

IN THE NATIONAL COMPANY LAW TRIBUNAL, BENCH-VI, MUMBAI

CP (IB) No. 1144/MB/2022

[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:

MR. PRAVEEN NATH

Address: C-121, Rameshwar Nagar, Kudi,

Basni-1st, Jodhpur-342005, Rajasthan.

...Operational Creditor

Versus

KHUSH INFRATECH PRIVATE LIMITED

[CIN: U45400MH2012PTC229866]

Registered Office: Office No. 3, Jay Kishan Market

RC Marg, Near Mono Rail Station, Chembur (East),

Mumbai-400071, Maharashtra

...Corporate Debtor

Order Reserved on: 07.09.2023
Order Pronounced on: 13.12.2023

CORAM:

HON'BLE SHRI K. R. SAJI KUMAR, MEMBER (JUDICIAL)

HON'BLE SHRI SANJIV DUTT, MEMBER (TECHNICAL)

Appearances:

Operational Creditor: Adv. Rahul Punjabi

Corporate Debtor: Adv. Annu Sharma

ORDER

[Per: SANJIV DUTT, MEMBER (TECHNICAL)]

1. Background

- 1.1 This Application bearing C.P. (IB) No.1144/MB/2022 was filed on 08.10.2021 by Mr. Praveen Nath, the Operational Creditor, under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as “the Code”) for initiating Corporate Insolvency Resolution Process (CIRP) in respect of Khush Infratech Private Limited, the Corporate Debtor.
- 1.2 The Operational Creditor is a contractor and is engaged in the business of all types of plantation work in road construction projects. The Corporate Debtor is carrying on the business of road construction as well as repair and maintenance of roads.
- 1.3 The Corporate Debtor availed of the services of the Operational Creditor under a work order for tree plantation issued by the Corporate Debtor in respect of a road construction project undertaken by it. A sum of Rs.1,13,39,141/- (One Crore Thirteen Lakh Thirty-Nine Thousand One Hundred Forty-One Rupees) fell due to the Operational Creditor from the Corporate Debtor on account of tree plantation work carried out by the former in terms of the work order. This represented the amount of Operational Creditor’s unpaid invoice dated 01.04.2019 raised on the Corporate Debtor towards tree plantation services provided to the Corporate Debtor.
- 1.4 The Operational Creditor sent various reminders during April, 2019 and January, 2021 to the Corporate Debtor to clear the outstanding dues of the

former, but the Corporate Debtor failed to make payment of the outstanding operational debt. This led to the filing of the present Application.

- 1.5 The Operational Creditor filed IA No. 5113/2023 on 08.11.2023 under Rule 11 of the NCLT Rules, 2016 seeking direction for restraining the Corporate Debtor from alienating, disposing of or creating third party interest in its assets. After hearing the Counsel for the Operational Creditor, the said IA was allowed vide separate order dated 08.11.2023.

2. Averments of the Operational Creditor

- 2.1 The Operational Creditor submits that on 01.05.2018, the Corporate Debtor issued a work order to it for tree plantation in a project awarded to the Corporate Debtor for improvement of Amritsar Bypass through construction of additional structures and service roads on NH-1 in the state of Punjab. The said project was to be done through Engineering, Procurement and Construction (EPC) mode.
- 2.2 The Operational Creditor further submits that as per the aforesaid work order, the said plantation of trees was to commence from 01.05.2018 and it was to be completed within a period of 11 to 12 months on turnkey basis. The date of completion of the aforesaid project was 31.03.2019, as mutually agreed between the parties.
- 2.3 The Operational Creditor submits that it had fulfilled its obligations as per the aforesaid work order dated 01.05.2018 and planted trees which were checked to the satisfaction of the Corporate Debtor. It is stated that the Corporate Debtor had never raised any dispute regarding quality of service

provided to it. So, the Operational Creditor had raised following invoices on the Corporate Debtor with regard to the services rendered to the Corporate Debtor:-

