

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
COURT- II
KOLKATA**

C.P(IB) No. 214/KB/2021

*A Petition 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:

Amit Agarwal

Proprietor of Adarsh Enterprise- Gagan Pahad

... Operational Creditor

versus

Parag Vinimay Private Limited

CIN: U51109WB2008PTC125519

... Corporate Debtor

Date of Pronouncement: 29 December 2022

Coram: Shri. Rohit Kapoor, Member (Judicial)

Shri Balraj Joshi, Member (Technical)

Appearances (through Video Conferencing/ physical hearing)

1. Mr. S. Rajagoalan, Advocate } For Operational Creditor

1. Mr. Arik Banerjee, Advocate } For Corporate Debtor

2. Mr. Arun Gupta, CA

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

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Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 by Mr. Amit Agarwal, proprietor of Adarsh Enterprises-Gagan Pahad ('Operational Creditor'), for initiation of Corporate Insolvency Resolution Process ('CIRP') against **Parag Vinimay Private Limited** ('Corporate Debtor').

3. The present Petition was filed on 03 August 2021 before this Adjudicating Authority. The total amount claimed in default is Rs.15,51,92,741/- (Rupees Fifteen Crore Fifty-One Lakh Ninety Two Thousand Seven Hundred and Forty One only) plus pendente lite interest @ 17.25% p.a. as on 28 June 2021.

4. **Submissions by the Ld. Counsel on behalf of the Operational Creditor**

4.1. The Operational Creditor transported Iron Ore to the Corporate Debtor and raised the following invoices

Sl. No	Date of invoice	Invoice No.	Description of Material	Quantity in Tonnes	Total Value in Rs incl GST
1.	15.03.2021	605	Iron Ore- Fines	6499.97	37131241
2.	15.03.2021	606	Iron Ore- Fines	7700.01	43986500
3.	15.03.2021	607	Iron Ore- Fines	2999.99	17137518
4.	15.03.2021	608	Iron Ore- Fines	1473.73	8418719
5.	25.03.2021	608/A	Jetty Charges	53673.7	9500245
6.	25.03.2021	608/B	Transport of iron ore through inland water ways	53673.7	8051055
7.	25.03.2021	608/D	Transport of iron ore through road	53673.7	42938960

4.2. As per the standard practice in mining and mineral industries to levy interest for delayed payments, therefore the Operational Creditor raised a Debit Note dated 28.06.2021 and demanded an amount of Rs.

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95,28,493/- (Rupees Ninety Five Lakh Twenty Eight Thousand Four Hundred and Ninety Three only) as interest.

4.3.The Corporate Debtor failed make payment on 15 March 2021, 23 March 2021 and accordingly the Operational Creditor raised debit note for interest on 28 June 2021 for the unpaid amount.

4.4.The Operational Creditor sent a demand notice on 29 June 2021 to which the Corporate Debtor had replied by a letter dated 06 July 2021.

5. *Submissions by the Ld. Counsel on behalf of the Corporate Debtor*

5.1. The Operational Creditor issued invoices dated 15 March 2021 on the basis of which default is claimed and as such it is within the suspension period as contained under section 10A of the Code which extended till 24 March 2021.

5.2.The learned Counsel appearing for the Corporate Debtor submitted that the Operational Creditor raised three transportation invoices dated 23 March 2021 and one transportation invoice dated 25 March 2021. He further submits that according to the contract dated 15 December 2020 there was no provision for raising transportation bill as the contract was ‘Free on Board Stowed and Trimmed (FOBST)’. Hence, the bills raised on account of transportation charges cannot be claimed to be due against the Corporate Debtor.

5.3. It is further submitted that the contract does not have any provision for claiming interest but the Operational Creditor has claimed interest from 15 March 2021.

5.4. The Corporate Debtor made several payments between 26 February 2021 to 13 April 2021 amounting to Rs.2.15Crore as advance.

5.5.The learned Counsel placed reliance on clause 7 of the contract and submitted that as per Clause 7(iii) the quality of goods sought to be supplied by the Operational Creditor was to be acknowledged only upon issuance of certificate of quality based on “joint sampling and analysis” done by a third-party agency being SGS India Private Limited to be appointed by the Operational Creditor and Inspectorate

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Griffith India Private Limited (IGI) being a third-party agency appointed by the Corporate Debtor but the same was never done by the Operational Creditor and even no certificate of quality and weight were also issued. Therefore, it is evident that the Operational Creditor never acted in terms of the contract executed between the parties.

