

**IN THE NATIONAL COMPANY LAW TRIBUNAL
"CHANDIGARH BENCH, CHANDIGARH"
(Exercising powers of Adjudicating Authority under
the Insolvency and Bankruptcy Code, 2016)**

CP (IB) No. 42/Chd/Pb/2018

**Under Section 9 of Insolvency and
Bankruptcy Code, 2016**

In the matter of :

Mr. Ashwani Kumar,
(Sole Proprietor)
House No.323,
Sector-7,
Panchkula, Haryana.

...Operational Creditor

Versus.

Kuvam Konstruktion Private Limited,
Having registered office at
House No.536, Mamta Enclave,
Village Dhakoli,
Punjab-140603.

...Corporate Debtor

Judgement delivered on: 14.11.2019

**Coram: Hon'ble Mr. Ajay Kumar Vatsavayi, Member (Judicial)
Hon'ble Mr. Pradeep R. Sethi, Member(Technical)**

For the applicant : Mr. Yash Pal Gupta, Advocate.

For the respondent : Mr. G.S. Sarin, Practising Company Secretary.

Per: Pradeep R. Sethi, Member(Technical)

JUDGEMENT

The present application under Section 9 of the Insolvency & Bankruptcy Code, 2016 (**Code**) read with Rule 6 of the Insolvency &

Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (**Rules, 2016**) is filed by Shri Ashwani Kumar (**Operational Creditor**) for initiating the Corporate Insolvency Resolution Process (**CIRP**) in the case of Kuvam Konstruktion Pvt. Ltd. (**Corporate Debtor**). As per Master Data of the corporate debtor at annexure A-2 of the petition, the registered address of the corporate debtor is at House No.536, Mamta Enclave, Village Dhakoli, Punjab 140603. Therefore, the jurisdiction lies with this Bench of the Tribunal.

2. The application in Form No.5 is signed by the operational creditor. His affidavit verifying the contents of the application is at pages 18 and 19 of the petition.

3. It is stated in Part IV of Form 5 that the debt is due in lieu of sub contractor-ship for fire fighting and water supply works pertaining to work allotted by National Building Construction Corporation Limited to the corporate debtor on the basis of an appointment in reference to the letter of intent (**LOI**) No. KKPL/NBCC/146/03/2015-16 dated 09.03.2016 and No. KKPL/NBCC/176/04/2016 dated 14.04.2016 at North Campus, IIT Kamand, Mandi, Himachal Pradesh. It is stated that the debt falls due as per Clauses 6 and 7 of the LOI dated 09.03.2016 (*supra*) and Clause 5 of the LOI dated 14.04.2016 (*supra*) which provide for submission of monthly bills for the completed work and payment to be released within 15 days from the date of submission of bill. It is stated that the corporate debtor has failed to make the payment as per the terms of the LOI and the total amount of debt is ₹17,85,564 as per the detailed invoices plus 18% interest per annum for the period of delay.

4. It is stated in the application that the operational creditor had to serve the notice demanding payment with invoices as per Form 4 under the Code read with the Rules, 2016 and the copy of the notice along with the postal receipt as well as the copy of email duly delivered to the corporate debtor are attached as Annexure A-7 (colly). It is stated that the corporate debtor chose not to file any reply to the statutory notice and that affidavit of no notice given by the corporate debtor relating to a dispute of the unpaid operational debt has been filed at page 20 of the petition.

5. In Part III of Form 5, the name of the Interim Resolution Professional (**IRP**) is left at the discretion of the Tribunal.

6. Vide order dated 28.02.2018, it is noted that the learned counsel for the operational creditor sought time to place on record copy of the ledger account of the respondent being maintained by the operational creditor. The compliance was made by Diary No.654 dated 06.03.2018. Vide order dated 07.03.2018, notice of the petition to the respondent/corporate debtor to show cause as to why the petition be not admitted was directed to be issued. The reply was filed vide Diary No.1973 dated 04.06.2018. Vide order dated 31.10.2018, the operational creditor was directed to file the reconciliation of the account statement as at page 48 of the petition with the ledger account attached with the affidavit filed vide Diary No.654 dated 06.03.2018. The reconciliation statement is sought to be filed by Diary No.254 dated 17.01.2019. The rejoinder was filed by Diary No.5604 dated 15.10.2019.

7. We have carefully heard and considered the arguments of the learned counsel for the operational creditor and the learned authorized representative for the corporate debtor and have also perused the record. The

amount claimed to be in default is ₹17,85,564 plus 18% interest per annum for the period of delay in respect of sub-contractor ship for fire fighting and water supply works pertaining to work allotted by National Building Construction Corporation Limited to the corporate debtor on the basis of LOIs dated 09.03.2016 and 14.04.2016 supra. It has been stated that the payment under the LOIs was required to be released within 10 days after submission of monthly bills as per the LOI dated 09.03.2016 and within 15 days after the submission of monthly bills under second LOI dated 14.04.2016.

