

IN THE NATIONAL COMPANY LAW TRIBUNAL,
KOCHI BENCH

TIBA NO.25/KOB/2019

(IBA No.598/2019 of NCLT Chennai Bench)

(Under Section 9 (6) of Insolvency and Bankruptcy Code 2016)

Date of Order: 07.11.2019

Applicant/Operational Creditor

M/s Roxcel Trading Company GmbH,
Thurngasse 10, 1090 Vienna,
Austria.

Vs.

Respondent/Corporate Debtor

M/s Nui Pulp and Paper Industries Pvt.Ltd.
Suroor, Chenakkal, Calicut University,
Calicut, Kozhikode, Kerala-673635.

Counsel for applicant .. M/s Santhosh Mathew & Vijay V.Paul

Counsel for respondent .. M/s Poulose C.Abraham & Pranoy
Harilal, Advocates.

ORDER

1. This is an application filed under section 9 of Insolvency & Bankruptcy Code, 2016 (hereinafter as **I&B Code**) read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (hereinafter as **Rules**) by the Petitioner **M/s Roxcel Trading GmbH** (hereinafter as '**Operational Creditor**') against **M/S NUI Pulp and Paper Industries Private Limited** (hereinafter as '**Corporate Debtor/Respondent**'). The application filed on 20.05.2019 with Hon'ble NCLT, Chennai Bench with **IBA/598/2019** and thereafter it was transferred to Kochi Bench with TIBA/25/KOB/2019.



2. The Operational Creditor inter alia engaged in the business of export of cup stock baseboard used in the manufacturing of paper cups and cup stocks. And the Corporate Debtor is engaged in the business of manufacturing paper and paper related products such as paper cups and cup stocks.
3. It is submitted by the Operational Creditor that the Corporate Debtor approached 'Roxcel/Handelsgesellschaft MBH' for supply of cup stock baseboard which is to be used in their manufacturing of paper cups and cup stock. Even though the original transaction was between Corporate Debtor and 'Roxcel/Handelsgesellschaft MBH' (hereinafter as 'Roxcel Handel') the business along with all rights and obligations of RoxcelHandel, has been legally transferred to Roxcel Trading GmbH (Operational Creditor) from 10.04.2018.
4. The Operational Creditor further submitted that, the Corporate Debtor and the Roxcel Handel have entered into several Proforma Invoice/ Order confirmation in their business transactions. Thereafter disputes arose between them regarding some of the invoices. The present demand is restricted to claim arising out of the undisputed Performa invoices only.
5. The operational Creditor has furnished the following invoices as undisputed and the amount of which was overdue as undisputed from the Corporate Debtor

COMMERCIAL INVOICE NO.	DATE	AMOUNT
2017 INV02295	06.03.2017	USD 118,958.40/-
2017 INV02294	06.03.2017	USD 4, 09,349.70/-
2017 INV03697	13.04.2017	USD 1, 18,885.32/-
2017 INV03820	18.04.2017	USD 4, 06,991.79/-



	TOTAL	USD 10,54,185.21/-
--	--------------	--------------------

6. The supplies were made by the Operational creditor for the above invoices and accepted by the Corporate Debtor. Thereafter, the Corporate Debtor failed to clear the payment arising out of the above invoices till date except for making payment of USD 41,978 on 11.05.2017. Thereby the total amount due and payable by the Corporate Debtor is USD 10,12,207.21 (USD Ten Lakhs Twelve Thousand Two Hundred and Seven Dollars and Twenty Cents) with interest at 10% per annum amounting to USD 71,636.20 (Seventy-One Thousand Six Hundred and Thirty-Six Dollar and Twenty Cents). The debt is in USD and has been converted to INR at the rate of ₹70.54 (as on 04.03.2019) ₹ 7,64,54,285.20 (Rupees Seven Crores Sixty-Four Lakhs Fifty-Four Thousand Two Hundred and Eighty-Five and Twenty Paisa). The Corporate Debtor has not paid the outstanding dues despite reminders. Therefore, the Operational Creditor sent a demand notice on 22.03.2019 to repay the outstanding amount within 10 days of receipt of notice. Having received the notice on 25.03.2019, the Corporate Debtor replied to the notice on 30.03.2019 informing that substantial sums were paid towards the invoice mentioned in the application and forwarded a bank statement on 01.04.2019 as proof of payment which were erroneously not enclosed to their reply on 30.03.2019. However, the Operational Creditor has not agreed with the claim of payment made by the Corporate Debtor.
7. The Operational creditor filed the petition on 20.05.2019 in Hon'ble NCLT, Chennai Bench. The Operational Creditor clearly opposed the averments made by the corporate debtor in the reply to demand notice. The Operational Creditor



