



IN THE NATIONAL COMPANY LAW TRIBUNAL
JAIPUR BENCH

CORAM: SHRI DEEP CHANDRA JOSHI,
HON'BLE JUDICIAL MEMBER

SHRI ATUL CHATURVEDI,
HON'BLE TECHNICAL MEMBER

CP No. (IB)- 10/9/JPR/2020

(Under Section 9 of the Insolvency and Bankruptcy Code, 2016, read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicatory Authority) Rules, 2016)

IN THE MATTER OF:

M/S MUSTAFA ENTERPRISES
(Through its Authorised Representative
Mr. Mohammad Waqas, Sole Proprietor)
Registered Office – B-53, Shadman
Colony, Gujarat, Pakistan

...Operational Creditor/Applicant

VERSUS

M/S BHARAT POTTERIES LIMITED
Registered Office – F/ 555-559, Road
No. 6, Vishwakarma Industrial Area,
Jaipur, Rajasthan – 302013

...Corporate Debtor/Respondent

**THE SECRETARY, MINISTRY OF
CORPORATE AFFAIRS**
A-Wing, Shastri Bhawan, Dr. Rajendra
Prasad Road, New Delhi – 110001

... Performa Respondent

For Applicant	:	Udit Purohit, Adv.
For Respondent	:	Prabhansh Sharma, Adv. Nagendra Singh Adha, Adv.

Order Pronounced On: 12.10.2023

CP No. (IB)- 10/9/JPR/2020

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ORDER

Per: Shri Deep Chandra Joshi, Judicial Member

1. This Application has been filed by the M/s Mustafa Enterprises through its authorised representative Mr. Mohammad Waqas ('Operational Creditor/ Applicant'), seeking to initiate Corporate Insolvency Resolution Process ('CIRP') against M/s Bharat Potteries Limited ('Corporate Debtor / Respondent'), under Section 9 of the Insolvency and Bankruptcy Code, 2016 (the 'IBC'/ 'Code') read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 ('Rules').
2. The Applicant, M/s Mustafa Enterprises, is engaged in the business of selling Calcium Phosphate. Its registered office is located at B-53, Shadman Colony, Gujarat, Pakistan. The alleged default on the part of the Respondent for the non-payment of operational dues amounting to \$ 27,052.50 (USD Twenty-Seven Thousand Fifty-Two and Fifty Cents Only) ~ Rs. 19,34,253.75/- (Rupees Nineteen Lakhs Thirty-Four Thousand Two Hundred Fifty-Three and Seventy-Five Paise Only) along with interest payable @ 18% per annum.
3. The Corporate Debtor, M/s Bharat Potteries Limited, is an Unlisted Public Company incorporated under the Companies Act, 1956 on 01.02.1990, having CIN: U26913RJ1990PLC005290. The Respondent has its registered office at F/ 555-559, Road No. 6, Vishwakarma Industrial Area, Jaipur, Rajasthan – 302013. The Corporate Debtor has an Authorised Share Capital



of Rs. 2,50,00,000/- (Rupees Two Crores Fifty Lakhs Only) and Paid-Up Share Capital of Rs. 1,93,84,000/- (Rupees One Crore Ninety-Three Lakhs Eighty-Four Thousand Only). A copy of the Corporate Debtor's Master Data as per the Ministry of Corporate Affairs is annexed as Annexure – A1 of the Application.

4. The details of the transactions leading to the filing of this Application are averred by the Applicant *vide* Diary No. – 3029/2019 dated 24.12.2019 are as follows:
- a. The Applicant is engaged in the business of selling Calcium Phosphate. The Applicant conducts his business operations in the name and style of M/s Mustafa Enterprises, which is a sole proprietorship firm of which the proprietor is the Applicant.
 - b. The Corporate Debtor approached the Applicant and placed two purchase orders on 28.03.2017 for the supply of a total of 50 metric tonnes of calcium phosphate for a sum of \$ 25,000 (Twenty-Five Thousand dollars) at the rate of \$ 500 per Metric tonnes. As per the terms of the purchase order, the amount was to be paid within 25 days from the date of the Bill of Lading. The Corporate Debtor also requested the Applicant to raise the proforma invoice according to the purchase order. The Applicant raised the pro-forma invoice, as per which the quantity variation could be in the range of +/- 10% of the quantity.