8. The first objection raised by the learned authorized representative for the corporate debtor is that the bills produced by the operational creditor have stamp and signature of the ex-employee Mr. Rajiv Bawa after the Power of Attorney given to him to sign and receive bills on behalf of the corporate debtor for the execution of letter of intent between the corporate debtor and operational creditor was revoked by the corporate debtor on 23.02.2017. It is also pleaded that the bills submitted to the corporate debtor are totally different from the bills which have been enclosed along with the petition.

9. In rejoinder, it is submitted that the revocation (Annexure R-2 of the reply) is an internal document of the corporate debtor and it is for the first time that the corporate debtor is showing this document to the operational creditor and neither the corporate debtor nor the employee ever mentioned to the operational creditor that there is any change in the authority of the person and that until the operational creditor was working with the corporate debtor, the same employee was in charge and was accepting the invoices as usual. It is averred that the operational creditor submitted the final invoice on

15.03.2017 and the same was acknowledged by the learned authorized representative for the corporate debtor and it is possible that the STA revoking the authority on 23.02.2017 was made effective at a later stage or it was created to mislead the creditors of the corporate debtor as it was an internal as well as personal document created to defraud the innocent creditors of the corporate debtor including the operational creditor.

10. The bills claimed to be submitted by the operational creditor to the corporate debtor are placed at Annexure A-1 of the reply. The bill at page 30 of the reply is dated 10.03.2017 and finally gives the position as under:-

<i>Total work done=</i>	<i>89,83,830</i>
<i>Paid to Om Metal</i>	
<i>Ind. Soution =</i>	<i>-50,78,463</i>
<i>Paid to Delhi Bitumin=</i>	<i>-4,58,670</i>
<i>Paid to Ashwani Kumar=</i>	<i>-18,90,247</i>
<i>Balance to be paid to Ashwani Kumar=</i>	<i>Rs. 15,56,450</i>
<i>Balance to be paid to Om Metals=</i>	<i>Rs.4,26,578</i>

11. The bill dated 10.03.2017 filed by the operational creditor along with the petition is at page 84 of the petition. It is finally stated in the bill as under:-

<i>Total work done</i>	<i>89,83,830</i>
<i>Paid to Om Metal</i>	
<i>Industrial Solution</i>	<i>50,78,463</i>
<i>Paid to Delhi Bitumin</i>	<i>4,58,670</i>
<i>Paid to Ashwani Kumar</i>	<i>18,90,247</i>
<i>Balance to be paid to Ashwani Kumar</i>	<i>15,56,450</i>
<i>Balance to be paid to Om Metal</i>	<i>4,26,578</i>

12. It would be seen that the details of the total work done as well as the balance payment to the operational creditor is exactly the same in both the bills. In these circumstances, the alleged revocation by the corporate debtor on 23.02.2017 of the Power of Attorney executed in favour of the employee Shri Rajiv Bawa becomes irrelevant. The enclosures to the petition also include a bill dated 15.03.2017 in which the total work done is stated to be ₹93,53,820 and the balance to be paid to the operational creditor is stated to be ₹17,85,564. Therefore, total work done has increased by about ₹3.7 lacs and the balance to be paid to the operational creditor by about ₹2.3 lacs. There is no claim that the amount of ₹15,56,450 due to the operational creditor as on 10.03.2017 was paid by the corporate debtor. Therefore, even if we assume that the bill dated 15.03.2017 is not genuine, the threshold limit for initiation of CIRP of ₹1,00,000 is very much satisfied. Moreover, the exact amount of the claim of the operational creditor can be decided by the IRP/RP during the course of the CIRP.

13. In the second objection, the learned authorized representative for the corporate debtor has referred to clause 5 of the LOI dated 09.03.2016 reading as follows:-

xxx xxx xxx xxx

5. All the purchases will be made in the name of Kuvam Konstruktion Pvt. Ltd.; we will make the payments directly to the concerned party and the amount shall be deducted from your bills.

14. The learned authorized representative for the corporate debtor has referred to the bank account statement and summary of the transactions

among the operational creditor, corporate debtor and concerned parties (Annexure R-3 (colly)) and has pleaded that an amount of ₹16,79,518 is actually due by the corporate debtor from the operational creditor. It is pleaded that an amount of ₹20,01,515 paid through RTGS on 18.03.2016 to Om Metal Industrial Solution has not been taken into account by the operational creditor and thereby, the payments directly made by the corporate debtor to the concerned parties were to the tune of ₹1,06,40,828 against the work done worth ₹89,61,310.