further submitted that they have followed all lawful procedures during the spin off of the company. Therefore, it is not mandatory for the operational creditor to inform the Corporate Debtor regarding the transfer of Company as averred by the Corporate Debtor and it is also not necessary for them to get a balance confirmation from the Corporate Debtor regarding the overdue amount to Roxcel Handel.

8. As regards to the quality of the materials supplied to the corporate Debtor. It was clarified by the Operational Creditor that the notice/instant application did not relate to the invoices that are disputed. Therefore, the allegation on quality of material supplied is irrelevant. After all, the Corporate Debtor having reaped the benefits or substantial profits out of the materials/ goods supplied by the Operational Creditor.
9. And the Operational Creditor also submitted that the Corporate Debtor's claim in their reply notice that substantial amount was paid by them is not correct, as the amount they purported to have paid is exactly the amount paid for the supplies made to the Matheel Al- Nujoom Group of Industries (a company incorporated under in the Kingdom of Saudi Arabia, conducting operations in accordance with the laws of that country) (hereinafter as 'MATHEEL'). The Corporate Debtor and the Matheel has common Directors and Mr. Shameem Eramakkaveetil Puthiyakath is a joint holder of the account of NUI Pulp and Paper Industries with Vijaya Bank and the same Mr. Shameem Eramakkaveetil Puthiyakath is also a Director and represent the Corporate Debtor in their business dealing. Further, it was business practice to apportion the payments received from both the companies which is being done earlier also as per understanding.
10. It is also submitted by the Operational Creditor in its application that the alleged Bank statements annexed with the reply notice, showing the amounts paid on



04.10.2016, 26.10.2016, 27.01.2017, 11.05.2017, 02.08.2017 and 06.10.2017, and these dates cannot be considered as payments of undisputed invoices in the instant petition. The operational Creditor set forth 3 main contention regarding the payment is that;

- I. The Bank statements are ledger entries without any seal/ letter head of any bank extracted from the books of accounts of the Corporate debtor therefore the same cannot be considered as proof of payments;
- II. The alleged statements are not attested and does not satisfy /comply with any criteria to be regarded as 'proof of payments; and
- III. The Bank statement is not complete as is evident from the page number containing therein.

11. Further the Operational Creditor also stated in the application that the amount was apportioned /accounted by the Operational Creditor in the name of two entities i.e.; NUI PULP AND PAPER INDUSTRIES PVT LTD (Corporate Debtor) and MATHEEL. Accordingly, the payments made in the Bank statements dated 04.10.2016, 26.10.2016, 27.01.2017, 11.05.2017, 02.08.2017 and 06.10.2017 were also apportioned between these two entities.

DATE	AMOUNT	APPORTIONMENT
04.10.2016	USD 377978 [₹2,52,56,060]	USD 33770- MATHEEL USD 40208- CORPORATE DEBTOR

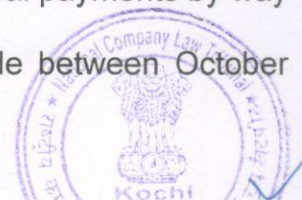


26.10.2016	USD 241978 [₹1,62,28,132]	This is for Invoice No.2016 Inv 03899 for which there is no dispute and which has been accounted as part payment in books of accounts of the Operational Creditor. The remaining amount is promised to be transferred from Saudi Arabia.
27.01.2017	USD 274000 [₹18755759]	USD 117920.80 – CORPORATE DEBTOR USD 156079.20 – MATHEEL
11.05.2017	USD 41978 [₹5779497]	Accounted fully in the name of the Corporate Debtor
02.08.2017	USD 161,741.61 [₹1,04,16,709]	Accounted in the name of the Corporate Debtor
06.10.2017	USD 291502.20	Accounted in the name of the Corporate Debtor and adjusted in another invoice which was due and payable by the Corporate Debtor.

