

**NATIONAL COMPANY LAW TRIBUNAL
GUWAHATI BENCH
GUWAHATI**

ORDER SHEET OF THE HEARING ON 25th JANUARY, 2024, 10:30 A.M.

CP (IB)/8/GB/2023

**Present: 1. Hon'ble Member (Judicial), Shri H.V. Subba Rao
2. Hon'ble Member (Technical), Shri Satya Ranjan Prasad**

Name of the Company	Growthtree Ventures Pvt. Ltd. (OC) Vs Umbrella Genomics Pvt. Ltd. (CD)
Under Section	U/s 9 of IBC, 2016

For Petitioner (s) : Ms. A. Nehra, Adv.

For Respondent (s) :

ORDER

Order Pronounced through VC *vide* separate sheets.

Sd/-
Satya Ranjan Prasad
Member (Technical)

Sd/-
H.V. Subba Rao
Member (Judicial)

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In the matter of:

An Application under Section 9 of the Insolvency and Bankruptcy Code, 2016 (“**IBC**”) read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (“**Rules**”), to initiate Corporate Insolvency Resolution Process;

-And-

In the matter of:

Growthtree Ventures Private Limited, Registered Office at Room No. 204, 2nd Floor, 9 Dacres Lane, Kolkata, West Bengal—700069;

... Operational Creditor

-Versus-

Umbrella Genomics Private Limited, Registered Office at Gayatri Kunj, House No. 17, Chitrallekha Lane, Supermarket Dispur, Guwahati, Assam—781001.

... Corporate Debtor

Coram:

Shri H. V. Subba Rao : Member (Judicial)

Shri Satya Ranjan Prasad : Member (Technical)

Appearances (through video conferencing):

For the Petitioners : Mr. Sandeep Bajaj, Adv.

For the Respondent : Mr. Rakesh Dubey, Adv.

**Order reserved on: 09.01.2024
Order pronounced on: 25.01.2024**

ORDER

1. This Application has been filed under Section 9 of the Insolvency And Bankruptcy Code, 2016, by the Operational Creditor (**OC**) or Petitioner, namely Growthtree Ventures Private Limited, seeking initiation of Corporate Insolvency Resolution

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Process (**CIRP**) against the Corporate Debtor (**CD**) or Respondent, namely Umbrella Genomics Private Limited.

2. Growthtree Ventures Private Limited /Operational Creditor is a private limited company (CIN: U51909WB2008PTC131055) having its registered office at Room No. 204, 2nd Floor, 9 Dacres Lane, Kolkata, West Bengal—700069. The Company was incorporated on 04.12.2008. As per the petition, presently the following are the Directors of the Operational Creditor:

- i. VARDAN VINOD BORA (Director);
- ii. NITESH DUTT JHA (Director).

3. The Petitioner submits that:

3.1 The CD represented to be a leading supplier of non-coking coal in India and on account of such representation, the OC expressed its desire to purchase coal from the CD. It was communicated by the CD that coal, being a price sensitive commodity, would require advance payments by the OC to the CD to enable it to supply the best quality coal within the prescribed time period. Therefore, the OC agreed to make payments for the same in advance and in tranches.

3.2 In furtherance of good faith and reputation of the CD, the Petitioner started making advance payments to the CD's bank account from 31.08.2022. This advance payment cumulatively added up to Rs. 3,85,00,000 from 31.08.2022 till the date of 21.09.2022. Further, a copy of Purchase Order #P00665 dated 12.09.2022 issued by the OC to the CD is annexed to the Petition.

3.3 Subsequently, in pursuance of the said Purchase Order, the Corporate Debtor supplied a deficient quantity of 2405 MT of Coal, whereas the agreed quantity under the said Purchase Order was 2600 MT of Coal. An invoice dated 24.09.2022 was issued by the CD upon the OC for a supply of 2405 MT for a total amount of Rs. 3,15,81,589 inclusive of taxes. A copy of the Invoice dated 24.09.2022 issued by the Corporate Debtor to the Operational Creditor is already annexed with the present Petition.