15. In the rejoinder, the learned counsel for the operational creditor has pleaded that the corporate debtor for the first time raised an issue saying that as per the bills produced by the operational creditor for the purchasers, the payments were directly made to the vendors which were more than the actual invoices. It is pleaded that there is no connection with the payments pending qua the operational creditor and payments made or pending qua the other vendors, as the payment had to be made to the vendors directly by the corporate debtor as per their invoices raised.

16. We find that as per para No.5 of LOI dated 09.03.2016 (*supra*) all the purchases by the operational creditor are to be made in the name of the corporate debtor who will make the payments directly to the concerned parties and the amount is to be deducted from the bills. Therefore, in the invoices dated 10.03.2017 and 15.03.2017 *supra*, the operational creditor has reduced the payments made to the concerned parties out of the total work done and the balance to be paid is shown separately for the operational creditor and the concerned parties. The terms and conditions at SI.No.5 of the LOI dated 09.03.2016 has reference to deduction of payments made directly to the

concerned parties by the corporate debtor in respect of the purchases made. However, in Annexure R-3 (colly) of the reply, the corporate debtor has filed only the details of the payments made to the concerned parties without any correlation with the purchases made in its name. The invoices in respect of purchases made from the concerned parties in the name of the corporate debtor have not been filed to show that the complete payments to the concerned parties as per Annexure R-3 (colly) have relation to the purchases made. Therefore, the objection raised cannot be accepted.

17. The third objection raised by the learned authorized representative for the corporate debtor is that the bills attached in support of the debt are forged and fake since the last bill is showing lesser amount than the previous bill in spite of being cumulative of previous transactions. In rejoinder, the learned counsel for the operational creditor has pleaded that the invoice dated 10.03.2017 is duly accepted and a small clerical issue does not make a document fake, especially an invoice which is already admitted.

18. We find that the bill dated 15.03.2017 is showing total work done of ₹93,53,820 whereas the earlier bill dated 10.03.2017 is showing total work done of ₹89,83,830. Therefore, total work done has shown an increase. The amount paid to Om Metal Industrial Solution does show a reduction from ₹50,78,463 on 10.03.2017 to ₹50,10,143 on 15.03.2017. However, this by itself cannot invalidate the bill dated 15.03.2017 and the difference may be on account of reconciliation or clerical issue as stated by the learned counsel for the operational creditor. The objection is therefore, not accepted. We may also add here that vide order dated 31.10.2018, the operational creditor was directed to file the reconciliation of the account statement as at page 48 of the

petition with the ledger account attached with the affidavit filed vide Diary No.654 dated 06.03.2018. The compliance was made by Diary No.254 dated 17.01.2019 in which only the copies of the two accounts were furnished. However, in view of our finding above that the balance to be paid by the corporate debtor to the operational creditor as per bill dated 10.03.2017 (page 57 of the petition) is accepted at page 30 of the reply, the issue becomes irrelevant.

19. In view of the above, the objections raised by the corporate debtor are found not to truly exist in fact and are spurious, hypothetical and illusory and are therefore, rejected.

20. The provisions of Section 9 (5)(i) are as under:-

(5) The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), by an order—

(i) admit the application and communicate such decision to the operational creditor and the corporate debtor if, —

(a) the application made under sub-section (2) is complete;

(b) there is no repayment of the unpaid operational debt;

(c) the invoice or notice for payment to the corporate debtor has been delivered by the operational creditor;

(d) no notice of dispute has been received by the operational creditor or there is no record of dispute in the information utility; and

(e) there is no disciplinary proceeding pending against any resolution professional proposed under sub-section (4), if any.

21. In the present case the application in Form No.5 is found to be complete; there is no payment of the unpaid operational debt of ₹ 17,85,564 (along with 18% interest per annum for the period of delay) the notice in Form

4 dated 07.12.2017 was duly delivered by the operational creditor as discussed above; no reply was received within the period of 10 days from the receipt of the notice and affidavit of no notice relating to dispute of the unpaid operational debt was filed by affidavit dated 18.01.2018. Finally, in the application, there is no proposal for appointment of IRP.

22. We therefore, hold that the conditions provided for in Section 9(5)(i) of the Code are satisfied in the present case and admit the application filed for initiation of CIRP in the case of Kuvam Constructions Private Limited and declare moratorium and appoint IRP as below.

23. We declare the Moratorium in terms of sub-section (1) of Section 14 of the Code as under:-

- (a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;
- (b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;
- (c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;

(d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

24. It is further directed that the supply of essential goods or services to the corporate debtor as may be specified, shall not be terminated or suspended or interrupted during moratorium period. The provisions of Section 14(3) shall however, not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator and to a surety in a contract of guarantee to a corporate debtor.

25. The order of moratorium shall have effect from the date of this order till completion of the corporate insolvency resolution process or until this Bench approves the resolution plan under sub-section (1) of Section 31 or passes an order for liquidation of corporate debtor under Section 33 as the case may be.

