



IN THE NATIONAL COMPANY LAW TRIBUNAL

NEW DELHI, BENCH-VI

C.P (IB)-830/(ND)/2022

Petition under Section 9 of the Insolvency and Bankruptcy Code, 2016 and Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

IN THE MATTER OF:

M/s BP Agency HYD

Having its registered Office at:

1st Floor, Plot No. 2, Padmaja Colony, Secunderabad, Telangana – 500009

Acting through its sole proprietor Mr. Vimal Jain

...Petitioner/Operational Creditor

versus

M/s BN Pack Corrugated Private Limited

Having its registered Office at:

A-37, Swasthya Vihar, New Delhi - 110092

[CIN: U27310DL2004PTC127213]

... Respondent/Corporate Debtor

CORAM:

SHRI.MAHENDRAKHANDLWAL, MEMBER(JUDICIAL)

SHRI. RAHUL BHATNAGAR, MEMBER (TECHNICAL)

APPEARANCES:

Counsel for Petitioner: Adv. Ankit Shah, Adv Tarun Arora.

Counsel for Respondent: Mr. Saurabh Dev Karan Singh, Adv.



ORDER

PER: RAHULBHATNAGAR, MEMBER(TECHNICAL)

Date: 14.08.2024

1. This petition has been filed by the applicant operational creditor seeking initiation of CIRP against the respondent corporate debtor alleging total outstanding of: -


- (i) Principal Amount of Rs. 1,31,29,245/-
- (ii) Interest of Rs. 12,44,802/- computed at the rate of 24% per annum from due dates of respective bill(s) till 31.07.2022.
- (iii) The total amount claimed being Rs. 1,43,74,047/-.


2. Notice was issued to Respondent on 03.01.2023 by this Adjudicating Authority.

3. The Operational Creditor (OC) has made the following submissions: -

- (i) That the OC is a sole proprietorship concern and engaged in the business of trading of paperboards and specialty papers. While the Corporate Debtor (CD) is engaged in the business of manufacturing of corrugated boxes for multiple industries and poly extrusion for paper cup industry.
- (ii) That the following invoices have been raised by the OC and remain unpaid by the CD: -

S. No	Date of Invoice	Invoice Number	Description of Goods	Amount (in Rupees)
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			and Quantity	
1.	30.12.2021	1016	Vivaa Liner, 180 GSM of 105 CMS – 6 Reels 93 CMS – 8 Reels 97 CMS – 5 Reels 101 CMS – 3 Reels	15,89,227/-
2.	18.01.2022	1094	Uncoated Vivaa Liner, 150 GSM of 117 CMS – 11 Reels and 117 CMS Reels (Total 22 reels)	18,36,811/-

				
	19.01.2022	1099	Uncoated Vivaa Liner, 150 GSM of 121 CMS – 10 Reels, 117 CMS 1 Reel, 106 CMS 10 Reels and 108 CMS 5 Reels (Total 26 Reels)	20,83,348/-
4.	19.01.2022	1100	Uncoated Vivaa Liner, 150 GSM of 111 CMS – 9 Reels, 114 CMS 5 Reels and 73 CMS 18 Reels (Total 32 Reels)	21,02,088/-
5.	29.01.2022	1148	Uncoated	15,14,927/-



			Vivaa Liner, 150 GSM of 117 CMS – 8 Reels, 130 CMS 3 Reels, 76 CMS 5 Reels, 68 CMS 2 Reels and 87.5 CMS 3 Reels (Total 21 Reels)	
6.	15.03.2012	1381	Uncoated Vivaa Liner, 150 GSM of 112 CMS – 13 Reels and 150 GSM of 110 CMS 11 Reels (Total 24	19,50,208/-

			Reels)	
	15.03.2012	1382	Uncoated Vivaa Liner, 150 GSM of 116 CMS – 5 Reels.	4,18,313/-
8.	25.03.2022	1421	Uncoated Vivaa Liner, 150 GSM of 116 CMS – 7 Reels, 110 CMS 9 Reels and 105 CMS 8 Reels (Total 24 Reels)	19,74,360/-

(iii) That the goods (paper) supplied by the OC were received by the CD without any objection. That the CD does not have any right to retain the goods supplied by the OC without making the due payment as per the invoices.

