



**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
(Court-II)
KOLKATA**

C.P. (IB) No. 30/KB/2022

An application under Section 9 of the Insolvency & Bankruptcy Code, 2016.

In the matter of:

Dileep Kumar Agarwal, proprietor of Phoenix Hydraulics, having its place of business at 1/1A, Vansittart Row Mezzanine Floor, Room No.2, Kolkata – 700001;

....Operational Creditor

-Versus-

Sujal Exim India Private Limited [CIN U27101WB2006PTC109613], having its registered office at 2/2, Nirmal Chandra Street, 3rd Floor, Kolkata – 700012;

...Corporate Debtor

**Date of hearing: 28 February, 2023
Order Pronounced on: 12 June, 2023**

Coram:

Smt. Bidisha Banerjee, Member (Judicial)

Shri Balraj Joshi, Member (Technical)

Appearances (via video conferencing/physical)

For the Operational Creditor : Mr. Abhishek Sikdhar, Advocate
: Ms. Sahili Dey, Advocate.
For the Corporate Debtor : Mr. Vipul Dharmani, Advocate.



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ORDER

Per: Bidisha Banerjee, Member (Judicial)

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 Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 by **Dileep Kumar Agarwal**, proprietor of Phoenix Hydraulics (*'Operational Creditor'*) for initiation of Corporate Insolvency Resolution Process (*'CIRP'*) against Sujal Exim India Private Limited (*'Corporate Debtor'*).
3. The present Petition was filed on **27 December, 2021** before this Adjudicating Authority. The total amount claimed in default is Rs.1,58,77,334/- (Rupees One Crore Twenty Seven Lakh Ninety Two Thousand Four Hundred Thirty only) along with an interest @18% per annum, which has been calculated from the date of last payment i.e., 28 November, 2019 till 31 March, 2021 [*Principal- Rs.1,27,92,431/ and Interest – Rs.30,84,903/-*]. The date of Default is stated to be as on **27 May, 2017**.
4. In part II of the Petition the authorized share capital of the Corporate Debtor is Rs.5,00,00,000/- (Rupees Five Crore only) with subscribed share capital of Rs.5,00,00,000/- (Rupees Five Crore only). Part – IV of the Petition deals with the particulars of the Operational Debt.
5. ***Submissions by the Ld. Counsel appearing on behalf of the Operational Creditor.***
 - 5.1 The Corporate Debtor had placed verbal purchase order with the Operational Creditor for the purchase of wall tiles. The Operational Creditor has made supply of the said goods and the same was accepted without any protest by the Corporate Debtor. Subsequent to the supply of the goods, invoices were raised by the Operational Creditor [*Page 17-266 of the Application*].



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- 5.2 The purchase by the Corporate Debtor from the Operational Creditor is admitted by the Corporate Debtor in the ledger annexed with the reply of the Corporate Debtor [*Pages 30-32 of the reply by the Corporate Debtor*].
- 5.3 The payment has always been made on Ad-hoc basis and not on bill to bill basis. The Total due principal amount 1,27,92,431/- and interest amount of Rs 30, 84,903/-, hence, the total due amount is Rs.1,58,77,334/-.
- 5.4 The last invoice was raised on 26 May, 2017 which has no credit period thereby the date of default is 27 May, 2017. The last payment was made on 28 November, 2019. The same can be corroborated from the ledger annexed by the Corporate Debtor [*Page 35 of the reply by the Corporate Debtor*].
- 5.5 The demand Notice dated 25 September, 2021 under Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 was also sent to the Corporate Debtor, and the same was received on 27 October, 2021 [*Page 282 of the Petition*]. Even after the receipt of the form 5 notice there was no response from the Corporate Debtor within the stipulated period.
- 5.6 There has been no protest or demur on part of the Corporate Debtor with regard to the goods supplied by the Operational Creditor. Further, on perusal of the reply of the Corporate Debtor it is clear that the purchase has been admitted, payment has been admitted and thereby the entire process of placing verbal purchase order, supply of good and its purchase, raising of invoice and making payment is thereby admitted by the Corporate Debtor.
- 6. *Per contra, submissions by the Ld. Counsel appearing on behalf of the Corporate Debtor.***
- 6.1 That, the Demand Notice issued under Section 8(1) of IBC in FORM-3 is incomplete and defective: That the demand notice dated 25 September, 2021 which forms the basis of this application has not been placed on record. On the contrary, there is another demand notice dated 23 October, 2021. Which was issued under “Form-3”. Further, no invoices or purchase orders has been annexed by the Operational Creditor with the Petition.



