

IN THE NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD
DIVISION BENCH
COURT - 1



ITEM No.301
CP(IB) 815 of 2019

Order under Section 9 IBC

IN THE MATTER OF:

Piyush Choudhary Partner of K & C Bioenergy Asia
V/s
Kunal Structure (I) Pvt Ltd

.....Applicant

.....Respondent

Order delivered on: 08/11/2023

Coram:

Mr. Shammi Khan, Hon'ble Member(J)
Mr. Sameer Kakar, Hon'ble Member(T)

PRESENT:

For the Applicant :
For the Respondent :

ORDER

The case is fixed for pronouncement of the order. The order is pronounced in the open court, vide separate sheet.

-SD-
SAMEER KAKAR
MEMBER (TECHNICAL)

-SD-
SHAMMI KHAN
MEMBER (JUDICIAL)



**BEFORE THE ADJUDICATING AUTHORITY
NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH -I, AHMEDABAD**

CP(IB)/815(AHM)/2019

(An application filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 r/w Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016)

In the matter of **M/s. Kunal Structure (I) Private Limited**

K and C Bioenergy Asia,
Through its partner,
Shri Piyush Chaudhary,
Having office at:
F-202, Vimal Shree Shagun Apartment,
146, Alok Nagar, Kanadiya Road,
Indore, Madhya Pradesh-452001.

...Applicant/Operational Creditor

VERSUS

Kunal Structure (I) Private Limited

Having address at:
“Mondeal Heights”, B Wing,
15th Floor, Near Hotel Novotel,
S G Highway, Ahmedabad-380015.

...Respondent/Corporate Debtor

Order pronounced on 08.11.2023

CORAM:

**SHAMMI KHAN, MEMBER (JUDICIAL)
SAMEER KAKAR, MEMBER (TECHNICAL)**



Appearance

For the Applicant : Ms. Pragati Bansal, Advocate
i/bThakkar & Pahwa

For the Respondent : Mr. Rashesh Sanjanwala, Senior
Advocate a/w Mr. Shravil
Majmudar, Advocate

ORDER

(Per: BENCH)

1. This is an application filed on 30.11.2019 by **K and C Bioenergy Asia** (hereinafter referred to as '**the Applicant/Operational Creditor**') through its partner Shri Piyush Chaudhary, having office at F-202, Vimal Shree Shagun Apartment, 146, Alok Nagar, Kanadiya Road, Indore, Madhya Pradesh-452001 under Section 9 of the Insolvency and Bankruptcy Code, 2016 ("**IBC, 2016**") read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 against **Kunal Structure (I) Private Limited** (hereinafter referred to as '**the Respondent/Corporate Debtor**') with request to admit the application, commence Corporate Insolvency Resolution Process ("**CIRP**"), appoint Interim Resolution Professional (hereinafter referred to as "**IRP**") and declare the moratorium.



2. On perusal of Part-II of the Form-5, it is seen that Corporate Debtor – Kunal Structure (I) Private Limited, having CIN: 048080 (*incomplete CIN*) was incorporated on 05.04.2006 and is having registered office at “Mondeal Heights”, B Wing, 15th Floor, Near Hotel Novotel, S G Highway, Ahmedabad – 380015.
3. On perusal of Part-III of the Form-5, it is seen that the Applicant has not named any IRP and has left the same to the discretion of this Adjudicating Authority.
4. On perusal of Part-IV of the Form-5, it is seen that the debt of default is mentioned as 22.07.2017 and the total amount of default is stated to be Rs.1,06,92,272/- comprising of principal amount of Rs.80,79,138/- and interest of Rs.26,13,134/- calculated at the rate of 12% from 01.09.2017 is unpaid and due from the Corporate Debtor.
5. The Operational Creditor is engaged in the business of supplying/transporting sand.



6. The Corporate Debtor is engaged in the business of construction of road and canal etc.
7. The Corporate Debtor has entered into various transactions with the Operational Creditor since 2015. During the financial year 01.04.2015 to 31.03.2016, the Corporate Debtor has purchased the material amounting to Rs.86,29,367/- out of which Rs.73,61,885/- was paid and Rs.12,67,482/- was not paid. The business transaction between the two parties continued till the financial year 2017-18.
8. The last payment was made by the Corporate Debtor on 26.07.2018 amounting to Rs.4,59,518/- and Rs.7,29,000/-. Thereafter, despite repeated correspondences and reminders, no payment was made by the Corporate Debtor to the Operational Creditor.
9. It is stated that as per the purchase order, the Corporate Debtor was obliged to pay the invoice amount within 15/30 days.




10. It is stated that the Demand Notice was issued on 30.09.2019 which was replied by the Corporate Debtor on 10.10.2019.

