



**IN THE NATIONAL COMPANY LAW TRIBUNAL  
KOLKATA BENCH(Court-II)  
KOLKATA**

**C.P. (IB) No. 734/KB/2020**

*An application under Section 9 of the Insolvency & Bankruptcy Code, 2016.*

***In the matter of:***

**Mitcon Consultancy & Engineering Services Limited [CIN L74140PN1982PLC026933]**, having its registered office at Kubera Chambers, Shivaji Nagar, Pune – 411005;

*....Operational Creditor*

-Versus-

**Kushal Polysacks Private Limited[CIN U21113WB1996PTC081714]**, having its registered office at 16, G.C. Avenue, Gandhi House, 6<sup>th</sup> Floor, Kolkata 700013;

*...Corporate Debtor*

**Date of hearing: 11 April, 2023  
Order Pronounced on: 13 June, 2023**

**Coram:**

***Smt.Bidisha Banerjee, Member (Judicial)***

***ShriBalraj Joshi, Member (Technical)***

**Appearances (via video conferencing/physical)**

For the Operational Creditor :	Mr.Ritoban Sarkar, Adv.
:	Mr.Rohan Mukherjee, Adv.
:	Mr.Tutul Das Singh, Adv.
For the Corporate Debtor :	Mr.Sujit Banerjee, Adv.
:	Mr.Nilay Sengupta, Adv.



IN THE NATIONAL COMPANY LAW TRIBUNAL  
KOLKATA BENCH  
(Court-II)

*Mitcon Consultancy & Engineering Services Limited v. Kushal Polysacks Private Limited*  
C.P. (IB) No. 734/KB/2020

**ORDER**

***Per: Bidisha Banerjee, Member (Judicial)***

1. The Court convened *via* hybrid mode.
2. This is a Company Petition filed under section 9 of the Insolvency and Bankruptcy Code, 2016 (*'the Code'*) read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 by Mr. Abhijit Shripad Ashtoorkar, Manager Legal, Mitcon Consultancy & Engineering Services Limited (*'Operational Creditor'*) duly authorised *vide* Board Resolution dated 21 February, 2019<sup>1</sup> for initiation of Corporate Insolvency Resolution Process (*'CIRP'*) against Kushal Polysacks Private Limited (*'Corporate Debtor'*).
3. The present Petition was filed on **17 March, 2020** before this Adjudicating Authority. The total amount claimed in default is Principal Amount of Rs.1,47,500/- (Rupees One Lakh Forty Seven Thousand Five Hundred only) and interest of Rs.10,329/- (Rupees Ten Thousand Three Hundred Twenty Nine only) at the rate of 18% per annum from the date of invoice to 19 August, 2019. The date of default is stated to be as on 30 March, 2019.
4. In part II of the Petition the authorized share capital of the Corporate Debtor is Rs.5,25,00,000/- (Rupees Five Crore Twenty Five Lakh only) with subscribed share capital of Rs. 3,80,25,000/- (Rupees Three Crore Eighty Lakh Twenty Five Thousand only). Part – IV of the Petition deals with the particulars of the Operational Debt.
5. ***Submissions by the Ld. Counsel appearing on behalf of the Operational Creditor.***
  - 5.1 The Corporate Debtor had approached the Operational Creditor for consultancy services for preparation of Techno-Economic Feasibility Report on Proposed Project of Post-harvest Facilities for Horticulture Produce at Kolkata, West Bengal, India, *vide* proposal dated 24 January

---

<sup>1</sup> Page 77 of the Petition.



**IN THE NATIONAL COMPANY LAW TRIBUNAL  
KOLKATA BENCH  
(Court-II)**

*Mitcon Consultancy & Engineering Services Limited v. Kushal Polysacks Private Limited  
C.P. (IB) No. 734/KB/2020*

2019 Total amount of work orders is Rs.5,00,000/- plus Taxes [Annexure II - Exhibit C].

- 5.2 The Operational Creditor commenced the work as per the terms of Proposal order. As per the payment terms stipulated in the Proposal order, the Operational Creditor has raised invoices after completion of each stage of work.
- 5.3 The invoices for the first two stages namely i.e. (i) for confirmation of assignment/work order as advance fees; and (ii) the invoice raised at the time of submission of draft report; were duly paid by the Corporate Debtor. After the third stage namely submission of final report was complete, an invoice of Rs.1,47,500/- (Rupees : One Lakhs Forty Seven Thousand and Five Hundred) only inclusive of tax was raised. Till date the said invoice remains unpaid.
- 5.4 Several reminders *vide* emails were sent to the Corporate Debtor on 30.08.2019, 27.08.2019, 09.09.2019, 14.09.2019, 16.09.2019, 27.09.2019, 30.09.2019, 04.11.2019, 09.11.2019, 11.10.2019, 17.10.2019 and 31.10.2019 for the unpaid dues of the Operational Creditor [Annexure II Exhibit – E].
- 5.5 Despite several oral/written requests and reminders there was no payment forthcoming from the Corporate Debtor. The Operational Creditor was constrained to issue a notice dated 19.08.2019 under Section 8 of the Code of 2016.
- 5.6 Upon receipt of the notice, the Corporate Debtor sent a reply *vide* email dated 23.08.2019, claiming that the Operational Creditor has not submitted hardcopies of Draft and Final Report to the Corporate Debtor. Such allegation is not only false but completely malicious. The draft as well final report was both sent to the Corporate Debtor by the Operational Creditor on 01 April 2019 through email dated 01 April 2019. The final copy of report has also been uploaded successfully on MOFPI site [Annexure II Exhibit F].