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- 6.2 The Operational Creditor has just mentioned the alleged aggregate amount of debt but no details of such transactions has been mentioned in the part (1) of the notice. Part/Column No.7 of FORM-3, provides for mentioning '*List of documents attached to this application in order to prove the existence of operational debt.*'
- 6.3 Application is incomplete: as the same has been filed by the Operational Creditor without placing on record any purchase orders, acceptance letters, acknowledgment of delivery of goods and/or any correspondence. The Operational Creditor has not produced any purchase orders, acceptance letters, invoices and proof of any intimation of sale to the Corporate Debtor or any post-delivery services.
- 6.4 Further, there is non-compliance of Rule 6 of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 which provides for documents and records required therein and as specified in the Regulations, 2016 and Regulation 2B of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 provides for Record or evidence of transaction, debt and default by the Operational Creditor.
- 6.5 Further, the Application is not maintainable because the Corporate Debtor is a 'going concern' and an MSME with a sales turnover of Rs.34.5 Crores (Average of last 3 years): CD is a 'going concern' and an MSME duly registered with Government of India having UDYAM Registration No. UDYAM-HR-01-0000241 (Exhibit-R/3). The Corporate Debtor has more than 100 employees working at its three offices / units at Haryana, Assam and Kolkata, who are earning their livelihood from the salaries being drawn from the Corporate Debtor.
- 6.6 That the Corporate Debtor is a 'solvent' company, is evident from the fact that it is currently availing various loan facilities from various Banks, including but not limited to loan facilities being availed from Yes Bank Ltd. (availed in the year 2022 for an amount of Rs.57,68,758/-), Bank of Maharashtra (availed in the year 2021 and enhanced in 2022; Four facilities:



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Cash Credit of Rs.2 Crores, Bank Guarantee of Rs.60 Lacs, Term Loan of Rs.84.7 Lacs and Letter of Credit to the tune of Rs. 1 Crore) and IDFC First Bank (availed in the year 2021 to the tune of Rs.54,50,000), wherein all the loans are regular and are 'standard accounts' being serviced regularly.

- 6.7 The Preamble of the Code is carefully worded to describe the spirit and objective of the Code as 'Reorganization' and 'Insolvency Resolution', specifically omitting the word 'Recovery'. There is a significant difference between 'Resolution and Recovery'. The Hon'ble Supreme Court has time and again observed that the fundamental intent of Code is 'maximizing the value of assets in the process of Resolution'.
- 6.8 Instant Application is nothing but a sheer abuse of the process of law and is a result of great manipulation, aimed at illegal arm-twisting of the Corporate Debtor by the Operational Creditor at the behest of erstwhile Statutory Auditor-CA of the Corporate Debtor and the proposed IRP. The Operational Creditor in collusion and criminal conspiracy with Mr. Nitin Hukumchand Agarwal, the erstwhile Statutory Auditor of the Corporate Debtor along with his wife - Mrs. Sonu Jain, Chartered Accountant the proposed Interim, has preferred this application.
- 6.9 The nexus and the modus operandi of the Operational Creditor and Mr. Nitin Hukumchand Agarwal CA is evident from the trail email (Exhibit - R/15) sent by Mr. Nitin Hukumchand Agarwal CA to the Corporate Debtor at its email, wherein Mr. Dileep Kumar Agrawal, the Applicant is also marked in the trail emails. In such facts and circumstances its crystal clear that the present application is not bonafide and is a result of gross mis-statement, conspiracy.
- 6.10 Mr. Nitin Hukumchand Agarwal, CA, being a Statutory Auditor and Chartered Accountant of the Corporate Debtor has starting blackmailing the management of the Corporate Debtor on the false premise that he will divulge confidential information of the promoter of the Corporate Debtor as he claimed to have high connections in the GST Department and ROC.



