

IN THE NATIONAL COMPANY LAW TRIBUNAL  
CUTTACK BENCH  
CUTTACK

CP (IB) No. 35/CB/2022

*In the matter of:*

*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;*

**-And-**

*In the matter of:*

**Chandra Nirman Private Limited**, having CIN: U45202WB2005PTC105647, and having its registered address at: - 2A, Ganesh Chandra, Avenue, 7<sup>th</sup> Floor, Room No. 7, Kolkata, West Bengal- 700 013;

**...Operational Creditor/Petitioner**

**-Versus-**

**Orient Paper and Industries Limited**, previously known as **Orient Paper Mills Ltd (OPM)**, having CIN: L21011OR1936PLC000117, and having its registered office at- Unit No VIII Plot No. 7, Bhoinagar Bhubaneshwar, Odisha- 751 012.

**...Corporate Debtor/Respondent**

**Coram:**

Shri P. Mohan Raj : Member (Judicial)  
Shri Kaushalendra Kumar Singh : Member (Technical)

**Appearances (through Video Conference)**

For the Petitioner : Mr. Sanyam Jain, Adv.


For the Respondents : Mr. Deepak Kumar Pani, Adv.

**Order reserved on: 10.10.2023**

**Order pronounced on:01.11.2023**

**ORDER**

1. This application has been filed by **Chandra Nirman Private Limited (CNPL)** through its Director **Mr. Sameer Agrawal**, (CIN: U45202WB2005PTC105647) having its registered office at- 2A, Ganesh Chandra, Avenue, 7<sup>th</sup> Floor, Room No. 7, Kolkata, West Bengal- 700 013; (hereinafter referred to as the "**Operational**



**Creditor”**), under Section 9 of the Insolvency and Bankruptcy Code, 2016 ( hereinafter referred to as “ **IBC, 2016**”) read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating Corporate Insolvency Resolution Process (**CIRP**) against **Orient Paper and Industries Limited**, previously known as Orient Paper Mills Ltd (OPM), (**CIN: L21011OR1936PLC000117**), having its registered office at- Unit No VIII Plot No. 7, Bhoinagar Bhubaneswar, Odisha- 751 012, (hereinafter referred to as the “**Corporate Debtor**” ‘**CD**’).

2. **Brief facts of the Petition are as follows:**

The petitioner/operational creditor is a private limited company engaging as a contractor in the construction of various natures. For the purpose of construction of water storage reservoir for the mill plant at Amlai, a notice inviting tender/proposal was floated by the CD. Initially, cost of such construction was Rs 1200 lakhs and the time provided for the completion of work was 150 days. The corporate debtor was required to give designs and drawing for the construction. The operational creditor submitted its offer which was accepted for at Rs. 1280 lakhs by the corporate debtor and a letter of Intent was issued on 17.12.2009. The last date fixed for completion of work was 31.05.2010. The work was carried out by the operational creditor for a total cost of Rs. 1589 Lakh. However, the dispute arose between the parties as according to the CD there was fault in construction and the same was not carried out within the time stipulated. The corporate debtor stated that, a total loss of Rs. 2,38.24,889.90/- caused to it, because of negligent on the part of the operational creditor and defective work of the construction. Penalty was imposed for not completing the work within stipulated period. This statement of the corporate debtor was not accepted by the operational creditor and, therefore, the application for appointment of arbitrator under the Arbitration and Conciliation Act, 1996 was filed in the High Court. The said application was disposed of with liberty to approach the chief executive officer of the corporate debtor for reference of dispute, and terms of arbitration agreement. The Operational creditor made an approach but the arbitrator was not appointed within