(iv) Thereafter, the OC sent a Demand Notice in Form-3 under the IBC (Application to Adjudicating Authority Rules), 2016 on 02.08.2022. The CD has responded to the said notice on 08.08.2022.



The respondent CD have filed their reply dated 21.01.2023 making the following submissions: -

- (i) That one of the customers of the Respondent entity namely “AB Inbev” (hereinafter referred to as “ABI” which is a large-scale beer manufacturer) had placed the requisition with the respondent to procure paper of “ITC Brand”.
- (ii) Since the OC was known to the respondent as a distributor of ITC, therefore the respondent placed the following orders upon the OC: -

S. No.	Date of Purchase Order	End User	Quantity
1.	23.10.2021	ABI	320 tons
2.	23.10.2021	Self	100 tons
3.	12.12.2021	ABI	290 tons

It is contended that the OC had agreed to deliver the aforesaid orders in the month of December, 2021. The price of the goods covered under the purchase order dated 23.10.2021 was fixed at Rs. 70.60 for 40 Tons and Rs. 74.60 for 60 Tons.

- (iii) That between the period of 12.11.2021 and 31.12.2021 the following quantities of the goods were delivered by the OC against the purchase order



dated 23.10.2021: -

S. No	Date of Delivery	Quantity delivered by the OC (in Kilograms)
1.	19.11.2021	22158 kg
2.	20.11.2021	13802 kg
3.	22.11.2021	6789 kg
4.	24.11.2021	22537 kg
5.	24.11.2021	16438 kg
6.	03.12.2021	6295 kg
7.	03.12.2021	1537 kg
8.	07.12.2021	1088 kg
9.	07.12.2021	5052 kg
10.	07.12.2021	940 kg
11.	07.12.2021	1014 kg
12.	07.12.2021	2496 kg
13.	07.12.2021	763 kg
14.	19.12.2021	11931 kg
15.	19.12.2021	5261 kg
16.	21.12.2021	5942 kg
17.	21.12.2021	14217 kg
18.	31.12.2021	6057 kg
19.	31.12.2021	4530 kg
20.	31.12.2021	7068 kg
21.	31.12.2021	2876 kg



As per the table above, the total quantity delivered by the OC was 1,58,791 kg which is 158.791 tons. In all the OC had delivered approximately 158 tons as against the order of 420 tons. In other words, there was a shortfall of 262 tons of goods(paper) supplied by the OC.

- (iv) It is alleged that the OC deliberately withheld the deliveries as the paper prices were increasing day by day, in an attempt to compel the CD to buy the paper at the 'higher price' and make an extra profit in the process.
- (v) Thereafter, the Respondent had opted to purchase 'paper' from TNPL (Tamil Nadu Newsprint and Papers Limited Unit II). However, since the purchase had to be made on an urgent basis and the price had already revised (since October, 2021); it is alleged that the Respondent had to face losses to tune of Rs. 1,39,34,726/-.
- (vi) Pursuant to purchasing the material from TNPL, the Respondent has set off its total damages of Rs. 1,39,34,726/- against the receivables of OC amounting to Rs. 1,11,40,673.05. Debit notes for the same were raised by the Respondent and the tax on the same has also been paid by the Respondent on 30.06.2022. It is contended that Sections 57, 60 and 61 of the Sale of Goods Act, 1930 allow a buyer to claim damages from the seller for wrongful rescission of contract, refusal / neglect to deliver the goods etc.
- (vii) It is alleged that on the contrary, the OC owes Rs. 27,94,053/- which is due, outstanding and payable from the OC to the Respondent. It is further submitted that the Rs. 27,94,053/- is the amount of damages occurred to



the Respondent from the transactions that are a subject matter of the present application.

