

**IN THE NATIONAL COMPANY LAW TRIBUNAL****NEW DELHI (COURT NO. IV)****Company Petition No. IB-1662/ND/2019**

(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)

**IN THE MATTER OF:****SOMANY CERAMICS LTD.****...APPLICANT/OPERATIONAL CREDITOR****VERSUS****INDO TECH PROJECTS PRIVATE LIMITED****...RESPONDENT/ CORPORATE DEBTOR***ORDER DELIVERED ON: 29.04.2021***CORAM:****DR. DEEPTI MUKESH****HON'BLE MEMBER (JUDICIAL)****MS. SUMITA PURKAYASTHA****HON'BLE MEMBER (TECHNICAL)****For the Applicant** : Mr. AvdheshBairwaAdv,**For the Respondent** : None

**MEMO OF PARTIES****SOMANY CERAMICS LTD.**

2 Red Cross Place,  
Kolkata 700001

**...APPLICANT/OPERATIONAL CREDITOR****VERSUS****INDO TECH PROJECTS PRIVATE LIMITED**

A-14/3 Acharya NiketanMayurVihar  
Phase I Delhi 110091

**...RESPONDENT/ CORPORATE DEBTOR****ORDER****AS PER SUMITA PURKAYASTHA (MEMBER TECHNICAL)**

1. The present application is filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'code') read with Rules 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority), 2016 (for brevity 'the Rules') by Somany Ceramics Limited(for brevity 'Applicant')through Mr. AmvrishJulka(Company Secretary of the Applicant Company authorized vide board resolution dated 07.08.2018)

with a prayer to initiate the Corporate Insolvency process against Indo Tech Projects Pvt Ltd (for brevity 'Corporate Debtor').

2. The Applicant Somany Ceramics Limited, claimed to be the Operational Creditor, incorporated on 20.01.1968 under the provisions of Companies Act 1996 CIN being L40200WB1968PLC224116 having its registered office at 2, RED CROSS PLACE KOLKATA Kolkata 700001. It is involved in the business of production and manufacturing of ceramics and floor tiles etc.
3. The Respondent Indo Tech Projects Pvt Ltd is a company incorporated on 05.07.2013 under the Companies Act, 2013 having its registered office at A-14/3, Acharya Niketan Mayur Vihar Phase-I Delhi and CIN U70102DL2013PTC254986 and is engaged in real estate activities with own or leased property which includes buying, selling, renting and operating of self-owned or leased real estate such as apartment building and dwellings, non-residential buildings, developing and subdividing real estate into lots etc.
4. As per the averments made by the applicant, the Corporate Debtor issued three purchase orders dated 04.04.2016, 08.04.2016 and 08.04.2016 for purchasing certain types of ceramic tiles from the Applicant. Pursuant to the purchase orders the Applicant supplied the products on 04.06.2016 and 05.06.2016 and raised four invoices which remains unpaid till date. The following invoices remain unpaid:

<b>Amount</b>	<b>Invoice Number</b>	<b>Invoice date</b>
Rs. 3,88,982/-	81601050900148	04.06.2016
Rs. 77,217/-	81601590000001	15.06.2016
Rs. 1,04,795/-	81601050900187	15.06.2016
Rs. 82,994/-	81601050900232	27.06.2016

5. The Applicant submits that as per the terms of the invoices the Corporate Debtor was obligated to make payment within 30 days from the date of each invoice. The Applicant was constrained to issue demand notice dated 19.03.2019 under Section 8 of the Code read with Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, calling upon the Corporate Debtor to pay an amount of Rs. 10,85,305/- inclusive of interest @24% per annum. The notice was served upon the Corporate Debtor vide speed post and registered post and delivered as on 28.03.2019.
6. The Corporate Debtor replied dated 19.06.2019 to the demand notice and submitted in its reply that the Corporate Debtor placed an order for qualitative goods of tiles and the Applicant did not provide good quality products causing a huge loss of Rs. 1,00,000,00/- due and

payable to its clients. The bills of works already done by the Corporate Debtor towards its contractors amount to Rs. 2,00,000,00/- which has been withheld by the Contractor due to sub-standard tiles supplied by the Applicant.