time stipulated. The Petitioner then moved before the Supreme Court. Finally, Justice K.K. Trivedi, former Judge, High Court of Madhya Pradesh, Jabalpur (M.P.) was appointed as arbitrator in the Arbitration case No 2/2017 and after going through the facts of the case, Ld sole arbitrator passed the Award in favour of Operational Creditor namely M/s. Chandra Nirman Pvt. Ltd. (CNPL), the pendency of the amount clearly reflected from the statement of Books of account maintained by operational creditor/Ledger and working computation. That various correspondence exchanges were made between the operational creditor & corporate debtor from 05.03.2011 to 18.07.2013 in which the corporate debtor clearly admitted the debt. Demand Notice dated 28.03.2022 was sent by email and also by speed post to the registered address as per company master data of corporate debtor on 30.03.2022. The notice was served on corporate debtor on 07.04.2022. It is stated that the Bank statement for the period 01.01.2010 to 31.03.2011 confirms no payment received from Corporate Debtor. Even after the expiry of 10 days of receiving the notice dated 28.03.2022 under section 8 of the code, the corporate debtor has failed to repay the debt to the extent of Rs. 6.43,01,399/- (Inclusive of Interest of Rs 3,31,31,685 of 11 years @ 10%) and Arbitration fees of Rs 10,50,000/- to the operational creditor. Hence the petition.

**3. The brief facts of the reply are as follows:**

The Corporate debtor stated that in the year 2009, it had floated a tender for construction of water storage reservoir for storing water during summer period and appointed Engineering & Development Consultants as the Consultant for the said works. The water reservoir was to be constructed at Amali, District Shadol, Madhya Pradesh as per the specifications provided in the said tender within 150 days from 10 days of issuance of the Letter of Intent ("LOI"). The Respondent issued a letter dated 07, February 2011 to the Petitioner in detail asking to fulfill certain Terms and Conditions of the Contract mainly delay in completion, poor quality of work resulting into leakage of filled reservoir, non-attending the leakage reported along with non-submission of proper documents. No reply was received to the said letter. Then, suddenly, on 02 June 2011, the Respondent received notice from the Hon'ble High Court of Madhya Pradesh at Jabalpur in Arbitration Case

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No. 22 of 2011 filed by the Claimant under section 11 (6) of the Arbitration & Conciliation Act 1996 seeking constitution of an arbitral Tribunal for resolution of disputes between the parties. The Arbitrator passed an award on 14.11.2018. The Respondent/CD preferred an appeal under Section 34 of Arbitration and Conciliation Act, 1996 before District and Sessions Judge, Jabalpur in MJCAV/41/2019, the petitioner also filed an appeal MJCAV/07/2019 before District and Sessions Court Shahdol, now both the appeals are pending. It is stated that the filing of a Section 34 application against an Arbitral Award show that a pre-existing dispute which culminates at the first stage of the proceedings in an Award, continues even after the Award, at least till the final adjudicatory process has taken place. The respondent after the receipt of notice on 08.04.2022 sent reply on 18.04.2022 raising the dispute about the pendency of Arbitration Application. Hence, the pre-existing dispute still continues, and the instant application is not maintainable. Thus, the instant application is liable to be dismissed.

**4. Brief facts of the Rejoinder are as follows:**

It is denied that the petitioner fails to make out a case under the definition of 'operational debt'. It is submitted that there is no pre-existing disputes between the petitioner and respondent and the petitioner filed the present petition as per law and along with arbitral award in favour of Operational Creditor. Petitioner reiterates that corporate debtor never disputed with the operational Creditor at any time before the service of the demand notice sent in accordance with the provisions of Section 8 of the IBC, 2016. Thereafter, the corporate debtor never raised any dispute against the operational creditor because in reality there is no dispute exists between OC and CD. It is submitted that the corporate debtor never filed any supportive documents in his favor which shows genuine pre-existing dispute in his favour. It is stated that in view of the submissions made above the respondent has failed to make out any solid defence in its favour and the relief sought by the corporate debtor against the provisions of the IBC, 2016, therefore the reply filed by the corporate debtor is liable to be dismissed.

**5. The point for consideration is:**



Whether pre-existing dispute exist between the parties?

6. The respondent engaged the petitioner for construction of water storage reservoir in the year 2009. According to petitioner he completed the construction but respondent failed to pay the part payment. The case of the respondent is the work carried out by the petitioner was defective and because of defective work he suffered a loss. Admittedly the matter was referred to Arbitration. The petitioner claims a sum of Rs.794.54 Lakhs with 18% interest before the Arbitrator, the respondent claims counter claim of Rs.2,38,24,889.90/- with interest. The Arbitrator passed an award on 14.11.2018. In the award the Arbitrator has not quantified the exact balance amount payable by the respondent to the petitioner towards the works carried out. The direction was given to work out the actual work done by the petitioner and difference amount to be paid within three months and the Arbitrator also not quantified the cost. The counter claim of the respondent was negated. The Arbitrator also passed supplemental Arbitration Award on 29.01.2019.