**IN THE NATIONAL COMPANY LAW TRIBUNAL  
KOLKATA BENCH  
(Court-II)**

*Mitcon Consultancy & Engineering Services Limited v. Kushal Polysacks Private Limited  
C.P. (IB) No. 734/KB/2020*

- 6. Per contra, submissions by the Ld. Counsel appearing on behalf of the Corporate Debtor would be as under:**
- 6.1 In the month of October 2018, the Corporate Debtor intended to venture into a new business of integrated coldchain and value addition infrastructure including frozen food facilities of Pradhan Mantri Kisan Sampada Yojana of the Central Government.
- 6.2 On 21 December 2018, one Mr. Chandrasekhar representing the Operational Creditor met the representatives of the Corporate Debtor and assured that they are not only one of the expert in preparing and implementing the project for the aforesaid integrated cold chain and value addition infrastructure including frozen food facilities of Pradhan Mantri Kisan Sampada Yojana but they will also recover the requisite subsidies, as available in the said scheme.
- 6.3 Pursuant to the aforesaid assurances the Corporate Debtor agreed to avail necessary expert services from the Operational Creditor. On 21 December 2018, the Operational Creditor emailed their quotation letter dated to the Corporate Debtor.
- 6.4 After several discussions following obligations of the Operational Creditor were agreed:
- (i) That the alleged Operational Creditor shall provide requisite Market Survey Report;
  - (ii) That the Operational Creditor shall prepare DPR.
  - (iii) That the Operational Creditor shall supply of drawing, design & Specification of all civil works.
  - (iv) That the Operational Creditor shall supervise the construction activities by regular visit.
  - (v) That the Operational Creditor shall provide the necessary technical support in respect of query or anything to Bank at the time of sanction of the Bank Finance;



**IN THE NATIONAL COMPANY LAW TRIBUNAL  
KOLKATA BENCH  
(Court-II)**

*Mitcon Consultancy & Engineering Services Limited v. Kushal Polysacks Private Limited  
C.P. (IB) No. 734/KB/2020*

- (vi) That the Operational Creditor shall provide all support at the start of production of the unit;
  - (vii) That the Operational Creditor shall provide all marketing support.
  - (viii) That the Operational Creditor shall prepare the subsidy application for such integrated cold chain and value addition infrastructure including frozen food facilities under the scheme of Pradhan Mantri Kisan Sampada Yojana.
  - (ix) That the Operational Creditor shall provide all support including reply of the query in relating with subsidy matter and follow up with the MoPF and NHB for releasing the subsidy from Government.
  - (x) That the Operational Creditor will provide all information /documents in relating of the project.
- 6.5 After finalization of the aforesaid terms, on 14 February 2019, the Corporate Debtor provided the requisite work order to the Operational Creditor, incorporating all the aforesaid obligations of the Operational Creditor.
- 6.6 The parties had agreed the consideration amount for said service as Rs.5,00,000/- only payable in 4 different stages, as follows:
- (i) Advance Payment of Rs. 1.25 Lacs;
  - (ii) Payment of Rs.1.25 Lacs at the submission of draft detailed;
  - (iii) Project report Payment of Rs. 1.25 Lacs at the time of final report;
  - (iv) Payment of Rs.1.25 Lacs after approval of the Government Subsidy.
- 6.7 The Corporate Debtor had paid more than 50% of the agreed fees aggregating a sum of Rs.2,50,000/- only along with GST elements of Rs.18% having an aggregate value of Rs.2,95,000/- only. However, the Operational Creditor had failed and neglected to deliver its obligations, as follows;
- (i) Till date said the Operational Creditor has not submitted the DPR and now same has become futile under present circumstances.
  - (ii) That the Operational Creditor did not arrange/ conduct any site visit of similar cold chain industries in spite of specific assurances thereof.



