: **anneelsaraogi@gmail.com**, is hereby appointed as Interim Resolution Professional (IRP) of the Corporate Debtor to carry out the functions as per the Code subject to submission of a valid Authorisation of Assignment in terms of regulation 7A of the Insolvency and Bankruptcy Board of India (Insolvency Professional) Regulations, 2016. The fee payable to IRP or the RP, as the case may be, 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 his 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 Rs.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).
- i) 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 and email immediately, and in any case, not later than two days from the date of this Order.
- j) 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.

13. CP (IB) No. 197/KB/2021 to come up on **20 July, 2022** for filing the periodical report.

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

BALRAJ
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BALRAJ JOSHI
Date: 2022.04.18
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Balraj Joshi
Member (Technical)

Digitally signed by Rajasekhar V
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Date: 2022.04.18 18:06:01
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Rajasekhar V.K.
Member (Judicial)

The order is pronounced on 18 April, 2022