7. The respondent/CD preferred an application to set aside the Award in MJC.AV.No.00041 of 2019 before the Additional District and Sessions Judge, Jabalpur. The petitioner also filed an Application MJC/0000007/2019 before the District and Sessions Judge, Shahdol to set aside the part of the award which direct to work out the actual work done by the petitioner and difference of amount payable by the respondent and to quantify the cost and for direction to the respondent to pay a sum of Rs.256 Lakhs with 10% interest. Now both the appeals are pending.

8. The petitioner claims a sum of Rs.2,56,19,714/- as principal amount, refund of EMD amount with interest at Rs.15,00,000/- loss of profit Rs.30,00,000/- and interest at 10% Rs.3,31,31,685/- in total a sum of Rs.6,43,01,399/- as an operational debt. In fact, the amount payable by the respondent is not yet determined as per the Arbitration Award, in the mean while both the parties preferred an application against the Arbitration Award under

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section 34 of Arbitration and conciliation Act 1996 and both the applications are still pending.

9. Section 8(2)(a) of IBC 2016 refers that the pending arbitration proceedings filed before the receipt of demand notice under section 8(1) of IBC 2016 is an existing dispute. In this case the petitioner sent section 8(1) demand notice dated 28.03.2022 (Annexure J of petition) by post on 30.03.2022. They were served on 01.04.2022, 04.04.2022 and 07.04.2022. The reply notice dated 18.04.2022 (Annexure K of petition), on the same date e-mail reply was served upon the petitioner, postal reply served on 22.04.2022. In the reply notice it is mentioned about the passing of additional award by the Arbitrator dated 29.01.2019 and referred about the pending two Arbitrations before two different courts at Jabalpur and Shahdol and pending OF the Transfer petition filed by the petitioner to transfer the Arbitration Application pending before the Jabalpur District court to Shahdol District court. Thus, the respondent raised the existence of dispute in its reply notice. Then the petitioner filed this petition in this Adjudicating Authority on 21.07.2022 after expiry of more than three and half months without assigning any reasons.

10. It is contended on the petitioner side that in the reply notice and in the reply, the respondent referred about the pendency of Applications against the Arbitral Award, but in section 8(2)(a) of IBC 2016 it is mentioned that pendency of Arbitration proceeding filed before the receipt of notice is existing dispute. Further in the absence of any stay order against the Arbitration award this petition filed under section 9 of IBC 2016 is sustainable. This contention is not acceptable because appeal is only a continuation of the original proceeding hence pending of Arbitration proceeding mentioned in section 8(2)(a) includes the Pending of Application for setting aside arbitral award under section 34 and Appeal pending under section 37(1)(c) of the Arbitration and conciliation Act 1996.

11. On the respondent side rely upon the Apex court citation **K.Krishan vs Vijay Nirman Company Pvt. Ltd (2018)17 SCC 662**, there the Apex court in para 18 & 19 observed as follows:

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18) *We repeat with emphasis that under our Code, insofar as an operational debt is concerned, all that has to be seen is whether the said debt can be said to be disputed, and we have no doubt in stating that the filing of a Section 34 petition against an Arbitral Award shows that a pre-existing dispute which culminates at the first stage of the proceedings in an Award, continues even after the Award, at least till the final adjudicatory process under Sections 34 & 37 has taken place.*

19) *We may hasten to add that there may be cases where a Section 34 petition challenging an Arbitral Award may clearly and unequivocally be barred by limitation, in that it can be demonstrated to the Court that the period of 90 days plus the discretionary period of 30 days has clearly expired, after which either no petition under Section 34 has been filed or a belated petition under Section 34 has been filed. It is only in such clear cases that the insolvency process may then be put into operation.*

12. In the present case before us, both the petitioner and respondent filed an Application under section 34 of Arbitration and conciliation Act 1996 within the period of Limitation as provided under section 34(3) R/w 33 of the Arbitration and conciliation Act 1996, hence this case does not fall under the situation as set out in para 19 of supra citation.

