

BENCH-I

MENTIONING

NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
KOLKATA

CP (.1B..) No. 1447.../KB/2018

Present: 1. Hon'ble Member (J), Shri Jinan K.R.
2. Hon'ble Member (T), Shri Harish Chander Suri

ATTENDANCE-CUM-ORDER SHEET OF THE HEARING ON 07/02/2020....., At 10:30 A.M

Name of the Company		Keshav park pvt. Ltd. vs West-Bengal Biotech Development Limited	
Under Section		91Bc	
Sl. No.	Name & Designation of Authorized Representative (IN CAPITAL LETTERS)	Appearing on behalf of	Signature with date

Mr. Quik Sanjay K

Operational
Creditor

7.2.20

ORDER

Ld. Counsel for the Operational Creditor mentions the matter drawing our attention to an omission of the word "Corporation" in the name of the Corporate Debtor. However, on going through the petition and Form 5 it appears that the name of the Corporate Debtor was mentioned as "**West Bengal Biotech Development Limited**".

However, it appears that inadvertently the word "Limited" was omitted from the name of the Corporate Debtor at pages 2 and 11, which is a typographical error, needs correction. Accordingly, the order is corrected as follows :-

- (i) At page 2, para 1, 6th line , after the word "Development" add the word "**Limited**"; and
- (ii) At page 11, para (i) of the operative portion of the order, last line, after the word "Development" add the word "**Limited**" by dropping the word "Dept."

The above rectification of the order has been made in terms of the power conferred upon the Tribunal under Rule 154 of the NCLT Rules, 2016.

Amended order is to be uploaded forthwith.

Urgent photo copy of this order, if applied for, be supplied to the parties subject to compliance with all requisite formalities.



(Harish Chander Suri)
Member (T)



(Jinan K.R.)
Member (J)

IN THE NATIONAL COMPANY LAW TRIBUNAL,
KOLKATA BENCH, KOLKATA

CP (IB) No.1447/KB/2018

In the matter of:

An application for initiation of Corporate Insolvency Resolution Process under Section 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016;
And

In the Matter of:

Keshav Park Private Limited, having its registered office at 32, Ezra Street, 6th Floor, Room No. 664, Kolkata-700001, West Bengal.

... Applicant/Operational Creditor

And

In the Matter of:

West Bengal Biotech Development Limited, Dept. of Bio-Technology, Govt. of West Bengal, having its registered office at Vigyan Chetana Bhawan, EN-24, 9th Floor, Sector-V, Salt Lake City, Kolkata- 700091, West Bengal.

... Respondent/Corporate Debtor

Date of Hearing: 23rd January, 2020

Order Delivered on: 28th January, 2020

Date of Amendment: 10th February, 2020

Coram:

Jinan K.R., Hon'ble Member (Judicial)
Harish Chander Suri, Hon'ble Member (Technical)

For the Operational Creditor : 1.Mr. Debmalya Ghoshal, Advocate
2.Mr. Ovik Sengupta, Advocate
3.Mr. Niladri Khanra, Advocate

For the Corporate Debtor : 1. Mr. G. Choudhary, Advocate
2. Mr. S. Majumdar, Advocate

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A M E N D E D O R D E R**Jinan K.R., Hon'ble Member (Judicial)**

1. Keshav Park Private Limited-Operational Creditor filed this application under Sec.9 of the Insolvency and Bankruptcy Code, 2016 (in short IB Code) read with Rule 6 of the Insolvency and Bankruptcy Code (Application to Adjudicating Authority) Rules, 2016 for initiation of corporate insolvency resolution process as against the Corporate Debtor/ West Bengal Biotech Development Limited on the allegation that the corporate debtor has committed default in payment of operational debt to the tune of Rs. 87,48,130.00 (Rupees Eighty-Seven Lakhs Forty-Eight Thousand One Hundred and Thirty) including the interest @ 18% from 11/02/2012 for the services rendered in pursuance of the work order issued by the Corporate Debtor dated 22/02/2011.