11. From the reply to the Demand Notice, it is seen that certain disputes were raised relating to royalty.

12. The following documents have been attached along with the application:

8. List of other documents attached to this application in order to prove the existence of operational debt and the amount in default	1. Copy of Purchase Orders placed by Corporate Debtor to Operational Creditor from 2015 onwards and Quotations approved by Corporate Debtor at Annexure-E Colly .
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K and C Bioenergy Asia
(P. Chavella) Partner

	2. Copy of delivery challans as signed by the Corporate Debtor acknowledging the receipt of sand are annexed at Annexure-F Colly 3. Copy of Invoices raised by Corporate Debtor to Operational Creditor from 2015 onwards at Annexure-G Colly .
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4. Ledger account of Corporate Debtor in the books of account of the Operational Creditor for the period from 1.4.2015 to 31.3.2016, 1.4.2016 to 31.3.2017, 1.4.2017 to 31.3.2018 and 1.4.2018 to 31.3.2019. A copy each of the ledger account duly signed by authorized officer on behalf of Operational Creditor is annexed herewith and marked at **Annexure-H Colly.**
5. Relevant abstract of Bank Statement of Operational Creditor in respect of amounts received from Corporate Debtor, a copy of which is annexed herewith and marked as **Annexure-I.**
6. Copy of communications exchanged between Operational Creditor and Corporate Debtor in relation to outstanding dues at **Annexure-J Colly;**
7. Copy of police statement of Mr. Mehul Patel, one of the Executive director of Corporate Debtor at **Annexure-K;**
8. Copy of Demand Notice issued under Form-3 dated 30.9.2019 at **Annexure-L.**
9. Copy of Reply to Demand Notice dated 10.10.2019 wherein the Corporate Debtor has essentially raised the issue of non-payment of royalty at **Annexure-M.**
10. Copy of proof evidencing payment of royalty by Operational Creditor to Corporate Debtor at **Annexure-N.**

K and C Bioenergy Asia
Partner
(P) 2019



8

		<p>11. Copy of Tracking Receipt for the demand notice at <u>Annexure-O Colly.</u></p> <p>12. Copy of Partnership Deed of Operational Creditor-partnership firm at <u>Annexure-P.</u></p>
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13. Reply was filed by the Corporate Debtor under Diary No. 1649 dated 03.02.2020. It is stated that as per the Corporate Debtor a sum of Rs.53,31,436.87 is the only amount which is legitimately payable to the Applicant and for which many times they have written to the Applicant, however, that was refused. Ultimately a cheque for the same was sent by the Corporate Debtor through R.P.A.D to the Operational Creditor and the said cheque has since been encashed.

14. It is stated that as per the purchase order issued by the answering Respondent, it was agreed between the parties that the Applicant herein is liable to provide royalty passes to the Corporate Debtor for material supplied by them. However, the Applicant has not provided said



royalty passes to the Corporate Debtor. As a consequence of the same, the department (for whom the Corporate Debtor was working) has withheld an amount of Rs.1,48,30,000/- of the answering respondent from the R.A. bills.

15. It is stated that the Corporate Debtor had a contract with the Water Resources Department, Madhya Pradesh. Since the Operational Creditor has not provided the royalty passes (royalty on sand supplied to the government), the Water Resources Department, Madhya Pradesh had deducted the aforesaid royalty payment from the bills of the Corporate Debtor.

16. It is stated that the present application be rejected on the aforesaid sole ground. The Corporate Debtor has attached the copy of various R.A bills and statement showing various deductions along with reply from page no. 1802 to 1859. The copy of cheque of Rs.53,31,436.87 is appended at page no. 1868 of reply.



17. Written submissions were filed by both sides which have been considered here.

18. We have heard counsels for both the sides and have perused the documents. It is not in dispute that goods were supplied by the Operational Creditor to the Corporate Debtor in terms of purchase order issued by the Corporate Debtor. The said purchase orders are attached along with the application. One of the conditions of the said purchase order is **“Bill without royalty paper will not be eligible for payment”**. The Corporate Debtor right from the Demand Notice stage stated that challans evidencing royalty payment were not furnished by the Operational Creditor to the Corporate Debtor. We have seen the R.A bills which were attached by the Corporate Debtor along with his reply which show that the Water Supply Department, Madhya Pradesh has deducted payment out of R.A bills of the Corporate Debtor on account of non-supply of the various challans for royalty. Apparently, there seems to be a plausible dispute between the parties as regards supply of the royalty challans.



19. The Hon'ble Supreme Court in the case of ***Mobilox Innovations Private Limited Vs. Kirusa Software Private Limited in Civil Appeal 9405 of 2017*** has held that:-

*“...40. It is clear, therefore, that once the operational creditor has filed an application, which is otherwise complete, the adjudicating authority must reject the application under Section 9(5)(2)(d) if notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility. It is clear that such notice must bring to the notice of the operational creditor the “existence” of a dispute or the fact that a suit or arbitration proceeding relating to a dispute is pending between the parties. Therefore, all that the adjudicating authority is to see at this stage is whether there is a plausible contention which requires further investigation and that the “dispute” is not a patently feeble legal argument or an assertion of fact unsupported by evidence. It is important to separate the grain from the chaff and to reject a spurious defence which is mere bluster. However, in doing so, the Court does not need to be satisfied that the defence is likely to succeed. The Court does not at this stage examine the merits of the dispute except to the extent indicated above. **So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application...**”.*

20. In terms of the law laid down by Hon'ble Supreme Court, in the above cited case, we are not inclined to admit the present application.

21. In terms of the above discussion, the present application is dismissed. No order as to costs.

-SD-
SAMEER KAKAR
MEMBER (TECHNICAL)

-SD-
SHAMMI KHAN
MEMBER (JUDICIAL)

Rajeev/PS