13. The NCLAT-Chennai in similar situation upheld the dismissal order of Bengaluru-NCLT dismissing section 9 IBC 2016 petition preferred by the operational creditor when the application under section 34 of Arbitration and conciliation Act 1996 was pending, in **M/s KK Ropeways Limited vs M/s Brilliant Smiles Hospitality Com. Appeal (AT)(CH)(INS)NO.246 o 2021 dated 12.06.2023**. The NCLAT-Chennai observed in para 23 to 25, 29 to 34 as follows:

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23. Be it noted, that a 'Dispute', in 'existence', means and includes raising a 'Dispute', before a 'Court of Law' or an 'Arbitral Tribunal', before receipt of 'Notice', under Section 8 of the I & B Code, 2016. Further, 'Dispute', continues at stage, where challenge to an 'Arbitral Award', in an 'Appeal', is projected by a 'Party', as opined by this 'Tribunal'.

24. So long as a 'Dispute', truly exists in fact and it is not 'spurious' or an 'imaginary', and not a 'hypothetical' one, an 'Adjudicating Authority' / 'Tribunal', is to 'reject', the 'Petition / Application', filed under the I & B Code, 2016.

25. It is to be remembered, that an 'Arbitration Proceedings', and 'I & B Code Proceedings', cannot go on together, in the considered opinion of this 'Tribunal'.

29. The Respondent / Corporate Debtor, preferred an 'Appeal', before the 'Hon'ble High Court of Delhi' (as per Section 34 of the Arbitration and Conciliation Act, 1996), assailing the 'Award'.

30. The primordial question that arises for determination in the instant 'Appeal', is that whether the main CP (IB) No. 276 / BB / 2019 (filed by the 'Appellant' / 'Petitioner' / 'Operational Creditor'), is per se 'maintainable', for the purpose of 'executing' the 'Award'.

31. By virtue of the 'Arbitration Clause', as per 'Agreement', the Appellant, had secured the 'Ex-parte Award', and as against the same, the 'Respondent / Corporate Debtor', filed an 'Appeal', in terms of Section

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34 of the Act. The very fact that an 'Appeal', was filed against the 'Ex-parte Award', by the Respondent, 'Prima Facie', there exists a 'Pre-existing Dispute'.

32. As far as the present case is concerned, this 'Tribunal' points out that the 'Award', came to be passed, based on the 'Rental Dispute', and when the 'Appeal', was filed by the 'Respondent', against the 'Award', the 'Operational Debt', can only considered to be under 'Dispute', in the considered opinion of this 'Tribunal'.

33. It cannot be gainsaid that, for 'initiating' a 'Corporate Insolvency Resolution Process', against the 'Corporate Debtor', there ought to be 'no real dispute', existing between the respective 'Parties', to the 'Debt', owed in question. So long as the 'Arbitration Award', was challenged under the relevant Section of the Arbitration and Conciliation Act, 1996, the 'Operational Debt', in the instant 'Appeal', is considered to be under 'Dispute', as opined by this 'Tribunal'.

34. The other candid fact that weighs against the 'Appellant / Petitioner / Operational Creditor' is that, the main 'Petition', before the 'Adjudicating Authority', in CP (IB) No. 276 / BB / 2019, was filed on 20.06.2019, of course, after a gap of about four months from the date of 'Demand Notice', dated 21.02.2019, and no 'reasons', were assigned for the 'delay in not taking the diligent steps by the 'Appellant', towards the implementation of the Award, in accordance with Law'.

Signature

Signature

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14. In the circumstances an application filed against an arbitral award under section 34 of the Arbitration and Conciliation Act 1996 Act would be construed as a 'pre-existing dispute' under the IBC 2016. As such, an arbitration award which is under challenge cannot be enforced as an 'operational undisputed debt' under section 9 of the IBC, and it is answered to the point that a pre-existing dispute exist between the parties.

15. In fine this petition is **Dismissed.** ✓

16. The Registry is directed to send e-mail copies of the order forthwith to all the parties and their Ld. Counsel for information and for taking necessary steps.

17. Certified copy of this order may be issued, if applied for, upon compliance of all requisite formalities.

**Kaushalendra Kumar Singh**  
Member (Technical)

**P. Mohan Raj**  
Member (Judicial)

Signed on this, the 1<sup>st</sup> day of November, 2023.

*Supriya \_P.S.*