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- c. The Applicant supplied 54 metric Tonnes of calcium phosphate *vide* two bills of lading dated 10.04.2017 bearing number GLPLMUN-017006 and another bill of lading dated 23.04.2017 bearing number GLPLMUN-0170014. Despite having received the goods, Corporate Debtor did not make the payment. The Applicant time and again requested the Corporate Debtor to make the outstanding payment, however, the Corporate Debtor did not pay a single penny. The Applicant also requested *vide* emails dated 02.08.2017 and 04.08.2017 to make payment.
- d. Instead of making the payment, the Corporate Debtor issued a debit note dated 26.09.2019, wherein the Corporate Debtor admitted that it had received goods worth Rs. 21,83,870/- (Rupees Twenty-One Lakh Eighty-Three Thousand Eight Hundred Seventy Only) from the Applicant. It was further stated that owing to the alleged defect in the quality of goods, the Corporate Debtor is debiting the account of the Applicant by a sum of Rs. 10,91,935/- (Rupees Ten Lakh Ninety-One Lakh Nine Hundred Thirty-Five Only) thereby leaving a balance of Rs. 10,91,935/- Rupees Ten Lakh Ninety-One Lakh Nine Hundred Thirty-Five Only) to be paid to the Applicant. The Applicant submitted that the debit note was false and baseless, as the allegation of defect in quality was baseless and without any proof and the same was raised at a belated stage after 6 months from the date when the goods were received by the Corporate Debtor.

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- e. In spite of the above, the Corporate Debtor admitted that it owes a sum of Rs. 10,91,935/- (Rupees Ten Lakh Ninety-One Lakh Nine Hundred Thirty-Five Only) to the Applicant. After not receiving the payment for over a period of 2 ½ years, the Applicant issued a demand notice dated 10.10.2019 under Section 8 of the Code. The demand notice was sent by email dated 18.10.2019 and speed post on 19.10.2019 which was delivered to the Corporate Debtor on 23.10.2019 however the Corporate Debtor did not give any response to it.
- f. The aforementioned details as reflected in Part IV of the Application are as follows:

PART IV

PARTICULARS OF OPERATIONAL DEBT

1.	Total amount of debt, details of transactions on account of which debt fell due, and the date from which such debt fell due	<p>Total amount of debt due: Principal amount of debt owed by the Corporate Debtor to the Applicant in USD 27,052.50 (United Stated Dollars Twenty-Seven Thousand Fifty-two and Fifty Cents Only) or Rs. 19,34,253.75/- (Rupees Nineteen Lacs Thirty-Four Thousand Two Hundred Fifty-Three and Seventy-Five Paise only). In addition to the same the Applicant is also entitled to interest @ 1.5% per month on delayed payment from the date of default till the date of realization.</p>
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2. Amount claimed to be in default and the date on which the default occurred	Amount Claimed to be in default: Rs. 19,34,253.75/- and interest @ 1.5% per month			
	<u>Workings for computation:</u>			
	Purchase Order No.	Date of Bill of Lading	Invoice Amount (In USD)	Due date of payment
	BPL-001/2017	14.04.2017	13,522.50	05.05.2017
	BPL-002/2017	23.02.2017	13,530.00	18.05.2017
	Total		27,052.50	

5. Consequent to the notice issued by this Adjudicating Authority, the Respondent filed its Reply *vide* Diary No. 535/2022 dated 25.02.2022 stating as follows:


a. The Respondent contended that the present Application filed by the Applicant is not maintainable in the eyes of law and the same is required to be dismissed in timelines with costs at the Applicant has not come before this Adjudicating Authority with clean hands. The entire Application is nothing but a gauntlet of lies, falsehood, suppression, and concealment of material facts.

b. The Corporate Debtor also relied on the following judgments:

i) *The Hon'ble Supreme Court in the case of Mobilox Innovations (P) Ltd. vs. Kirusa Software (P) Ltd. (MANU/SC/1196/2017: [2017]85) taxmann.com 292/144 SCL 37(SC)*


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- ii) *The Hon'ble Supreme Court in the case of Transmission Corporation of A.P. Limited Vs. Equipment Conductors & Cables Ltd. (MANU/SC/1192/2018: [2018]98) taxmann.com 375/150 SCL 447(SC)*
- c. The dispute very well falls within the ambit of Section 5(6) of the Code which provides as below: dispute includes a suit or arbitration proceedings relating to a) the existence of the amount of debt; b) the quality of goods or service; or c) the breach of a representation of warranty. The Applicant has failed and neglected to comply with section 9(3)(b) of the Code and furnish an affidavit truthfully stating that no notice has been given by the Corporate Debtor related to a dispute of the alleged unpaid operational debt.
- d. Further, the bills that have been issued are being issued in the name of Mustafa Enterprises whereas the Application has been filed by "Mohammad Waqas". The sanctity of filing the present Application is under challenge as there has been no proof attached which shows the authority on behalf of the Mohammad Waqas to file the said Application.
- e. The Applicant has delivered the material less than the said stipulated quality as stated in the purchase order also the quality delivered was poor quality, also in relation to the same the Applicant was to submit an affidavit under Section 9(3)(b), but the same has not been submitted by the Applicant.