5.6.The Corporate Debtor states that on conducting the investigation regarding the quality of iron ore by the third-party agency appointed by the Corporate Debtor, it was found that the Fe component was 53.52% which is much below the one specified in the contract and also it did not meet the other specifications as mentioned in the contract. Hence, due to the defective quality of goods, the entire shipment which was sent to China was rejected by the Chinese importer being Wingsing International Limited which caused the Corporate Debtor to suffer huge loss and damages. This was intimated to the Operational Creditor but it did not take any steps for the same.

5.7.Due to the entire rejection, the Corporate Debtor suffered huge loss for which the Operational Creditor is liable to compensate. The Chinese importer on the basis of contract executed between the Corporate Debtor and the Chinese importer, had claimed a sum USD 256,429.90 as compensation which is equivalent to Rs.1,89,75,812.60.

5.8.Apart from the above, the Corporate Debtor also paid Rs. 7,44,83,991.61 (USD 1,031,412.47) on account of freight and demurrage charges to Aegis Carrier and also paid Rs. 1,86,780.57 as inspection charges to IGI and various other charges.

5.9.Hence, there are pre-existing disputes between the parties and the present Company Petition should be rejected.

5.10. The Corporate Debtor states that on the basis of arbitration clause contained in the agreement, it invoked arbitration clause against the Operational Creditor and its sister concern before the Ld. Commercial Court at Alipore and prayed for certain reliefs

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which was moved on 04 July 2022.

5.11. That on hearing the same, the Ld. Commercial Court *vide* order dated 05 July 2022 was pleased to protect the arbitral amount in dispute by directing the respondent to secure a sum of Rs. 24,27,26,974.31 through bank guarantee or in a separate fixed deposit account.

5.12. The Corporate Debtor had communicated the said order to the Operational Creditor but they have neither challenged the order nor complied with the same which implies that it has admitted/ acquiesced to such order.

5.13. The Corporate Debtor has placed reliance on ***Brand Realty v. Sir John Bakeries*** in support of its contention that not replying to the Demand Notice or not raising any pre-existing dispute by written notice does not take away the right of the Corporate Debtor to raise defense in the reply to the main Company Petition.

5.14. The learned Counsel placed further reliance on ***K Continental v. Diamond Trexim*** and ***SS Engineers v. HPCL***.

6. Rejoinder to the reply submitted by the Corporate Debtor.

6.1. It states that the date of default in the petition is 28.06.2021, therefore it does not fall within the suspension period as per Section 10A IBC. It states that the CD also made part payment of Rs.40,00,000/- to the OC out of the outstanding amount of Rs. 15,51,92,721 on 13.04.2021.

6.2. The OC states that the CD is relying on a Terminated contract in support of his claim pertaining to Quality of Iron Ore and FOBST. The said contract was terminated on 05.02.2021 on account of both-(i) Noncompliance by CD and (ii) Efflux of time. The time to pay the amount was specified in the contract which resulted in non-compliance and also the shipment date was extended till 05.02.2021 but no ship was placed on the said date, therefore it resulted in repudiation of contract by both the parties. They have not entered into any amendment or revision of the contract in writing, neither there was

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any confirmation of time.

6.3. There was no pre-existing dispute between the Corporate Debtor and the Operational Creditor. The arbitration clause was invoked after the section 9 Company Petition was filed and is an afterthought.

6.4. No dispute was raised in the reply to the Demand Notice.

7. Issues

7.1. Whether there is pre-existing dispute?

7.2. Whether the Company Petition is barred under section 10A of the Code?

7.3. Whether payment has already been made?

8. Analysis and Findings

8.1. We have heard the learned Counsel appearing on behalf of the Operational Creditor and the Corporate Debtor and perused the record.

8.2. On perusal of the record, the Corporate Debtor has filed the Certificate of Quality which does reflect that the quality delivered was not at par with the quality mentioned in the contract, but the same was never informed to the Operational Creditor. The reply to the section 8 notice placed at pages 43 to 46 of the Company Petition does not specifically deal with whether any dispute was raised before the section 8 notice was issued.

