

**IN THE NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH, COURT NO. II
KOLKATA**

Company Petition (IB) No. 58/KB/2022

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

IN THE MATTER OF:

**Winntus Formworks Private Limited
(CIN: U74140HR2015PTC055615)**

... Operational Creditor/ Applicant.

Verses

**Raj Laxmi (Bihar) Buildcon Private Limited
(CIN:U45100BR2012PTC019058)**

... Corporate Debtor/ Respondent.

Date of Pronouncement: January 31 ,2024.

CORAM:

**SMT. BIDISHA BANERJEE, HON'BLE MEMBER (JUDICIAL)
SHRI. D. ARVIND, HON'BLE MEMBER (TECHNICAL)**

Appearance (via video conferencing/physically):

For the Corporate Debtor:

Mr. Sunil Gupta, Adv.

ORDER

PER Bidisha Banerjee, Member (Judicial)

1. This Court is congregated through hybrid mode.
2. Heard the Learned Counsels for both parties.
3. This Application has been preferred under Section 9 of the Insolvency and Bankruptcy Code, 2016, for brevity "I&B Code" by one **Winntus Formworks Private Limited**, hereinafter referred to as the "Applicant" or "Operational Creditor" against one **Raj Laxmi (Bihar) Buildcon Private Limited**, hereinafter referred to as the "Respondent" or "Corporate Debtor" seeking a direction to initiate Corporate Insolvency

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Resolution Process, for brevity "CIR Process" in respect to Corporate Debtor herein.

4. Factual Matrix:

1. The total amount claimed to be in default is **Rs. 85,05,451.5/-** in which calculated @ 12% per annum and debt has fallen due from **10.09.2017**.

2. Applicant's submissions:

2.1 The Learned Counsel for the applicant submits that , Raj Laxmi (Bihar) Buildcon Private Limited (hereinafter, referred to as the "Corporate Debtor") and Winntus Formwork Private Limited formerly known as Shiv Shakti Scaffolding Private Limited (hereinafter, "Operational Creditor entered into an Agreement dated 07.03.2017 Pursuant to the Agreement, the Operational Creditor started supply Scaffolding Material on hire basis at the project site of Corporate Debtor.

2.2 It is state that, in terms of the Agreement, the Operational Creditor commenced to supply of Scaffolding Material at the Project Site of Corporate Debtor, receive payments from October 2017 onwards, as reflected in the Ledger maintained by Operational Creditor in respect of accounts of Corporate Debtor.

2.3 Further it is stated that, the Operational Creditor was maintaining a running account in respect of the Materials supplied to the Corporate Debtor, and was raising invoices upon the Corporate Debtor, monthly. **That, between 31.08.2017 and 25.12.2019**, the Operational Creditor continued to raise invoices for the goods supplied to the Corporate Debtor, and the said invoices aggregated to **Rs. 32,12,838/-**.

2.4 It is claimed that, between October 2017 and August 2019, the Corporate Debtor had made ad-hoc payments, in response to the

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constant communications which were underway between the Corporate Debtor and the Operational Creditor. However, after 29.08.2019 till date, no payments whatsoever, had been credited in favour of the Operational Creditor, thereby resulting in an outstanding operational debt of Rs. 32, 12, 838/-.

2.5 Further it is stated that as a matter of practice, any delay in clearance of invoices was specified to attract interest at 12% per annum. Consequently, as of Ledger Closing for 2019, a total outstanding amount of Rs. 36, 54, 451.5/- was due and Rs. 48, 51, 000/- towards Material Cost, thus in total Rs. 85, 05, 451.5/ was due and payable by the Corporate Debtor in favour of the Operational Creditor.

2.6 It is submitting that, given the fact that the liabilities qua the Corporate Debtor in the books of the Operational Creditor had been escalating in its books, the Operational Creditor had engaged in numerous telephonic conversations, etc. between September 2019 and December 2019 with the Corporate Debtor, with the premise that the outstanding liabilities would stand resolved. However, apart from feeble assurances, and minimal communications, nothing concrete was ever forthcoming from the Corporate Debtor.

2.7 It is claimed that the soft copy of the Demand Notice was issued through email on 18.01.2020, and the same had not been received back undelivered/bounced and despite receiving the Demand Notice dated 18.01.2020; no response whatsoever is forthcoming from the Corporate Debtor.

3. We have noted that on 6th October 2023, we have noted despite several notices, none appeared on behalf of the Corporate Debtor. We allowed one last chance to the Corporate Debtor to appear in this matter otherwise this matter would be heard *ex-parte*. It is further noted that

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on 19th January 2024, this matter was reverse for order and none for the Corporate Debtor has appeared. Thus, we proceed with the merits of the case and the documents placed.

4. Analysis and Findings

- 4.1** It is evident that the Corporate Debtor made ad hoc payments between October 2017 and August 2019, in response to ongoing communications between the Corporate Debtor and the Operational Creditor, and that the Operational Creditor incorrectly claimed the date of Default.
- 4.2** It is evident that the 12% per annum is alleged to be incorrectly calculated due to the lack of an agreement between the parties involved.
- 4.3** It is evident that if we deduct the interest part from the total debt than it will be Rs. 85,05,451.5/- which is less than threshold limit.

5. The legal position:

- a) Further that the Hon'ble Apex Court in the matter of **Mobilox Innovations Pvt. Ltd. vs. Kriusa Software Pvt. Ltd. on para 25 held that**, "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 crore? (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

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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 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 supplied)

b) Further, as observed in the landmark judgement by NCLAT in **Krishna Enterprises Vs Gammon India Ltd Company** Reported [2018] **ibclaw.in 46 NCLAT** wherein it was held that

“4. It is submitted that the ‘debt’ includes the interest, but such submission cannot be accepted in deciding all claims. If in terms of any agreement interest is payable to the Operational or Financial Creditor, then debt will include interest, otherwise, the principal amount is to be treated as the debt which is the liability in respect of the claim which can be made from the Corporate Debtor”.

(Emphasis supplied)

C) Furthermore, in the case of **Khatunaresh Impex Pvt. Ltd v. Jindal (India) Limited** Reported in (2022) **ibclaw.in 950 NCLT** wherein it was held that in absence of any contract or agreement between Parties which provides for payment of interest to the Operational Creditor cannot claim interest in Section 9 proceedings merely to cross the threshold limit of Rs. One Crore.

(Emphasis supplied)

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- 6.** In the view foregoing, we **dismiss** this application **Company Petition (IB) No. 58/KB/2022** accordingly.

- 7.** Certified copies of the order, if applied for with the Registry of this Adjudicating Authority, be supplied to the parties upon compliance with all requisite formalities.

D. Arvind
Member (Technical)

Bidisha Banerjee
Member (Judicial)

This order is signed on the 31st Day of January 2024.

Tiwari. V. [LRA]