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- 6.11 The shareholders/promoters of the Corporate Debtor had sent a notice dated 08 March, 2021 to Mr. Nitin Hukumchand Agarwal, CA, which was replied by him through his counsel, Mr. Abhishek Sikdar, Advocate, (who is also the counsel in present petition for the Corporate Debtor) *vide* his reply dated 08 March, 2021 (Exhibit R-8).
- 6.12 Mr. Nitin Hukumchand Agarwal, CA acting along with the present Operational Creditor has been calling the promoters/ shareholders of the Corporate Debtor. He had also sent an email dated 07 February, 2022 (Exhibit R-12 Colly) to the promoters/ shareholders of the Corporate Debtor and asked for payment of Rs.16,86,018/- and threatened that in case payments are not made the Company Petition will get admitted and Mrs. Sonu Jain will become IP and they will take over the entire control of the management.
- 6.13 Being under constant pressure and threat the Corporate Debtor involuntarily and under threat and coercion entered into a settlement deed dated 04 March, 2022 (Exhibit R-13) with Mr. Nitin Hukumchand Agarwal, CA wherein an amount of Rs.16,86,018/- was to be paid in instalments till August, 2022. Pertinently, the said settlement deed was witnessed by Mrs. Sonu Jain, CA and IP.
- 6.14 In the said settlement deed Mr. Nitin Hukumchand Agarwal, CA duly admitted having filed the present company petitions and agreed that upon payment of the amount he will get the petitions, i.e. CP(IB)-30/KB/2022 (present petition) and CP(IB)-183/KB/2021 (other one pertaining to Jindal Udyog Ltd. withdrawn. That the Corporate Debtor made payments in installments to the tune of Rs. 3 Lacs on 04 March, 2022, Rs.2,86,000/- on 04 April, 2022, Rs.2,74,000/- on 04 May, 2022, Rs.2,75,000/- on 04 June, 2022 and Rs.2,75,000/- on 04 July, 2022 (Exhibit R-14 Colly) but at the time of last payment on 04 August, 2022, the Operational Creditor and Mr. Nitin Hukumchand Agarwal, CA demanded extra amount of Rs.25 Lacs in order to withdraw the present two company petitions. There is no operational debt in favor of the Operational Creditor as against the



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Corporate Debtor. Hence the Operational Creditor neither has any cause of action nor any locus to file the present petition under Section 9 of the Code.

7. No rejoinder has been filed to counter these allegations levelled by the Corporate Debtor. There is no oral prayer made before this Bench to deem the said allegations as not to be admitted. No records have been placed in denial.

Analysis and Findings

8. We have heard the Learned Counsel appearing on behalf of the Operational Creditor and the Corporate Debtor and perused the documents on record.
9. Upon perusal of the settlement deed dated 04 March, 2022 [Annexure R-13 at Pages 180 – 181 of the Application] it is evident that the Corporate Debtor did enter into an arrangement with Mr. Nitin Hukumchand Agarwal, CA for the settlement of the loan amount of Rs.10,00,000/-, ROC challan, DSC and professional fees since 30 September, 2019 and Rs.7,58,726/- towards interest @18% per annum for two and half years i.e., from October 2019 to March 2022.
10. However, no documents come to the fore to show that Mr. Nitin Hukumchand Agarwal CA has been authorized by the Operational Creditor to enter into any settlement agreement with the Corporate Debtor.
11. Further, as per the arrangement an amount of Rs.16,86,018/- was to be paid in instalments till August, 2022. And, Mr. Nitin Hukumchand Agarwal, CA seems to have mutually agreed to waive off all the interest amount for entire 2 years 6 months, and to withdraw all the case (i.e., CP No.183(KB)2021 and CP No.30/KB/2022) including all the suits filed by him either in any court or with other legal authority. Which speaks volumes about the conduct of the CA.
12. It is further evident that, thereafter, subsequent to the arrangement the Corporate Debtor made the payments in installments, details of which are as follows;

<i>SI NO.</i>	<i>Transaction date</i>	<i>Transaction ID</i>	<i>Transaction amount</i>
<i>1.</i>	04 March, 2022	S13510033	Rs.3,00,000/-



