

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
(Court No. 1)
KOLKATA**

C.P (IB) No. 579/KB/2020

An application 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:

Sudarshan Paper And Board Pvt. Ltd. [CIN U21015WB2003PTC095782], a company incorporate under the Companies Act, 1956, having its registered office at Unit No. 1106, 11th Floor, Godrej Genesis, Plot No XI, Block - EP & GP, Salt Lake, Sector-V, Kolkata, Parganas North - 700091.

...Operational Creditor

Versus

Kalika Press Private Limited [CIN U22219WB1938PTC009243], a company incorporate under the Companies Act, 1913, having its registered office at 25, DL Roy Street, Kolkata – 700006.

...Corporate Debtor

Date of Hearing: 28.09.2022

Date of pronouncing the order: 14.12.2022

Coram:

Shri P. Mohan Raj : *Member (Judicial)*
Shri Balraj Joshi : *Member (Technical)*

Appearances (through Video Conferencing/physical hearing)

Mr. Avishek Guha, Adv. : *For Operational Creditor*

Mr. Chitresh Saraogi, Adv.

Mr. Pradip Paul, Adv. : *For Corporate Debtor*

ORDER

Per Balraj Joshi, Member (Technical)

1. The Court convened *via* hybrid mode.
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 Mr. Atanu Mitra, Authorised Representative, Sudarshan Paper And Board Pvt. Ltd. (*‘Operational Creditor’*), duly authorised *vide* Board Resolution dated 20 September, 2019¹ for initiation of Corporate Insolvency Resolution Process (*‘CIRP’*) against Kalika Press Private Limited (*‘Corporate Debtor’*).
3. The present Petition was filed on **21 February, 2020** before this Adjudicating Authority. The total amount claimed in default is Total amount of Rs.12,72,000 /-.(Rupees Twelve Lakh and Seventy Two Thousand Only), including an interest at the rate of 18% Per Annum is of Rs. 72,000 /- (Rupees Seventy Two Thousand Only), calculated from 22nd July, 2019 till 22nd November, 2019.
4. In part II of the Petition the authorized share capital of the Corporate Debtor is Rs.65,00,000/- (Rupees Sixty Five Lakh only) with subscribed share capital of Rs.50,00,000/- (Rupees Fifty Lakh only).
5. ***Submissions by the Ld. Counsel appearing on behalf of the Operational Creditor.***
 - 5.1 The Operational Creditor had supplied paper and paper boards to the Corporate Debtor and the same was appropriated by the Corporate Debtor. That in the usual course of business, the Corporate Debtor had approached the Operational Creditor, and made representations. In pursuance to such representation the Corporate Debtor, were supplied with the materials and thereby became liable to make payments towards the materials supplied.

¹Annexure – C of the Petition.

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- 5.2 Several invoices were issued against such supply of goods, which remained unpaid. Since such amount remained unpaid, the Operational Creditor company was compelled to initiate a proceeding under section 9 of the Insolvency and Bankruptcy Code, 2016, before the National Company law Tribunal, Kolkata Bench for a total claim of Rs.49,98,871/- which was recoverable against the invoices raised and transactions that took place on and from 25th August, 2016 till 3rd October, 2016 inclusive of interest.
- 5.3 Subsequently, the said application under section 9 of the Insolvency and Bankruptcy Code, 2016, before the National Company law Tribunal, Kolkata Bench, got admitted *vide* order dated 14th September, 2018 [*Annexure D of the Petition*].
- 5.4 Upon such admission, the Corporate Debtor approached the IRP and requested to settle the issue with the Operational Creditor. Thereafter, the parties agreed to enter into a Memorandum of Understanding (*MoU*). In terms of the said MoU, a withdrawal application was filed and the CP No. 251/KB/2018 was withdrawn.
- 5.5 As per the MoU, the Corporate Debtor acknowledged the entire dues, and agreed to pay a sum of Rs. 50,00,000/-which was in return being accepted by the Operational Creditor and as such the said MoU was prepared and duly signed on 08 December, 2018.
- 5.6 Further, as per the said MoU, it was agreed that the corporate debtor will be issuing eight (08) cheques from the personal account of Sri. Adhir Kumar Ghosh as the Company was under CIRP and on each due dates, the Company will replace such personal cheques being issued by Sri. Adhir Kumar Ghosh with a demand draft or a cheque of the Company. Based on the said schedule, part payments were made, details of which are laid down here under and are as follows:
- (a) A sum of Rs. 15,00,000/-was issued by a cheque dated 20 December, 2018 by Sri. Adhir Kumar Ghosh which was subsequently being