**IN THE NATIONAL COMPANY LAW TRIBUNAL  
KOLKATA BENCH  
(Court-II)**

*Mitcon Consultancy & Engineering Services Limited v. Kushal Polysacks Private Limited  
C.P. (IB) No. 734/KB/2020*

- (iii) That Mr. Chandrasekhar Khurade representing the Operational Creditor assured the Corporate Debtor to arrange visit with Senior Officer of the Corporate Debtor to show him a similar nature of live plant. But till date failed to arrange such visit with answering respondent.
- (iv) That the purported project report, as submitted by the Operational Creditor, for setting up cold chain project was also found faulty by the MoFPI and they rejected the same straightway in presence of their said technical expert Mr. Chandrasekhar Khurade [*Letter dated 26th July 2019*].
- (v) Moreover, none of the other obligations, as specified in work order has been compiled by the said Operational Creditor.
- 6.8 Besides, the Corporate Debtor by email dated 08 April 2019, requested the Operational Creditor to arrange a site visit of similar cold chain along with the highest officers of the answering respondent. But the Operational Creditor neglected to arrange such visit.
- 6.9 On continuous gross negligence on the part of the Operational Creditor, *vide* email dated 02 August 2019, the Corporate Debtor cancelled the contract with the Operational Creditor and requested them to refund a sum of Rs. 10,00,000/- (Rupees Ten Lakh only), subject to final assessment of the loss and damages of the Plaintiff [*Email dated 02 August 2019 - Letter- 'G'*].
- 6.10 The purported demand by the Operational creditor for a sum of Rs. 1,47,500/- is completely illegal, malafide and an attempt to black mail the Corporate Debtor, meant for their unjust enrichment and gain. That the alleged Operational Creditor should not get any further amount from the Corporate Debtor, without doing their portions of obligations, as per the work order.
- 6.11 On the other hand, the Corporate Debtor has a claim on account of loss and damages against the Operational Creditor for sum of Rs. 17,36,500/-. Under



**IN THE NATIONAL COMPANY LAW TRIBUNAL  
KOLKATA BENCH  
(Court-II)**

*Mitcon Consultancy & Engineering Services Limited v. Kushal Polysacks Private Limited  
C.P. (IB) No. 734/KB/2020*

the aforesaid back ground, the Corporate Debtor has filed a Civil Suit being Money Suit no: 15 of 2020 in the Court of the Ld. Civil Judge, Sr. Division at Purulia.

**7. *Rejoinder to the reply filed by the Operational Creditor***

7.1 The Corporate Debtor accepted the work order *vide* its email dated 18 February, 2019. The Operational Creditor has completed its job as per the work order bearing no. AIFC/Prop/056-R-1.1/18-19 dated 24 January, 2019. The distorted terms listed by the corporate Debtor in their reply neither form part of the agreed proposal nor were accepted by the Operational Creditor

7.2 It would be evident from the terms of the work order that the Operational Creditor did not have any obligation to arrange visits for the Corporate Debtor.

7.3 That Mr.Chandrasekhar Kurhade, designated official of the Operational Creditor attended the MOFPI meeting on behalf of Corporate Debtor on 14.06.2019 and the promoters of Corporate Debtors were also present for the said meeting. The claim of Corporate Debtor that the DPR prepared by Operational Creditor was found to be faulty is refuted.

7.4 It is a matter of fact that the Project Proposal includes documents from the Promoter of the corporate debtor as well as the Project Report. The Bank appraisal note is not a part of Project Report, but is a part of the Promoters documents. In such regard Clause 8 (c) of the final proposal may be referred to – *“the Client alone shall be responsible for the performance of its personnel and agents, for the timeliness, accuracy and completeness of all his data and information (including all financial information and statements) provided to MITCON by or on behalf of the Client.”*

The Term loan sanction and appraisal note from the bank was an obligation of the Corporate Debtor and hence not within the scope of work of the Operational Creditor.

7.5 Further, the Draft and Final copy of DPR was provided to the Corporate Debtor *vide* an email dated 01 April 2019. Additionally the final copy of the



**IN THE NATIONAL COMPANY LAW TRIBUNAL  
KOLKATA BENCH  
(Court-II)**

*Mitcon Consultancy & Engineering Services Limited v. Kushal Polysacks Private Limited  
C.P. (IB) No. 734/KB/2020*

report has also been uploaded successfully on MOFPI site to which the Corporate Debtor holds the information of login ID and password of the site, Copies of the email dated 01.04.2019 and an email dated March 29, 2019 issued by the corporate debtor acknowledging the online submission of the Report to the Ministry (MOFPI) [Annexure P-6 of the Rejoinder]. The Corporate Debtor has to create the login and password for online submission of Project Proposal to the Ministry of Food Processing Industries, Govt. of India, New Delhi, hence the Corporate Debtor is solely responsible for online submission of all requisite documents to the Ministry within the stipulated time.