Sr. No.	Date	Invoice No	Principal Amount (In Rs)	TDS (In Rs)	Total (In Rs)
1.	30.11.2018	RA-01	13,51,000/-	13,645/-	13,64,645/-
2.	01.04.2019	RA-02	1,12,25,750/-	1,13,391/-	1,13,39,141/-

2.4 The Operational Creditor submits that it had maintained the ledger of Corporate Debtor's running account for the period from 01.04.2018 to 31.03.2020 which showed outstanding amount of Rs.1,12,25,750/- (rounded off) as on 01.04.2019 due and payable by the Corporate Debtor. It is stated that the Corporate Debtor failed to pay the said amount of operational debt of Rs.1,12,25,750/-. However, the Operational Creditor submits that the Corporate Debtor had admitted and acknowledged its liability towards the Operational Creditor vide balance confirmation of its account dated 01.04.2019, 24.05.2019 and 01.06.2020.

2.5 The Operational Creditor further submits that the Corporate Debtor had failed to deposit the TDS of Rs.1,13,391/-(rounded off) with the Tax Authorities which was deducted against the Operational Creditor's invoice dated 01.04.2019. This led to the amount of Rs.1,13,391/- also becoming due and payable by the Corporate Debtor along with the principal outstanding amount of Rs. 1,13,25,750/-.

2.6 The Operational Creditor submits that while the Corporate Debtor had made full payment against the Operational Creditor's invoice bearing No.

RA-01 dated 30.11.2018, it had failed to pay the outstanding dues as per the Invoice bearing No.RA-02 dated 01.04.2019, despite Operational Creditor's attempts to contact and remind the Corporate Debtor about its obligations through notices on various dates. As per the terms of invoices raised by the Operational Creditor, these were payable within fifteen (15) days of the date of invoice and 18% interest per annum was to be charged in case of any delayed payment.

2.7 In these circumstances, the Operational Creditor issued a Demand Notice under Section 8 of the Code on 19.01.2021 to the Corporate Debtor which was served on the latter the same day. However, the Corporate Debtor failed to respond to the Demand Notice and no payment has been released in favour of the Operational Creditor till date.

2.8 The Operational Creditor further submits that it had furnished the Affidavit dated 08.10.2021 under Section 9(3)(b) of the Code about the fact that the Operational Creditor had not received any notice or letter regarding any dispute of unpaid operational debt or dispute over any invoices from the Corporate Debtor.

3. Contentions of the Corporate Debtor

3.1 The Corporate Debtor submits that the present application filed by the Operational Creditor is totally based on false, misconceived and unsubstantiated allegations and that the Operational Creditor has merely used the process of the Code as a debt recovery mechanism for extracting its outstanding dues from the Corporate Debtor which is nothing but sheer abuse of process of law.

- 3.2 The Corporate Debtor further submits that the Operational Creditor had hidden material facts of the present case in its application and failed to disclose the actual facts of the case. It is contended that the Corporate Debtor had raised concerns over the service provided by the Operational Creditor but did not give its objection in writing citing good working relationship.
- 3.3 It is argued on behalf of the Corporate Debtor that though the invoices were issued in the year 2018-2019, the Operational Creditor deliberately filed the application on 08.10.2021 so as to merely harass the Corporate Debtor. The Corporate Debtor on its part tried to resolve the case with the Corporate Debtor but the Operational Creditor deliberately went ahead with filing of present application instead of amicably resolving the matter with the Corporate Debtor.
- 3.4 The Corporate Debtor further submits that the Hon'ble Adjudicatory Authority has no territorial jurisdiction to adjudicate the present matter since Mumbai was not the place of cause of action between the parties. It is contended that both the Operational Creditor and the Corporate Debtor were operating their business from Jodhpur, Rajasthan and, therefore, the City Civil Court of Jodhpur has the appropriate jurisdiction to adjudicate the present case.