2. The brief facts for the consideration of this application are as follows: -

- i. The Corporate Debtor issued a work order on 22/02/2011 to the Operational Creditor for interior decoration of the 1st, 2nd and 4th floor of the building at EN24, Salt Lake, Sector-V, Kolkata-700091. On completion of the work, the Operational Creditor raised three bills on 11/02/2012 bearing bill No. Keshav/11-12/1, Keshav/11-12/2, Keshav/11-12/3 total Amounting to Rs. 35,44,776.00 and forwarded the same to the office of the Corporate Debtor through a forwarding letter dated 11/02/2012, out of which, an amount of Rs. 6,34,886.00 was paid by the Corporate Debtor against the aforesaid dues. In spite of giving several reminders, the Corporate Debtor did not pay the outstanding bill amount. Finding no other alternatives, the Operational Creditor, on 07/11/2017, issued demand notice under Section 8 in Form 3 under the Insolvency and Bankruptcy Code, 2016

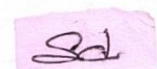
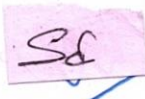
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read with Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 to the Corporate Debtor. Immediately after receiving the notice dated 07/11/2017, the MD of the Corporate Debtor through letter dated 14/12/2017 requesting the Operational Creditor to send its representatives to the office of the Corporate Debtor with all the papers and documents for settlement of the claim thereby duly admitting and accepting the claim of the Operational Creditor. But in spite of the meeting dated 20/12/2017, the Corporate Debtor till now did not clear the outstanding bills of the Operational Creditor. But in spite of the meeting dated 20/12/2017 and subsequent receipt of bills and letters dated 11th January, 2018 and 11th April, 2018, the Corporate Debtor till now did not clear the outstanding bills of the Operational Creditor. In view of the above, it is submitted that the Corporate Debtor is deemed to be "unable to pay its debts". Upon the above contentions, the Operational Creditor prays for passing an order for admission under section 9 of the IBC, 2016.

3. The Respondent/corporate debtor appeared and filed the reply affidavit contending in brief as follows:-

- i. The application filed by the Operational Creditor is not maintainable in law or in the facts and circumstances of the case. Disputed issues are involved in the matter and, therefore, cannot be decided in a summary manner. The claim of the Operational Creditor is also barred by limitation and the Operational Creditor has suppressed the material facts, the documents produced on the side of the Operational Creditor are fabricated and created for the purpose of the present litigation. The Operational Creditor was engaged in the renovating



works in order to carry out glass partition, electrical fittings, air condition fittings and false ceilings in respect of a building situated at EN-24,9th Floor, Sector V, Salt Lake, Kolkata. In terms of the letter of work order issued to the Operational Creditor, the Operational Creditor was required to carry out the above said works in terms of for the plan attached along with letter dated 22nd February, 2011. The work which has been done is contrary to the plan and not in consonance therewith. Moreover, there is no completion certificate to show that the work has been completed. In fact the work has remained incomplete. The Operational Creditor also failed to cause produced original invoices, vouchers from third party vendors, who were inducted by the Operational Creditor in order to carry out the said works. The original invoices, vouchers or challans were also not made over by the operational creditor to the corporate debtor. It is denied that a sum of Rs. 87,48,130.00 or any part thereof is due or payable as claimed by the Operational Creditor. The Corporate Debtor has not promised to pay any amount as claimed by the Operational Creditor.

- ii. The Corporate Debtor was on the verge of sending the reply to the Form-3 notice issued by the Corporate Debtor. However, by the time the reply was made ready by the Corporate Debtor, the present petition was served upon the Corporate Debtor. It is incorrect to say that the Corporate Debtor is commercially insolvent. The Corporate Debtor is not liable to pay the amount as demanded by the Operational Creditor. No amount is due and payable to the Operational Creditor. Accordingly, this application is liable to be

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dismissed.

4. The Operational Creditor filed Rejoinder denying the allegations leveled by the Corporate Debtor in the reply affidavit and contended that the Corporate Debtor is trying to evade the payments found due by making out a moonshine defence. The Operational Creditor's induction for carrying out the work is admitted by the Corporate Debtor. It is incorrect to say that the work entrusted to the Operational Creditor was incomplete. The payments were to be made upon the bills raised by the Operational Creditor. The contractors appointed by the Operational Creditor are within the exclusive domain of the Operational Creditor and the same was never to look out the Corporate Debtor. It is incorrect to say that the petition is barred by limitation. All the works entrusted to the Operational Creditor has been done and it is incorrect to say that only fixation of air condition work has been done as alleged. It is also incorrect to say that the documents produced by the Operational Creditor were forged as alleged. The instant application is liable to be admitted and the contentions raised by the Corporate Debtor are liable to be rejected.