8.3. Further, the Arbitration clause was invoked on 04 July 2022 whereas the Company Petition was filed on 19 August 2021, hence, the defence of preexisting dispute on this basis is an afterthought as the same had not been informed to the Operational Creditor before the issuance of the demand notice.

8.4. The second defence taken by the Corporate Debtor that the date of default falls under the time prescribed under section 10A of the Code is also not tenable. Section 10A of the Code envisages the suspension of initiation of Corporate Insolvency Resolution Process for any default arising on or after 25 March 2020 till 25 March 2021. In Part IV of the Form 5 the Operational Creditor has stated the date of default

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as 28 June 2021, hence the Company Petition does not fall under the purview of section 10A of the Code.

8.5.The Corporate Debtor claims that payments were made to third parties due to fault of the Operational Creditor, but the Corporate Debtor has failed to submit any communication or document substantiating that payments were made due to the wrongs of the Operational Creditor and not in normal course of business.

8.6.The Operational Creditor provided goods to the Corporate Debtor and the Corporate Debtor failed to make payment for the services provided by the Operational Creditor.

8.7.The present petition made by the Operational Creditor is complete in all respects as required by law. The petition establishes that the Corporate Debtor is in default of a debt due and payable and that the default is more than the minimum amount stipulated under section 4(1) of the Code, *i.e.*, Rupees One Lakh, at the relevant time.

9. It is, accordingly, hereby ordered as follows:-

- a. The application bearing CP (IB) No. 214/KB/2021 filed by Amit Agarwal proprietor of Adarsh Enterprises-Gagan Pahad, the Operational Creditor, under section 9 of the Code read with rule 6(1) of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating CIRP against **Parag Vinimay Private Limited**, the Corporate Debtor, is **admitted**.
- b. There shall be a moratorium under section 14 of the IBC.
- c. The moratorium shall have effect from the date of this order till the completion of the CIRP or until this Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 of the IBC or passes an order for liquidation of Corporate Debtor under section 33 of the IBC, as the case may be.

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- d. Public announcement of the CIRP shall be made immediately as specified under section 13 of the Code read with regulation 6 of the Insolvency & Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.
- e. **Mr. Sunil Choraria**, registration IBBI/IPA-002/IP-N01209/2022-2023/14078 email: chorariamba@rediffmail.com is hereby appointed as Interim Resolution Professional (IRP) of the Corporate Debtor to carry out the functions as per the Code subject to submission of a valid Authorisation of Assignment in terms of regulation 7A of the Insolvency and Bankruptcy Board of India (Insolvency Professional) Regulations, 2016. The fee payable to IRP or, as the case may be, the RP shall be compliant with such Regulations, Circulars and Directions as may be issued by the Insolvency & Bankruptcy Board of India (IBBI). The IRP shall carry out his functions as contemplated by sections 15, 17, 18, 19, 20 and 21 of the Code.
- f. During the CIRP period, the management of the Corporate Debtor shall vest in the IRP or, RP, as the case may be, in terms of section 17 of the IBC. 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 one week from the date of receipt of this Order, in default of which coercive steps will follow.
- g. The IRP/RP shall submit to this Adjudicating Authority periodical reports with regard to the progress of the CIRP in respect of the Corporate Debtor.
- h. The Operational Creditor shall deposit a sum of **Rs.3,00,000/- (Rupees Three Lakh only)** with the IRP to meet the expenses arising out of issuing public notice and inviting claims. These

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expenses are subject to approval by the Committee of Creditors (CoC).

- i. The Court Officer of this Court is hereby directed to communicate this Order to the Operational Creditor, the Corporate Debtor and the IRP by Speed Post, email and WhatsApp immediately, and in any case, not later than two days from the date of this Order.
- j. Additionally, the Operational Creditor shall serve a copy of this Order on the IRP and on the Registrar of Companies, West Bengal, Kolkata by all available means for updating the Master Data of the Corporate Debtor. The said Registrar of Companies shall send a compliance report in this regard to the Registry of this Court within seven days from the date of receipt of a copy of this order.

10. **CP (IB) No. 214/KB/2021** to come up on 10.2.2023 for filing the periodical report.

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

(Balraj Joshi)
Member (Technical)

(Rohit Kapoor)
Member (Judicial)

This order is pronounced on 29th day of December 2022.