4. Analysis and Findings

Upon due consideration of the pleadings along with the materials available on record and hearing the Counsel for both the parties, our findings in the matter are as under:-

- 4.1 At the outset, it is proposed to deal with the Corporate Debtor's objection regarding lack of territorial jurisdiction of this Bench to hear and dispose

of the present Application. In this connection, the provisions of Section 60(1) of the Code very clearly and unequivocally lay down that "*the Adjudicatory Authority, in relation to insolvency resolution and liquidation of the corporate persons including corporate debtors...shall be the National Company Law Tribunal having territorial jurisdiction over the place where the registered office of the corporate person is located*". Thus, Section 60 of the Code nowhere makes mention of situs of cause of action as a ground for determining the territorial jurisdiction of the adjudicatory authority. Merely because both the Operational Creditor and the Corporate Debtor operate their respective businesses from Jodhpur, Rajasthan does not negate the fact that the Corporate Debtor's registered office is located at Mumbai which is confirmed by the master data of the Corporate Debtor. The aforesaid plea raised by the Corporate Debtor is thus found to be devoid of substance and is accordingly rejected.

- 4.2 We find that the debt of Rs.1,13,39,141/- owed by the Corporate Debtor to the Operational Creditor on account of tree plantation work carried out in terms of the work order issued by the Corporate Debtor falls within the meaning of "operational debt" under Section 5(21) of the Code. The Operational Creditor has placed on record statement of running account/ ledger of the Corporate Debtor for the period from 01.04.2018 to 31.03.2020 showing outstanding amount of Rs.1,12,25,750/- (excluding TDS of Rs.1,13,391/-) due from the Corporate Debtor as on 01.04.2019. The fact that the Corporate Debtor had admitted and acknowledged its liability towards the Operational Creditor is borne out from the balance confirmation statements dated 01.04.2019, 24.05.2019 and 01.06.2020.

- 4.3 We also find that the Corporate Debtor defaulted in payment of the dues of the Operational Creditor and, therefore, the Operational Creditor issued a Demand Notice dated 19.01.2021 to the Corporate Debtor as mandated under Section 8(1) of the Code in the prescribed Form demanding payment of the outstanding amount. The said Demand Notice was delivered to the Corporate Debtor on the same day. It is a matter of record that the Corporate Debtor neither responded to the aforesaid Demand Notice nor made the required payment of the outstanding operational debt. There is nothing on record to demonstrate that the Corporate Debtor had made payment of the unpaid operational debt to the Operational Creditor even subsequent to the receipt of the Demand Notice.
- 4.4 On perusal of the materials available on record, we find that there is nothing to show that any dispute existed between the parties before the issuance of the Demand Notice. The Operational Creditor has filed an Affidavit dated 08.10.2021 under Section 9(3)(b) of the Code, *inter alia*, affirming that it had not received any communication from the Corporate Debtor raising any dispute towards the outstanding amount. Even in its reply, the Corporate Debtor has categorically admitted that it had not raised any objection in writing regarding the services rendered by the Operational Creditor. To contend that the Corporate Debtor had verbally “raised concerns over the services provided by the Operational Creditor” is nothing more than a bald assertion unsupported by any concrete or credible evidence. It is well settled that there must be a genuine pre-existing dispute between the parties warranting rejection of an application under Section 9 of the IBC. In the absence of any documentary evidence

of alleged dispute, we are of the considered opinion that such plea of the Corporate Debtor deserves to be rejected as nothing but moon shine defence. Hence, it is found that there is no pre-existing dispute between the parties with respect to the transaction involving the operational debt in default.

- 4.5 The date of default mentioned by the Operational Creditor in Part-IV of the Application is 01.04.2019. The Demand Notice also specifies the same date of default. The present Application filed by the Operational Creditor on 08.10.2021 is thus well within the period of limitation under Section 238A of the Code read with Article 137 of the Limitation Act, 1963, thereby making it maintainable for adjudication. The total amount of default involved in the Application is Rs.1,13,39,141/- as stated above.
- 4.6 From the above discussion, it is very clear that there was a default on part of the Corporate Debtor in payment of undisputed operational debt to the Operational Creditor of more than Rs.1,00,00,000/- (Rupees One Crore) being the threshold monetary limit under Section 4 of the Code. Thus, this Application preferred by the Operational Creditor under Section 9 of the Code is found to be maintainable. The Application is complete and has been filed in the prescribed form. In view of the above, we find that the matter is fit for admission under Section 9(5)(i) of the Code.
- 4.7 The Operational Creditor has proposed the name of Mrs. Palak Swapnil Desai, a registered Insolvency Professional having Registration Number IBB/ IPA001/IP-P-01517/2019-2020/12515 and email-palakdesai77@gmail.com as the Interim Resolution Professional (IRP).