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replaced by an instrument issued by the Company and as such the said amount was duly realised by the operational creditor.

- (b) Similarly the Cheque of Rs. 5,00,000/- issued by Sri. Adhir Kumar Ghosh was replaced by way of Bank transfer through RTGS, and the same was also realised by the Operational Creditor.
- (c) Similarly replacing the cheque for an amount of Rs. 6,00,000/- issued vide cheques bearing no.298336 by Sri. Adhir Kumar Ghosh was replaced by way of, a cheque in the name of the Operational Creditor Company herein and the same was also realized by the Operational Creditor.
- (d) Similarly two cheques of Rs.3,00,000/- each bearing cheque numbers: 298352 and 298353 dated 20 March, 2019 and 20 April, 2019 respectively was replaced by way of a cheque of Rs. 6,00,000/-by the Company and the same was also realised by the operational creditor.
- (e) Similarly two cheques of Rs.3,00,000/- each bearing cheque numbers: 298364 and 298365 dated 28 March, 2019 and 28 June, 2019 respectively was replaced by way of a cheque of Rs. 6,00,000/-by the Company and the same was also realised by the operational creditor.

5.7 After giving the due credits to the payments made by the corporate debtor against the Agreed Settlement amount of Rs. 50,00,000/- an amount of Rs. 12,00,000/- was still due and payable which were to be paid by the remaining 2 instalments of Rs.6,00,000/ - each. However, the Corporate Debtor failed to issue further demand drafts and to replace the remaining two post-dated cheques for an amount of Rs. 6,00,000/- each bearing no.031795 and 031796, as on 25th April, 2019 and 25th May, 2019, being payable at the 6th and the Final Instalments being the 7th instalment.

5.8 It is pertinent to note, that despite several attempts being made by the Operational Creditor to communicate with the Corporate Debtor to replace the

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said post-dated cheques with new cheques in the name of the company, the Corporate Debtor failed and neglected to do so.

5.9 Further, on having no other alternative, the Operational Creditor was compelled to present both the cheques on 22 July, 2019 for an amount of Rs. 6,00,000/- each bearing cheque no. 031795 and 031796, dated 25 April, 2019 and 25 May, 2019 respectively drawn on Union Bank in favor of Sudarshan Paper & Board Private Limited in City Bank Chowringhee Branch with its banker in order to realise the part payment due. However, upon presentation, the said cheques were dishonored and returned with a remark as “*insufficient fund*”.

5.10 Subsequently, the operational creditor duly issued a demand Notice under sec 138 of NI Act for repayment of the dishonoured cheque amount with 15 days, which remained un answered and unpaid also and as such upon expiry of the 15 days, the operational creditor was compelled to file two separate proceedings under the NI Act, 1881 before the Chief Metropolitan Magistrate's Court at Calcutta being numbered as CC No. 48420 of 2019 and CC No. 48429 of 2019.

5.11 Since no further payments were made, the Operational Creditor was compelled to issue a demand notice in Form 3 (Demand Notice) dated 12 December, 2019 under section 8 of the Code. Further, upon receipt of such notice, the Corporate Debtor through its Ld. Advocate had issued a sham reply on some the baseless and false grounds on 23 December 2019.

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

6.1 The application filed by the Operational Creditor under section 9 of Code, 2016 has been fully misconceived. The last invoiced raised by the Operational Creditor was on 03 October 2016 and the statutory demand notice was issued under Section 8 on 12 December, 2019. Considering the statutory notice the invoice bill time was over more than three years. As per the Limitation Act, Article 137 will begin to run from the date when the "right to apply accrues" and IBC Code apply from 03 October 2016.