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2.	04 April, 2022	S44567404	Rs.2,86,000/-
3.	04 May, 2022	S90984615	Rs.2,74,000/-
4.	04 June, 2022	S81963010	Rs.2,75,000/-
5.	04 July, 2022	S43340025	Rs.2,74,000/-
Total			Rs.14,10,000/-

13. In *Mobilox Innovations (P) Ltd. v. Kirusa Software (P) Ltd.*¹, Hon'ble Supreme Court has held that;

“34. Therefore, the adjudicating authority, when examining an application under Section 9 of the Act will have to determine:

- (i) Whether there is an 'operational debt as defined exceeding Rs. 1 lakh? (See Section 4 of the Act)*
- (ii) Whether the documentary evidence furnished with the application shows that the aforesaid debt is due and payable and has not yet been paid? And*
- (iii) Whether there is 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 in relation to such dispute?*

If any one of the aforesaid conditions is lacking, the application would have to be rejected. Apart from the above, the adjudicating authority must follow the mandate of Section 9, as outlined above, and in particular the mandate of Section 9(5) of the Act, and admit or reject the application, as the case may be, depending upon the factors mentioned in Section 9(5) of the Act.”

(Emphasis added)

14. In *Agarwal Veneers v. Fundtonic Service Private Limited*², the Hon'ble NCLAT observed as under;

“14. It is clear from the aforesaid provisions of the Code and also the Regulations therein that unless the Operational Creditor along with its

¹ (2018) 1 SCC 353 : 2017 SCC online SC 1154)

² Company Appeal (AT) (Ins) No.968 of 2020



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Application furnishes a copy of the invoices, the bank statements and the financial accounts, the Adjudicating Authority is empowered to reject an incomplete Application.

15. Lastly, we address to the Contention of the Ld. Counsel for the Appellant that merely because the Corporate Debtor is a going concern and an MSME, the Adjudicating Authority ought not to have rejected the Application on this ground also.

16. The Preamble of IBC is carefully worded to describe the spirit and objective of the Code to be Reorganisation' and Insolvency Resolution', specifically omitting the word Recovery. The Parliament has made a conscious effort to ensure that there is a significant difference between 'Resolution' and Recovery. The Hon'ble Supreme Court has time and again observed that the fundamental intent of IBC is maximising the value of assets' in the process of Resolution'.

In Mobilox Innovations Private Limited' Vs. Kirusa Software Private Limited', (2018) 1 SCC 353, the Hon'ble Apex Court has examined in detail the United Nations Legislative Guide on Insolvency, in which the IBC finds its roots. Any Application to commence CIRP can be denied when the Creditor is using Insolvency as an inappropriate substitute for Debt Recovery Procedures. If IBC is purely used for the purpose of Debt Recovery, particularly when the amounts due are small, and the Company is a solvent entity and is a going concern, the question of Reorganising' or 'Resolution of the Company' does not arise. This Tribunal in Binani Industries Limited' Vs. 'Bank of Baroda & Anr.', Company Appeal (AT) (Ins.) No. 82 of 2018, has differentiated between Recovery' and 'Resolution' and has observed that IBC is not a Recovery Proceeding. 'Recovery' dispossesses the 'Corporate Debtor' of its assets while a Resolution is an effort to keep it afloat. Further, this Tribunal in 'Asset Advisory Services' Vs. VSS Projects', CP (IB) No. 96/7 / HDB (2017), and also in 'Praveen Kumar Mundra' Vs. 'CIL Securities Ltd.', 2019 SCC OnLine Company Appeal (AT) (Insolvency) No. 512 of 2021 NCLAT 334, has noted that CIRP cannot be



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initiated with fraudulent intent for any purpose other than the Resolution of Insolvency or Liquidation' and therefore it is clearly covered under Section 65 of the Code.

17. The Hon'ble Supreme court in 'Vidarbha Industries Power Ltd. Vs. Axis Bank Ltd'. 2022 SCC Online SC 841 has observed that even if there is a 'debt' and 'default, the Adjudicating Authority should use its discretion in admitting/ rejecting an Application. In the instant case, the Adjudicating Authority has rightly rejected the Application on this ground too.