- (viii) The Respondent had initiated pre - litigation mediation proceedings under Section 12A of the Commercial Courts Act, 2015 on 17.08.2022, the notice of which was sent to the OC sometime in latter half of August, 2022. OC failed to participate in the pre - litigation mediation proceedings and communication to that effect was sent by the OC to Delhi State Legal Services Authority, East. On 01.09.2022, the pre - litigation mediation proceedings were closed as the OC did not participate in the same.
- (ix) Respondent has filed a commercial suit against the OC being C. S. (COMM) No. 315 / 2022 [pending before the Ld. District Judge (Commercial Court) - 02, East District, Karkardooma Courts, Delhi] claiming damages. The total damages suffered by the Respondent are to the tune of Rs. 1,39,34,726/-. After setting off an amount of Rs. 1,11,40,673/-; the Respondent has instituted the aforesaid suit for an amount of Rs. 27,94,053/-.
- (x) Summons in the aforesaid suit were issued on 11.10.2022 and have been served on the OC on 17.10.2022.
- (xi) Accordingly, the respondent has prayed that the instant application deserves to be dismissed.

5. The OC have filed their rejoinder dated 25.02.2023 making the following submissions: -

- (i) That the Debit Note issued by the respondent is invalid because as per



Section 34(3) of the GST Act, only the supplier (petitioner) is entitled to raise the Debit Note. Moreover, the amount in the debit note is much more than the invoiced amount.

- (ii) That there has been no promise regarding delivery dates and the same are provided as tentative timelines based on the availability of the product. It is submitted that all the orders were accepted subjected to the pre-condition on availability of raw material and acceptance of orders by the manufacturer (ITC). Moreover, ITC have clarified that they are not accepting further orders due to market conditions.
- (iii) The counter-claim of the respondent worth Rs. 27,94,053/- (after set-off) is an after-thought and without any ledger or strict documentary proof for the same, and has been drawn upon to arm-twist the petitioner.
- (iv) That vide email dated 04.03.2022, the respondent M/s BN Pack has stated that "payment will be released in coming week.". Accordingly, it is contended that CD has clearly acknowledged its liability in respect of the outstanding dues and has consequently failed to pay the same.
- (v) It is alleged that a 'false sense of urgency' to obtain the consignment has been shown by the CD to mislead this Adjudicating Authority. Such is evident from the fact that a different specification of paper was later procured by CD in consultation with ABI from another vendor (TNPL).
- (vi) It is accordingly prayed that in light of the aforementioned circumstances, CIRP may be initiated against the respondent herein.



ANALYSIS & FINDINGS

6. We have heard the Learned Counsel(s) appearing for the parties and upon perusal of documents placed on record to substantiate their respective claims, proceed to adjudicate the present petition on merits.
7. The Demand Notice was sent by the Corporate Debtor on 02.08.2022. The pre-litigation mediation under the Commercial Courts Act, 2015 was instituted by the CD on 17.08.2022 followed by a commercial suit was filed by CD before Ld. Commercial Judge at Karkardooma Courts, Delhi (Summons in the aforesaid suit were issued on 11.10.2022 which were served upon the petitioner on 17.10.2022). Since, the action instituted by the CD was initiated **after the receipt of demand notice**, the same cannot be said to be a pre-existing dispute.
8. It is not disputed that certain quantity of delivery of paper was provided by the applicant to the CD, the invoice(s) of which remain unpaid. It is further noted that there was a shortfall in the supply of paper with regards to the actual order placed, prompting the CD to buy remaining quantity from another vendor (TNPL).
9. An email trail of communication has been placed on record by both the parties. It is observed that the applicant had intimated the CD regarding the delay and consequent cancellation for a part of the assignment as the manufacturer (ITC) had stopped taking orders meanwhile, for which the petitioner has no direct role.
10. The entire defense of the CD is premised upon the contention that there was a “shortfall” in the quantity of the goods supplied by the OC to the CD with regard to the order that was placed. However, the OC has emphasized that the



irrespective of the shortfall in the supply of the goods, the CD remains liable for payment of the portion of the goods (paper) already delivered. It is further noted that in so far as the actual delivery took place (albeit in deficit), there was no objection raised by the CD regarding the quality or pricing of goods whatsoever.