12. Hence under these circumstances the Operational Creditor filed an application before the National Company Law Tribunal, Chennai to initiate Corporate Insolvency Resolution Process for recovery of USD 10,12,207 (INR 7,64,54,285.20 (Rupees Seven Crores Sixty-Four Lakhs Fifty-Four Thousand Two Hundred and Eighty-Five and Twenty Paise) relating to the undisputed invoice, for which payments were not made by the Corporate Debtor.

13. The Corporate debtor in its reply submitted that the present dispute arises out of a contractual relation between M/s RoxcelHandelsgesellschaft MBH, and the Corporate debtor, to supply goods based on an agreed sample in the year 2016. However, no intimation regarding the transfer of assets, rights and obligation was made to the corporate Debtor. During the course of business, the product quality of several lots was not up to the desired level and was disputed.

14. The Corporate Debtor has also submitted in the Reply that several payments by way of advance remittances in favour of Roxcel Handel were made between October



2016 and 2017, through the running account holding by NUI PULP AND PAPER INDUSTRIES PVT LTD and SHAMEEL ERAMAKAVEETIL PUTHIYAKATH maintained with Vijaya Bank. Despite receipt of several payments due to them an exaggerated amount was claimed.

15. The Business transaction with Roxcel Handel is commenced only since October 2016, During the discussion between two entities the payment terms were confirmed by the Corporate Debtor was L/C or cash in advance, which terms were complied by the Corporate Debtor by way of advance remittances for Imports. As regards, the amounts paid on 04.10.2016, 26.10.2016, 27.01.2017, 11.05.2017, 02.08.2017 and 06.10.2017 had been in receipt of the said advance remittances. The invoices raised in the name of the Corporate Debtor by Roxcel Handel; however, the operational Creditor, on its own has attempted to combine the dues of a foreign entity (MATHEEL) and that of the Corporate Debtor. In the normal course of business, transfer of funds towards the dues of another company ought to be supported by approval of the Corporate Debtor followed by a debit note for the agreed amounts. No approval regarding such transaction has been taken from the corporate Debtor.

16. The Corporate Debtor further claimed that admittedly since the month of October 2017 quality issues had cropped up over the materials supplied by Operational Creditor and is still under dispute. Thus, invoices No's 2017INV09404 & 2017INV10887 was duly communicated to the operational Creditor as disputed one and the Operational Creditor conducted an Inspection and attempted to settle disputes by offering discounts. And also, the Operational Creditor had failed to obtain the balance Confirmation from the Corporate Debtor.



17. The Operational Creditor submitted that, when the application came up before the NCLT, Chennai Bench they have sought an interim order restraining the Corporate Debtor and its directors from alienating, encumbering or creating any third party interest on the assets of the corporate Debtor. The NCLT, Chennai Bench after hearing both the counsel has passed the following interim order.

“However, the apprehension of the Applicant can be taken note of till the time either the Application is admitted or rejected, the assets and the accounts of the Company need to be maintained on date except withdrawal of the legitimate expenses required for carrying on the day-to-day expenses. Therefore, this Authority in exercise of the powers conferred under Rule 11 of the NCLT Rules, 2016, restrains the Corporate Debtor and its Directors from alienating, encumbering or creating any third-party interest on the assets of the 1st Respondent Company till further orders.”

18. Against the said order an appeal was filed before the Hon'ble National company Law Appellate Tribunal by the Corporate Debtor. However, NCLAT upheld the Interim order of NCLT, Chennai. The Counsel for the Operational Creditor further informed that an SLP was filed in the Hon'ble Supreme Court by the Corporate Debtor against the said order of NCLAT under CIVIL APPEAL NO(S). 6697/2019. The Hon'ble Supreme court dismissed the appeal with the following observations:



'No case is made out to interfere with the impugned order(s) passed by the Tribunal. The appeal is, accordingly, dismissed.'