5. Heard the learned counsels appearing on the side of the Operational Creditor and Corporate Debtor and perused the records and the citation referred to on the side of the Operational Creditor. The Operational Creditor admittedly was engaged in the business of carrying out interior and/or renovating works. Admittedly a work order was issued to the Operational Creditor dated 22nd February, 2011 (Annexure-D) by the Corporate Debtor to the Operational Creditor to carry out glass partition, electrical fittings, air condition fittings and false ceilings in respect of a building situated at Salt Lake, Kolkata. It is contended by the learned counsel for the Operational Creditor that entire work has been carried out with satisfaction of the Corporate Debtor and the

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Corporate Debtor failed in payment of Rs.29,09,890/- with interest @ 18% which comes to Rs. 58,38,240.00/- totaling to Rs. 87,48,130.00/- It is further contended on the side of the Operational Creditor despite reminder letters issued dated 28/05/2012, 05/06/2013, 14/11/2013, 01/04/2014 and 07/06/2016 (Annexure-F). The Corporate Debtor failed to pay the outstanding amount due and claimed by the Operational Creditor, and thereby was compelled to issue a demand Notice under section 8 of the Code on 7th November, 2017 demanding the outstanding amounts. The demand notice was served upon the corporate debtor. Despite service of demand notice, the Corporate Debtor has not paid the amount and no notice of dispute also has been served upon the Operational Creditor, but issued reply letter dated 14.12.2017 showing his readiness to settle the matter and that despite the reply and approaching the respondent for discussions, the Corporate Debtor did not pay the debts and therefore the application is liable to admitted.

6. When this case was taken up for hearing, the learned counsel appearing for the Respondents/Corporate Debtor mainly objected this application contending that the claim of the Operational Creditor is barred by limitation. According to the learned counsel for the Corporate Debtor, the bills on the basis of which claims have been raised are dated 11th February, 2012 and therefore, the application filed on 26/10/2018 is barred by limitation and for the said reasons itself, this application is liable to be dismissed.

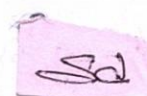
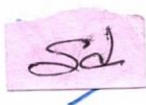
7. Upon perusal of the records and hearing the contentions on both sides, we are satisfied that the Corporate Debtor has not succeeded in establishing any pre-existing disputes. It can be legitimately inferred that it is why the Ld. Counsel did not address any argument attempting to prove a pre existing dispute other than a challenge that the corporate debtor is not liable for the

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interest as claimed by the operational creditor for want of agreement to pay interest. The application is otherwise complete meeting all the requirement to be meted out under section 9 (2) of the Code. The affidavits under section 9(3)(b) of the Code and statement of bank account proving non-payment of unpaid Operational debt as required under Section 9(3)(c) of the Code seen produced on the side of the operational creditor. The Operational Creditor has proposed the name of Insolvency Professional namely Mr. Shashi Agarwal, IP Registration No. IBBI/IPA-001/IP-P00470/2017-2018/10813, Email- shashiagg@rediffmail.com. The written communication shows that no disciplinary proceeding is pending against him. Being satisfied that the Operational Creditor has meted out all the requirement under section 9(2) of the Code. The only question which we are asked to answer is as to whether the application filed by the Operational Creditor was within the period of limitation as alleged by the Corporate Debtor.

8. Admittedly, the invoice was raised on 11th February, 2012 and the work order was issued by the Corporate Debtor on 22nd February, 2011. The averments produced on the side of the operational creditor prove that the Operational Creditor demanded the amount repeatedly from 28/05/2012 onwards till 07/06/2016. Failing payment of the amount in demand on the side of the Corporate Debtor, the Operational Creditor was compelled to issue demand notice as per section 8 (1) of the Code. That notice was issued on November 7, 2017 and it was admittedly received by the Corporate Debtor and also sent a reply dated 14/12/2017. The reply of the Corporate Debtor is the main document relied on the side of the Operational Creditor to prove that the claim of the Operational Creditor is not barred by limitation but was within the period of limitation. So, considering the reply evidently sent by the Corporate Debtor is good to read. It reads as under:-