The Operational Creditor has also furnished a valid Authorization for Assignment held by her till 22.10.2024.

ORDER

The Application bearing C.P.(IB) No.1144/NCLT/MB/ 2022 filed by Mr. Praveen Nath, the Operational Creditor, under Section 9 of the Code for initiating CIRP in respect of Khush Infratech Private Limited, the Corporate Debtor is hereby **admitted**.

We further declare moratorium under Section 14 of the Code with consequential directions as follows:

I. We prohibit-

- a) the institution of suits or continuation of pending suits or proceedings against the Corporate Debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;
- b) transferring, encumbering, alienating or disposing of by the Corporate Debtor any of its assets or any legal right or beneficial interest therein;
- c) any action to foreclose, recover or enforce any security interest created by the Corporate Debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);
- d) the recovery of any property by an owner or lessor where such property is occupied by or in possession of the Corporate Debtor.

II. That the supply of essential goods or services to the Corporate Debtor, if continuing, shall not be terminated or suspended or interrupted during the moratorium period.

- III. That the order of moratorium shall have effect from the date of this order till the completion of the CIRP or until this Tribunal approves the resolution plan under sub-section (1) of section 31 of the IBC or passes an order for the liquidation of the Corporate Debtor under section 33 of the IBC, as the case may be.
- IV. That the public announcement of the CIRP shall be made in accordance with the provisions of the IBC, the Rules and Regulations made thereunder.
- V. That this Bench hereby appoints Mrs. Palak Swapnil Desai, a registered Insolvency Professional having the Registration Number-IBBI/IPA001/IP-P-01517/2019-2020/12515 and email- palakdesai77@gmail.com as the Interim Resolution Professional (IRP), having valid Authorisation for Assignment up to 22.10.2024, to carry out the functions under the IBC, the fee payable to IRP/RP shall be in accordance with the Regulations/Circulars issued by the IBBI.
- VI. During the CIRP Period, the management of the Corporate Debtor shall vest in the IRP or, as the case may be, the RP under the Code. 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 a period of one week from the date of receipt of this Order, and shall not commit any offence punishable under Chapter VII of Part II of the IBC, in default of which coercive steps will follow under the provisions of the IBC read with Rule 11 of the National Company Law Tribunal Rules, 2016 (NCLT Rules).
- VII. The IRP/IP shall submit to this Adjudicatory Authority periodical reports with regard to the progress of the CIRP in respect of the Corporate Debtor.
- VIII. In exercise of the powers under Rule 11 of the NCLT Rules, we order the Operational Creditor to deposit a sum of Rs.5,00,000/-with the IRP to meet the

initial CIRP cost, if demanded by the IRP to fund initial expenses on issuing public notice and inviting claims, etc. The amount so deposited shall be interim finance and paid back to the Operational Creditor on priority upon the funds available with IRP/RP. The expenses, incurred by the IRP out of this fund, shall be subject to approval by the Committee of Creditors (CoC).

IX. A copy of this Order be sent to the Registrar of Companies, Maharashtra, Mumbai for updating the Master Data of the Corporate Debtor.

X. The Registry is directed to immediately communicate this order to the Operational Creditor, the Corporate Debtor and the IRP including by way of email and WhatsApp.

XI. Besides, a copy of this order shall also be forwarded by the Registry of this Tribunal to the IBBI for their record.

XII. **Compliance report of the order by Designated Registrar is to be submitted today.**

XIII. In view of the admission of this Application, IA No. 5113/2023 filed by the Operational Creditor becomes infructuous and is thus disposed of accordingly.

Sd/-

SANJIV DUTT
MEMBER (TECHNICAL)
//JNK//

Sd/-

K. R. SAJI KUMAR
MEMBER (JUDICIAL)