19. The Operational Creditor denied all the allegations/averments made by the Corporate debtor in his counter. The Operational Creditor claimed that he had produced relevant e-mail correspondence between the parties where in the operational Creditor had clearly stated the apportionment of amounts between the Corporate Debtor and Matheel. The counsel for the Operational Creditor pointed out the emails dated 13.10.2017 indicating the apportionment of the amount for the invoice dated 06.10.2017. (Annexure 1) The operational Creditor also drew attention of the Tribunal to the e-mails dated 05.10.2016 (Annexure-II 17 to the Application) and 12.05.2017 (annexure II 20 to the Application) in this regard. At no point of time, the Corporate Debtor has raised any objection for the apportionment of payments received by the Operational Creditor. Corporate Debtor cannot raise an objection now, as an afterthought.
20. It was further stated that the SWIFT copies of the payments made furnished by the Corporate Debtor in their Counter did not contain the invoice numbers which are the subject matter of the instant application except for a partial payment towards Invoice No. 2017 INV02295. And as far as the advance remittances is concerned no logical explanation is drawn as to how the Corporate debtor paid the amounts before the date of invoice, even though there is a window of 90 days for payment from the date of Bill of Lading.
21. The Corporate Debtor in response to the Rejoinder stated that the 'substantial payments 'as mentioned in the reply notice pertains to the amount still under contingency as a part of the disputed invoices after discount. And the full and



11BA/25/KOB/2019

Complete payments' indicates the amounts for the undisputed invoices pertain to the raw materials supplied to India.

22. It is also submitted that the Roxcel Handel had obtained payment guarantee dated 04.06.2017 from the Foreign Entity 'MATHEEL' towards payments allegedly due in various invoices including the 4 invoices in respect of which the amount is due and payable towards the Operational Creditor. This was followed by a Demand Letter dated 14.12.2017 issued to Saudi Arabian entity 'MATHEEL' calling for production of SWIFT copy of agreed amount of USD 1 million. And the Operational creditor also filed case No. 1140 against 'Matheel' on 21.11.2018 before the Jeddah Commercial Court in Saudi Arabia claiming the amount due and payable by the Corporate Debtor. However, the Operational Creditor during the final arguments submitted that if they receive any amount from Matheel pertaining to case No. 1140 before the Jeddah Commercial Court in Saudi Arabia, the amount so received shall be proportionately reduced from the claim made in this Application.

23. Further it is stated that the Operational Creditor had mixed-up the accounts /invoices of a Saudi Arabian Entity (MATHEL) with accounts of the Corporate Debtor. And there is no agreement or consent, in any manner whatsoever, given by the Corporate Debtor to apportion the payments made by Corporate Debtor towards the account of Matheel. Apportionment of the amounts paid by the Corporate Debtor by the petitioner towards the alleged dues against another company, that too which is incorporated outside India is illegal, contrary to RBI norms, arbitrary and without the knowledge of the Corporate Debtor, even though there were e-mail correspondences between the parties for apportionment, it is a settled principle that parties cannot contract out of the Law.

FINDINGS: -



24. At the time of final hearing, the Corporate Debtor was directed to file Audited Financial statements for the Financial year from 2015-16 to 2018-19. After verifying the statements it was clearly evident from the 'Notes to the Financial statements', in the head 'trade payables' as on 31.03.2017 no due amount is shown towards the Operational Creditor. However as on 31st March 2018, it appears that an amount of ₹ 2,96,57,794/- in the name of Roxcel Handel MBH is due. It is also evident from the 'Trade payables' as on 31.03.2019 an amount of ₹91,05,994 is still due to the Operational Creditor. This indicates the averment made by the Corporate Debtor that they have made advance payments for the supplies is not supported by any evidence.
25. We did not agree with the contention of the Corporate Debtor that the amount transferred by them was accounted for by the Operational Creditor unilaterally in the name of two entities, as several e-mail communications dated 06.10.2016, 17.05.2017, 13.10.2017 regarding the apportionment were placed on record and nowhere the Corporate Debtor has objected for such apportionment. This clearly shows the business practice prevailing between the parties.
26. It is also appeared from the records that by way of a division agreement and board resolution, 'Roxcel/Handelsgesellschaft MBH' decided to spin off all the assets of 'Roxcel/Handelsgesellschaft MBH' to operational Creditor. Therefore, the debt now stands transferred and vested with Operational Creditor. The Corporate Debtor has done e-mail correspondences with the new entity i.e. Roxcel Trading GmbH regarding supplies made and outstanding dues. Hence, they cannot claim ignorance of the same at this stage and dispute the spin off which was an internal arrangement of Roxcel.