- 6.2 Further, one set of application was filed by Operational Creditor previously, however, the same was withdrawn without getting "Order to File a fresh in case of default". Moreover, the Operational Creditor have stated that the Corporate Debtor owes a sum of Rs 12,72,000/- (twelve lakhs seventy two thousands) including interest @ 18% per annum till 22nd November, 2019 to the Operational Creditor, without necessary documents like, invoice copy and ledger, statements etc. in the Statutory IBC Code notice (compulsory required) which describe The Operational Creditors 'claim in details
- 6.3 This instant case is barred by Law of Constructive Res-judicata. It provides that if a plea has been taken by a party in proceedings be Corporate Debtor or the Operational Creditor, then the Corporate Debtor or the Operational Creditor will not be permitted to take pleas against the same party in the following subsequent proceedings with reference to the same matter. It is opposed to public policies on which the Principal of Res-judicata based. It would mean harassment and hardship to the Corporate Debtor.
- 6.4 Further, a claim arising out of a MoU never falls under the purview of the Operational Debt. It is a contractual agreement now. It is to be dealt under section 62 of Contract Act, 1872. The said operational debt is not in force as per law of land and not also applicable under Insolvency and Bankruptcy Code, 2016. So, there is no Operational Debt in the instant case and Section 8 and 9 IBC Code, 2016 demand notice relating to operational debt is also disputed. The case therefore be dismissed.

Analysis & Findings

7. We have heard the Ld. Counsel appearing on behalf of the Operational Creditor and the Ld. Counsel appearing on behalf of the Corporate Debtor and perused the record. The issue that arises is, ***whether, an application arising out of the MoU's entered between the parties is maintainable under section 9 of code or not?***
8. As envisaged under the Insolvency and Bankruptcy Code, 2016;

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“(20) ‘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;

(21) ‘Operational Debt’ means a claim in respect of the provision of goods or services including employment or a debt in respect of the repayment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority;”

9. Whereas, the facts and circumstance of this case is concerned, CIRP was initiated against the Corporate Debtor *vide* order dated 14 September, 2018 by this Adjudicating Authority, however, the same was withdrawn on the grounds of settlement between the parties [*order dated 10 January, 2019*]. On 08 December, 2018, the parties had entered into a MoU. Now, this application has been filed on the failure of the Corporate Debtor to adhere to the agreed MoU between the parties.
10. It is also pertinent to refer to the object of the Code , which is - *not to act a recovery mechanism but to facilitate in the process of resolution of a the Corporate Debtor*. Further, the definition of Operational Debt is also unclouded under the Code; Operational Debt means a debt arising out of of goods or services from the supplier/Operational Creditor.
11. Further, when a MoU is being entered between the parties, and if the same is not complied with, then this would create a fresh cause of action and everything has to be evaluated through the prism of the provisions of Section 9. Considering the definition of the operational debt envisaged in the Code and as recapitulated herein above, and also focusing on the object of the Code, it is seen that the purported debt emanates from an MoU, which is in the shape of a contract between the parties and therefore this Adjudicating Authority is not the forum where parties could seek implementation of the MoU in the guise of Section 9 Application of the Code.

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- 12.** We also rely on the Judgment of Hon’ble NCLAT in the matter of NCLAT, Delhi in **Amrit Kumar Agrawal v. Tempo Appliances Pvt. Ltd**, where it has been inter-alia held that “ *...Mere obligation to pay under a Settlement Agreement would not amount to disbursal of amount for consideration against the time value of money and breach thereof would not entitle the Appellant in the instant case to trigger Corporate Insolvency Resolution Process against the Respondent....*”
- 13.** Hence, this Petition being **C.P. (IB) No.579/KB/2020** is **dismissed**. Needless to say that the Operational Creditor is at liberty to resort to other remedies that may be available to it under any other law.
- 14.** A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

Balraj Joshi
Member (Technical)

P. Mohan Raj
Member (Judicial)

The order is pronounced on 14th day of December, 2022

SA [LRA]