

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

CP(IB) No. 140/KB/2020

*A petition 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:

Indrani Saha, sole proprietor of International Paper Concern, having address
of correspondence- 15, S.C. Dey Street, Vidyasagar Tower, Kolkata- 700073.

.....Operational Creditor

-Versus-

BK Podder Printing Private Limited, a company incorporated under the
Companies Act, 1956 and being a company within the meaning of Companies
Act, 2013 and having Corporate Identification No-
U22219WB2012PTC181796 and its registered office at 43/P, Ultadanga Road,
Kolkata-700004, in the State of West Bengal.

.... Corporate Debtor

Date of Hearing : 26th July, 2022

Date of pronouncing the order: 19th September, 2022

Coram:

Shri Rohit Kapoor, Member (Judicial)

Shri Balraj Joshi, Member (Technical)

Appearances (via video conferencing/ physical):

For Operational Creditor	:	Mr. Shaunak Mitra, Advocate Ms. Sristi Burman Roy, Advocate Ms. A Poddar, Advocate
For Corporate Debtor	:	Mr. Prodyut Banerjee, Advocate Mr. Pratip Mukherjee, Advocate

Ms. Rima Banerjee, Advocate

ORDER

Rohit Kapoor, Member (Judicial):

1. This Court convened through hybrid mode.
2. This is a Company Petition filed under section 9 of the Insolvency and Bankruptcy Code, 2016 (the Code) by **Indrani Saha**, sole proprietor of International Paper Concern (Operational Creditor), seeking to initiate Corporate Insolvency Resolution Process (“CIRP”) against **BK Podder Printing Private Limited** (“Corporate Debtor”).
3. The Corporate Debtor is a public company incorporated on 17.05.2012. The authorized share- capital of the company is ₹5,25,00,000/- and the paid-up share- capital of the company is ₹5,02,25,000/-.
4. The total amount claimed by the Operational Creditor is ₹58,78,873/- plus interest @18% from 31.08.2019 and the date of default is 05.03.2018. The Demand notice under section 8 of the Code was issued by the Operational Creditor on 13.11.2019. No reply was sent by the Corporate Debtor.
5. **Submissions on behalf of the Operational Creditor:**
 - 5.1 The Operational Creditor is engaged in various businesses including distribution and supply of superior quality duplex board, paper reel and paper sheet manufactured by renowned vendors of the industry.
 - 5.2 Upon various orders being placed by the Corporate Debtor over emails dated 24.11.2017, 03.01.2018, 12.04.2018 and 16.04.2018, the Operational Creditor sold and delivered various specifications of GSM papers to the Corporate Debtor. The said goods were received by the Corporate Debtor without raising dispute of any nature whatsoever.

Accordingly, invoices were raised by the Operational Creditor which were also received by the Corporate Debtor without demur. However, the Corporate Debtor failed to make payments within the scheduled time of 7 days as agreed upon and as a result, interest became payable @1.5% per month.

- 5.3 In January 2018, the prices of paper were increased nominally. Such increases were duly communicated to the Corporate Debtor.
- 5.4 The last supply of paper made by the Operational Creditor to the Corporate Debtor's factory was on 23.04.2018. The Corporate Debtor has made payments of the Operational Creditor's invoices from 05.01.2018 up until 03.04.2019. However, despite repeated requests from the Operational Creditor end and continued assurances from the Corporate Debtor, no payments have been forthcoming for the remaining invoices.
- 5.5 As on date, a total sum of Rs. 58,78,873/- is due and payable by the corporate debtor on account of unpaid invoices and unpaid interest on paid invoices. Furthermore, the operational creditor is entitled to interest at the rate of 18% per annum till the date the invoices remain unpaid.
- 5.6 The Operational Creditor issued a letter dated 02.09.2019 to the Corporate Debtor asking for payment of dues stated above. The Corporate Debtor replied by a letter dated 03.09.2019 and sought to raise frivolous disputes with regard to providing originals of the challans issued by the Mill from which delivery was made and shortage of paper reels supplied. No contemporaneous dispute was ever raised by the Corporate Debtor with regard to the disputes sought to be raised by the letter dated 03.09.2019. Furthermore, all supplies have been duly acknowledged by the staff of the Corporate Debtor by countersigning the invoices and the invoices

corresponding to the supplies made have been passed by the Accounts Department of the Corporate Debtor.

5.7 Accordingly, the Operational Creditor issued demand notice in Form 3 accompanied with form 4, claiming ₹58,78,873/- on 07.11.2019. The tracking report obtained shows that the “Door was locked” of the registered office of the Corporate Debtor at the time of delivery attempted by the postal delivery attempted by the postal authorities. Therefore, the envelope containing the Demand Notice was returned as “Not Claimed”.

5.8 Under such circumstances, the demand notice was also served to the Corporate Debtor by email on 13.11.2019. Now Reply to the same was received from the Corporate Debtor.

5.9 The default is continuing since 05.03.2018, which is the first date on which the Corporate Debtor failed to make payment of invoice dated 26.02.2019.