27. Further the Corporate Debtor in support of their arguments had referred to several SWIFT transaction messages. We observe from the SWIFT messages that none of them was related to disputed invoices in the instant petition except one, which relates to partial payments of an Invoice. The Operational Creditor admitted receipt by partial payment of USD 42,000 due on Commercial Invoice No. 2017 INV02295, dated.06.03.2017 which was reduced from that invoice amount of USD 118.958.40.
28. Further the statement made by the Corporate Debtor that there was a Payment terms between them in relation to the advance remittances for imports made by Operational Creditor was not proved. On perusal of 4 Commercial invoices in dispute, we found that, the payments are to be made within 90 days from Bill of Lading date to Roxcels Handel account with Raiffeisen bank International AG. Therefore, the arguments stated by the Corporate Debtor on this ground could not be supported by evidence. Hence, they are bound to be rejected.
29. After getting convinced with the points mentioned by Operational Creditor we proceed further to determine the admissibility of the application based on the landmark judgement of the Hon'ble Supreme Court in "**Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software (P) Limited- 2017 1 SCC Online SC 353**", held that as to what are the facts to be examined by the Adjudicating Authority while examining an application under Section 9, which are as follows:
- (i) *Whether there is an "operational debt" as defined exceeding Rs.1 lakh?
(Section 4 of the Code);*
 - (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*



TIBA/25/KOB/2019

(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."

30. After perusal of case record, it is established that:

- i. The operational debt due to pay exceeds Rs 1 Lakh
- ii. The documentary evidence furnished shows that the aforesaid debt is due and not paid till date.
- iii. There is no proof of existence of any earlier dispute between parties or arbitration proceedings filed before the Competent Authority.

31. Since all the aforesaid condition are fulfilled in the instant case, we find application submitted by operational Creditor is Complete in all respects and there is no defect pointed out by Corporate Debtor. As such the instant Application deserves to be admitted. Therefore, Application No. **TIBA/25/KOB/2019** is **ADMITTED** and the moratorium is declared for prohibiting all of the following in terms of Section 14(1) of the Code as amended:

- 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 off 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 Securitisation 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

32. It is further directed that the services to the corporate-debtor, if continuing shall not be terminated or suspended or interrupted during moratorium period. The moratorium shall however not apply to such transactions as may be notified by the Central Government in consultation with any financial regulator and to a surety in a contract of guarantee to a Corporate Debtor.

a) The order of moratorium shall have effect from the date of this order till the 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.

b) That the public pronouncement of the corporate Insolvency Resolution process shall be made immediately as specified under Section 13 of IBC.



c) As the Operational Creditor has not suggested any name of IRP in their application, after perusing the IBBI empanelment of IRP list available as on date, this Bench at this moment appoints **Mr. BALAKRISHNAN BABURAJAN** having registration No. IBBI/IPA-002/IP-N00544/2017-2018/11691 (Email-baburajanfcs@gmail.com) residing at 2nd Floor, Uzhinjelil Tower, Subhash Chandra Bose Road Ponnuruni, Vytilla P.O Kochi, Ernakulam, Kerala. Pin Code. 682019 as Interim Resolution Professional to carry the functions as mentioned under IBC, the fee payable to IRP/RP shall comply with the IBBI Regulations/Circulars/Directions issued in this regard.

d) The Registry is directed to immediately communicate this order to the Operational Creditor, the Corporate Debtor and the Interim Resolution Professional.

Dated the 7th day of November, 2019

Sd/-
(Veera Brahma Rao Arekapudi)
Member (Technical)

Sd/-
(Ashok Kumar Borah)
Member (Judicial)

Certified to be True Copy


8/11/2019
Deputy Registrar

National Company Law Tribunal
Kochi Bench

Memo No. TIBA/25/KOB/2019/.....
To

Date: 8.11.2019

1. M/s Santhosh Mathew & Vijay V.Paul, Advocates, Ninan & Mathew, Advocates, 2nd floor, 42/1686, D20, High Court East End, Kochi-18 (**Counsel for the petitioner**)
2. M/s Gopalakrishnan Nambiar & Paulose C.Abraham, M/s Menon and Pai, A Advocates, IS Press Road, Ernakulam, Kochi-682018 (**Counsel for the respondents**)
3. **Mr. BALAKRISHNAN BABURAJAN** having registration No. IBBI/IPA-002/IP-N00544/2017-2018/11691 residing at 2nd Floor, Uzhinjelil Tower, Subhash Chandra Bose Road Ponnuruni, Vytilla P.O Kochi, Ernakulam, Kerala. Pin Code. 682019