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f. As per the authority letter, it is well established that the Applicant has not filed the Application for initiating CIRP but the only aim is to recover the amount in a fraudulent manner, the objective of the act is that the company becomes the going concern and not for recovering the amount which shows the intent of the Applicant from the authority letter which shall defeat the purpose of the act.

6. The Applicant has also filed an affidavit for placing on record the Settlement Agreement dated 15.12.2022 *vide* diary No. 518/2023 dated 24.02.2023 wherein it was mutually agreed between the parties that the Corporate Debtor shall pay Rs. 14,00,000/- (Rupees Fourteen Lakh Only) as full and final payment in terms of the settlement arrived between the Applicant and Corporate Debtor.

7. The Applicant filed its Written Submission *vide* Diary No. 1247//2023 dated 18.05.2023 and stating the following:

a) During the pendency of the present Application, the Corporate Debtor made an offer to the Applicant *vide* its email dated 18.12.2022 for settling the disputed by making a payment of USD 17,300 only in 4 instalments spread over 90 days from the date of execution. Thereby the settlement agreement was executed between the parties. This showed that the Corporate Debtor clearly admitted the receipt of material supplied by the Applicant as well as the operational debt owed by it to the Applicant which was not paid in full. After the execution of the agreement, the

Corporate Debtor did not comply with any of the terms of the settlement, the Applicant kept on reminding the Corporate Debtor to fulfil its obligations under the agreement. The payment schedule was spread over 90 days as follows:

<i>S. No.</i>	<i>Time Duration for Payment</i>	<i>Amount to be paid</i>
1.	21 days	USD 4300
2.	45 days	USD 4000
3.	67 days	USD 4000
4.	90 days	USD 5000
	<i>Total Amount</i>	<i>USD 17300</i>

b. The Applicant had also relied on the following judgments:

- i) *M/s Bhagwati Vanaspati Traders Vs. Senior Superintendent of Post Officers, Meerut reported in AIR 2015 SC 901.*
- ii) *Mobilox Innovations (P) Ltd. vs. Kirusa Software (P) Ltd. AIR 2017 SC 4532.*
- iii) *Rajpal Singh Solanki Vs. Quazar Infrastructure Pvt. Ltd. & Ors.*
- iv) *T & D Hospitality India LLP vs. Explo Media Pvt. Ltd. & Ors.*
- v) *Jain Mills and Electrical stores Vs. State of Orissa & Ors.*
- vi) *Vishal Export Overseas Ltd. Vs. Ind Agro Synergy Ltd. & Ors.*
- vii) *S.N. Bansal Vs. Government of National Capital Territory of Delhi.*

8. At the later stage the Corporate Debtor has filed an additional affidavit *vide* Dairy No. 2471/2023 dated 11.10.2023 wherein the Corporate Debtor states that in terms of the Settlement Agreement dated 15.12.2022, the Corporate Debtor had made the payment of the agreed amount in three instalments

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through demand draft. The particulars of the said payments in terms of the settlement agreement are as follows:

<i>Sr. No.</i>	<i>Particulars of the Demand Draft</i>	<i>Date</i>	<i>Amount in INR</i>
1.	033074	25/08/2023	2,50,000/-
2.	033101	02/09/2023	3,50,000/-
3.	033189	05/10.2023	7,50,000/-
		<i>Total</i>	<i>13,50,000/-</i>

9. We have heard the Learned Counsels for the parties and perused the averments made in the Application, Reply, Additional Affidavits, Written Submissions, and the Documents enclosed with the Application.
10. This Adjudicating Authority having perused all the relevant papers and finding them in order notes that the Registered Office of the Respondent is situated in Jaipur, and therefore Adjudicating Authority has jurisdiction to entertain and try this Application. Further, this matter is within the purview of Laws of Limitation, as the time period of default is in the year 2017 and the Application was filed before this Adjudicating Authority on 24.12.2019, hence the period of three years after the default occurred had not been exhausted at the time of filing of this Application. Therefore, the present Application has been filed within the prescribed period of limitation.
11. Before we come to the facts of the present case, the statutory scheme with regard to the Application under Section 9 needs to be recapitulated. Section 8 of the Code requires the Operational Creditor on the occurrence of default

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to deliver a Demand Notice on unpaid Operational Debt. Section 8(2) provides that Corporate Debtor within a period of 10 days of the receipt of the Demand Notice bring to the notice of the Operational Creditor existence of dispute if any. Section 8 of the Code is as follows:

“Section 8: Insolvency resolution by operational creditor. - (1) An operational creditor may, on the occurrence of a default, deliver a demand notice of unpaid operational debt or copy of an invoice demanding payment of the amount involved in the default to the corporate debtor in such form and manner as may be prescribed.