18. For all the aforementioned reasons, this Appeal fails on merits and is accordingly dismissed. No order as to costs."

(Emphasis added)

15. In ***Ramco Systems Ltd. v. Spicejet Ltd***³, Hon'ble NCLAT observed and held as under;

"10. There is nothing on the record to suggest that the invoices dated 23rd July 2014 were forwarded or received by the Respondent- 'Spicejet Limited' Therefore, the Demand Notice issued on 24th April 2017 as relates to invoice dated 23rd July 2014, though it cannot be held to be barred by limitation, but in the absence of specific evidence relating to invoices forwarded by the Appellant and there being a doubt, we hold that the Adjudicating Authority has rightly refused to entertain application under Section 9 which requires strict proof of debt and default."

16. In ***Neeraj Jain, Director of M/s Flipkart India Private Limited v. M/s Cloud walker Streaming Technologies Private Limited***⁴, Hon'ble NCLAT observed, as follows;

"The Operational Creditor has failed to produce invoices, purchase orders or any documents to prove its claim and has filed a defective Section 9 Application for initiation of Corporate Insolvency Resolution Process. And

³ 2019 SCC OnLine NCLAT 354

⁴ Company Appeal (AT) (Insolvency) No. 1354 of 2019



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as such “*the Operational Creditor has failed to substantiate the provisions of a single good or service fro which payment has remained outstanding.*”

Where a “*computation chart value of goods is shown as 13.95 crores, whereas the Operational Creditor has not produced any record, any Purchase Order, Invoices or any other document to substantiate its claims*”

Hon’ble Court observed as under;

“We have found that demand notice delivered under Section 8(1) of the Code was not proper and was also incomplete. The Operational Creditor failed to submit any documents to prove in existence of the Operational debt and the amount in default. The Operational Creditor also failed to submit the copy of invoices and copies of all the documents referred in the application to be submitted in Form 5, under Section 9 of the Code. The Operational Creditor has failed to submit the relevant documents under which the debt has become due. The Operational Creditor has only filed the copy of the Supply Agreement, and the projections email, which by themselves can by no stretch of the imagination constitute proof of debt. The Operational Creditor had not filed a copy of the bank statement. Instead of filing the relevant document, the Operational Creditor had solely placed reliance on a few emails to allege that he had suffered losses on account of projections for the demand provided by Flipkart. The figures provided by Flipkart were only projections that do not constitute the binding purchase order under the Supply Agreement. It is also clear that before issuance of demand notice, Operational Creditor had itself issued a notice against the Corporate Debtor with a request of making the payment within 30 days, failing which the dispute was said to be referred to the Arbitrator. This notice was withdrawn before issuance of demand notice under Section 8(1) of the Code. But by withdrawing the said notice, the dispute does not cease to exist. The entire claim of the Corporate Debtor is an uncrystallised claim which cannot be adjudicated by the Adjudicating Authority under summary jurisdiction. In the circumstances, it appears that the Appeal deserves to be”



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*allowed and impugned order passed by the Adjudicating Authority
admitting the petition, deserves to be set aside.”*

(Emphasis added)

17. In the aforesaid backdrop backdrop it is noted that, in the present case no rejoinder has been used to refute the allegations of the Corporate Debtor that;

- (i) The demand notice dated 25 September, 2021 which forms the basis of this application has not been placed on record and the demand notice dated 23 October, 2021 is not supported by invoices or purchase order. Hence, the notice was defective.
- (ii) No purchase orders has been annexed by the Operational Creditor with the Petition to substantiate that a debt is due and payable and has not been paid.
- (iii) No details of such transactions has been mentioned in the part (1) of the notice.
- (iv) Application is incomplete: as the same has been filed by the Operational Creditor without placing on record any purchase orders, acceptance letters, acknowledgment of delivery of goods and/or any correspondence.
- (v) There is non-compliance of Rule 6 of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016

18. In lights of the above facts and circumstances and the legal proposition discussed above, *C.P. (IB) No. 30/KB/2022* is *dismissed*

19. A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

Balraj Joshi
Member (Technical)

Bidisha Banerjee
Member (Judicial)

The order is pronounced on 12th June, 2023

SA [LRA]