West Bengal Biotech Development Corporation Limited
Kolkata Biotech Park
EN-24, Sector-V, Salt Lake, Kolkata-91

No. 90-WBBDC/1E-15/10

Dated 14/12/2017

From: The Managing Director,
West Bengal Biotech Development Corporation Limited
En-24, Sector-V, Salt Lake,
Kolkata- 700 091

To: The Director,
Keshav Park Private Limited
32, Ezra Street,
6th Floor, Room No. 664
Kolkata-700001

Sub:-Demand Notice/Invoice demanding payment in respect of operational debt due from West Bengal Biotech Development Corporation Limited, under the Code

Madam/Sir,

With reference to your Demand Notice date 07.11.2017 on the above subject, I am directed to request you to send one of your representatives /officials with all relevant papers/documents in this regard to my office chamber at Vigyan Chetana Bhavan, DD 26/B, 5th Floor, Sector-I, Salt Lake, Kolkata-700064 for a discussion in order to settle your claim soon.

A date and time of your convenience for the said purpose may please be communicated at the earliest.

This is topmost urgent.

Yours Faithfully

Managing Director

West Bengal Biotech Development Corporation Limited

9. Relying the reply notice, the learned counsel for the Operational Creditor has submits that the letter amounts to a promise to pay a time barred debt under section 25 (3) of the Indian Contract Act. Sub- Section (3) of Section 25 of the Indian Contract Act reproduced as follows: -

“ (3) *It is a promise, made in writing and signed by the person to be*

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charged therewith, or by his agent generally or specially authorized in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suit... such an agreement is a contract."

Referring to the Section 25(3) read above, the learned Counsel appearing for the Operational Creditor attempted to prove that the Corporate Debtor did not dispute its claim but showed his readiness to settle the claim after a discussion. So the reply is a promise to pay the amount claimed by the Operational Creditor after a discussion. It, according to him, is a promise to pay the amount found due to the Operational Creditor and accordingly filing of this application is within time.

10. The Learned Counsel appearing for the Corporate Debtor objected to this contention and submitted that the reply notice never admitted its liability, never accrued the liability and that the Corporate Debtor never intended to give promise to pay the claim of the Operational Creditor but it only invited the Operational Creditor to have a discussions as to their claim, so that it means that entire claim of the Operational Creditor has been admitted or acknowledged or promised to pay and therefore the letter not at all come under the purview of Section 3 and section 25 of the Indian Contract Act.

11. At this juncture, learned counsel appearing for the Operational Creditor referred to a judgement of the Hon'ble High Court of Mumbai reported in *SCC Online (1993 Mh.J.) South Eastern Roadways, Bombay Vs. U.P. State Agro Industrial Corporation Ltd.* The above said judgment cited by the Operational Creditor has got some similarity of the facts with the case in hand. In the said case also a letter calling for settlement similar to the letter in the case in hand seemed to have been considered by the Hon'ble High court. It seemed to have been disputed in the above said case on the side of the person who issued the

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letter. It is quite profitable to read the letter in dispute in the above said judgment, which reads as follows:-

“Please refer to your notice dated 15th May,1978 given by you on behalf of your client(plaintiff)... In this regard it is to inform you that matter will be settled between our General Manager, Shri S. N. Khanna, who is on tour to Bombay..”

12. On a reading of the above said judgement, it is also understood that the author of the letter was examined in evidence and after an elaborate discussions, the Hon'ble High Court of Mumbai has held that ***“If Ex. 35 does not amount to an acknowledgement within the meaning of that expression appearing in section 18 of the Limitation Act, the same certainly attracts sub-section (3) of Section 25 of the Indian Contract Act. Therefore, however looked at, the claim was within limitation and we so hold”***.

13. After elaborate discussions, the Hon'ble High Court of Mumbai has held that the letter referred to above in the said judgement falls within the purview of sub-section (3) of section 25 of the Indian Contract Act and construed as a promise to pay and therefore the period of limitation starts from the date of promise. Applying the propositions in the above said judgement in the case in hand, we are of the considered view that the letter dated 14.12.2017 issued by the Corporate Debtor is a promise to pay after discussions and thereby filing of this application on 26.10.2018 is within the period of limitation, and application filed is perfectly maintainable. There is no other objection sufficient enough to uphold any one contention in the objections being raised on the side of the Corporate Debtor. It appears to us that the claim of the Operational Creditor that an amount of Rs.29,09,890.00 is due and payable by the Corporate Debtor as the Principal amount is found true and correct.