11. It is further observed that the CD vide email dated 04.03.2022, had stated that "payment will be released in coming week." This would be regarded to be an acknowledgement of debt on the part of the CD. It is further observed that no payment was subsequently released by the CD, despite express assurance provided by it to the Corporate Debtor regarding the same.

12. The Hon'ble NCLAT in the matter of "GT Polymers vs Keshva Medi Devices Private Limited" held as follows (relevant extract): -

"We find that in this case in reply to the notice, the Respondent has raised vague and baseless allegations against the appellant which are not supported by any documentary evidence. Therefore, we are of the view that the dispute is spurious or hypothetical, hence the Adjudicating Authority has to reject such defence."

13. The Hon'ble Supreme Court of India in the matter of "Mobilox Innovations Private Limited versus Kirusa Software Private Limited" held as follows (relevant extract):

*- "In absence of any existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before the receipt of the demand notice of the unpaid operational debt, the application under section 9 cannot be rejected and is required to be admitted"... **further held that** "Therefore, merely the corporate debtor has disputed the claim by showing that there is a counter claim, it cannot be held that there is pre-existence of dispute in absence of any*



evidence to suggest that dispute was raised prior to the issuance of demand notice under Section 8(1) or invoice.”

14. We are of the opinion that the applicant (Operational Creditor) has established the existence of an ‘operational debt’ and subsequent ‘default’ by the Respondent Corporate Debtor. The shortfall in the supply of goods (with regard to the quantity ordered by the Corporate Debtor) does not disentitle the Operational Creditor from realizing its dues with regard to the limited quantity already supplied.

15. In light of the above, this Adjudicating Authority **admits** the present application and declares a moratorium under Section 14 with immediate effect. The necessary consequences of imposing the moratorium flows from the provisions of Section 14 (1)(a), (b), (c), (d) of the IBC, 2016. Thus, the following prohibitions are imposed: -

- (a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgement, 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;
- (d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.



16. The applicant has not proposed the name of any Resolution Professional. Therefore, this adjudicating authority proceeds to appoint a Resolution Professional from the panel of Insolvency Professionals maintained with it. Accordingly, Ms. Harmeet Kaur [IBBI/IPA-002/IP-N00948/2020-2021/13076] is appointed as Resolution Professional to conduct the CIRP in this matter.

17. The aforesaid RP is directed to furnish their consent declaration indicating willingness to accept the present assignment along with undertaking that they have a valid AFA and no disciplinary proceedings are pending against him/her.

18. Registry is directed to intimate the aforesaid RP regarding her appointment in the matter, on the following communication details: -

(i) Email id – harmmeet.kaur@rrrinsolvency.com

(ii) Mobile Number – 9810629634.

19. During the CIRP period, the management of the Corporate Debtor shall vest in IRP/RP as per Section 17 of the IBC. The IRP is directed to make a public announcement in terms of Section 13(2) of the IBC immediately within 3 days from the date of this order as clarified by explanation to Regulation 6(1) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. The Petitioner (Operational Creditor) shall deposit a sum of Rs. 2,00,000/- with the IRP to meet the expenses arising out of public notice and inviting claim from the stakeholders. These expenses would be subject to approval of the CoC.

20. Registry is directed to provide a copy of order to the parties and also to the IBBI &



RoC (NCT of Delhi and Haryana) to update the status of the Corporate Debtor as undergoing Corporate Insolvency Resolution Process.

21. The petition stands allowed in light of the aforesaid discussion.

No order as to costs.

-SD/-

RAHUL BHATNAGAR

MEMBER (TECHNICAL)

-SD/-

MAHENDRA KHANDELWAL

MEMBER (JUDICIAL)