7. The Applicant has filed this application as an Operational Creditor praying for initiation of Corporate Insolvency Resolution Process of the Corporate Debtor for its inability to liquidate their claim of Rs. 10,85,305/- inclusive of interest @24% per annum towards unpaid invoices for the material supplied by the Operational Creditor.
8. Noticeto the Section 9 application was issued to the Corporate Debtor vide order dated 06.11.2020 of the Adjudicating Authority. The Corporate Debtor filed a reply dated 30.12.2019 to the Section 9 application and submitted that there is an existence of dispute before the demand notice under Section 8 was served to the Corporate Debtor. The Applicant was communicated about the poor quality of the products provided which caused huge losses to the Corporate Debtor. The Corporate Debtor submits that the bills of works already done by the Corporate Debtor towards its contractors amount to Rs. 2,00,000,00/- has been withheld by the Contractor due to sub-standard tiles supplied by the Applicant. The same was communicated to the applicant vide email dated 20.09.2017, 24.01.2018 wherein it is stated that ***“Our finalization of bill with BSNL is in process as you know very well our major tiles bill of amount of Rs90 lacs is held due to bad quality of tiles supplied by Somany but we have given***

***maximum payment of amount of Rs 67 lacs instead of this quality issue. So we will finalize your account which is very small as compared to our amount held, only after finalization of our bill.”***

9. The Corporate Debtor has also placed on record the Legal Demand Notice Sent by the Applicant vide email dated 15.02.2018 demanding a payment of Rs 6,53,988/- with respect to the unpaid invoices. The Corporate Debtor has placed on record the correspondence email dated 15.02.2018 sent by the Corporate Debtor in reply to the said legal demand notice wherein it is stated that ***“with reference to your mail dated 15.02.2018 regarding the outstanding payment we have informed you that our client has hold a big amount which is more than One Crore due to bad quality, sub grade material supplied by you which was physically shown to your people. This strange that instead of supporting us you are threatening us for legal litigation.”***
10. The Right to file the rejoinder was closed vide order dated 13.02.2020.
11. The date of default is 26.07.2016 as per Form V and the present application is filed on 10.07.2019 Hence, the application is not time barred and filed within the period of limitation.
12. The registered office of corporate debtor is situated in Delhi and therefore this Tribunal has jurisdiction to entertain and try this application.

13. In ***“Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software (P) Limited– 2017 1 SCC OnLine SC 353”***, the Hon’ble Supreme Court analysed the meaning of dispute with respect to Operational Creditors and observed:

“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 non-payment 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 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. ....”

“34. Therefore, the adjudicating authority, when examining an application under Section 9 of the Act will have to determine: .....

(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.

14. From the aforesaid decision, it is clear that the dispute must exist before the receipt of demand notice. Be that as it may, on perusal of the documents, it emerges that there were disputes existing prior to the issuance of the Demand Notice. We find that the Corporate Debtor had raised an issue with respect to bad quality of the tiles and had communicated to the applicant vide email dated 20.09.2017, 24.01.2018. The Applicant has also concealed the fact that a legal notice dated 15.02.2018 demanding a payment of Rs 6,53,988/- was sent by the Applicant prior to issuance of Demand Notice, which was replied vide email on the same day wherein the Corporate Debtor has raised an issue with respect to substandard quality of the product being delivered. A pre-existing dispute does not entitle the Operational Creditor to seek Insolvency Resolution of the Corporate Debtor.

15. In view of the above, this Bench is of the view that the prayer for initiating Corporate Insolvency Resolution process against the Corporate Debtor is not sustainable.
16. The Application is therefore rejected and dismissed in terms of above order.

**Sd/-**  
**Sumita Purkayastha**  
**Member (T)**

**Sd/-**  
**Dr. Deepti Mukesh**  
**Member (J)**

**Pronounced today under Rule 151 of NCLT Rules, 2016 as the Hon`ble Member (T) Smt. SumitaPurkayastha is not holding the court today.**

**Court Officer**  
**29.04.2021**