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- 3.4 Against the amount of Rs. 3,85,00,000 advanced by the OC, coal worth only Rs. 3,15,81,589 was supplied. Consequently, further quantity of coal was due to be received from the CD and it must be noted that the CD was holding an amount of Rs. 69,18,411 at this instance.
- 3.5 The OC objected to the deficient supply by the CD and pursuant to this objection, the CD assured that it will supply the deficit quantity. The OC was having additional demand of coal from its clients but was not able to issue a second purchase order due to the prevailing circumstances at that time and the fact that advance amount was already being held by the CD.
- 3.6 Finally, the CD on 01.11.2022, orally informed its inability to timely supply the pending quantity of coal. The Operational Creditor immediately informed the Corporate Debtor of the loss suffered as a result of this default on account of the Operational Creditor's inability to meet its supply commitments with respect to orders from its clients. Thereafter, the Parties made endeavours to resolve the issues. As a result, the parties entered into an oral agreement whereby the Corporate Debtor agreed to pay and the Operation Creditor agreed to receive a lump-sum sum of Rs 1,00,00,000 towards the amount required to be refunded, with applicable interest and compensation payable to the OC as a result of CD in failing to meet its commitments, on or before 07.02.2023.
- 3.7 In order to honor the terms of the oral agreement, the CD issued the following “Cheques” in favour of the Operational Creditor drawn on ICICI Bank bearing account number 63430514146:
- i. Cheque dated 07.02.2023 bearing number 000576 for Rs. 40,00,000
 - ii. Cheque dated 07.02.2023 bearing number 000579 for Rs. 60,00,000
- Copies of the abovementioned Cheques have been annexed with the present Petition under consideration.
- 3.8 Consequently, the OC awaited receipt of the monies; however, since no payment was received on or before 07.02.2023, the OC presented the said Cheques to the Bank for encashment. However, much to the shock of the

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OC, both the said Cheques were returned unpaid by ICICI Bank on 10.02.2023 due to the reason "Payment stopped by drawer" along with its memo dated 10.02.2023 in respect of each of the said Cheques. A copy of the Return Memos for the aforementioned Cheques received from the Bank by the OC is annexed with the present Petition.

3.9 The debt was due and payable on 01.11.2022, when the CD admitted to its failure to supply the deficit quantity of coal and agreed to pay the lump-sum amount of Rs. 1,00,00,000 on or before 07.02.2023 which in turn was duly acknowledged by the issuance of the said Cheques.

3.10 Being aggrieved, Operational Creditor was constrained to issue a demand notice dated 25.03.2023 ("**Demand Notice**") under Section 8 of the Code read with Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for an amount of Rs. 1,00,00,000 along with payment of interest at the rate of 18% per annum and reimbursement of the expenses incurred by the Operational Creditor, through speed post and the same was duly delivered to the Corporate Debtor on 30.03.2023. Proof of delivery of the Demand Notice has been annexed with the present Petition.

4. It must be noted that there is no reply on record filed by the Respondent despite several opportunities given by this Tribunal. The right to file reply was forfeited *vide* order dated 03.10.2023.

5. Heard Mr. Sandeep Bajaj, Ld. Counsel appearing for the OC/Petitioner and perused the available records.

6. Analysis of Averments and Conclusion

6.1 Before engaging with the submissions of the Petitioner, it is important to list down the essential ingredients of Section 9 *vis a vis* Operational Creditor and Operational Debt:

a. Expiry of 10 days from the delivery of the Demand Notice under sub-Section (1) of Section 8.

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- b. Affidavit to the effect that no notice was given by the CD relating to a dispute of the unpaid operational debt.
 - c. Proof confirming that there is no payment of an unpaid operational debt by the corporate debtor or such other information.
- 6.2 Now, it is the submission of the Petitioner that the Respondent has not replied to the already sent Demand Notice dated 25.03.2023 and has neither disputed the claim filed on National E-Governance Services Limited (“NESL”) portal.
- 6.3 The argument of the OC is that after the first default on 01.11.2022, the CD admitted to its failure to supply the deficit quantity of coal and agreed to pay the lump sum amount of Rs 1,00,00,000 on or before 07.02.2023. The foundation of this argument is the issuance of Cheques in favour of the Operational Creditor, duly acknowledged by the issuance of Cheques dated 07.02.2023 bearing number 000576 for Rs. 40,00,000 and dated 07.02.2023 bearing number 000579 for Rs. 60,00,000. Further, it was submitted that when the payment was not received on 07.02.2023, second default occurred and the last default occurred when the cheques were returned on 10.02.2023.
- 6.4 This Bench is in agreement with the following submissions of the Operational Creditor after perusing the records:
- i. Demand Notice dated 25.03.2023 was sent to the Corporate Debtor which has not been replied to.
 - ii. No dispute with respect to the claimed operational debt of Rs. 69,18,411.
- 6.5 However, this Bench notices that advance payments cumulatively added up to Rs. 3,85,00,000 from 31.08.2022 till the date of 21.09.2022 and against the amount of Rs. 3,85,00,000 advanced by the OC, coal worth Rs. 3,15,81,589 was supplied. Consequently, further quantity of coal was due to be received from the CD, leaving an amount of Rs. 69,18,411 in the hands of the CD. Therefore, it can be concluded that, an amount of Rs. 69,18,411 was owed as operational debt by the CD to the OC in this instance. There