***Analysis and Findings***

8. We have heard the Learned Counsel appearing on behalf of the Operational Creditor and the Corporate Debtor and perused the documents on record. The prima facie issue that arises is ***whether there was any pre-existing dispute before the filing petition under Section 9 of the Code?***
9. Evidently from the records and irrefutably, it is seen that after several discussions the parties finally agreed to the terms and conditions as on 14 February, 2019 [at Page 14 of the Reply]. As per the arrangement, a sum of Rs.5,00,000/- plus Taxes was to be paid, as follows [at Page 16 of the Reply];
  - i. Advance payment Rs. 1.25 lacs
  - ii. Payment Rs. 1.25 lacs at the submission of Draft Report
  - iii. Payment Rs. 1.25 lacs at the time of Final Report
  - iv. Payment Rs. 1.25 lacs after approval of Govt. subsidy
10. Subsequently, the Corporate Debtor paid an advance of Rs.1,35,000/- including GST on 19 February, 2019 [at Page 17 of the Reply] and another Rs.1,35,000/- including GST on 08 May, 2019 [at Page 18 of the Reply].
11. Further, from the records [at Page 22 of the Reply] it is also seen that Ministry of Food Processing Industries vide notification no. C-13011/3/2019-COLD Chain, dated 27 July, 2019, rejected the proposal of



**IN THE NATIONAL COMPANY LAW TRIBUNAL  
KOLKATA BENCH  
(Court-II)**

*Mitcon Consultancy & Engineering Services Limited v. Kushal Polysacks Private Limited  
C.P. (IB) No. 734/KB/2020*

cold chain of the Corporate Debtor on the grounds of non-submission of bank appraisal note and in-principal sanction [at Page 25 of the Reply].

12. Thereafter, on rejection of proposal by the Ministry of Food Processing Industries, the Corporate Debtor *vide* its email dated 02 August, 2019 [at Page 29 of the Reply] terminated the contract. The Corporate Debtor categorically mentioned, as follows;

*“In reference to our work order dated 14.02.2019, we hereby terminate our contract with you as because the application for Chain Project has been rejected by MOFPI due to technical issue. For the deficiency/faulty of service in your part resulting of Rs.10.00 lacs which you are liable to refund us immediately, otherwise we have no option but to recourse legal action again for all risks and costs.”*

13. During the hearing, number of charges and counter charges were made by the Ld. Counsel on both sides. Be that as it may, it appears from the documents on record that there is a pre-existing dispute, as well as a money suit pending, between the parties,.

14. We rely on the celebrated decision of Hon’ble Supreme Court in the matter of *Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software (P) Limited*<sup>2</sup>, which states that even a presumption of pre-existing dispute is good enough, and this saves the Corporate Debtor from the clutches of CIRP.

It was opined by the Hon’ble Apex Court there that;

*“33. The scheme under Sections 8 and 9 of the Code, appears to be that an operational creditor, as defined, may, on the occurrence of a default (i.e., on nonpayment of a debt, any part whereof has become due and payable and has not been repaid), deliver a demand notice of such unpaid operational debt or deliver the copy of an invoice demanding payment of such amount to the corporate debtor in the form set out in Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 read with Form 3 or 4, as the case may be (Section 8(1)). Within a*

---

<sup>2</sup>2017 (1) SCC onLine SC 353



IN THE NATIONAL COMPANY LAW TRIBUNAL  
KOLKATA BENCH  
(Court-II)

*Mitcon Consultancy & Engineering Services Limited v. Kushal Polysacks Private Limited*  
C.P. (IB) No. 734/KB/2020

*period of 10 days of the receipt of such demand notice or copy of invoice, the corporate debtor must bring to the notice of the operational creditor the existence of a dispute and/or the record of the pendency of a suit or arbitration proceeding filed before the receipt of such notice or invoice in relation to such dispute (Section 8(2) (a)). What is important is that the existence of the dispute and/or the suit or arbitration proceeding must be pre-existing – i.e. it must exist before the receipt of the demand notice or invoice, as the case may be. ....”*

The Hon’ble Supreme Court in *Mobilox (Supra)* has also observed that all that the Adjudicating Authority has to see at ‘the stage of Admission’ is “*whether there is a plausible contention which requires further investigation and that the ‘Dispute’ is not a patently feeble legal argument or an assertion of fact or a moonshine defence unsupported by tangible materials/evidence.*”

15. In view of the above, we note that there has been a pre-existing dispute in the matter and therefore *C.P (IB) No. 734/KB/2020* is *rejected*. However, the Operational Creditor is at liberty to resort to other remedies that may be available under any other law.
16. Certified copy of the order may be issued to all the concerned parties, if applied for, upon compliance with all requisite formalities.

**Balraj Joshi**  
Member (Technical)

**Bidisha Banerjee**  
Member (Judicial)

The order is pronounced on 13<sup>th</sup> day of June, 2023

SA [LRA]