14. As per Annexure-E, the Operational Creditor demanded an amount of Rs.

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35,44,776.00 as the amount due for undertaking the work on emergency basis and according to the Operational Creditor Rs. 6,34,886.00 was paid by the Corporate Debtor against the aforesaid dues by three cheque dated 30/03/2012, 03/04/2012 and lastly on 03/05/2012, and also cleared the 2nd and 3rd bills dated 03/05/2012 of Rs. 4,05,794.00 out of Rs. 33,15,484.00, and the balance outstanding due is Rs. 29,09,890/- and that amount has been through various letters dated 28/05/2012, 05/06/2013, 14/11/2013, 01/04/2014 and on 07/06/2016 (Annexure-F) has been claimed in the case in hand. The Operational Creditor also claimed interest. However, there is no agreement seen entered into in between the Operational Creditor and Corporate Debtor to pay interest for the delayed payment. Therefore, the claim of interest cannot be sustained in the case in hand. But being found that the principal amount of Rs. Rs.29,09,890.00 is found due and payable by the Corporate Debtor and the Corporate Debtor failed to pay even after demand, this application is liable to be admitted.

15. In the result, we admit this application on the following orders: -

ORDERS

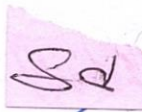
- i. The application filed by the Operational Creditor under section 9 of the Insolvency & Bankruptcy Code, 2016 for initiating Corporate Insolvency Resolution Process against the Corporate Debtor, West Bengal Biotech Development Limited is hereby admitted.
- ii. We declare a moratorium and public announcement in accordance with Sections 13 and 15 of the IBC, 2016.
- iii. Moratorium is declared for the purposes referred to in Section 14 of the Insolvency & Bankruptcy Code, 2016. The IRP shall cause a public announcement of the initiation of Corporate Insolvency

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Resolution Process and call for the submission of claims under Section 15. The public announcement referred to in clause (b) of sub-section (1) of Section 15 of Insolvency & Bankruptcy Code, 2016 shall be made immediately.

- iv. Moratorium under Section 14 of the Insolvency & Bankruptcy Code, 2016 prohibits the following:
 - 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 (54 of 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.
- v. The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated, suspended, or interrupted during moratorium period.
- vi. The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.



- vii. The order of moratorium shall have effect from the date of admission till the completion of the corporate insolvency resolution process.
- viii. Provided that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of Section 31 or passes an order for liquidation of corporate debtor under Section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be.
- ix. Necessary public announcement as per Section 15 of the IBC, 2016 may be made.
- x. Mr. Shashi Agarwal, IP Registration No. IBBI/IPA-001/IP-P00470/2017-2018/10813, Email- shashiagg @rediffmail.com is appointed as Interim Resolution Professional for ascertaining the particulars of creditors and convening a Committee of Creditors for evolving a resolution plan.
- xi. The Operational Creditor is directed to deposit Rs.2,00,000/- (Rs. Two Lakhs only) in the Escrow Account in SBI to be operated through the Registrar NCLT, Kolkata Bench, for the purpose of meeting the preliminary expenses for initiating the CIR Process by the IRP. IRP can claim the preliminary expenses and fees subject to the approval by the CoC and after constitution of CoC.
- xii. The Resolution Professional shall conduct CIRP in time bound manner as per Regulation 40A of IBBI (Insolvency Resolution Process for Corporate Persons) Regulation, 2016.

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xiii. Registry is hereby directed under section 9(5) of the I.B.Code, 2016 to communicate the order to the Operational Creditor, the Corporate Debtor and to the I.R.P. by Speed Post as well as through e-mail.

16. List the matter on 28.02. 2020 for the filing of the progress report.

17. Certified copy of the order may be issued to all the concerned parties, if applied for, upon compliance with all requisite formalities.

Sd

Harish Chander Suri
Hon'ble Member (T)

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(Jinan K.R.)
Hon'ble Member (J)

Signed on 10th February, 2020

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