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is nothing on record to establish that the two bounced Cheques totaling to Rs. 1 Crore were issued towards repayment of any operational Debt. Further, there are no records/documents, produced to establish that why and how for an operational debt of Rs. 69,18,411, Cheques worth Rs.1.00 Crore were issued or that how an operational debt of Rs.69.00 lakh (approx.) has become Rs.1 Crore.

- 6.6 This Tribunal notes that there is no dispute over the fact that the CD owes Rs. 69, 18,411 to the OC. But, just two unpaid Cheques totaling to Rs.1.00 Crore, more particularly in absence of any other supporting document, does not imply that the operational debt is to the tune of Rs. 1.00 Crore.
- 6.7 We note that in accordance with the threshold prescribed by Section 4 of the IBC— minimum amount of default has been set to Rs. 1,00,00,000, which raises the question as to whether issuance of Cheques to the tune of Rs 1,00,00,000 by the CD in favour of the OC automatically meets the threshold under the IBC.
- 6.8 Before answering the above question, it is important to see how an advanced payment by a purchaser to vendor is treated under the scheme of IBC. Reliance can be placed on the decision of the Hon'ble Supreme Court in *M/s Consolidated Construction Consortium Limited. vs. M/s Hitro Energy Solutions Private Limited, Civil Appeal No 2839 of 2020*. It was observed in the aforesaid judgement:

“First, Section 5(21) defines ‘operational debt’ as a “claim in respect of the provision of goods or services”. The operative requirement is that the claim must bear some nexus with a provision of goods or services, without specifying who is to be the supplier or receiver..... Hence, this leaves no doubt that a debt which arises out of advance payment to a corporate debtor for supply of goods and services would be considered as an operational debt.”

It is not in the realm of contention that issuance of a cheque becomes a promise to pay under Section 25(3) of the Contract Act, 1872 and in accordance with Section 118 of the Negotiable Instruments Act, 1881, a presumption arises to the effect that the cheque was drawn and accepted for

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consideration. However, these arguments do not help the OC in meeting the threshold set under IBC in this present instance.

- 6.9 Now, we can come to core issue with this Petition and the submissions of the OC. The OC has not been able to establish by placing any evidence on record to point out that amount beyond Rs. 69,18,411 is owed by the CD to the OC in relation to the same operational debt. There is no written agreement or document delineating the settlement of an amount to the tune of Rs 1,00,00,000 or any interest arrangement *vis a vis* the existing debt, but the pleadings of the OC only point to an oral arrangement sans any other hard and concrete foundation for its assertions and arguments, which the CD has denied. Therefore, the OC failed to establish that its operational debt meets the existing threshold of Rs 1,00,00,000 under the IBC. It would also appear that the OC has alternative remedies for the return of Cheques under law and can approach the relevant authorities for the same. Hence, the position taken by the Operational Creditor is not legally tenable and the current Petition under Section 9 of the IBC cannot be admitted.
7. Accordingly, with the above observations, CP (IB)/8/GB/2023 is dismissed.
8. 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.
9. Certified Copy of this order may be issued, if applied for, upon compliance of all requisite formalities.
10. File be consigned to records.

Sd/-
Satya Ranjan Prasad
Member (Technical)

Sd/-
H.V. Subba Rao
Member (Judicial)

Signed this on 25th day of January, 2024.