(2) The corporate debtor shall, within a period of ten days of the receipt of the demand notice or copy of the invoice mentioned in sub-section (1) bring to the notice of the operational creditor—

(a) existence of a dispute, [if any, or] record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoice in relation to such dispute;

(b) the [payment] of unpaid operational debt—

(i) by sending an attested copy of the record of electronic transfer of the unpaid amount from the bank account of the corporate debtor; or


(ii) by sending an attested copy of record that the operational creditor has encashed a cheque issued by the corporate debtor.

Explanation.—For the purposes of this section, a “demand notice” means a notice served by an operational creditor to the corporate debtor demanding 2[payment] of the operational debt in respect of which the default has occurred.”

12. In the present case, the first issue for consideration is whether the Demand Notice under Section 8 of the IBC, 2016 has been served to the Corporate Debtor. The Applicant in Form – 4 has served the Demand Notice dated

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16.10.2019 to the Corporate Debtor on 19.10.2019 through the registered post and e-mail on 18.10.2019.

13. The next issue for consideration is whether there is a dispute regarding the quality of the goods supplied by the Applicant to the Corporate Debtor. In the present case the Corporate Debtor has disputed the claim of the Applicant on account of deficiency of the quality and the same was contended in the purchase order that the quality of goods delivered was poor. The contention of the Operational Creditor that the dispute regarding the quality of goods was raised after 6 months of delivery of the same is not tenable. The purchase orders along with Performa invoices and bill of lading were raised by the Applicant in the months of March and April 2017 and the alleged dispute was raised by the Corporate Debtor on 26.09.2017 by way of issuance of the Debit Note on the account of the quality of the goods supplied by the Applicant. There was no mention of the quality of goods being sub-par at any time before the said scenario. The defence taken by the Corporate Debtor was an afterthought to shrug off liability and was not covered in a pre-existing dispute. Therefore, it is considered an afterthought with the sole intention to stall the commencement of insolvency resolution proceedings against the Corporate Debtor. Therefore, it is held that there exists no dispute, as contemplated under Section 8(2)(a) of the Code.





14. Before we delve into the issue before us, it is important to refer to the Additional Affidavit filed by the Corporate Debtor wherein it is seen that the Corporate Debtor has made the payment of Rs. 13,50,000/- (Rupees Thirteen Lakh Fifty Thousand Only) in terms of the Settlement Agreement dated 15.12.2022. The particulars of the said payments to in terms of the Settlement Agreement are as follows:

<i>Sr. No.</i>	<i>Particulars of the Demand Draft</i>	<i>Date</i>	<i>Amount in INR</i>
1.	033074	25/08/2023	2,50,000/-
2.	033101	02/09/2023	3,50,000/-
3.	033189	05/10.2023	7,50,000/-
		<i>Total</i>	<i>13,50,000/-</i>

Once a certain amount is paid by the Corporate Debtor as a settlement against full payment and the same is corroborated by the said additional affidavit filed by the Corporate Debtor, the Operational Creditor cannot be allowed to go back and undo the same as it pleases, and when it pleases.

15. Therefore, it is clear from the documents produced before us that the Corporate Debtor has already paid Rs. 13.50 Lacks in compliance of the Settlement Agreement. We need not go into the ingredients of Section 9 in the present matter as it is clear from the documents presented before us that a settlement was arrived at between the parties for payment of Rs. 14,00,000/- (Rupees Fourteen Lakh Only) as full and final payment against the total claim of the Applicant. Out of that the Corporate Debtor has made of Rs. 13,50,000/-

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(Rupees Thirteen Lakh Fifty Thousand Only) via Demand Draft. Hence the present application is pursued with an intention to recover the alleged outstanding amount by initiating CIRP proceedings, it is not a fit case for admission and the same is liable to be rejected. It is a settled position of law that provisions of the Code cannot be invoked for the recovery of outstanding amount but it can be invoked to initiate CIRP for justified reasons; as the spirit of legislation of the Code is for the resolution of debt and not for recovery.

16.Hence, the Application is dismissed. The Order in the present matter is made in terms of Section 9 (5) (ii) of IBC, 2016 and based on the facts and pleadings submitted by the parties in the instant case and shall not prejudice any matter or proceedings between the parties, if any, before any other Court, Tribunal or any judicial or other authority.

17.Let the copy of the Order be served to the parties and IBBI.

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**DEEP CHANDRA JOSHI,
JUDICIAL MEMBER**

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**ATUL CHATURVEDI,
TECHNICAL MEMBER**