26. Under sub-section (4) of Section 9 of the Code, the operational creditor may propose the name of Resolution Professional to be appointed as Interim Resolution Professional but it is not obliged to do so. In the instant case also, the operational creditor has not proposed the name of any Resolution Professional to be appointed as Interim Resolution Professional. Section 16(3)(a) of the Code says that where the application for Corporate Insolvency Resolution Process is made by an operational creditor and –

“a) no proposal for an interim resolution professional is made, the Adjudicating Authority shall make a reference to the Board for the recommendation of an insolvency professional who may act as an interim resolution professional;
b) x x x x x”

27. Sub-section (4) of Section 16 says that the Board shall, within ten days of the receipt of a reference from the Adjudicating Authority under sub-section (3), recommend the name of an insolvency professional to the Adjudicating Authority against whom no disciplinary proceedings are pending.

28. In this regard a letter bearing File No.25/02/2019-NCLT dated 28.06.2019 has been received from the National Company Law Tribunal, New Delhi forwarding therewith a copy of letter No. IBBI/IP/EMP/2018/02/ dated 24.06.2019 along with the guidelines and the panel of resolution professionals approved for NCLT, Chandigarh Bench for appointment as IRP or Liquidator. The panel is valid for six months from 01.07.2019 to 31.12.2019. We select Mr. Parvinder Singh appearing at Serial No. 65 of the panel to be appointed as Interim Resolution Professional.

29. The Law Research Associate of this Tribunal has checked the credentials of Mr. Parvinder Singh and there is nothing adverse against him. In view of the above, we appoint Mr. Parvinder Singh, Registration No. IBBI/IPA-001/IP-P01603/2019-2020/12468, 10 Jandu Tower, Miller Ganj, Ludhiana-141003, E-mail: caparvinder03@gmail.com, M: 9814798374 as the Interim Resolution Professional with the following directions: -

- i) Appoint Mr. Parvinder Singh, registered insolvency professional bearing Registration No. IBBI/IPA-001/IP-P01603/2019-2020/12468; Mobile No. 9814798374; email ID: caparvinder03@gmail.com as Interim Resolution Professional.

- ii) The term of appointment of Mr. Parvinder Singh shall be in accordance with the provisions of Section 16(5) of the Code;
- iii) In terms of Section 17 of the Code, from the date of this appointment, the powers of the Board of Directors shall stand suspended and the management of the affairs shall vest with the Interim Resolution Professional and the officers and the managers of the Corporate Debtor shall report to the Interim Resolution Professional, who shall be enjoined to exercise all the powers as are vested with Interim Resolution Professional and strictly perform all the duties as are enjoined on the Interim Resolution Professional under Section 18 and other relevant provisions of the Code, including taking control and custody of the assets over which the Corporate Debtor has ownership rights recorded in the balance sheet of the Corporate Debtor etc. as provided in Section 18 (1) (f) of the Code. The Interim Resolution Professional is directed to prepare a complete list of inventory of assets of the Corporate Debtor;
- iv) The Interim Resolution Professional shall strictly act in accordance with the Code, all the rules framed thereunder by the Board or the Central Government and in accordance with the Code of Conduct governing his profession and as

an Insolvency Professional with high standards of ethics and moral;

- v) The Interim Resolution Professional shall cause a public announcement within three days as contemplated under Regulation 6 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 of the initiation of the Corporate Insolvency Resolution Process in terms of Section 13 (1) (b) of the Code read with Section 15 calling for the submission of claims against 'Corporate Debtor';
- vi) It is hereby directed that the Corporate Debtor, its Directors, personnel and the persons associated with the management shall extend all cooperation to the Interim Resolution Professional in managing the affairs of the Corporate Debtor as a going concern and extend all cooperation in accessing books and records as well as assets of the Corporate Debtor;
- vii) The Interim Resolution Professional shall after collation of all the claims received against the corporate debtor and the determination of the financial position of the corporate debtor constitute a Committee of Creditors and shall file a report, certifying constitution of the Committee to this Tribunal on or before the expiry of thirty days from the date of his appointment, and shall convene first meeting of the

committee within seven days of filing the report of constitution of the committee; and

- viii) The Interim Resolution Professional is directed to send regular progress report to this Tribunal every fortnight.

30. A copy of this order be communicated to both the parties. The learned counsel for the petitioner shall deliver copy of this order to the Interim Resolution Professional forthwith. The Registry is also directed to send copy of this order to the Interim Resolution Professional at his email address forthwith.

Pronounced in open court.

Sd/-

(Ajay Kumar Vatsavayi)
Member (Judicial)

Sd/-

(Pradeep R. Sethi)
Member (Technical)

November 14, 2019
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