5.10 The Operational Creditor has relied on the following documents to support his claims:

- a. Demand notice in Form 3, being Annexure A;
- b. Tracking Report from India Post Website, being Annexure B;
- c. A copy of the Returned Envelope, being Annexure C;
- d. A copy of the email sent to the Corporate Debtor, being Annexure D;
- e. A copy of the email dated 24.11.2017, being Annexure F;
- f. Copies of invoices, being Annexure H;
- g. Copies of other letters, being Annexure J.

6 Submissions on behalf of the Corporate Debtor:

- 6.1 The applicant has suppressed the fact that in all the correspondences by and between the parties from the very beginning the email ID of the Corporate Debtor has been categorically mentioned as bkp1097.rediffmail.com. Even the documents annexed by the Operational Creditor/applicant shows the aforesaid fact. However, the Operational Creditor had sent the Demand Notice in Form No. 3 to two different email IDs *i.e.*, rkpukp2003@gmail.com and ibkp1097@gmail.com.
- 6.2 The email ID rkpukp2003@gmail.com is the email ID of the statutory Auditor of the respondent who is not at all a party in the dispute between the Operational Creditor and Corporate Debtor. Further, the email ID ibkp1097@gmail.com does not belong to the Corporate Debtor at all.
- 6.3 Further, the purported amount as claimed by the Operational Creditor is disputed since long *i.e.* since 01.10.2018 wherein the respondent had sent a letter dated 01.10.2018 vide email to the applicant and thereby had raised various disputes regarding the quantity/weight of the goods supplied by the operational creditor through the concerned paper mill and that in such letter it had been categorically mentioned that there had been a short supply of 7 Kgs, in every paper reels supplied by the Operational Creditor, totaling to a shortage of 7161 Kgs. In fact, the Operational Creditor had accepted the aforesaid dispute by its reply email dated 01.10.2018. The Operational Creditor therein admitted that the excess amount will be credited after the full payment of disputed invoices is made.
- 6.4 On 30.08.2019, the Operational Creditor had sent a demand notice thereby demanding a vexatious claim of Rs. 28,82,557/- + interest thereon. The Corporate Debtor had immediately replied and categorically disputed the aforesaid demand vide its letter dated 03.09.2019 wherein it had again

raised the issue of short supply of the quantity of paper reels, excess rates for different quality of paper reels and art boards as also some serious issues regarding non-furnishing of original challans and reel charts issued by M/s. Supreme Paper Mills Limited. The Operational Creditor replied to the said letter of dispute *vide* letter dated 19.09.2019. On receipt of the same, the Corporate Debtor issued a counter- reply dated 27.09.2019. The Operational Creditor has not rebutted the said counter- reply. Copies of the aforesaid letters is annexed to the Reply-Affidavit and marked as Annexure “D”.

- 6.5 It is to be further noted that though the Operational Creditor has raised a point of purported approval of their bills by the accounts department of the Corporate Debtor, it has failed to file any confirmation of accounts from the Corporate Debtor. This fact clearly shows that there is a dispute regarding the claimed amount.
- 6.6 In reply to the letter of the Corporate Debtor dated 03.09.2019, the Operational Creditor, *vide* letter dated 19.09.2019 admitted that disputes amount of ₹3952/- had been raised in excess in the invoices. Therefore, there are serious pre-existing disputes in the instant matter.
- 6.7 Further, for continuous business transaction, the Corporate Debtor time to time made payments for supply of paper reels and Art boards, sometime which exceeds the billed Amount, and by this way the Corporate Debtor had already paid a sum of Rs. 2,46,00,000/- (Rupees Two Crores forty six lakhs) against the different invoices raised by the Operational Creditor by excluding the excess bills for shortage of goods and excess rates, which were accepted by the Operational Creditor.
- 6.8 Further, the Corporate Debtor did not pay any amount against any particular bills and/or invoice, thus it is should not be construed

that any payment has been made by accepting the purported increased rate any goods supplied by M/ s. Supreme Paper Mills Ltd. The copy of the bank statements of the Corporate Debtor in respect is annexed to the Reply affidavit and marked with letter “E”.

6.9 Further, the rate for various supplies had not also been finalized by and between the parties as would be depicted from the email of the respondent dated 12.04.2018 and 16.04.2018.

7 Supplementary Affidavit on behalf of the Corporate Debtor:

7.1 The Corporate Debtor, vide supplementary affidavit dated 13.06.2022, has introduced to the record, a report from the Postal Authorities showing the “return delivery” of the purported demand notice of the Operational Creditor, along with a letter dated 08.04.2022 by the Deputy Director, PO (BD & MKTG) Kolkata GPO.

7.2 Further, the Corporate Debtor has reiterated that the email id being rupukp2003@gmail.com belongs to its statutory auditor and that the Operational Creditor has deliberately sent the demand notice to wrong email IDs.

8. Analysis and Findings:

8.1 We have heard the Ld. Counsel for the Operational Creditor and the Ld. Counsel for the Corporate Debtor and perused the record.

8.2 A perusal of Part IV of the Form V, specifically page 7, reveals that the Operational Creditor has submitted that the Corporate Debtor has made payments for invoices ranging from 05.01.2018 till 03.04.2019. However, the amount claimed by the Operational Creditor is for 11 invoices ranging from 27.02.2018 to 23.04.2018. Further, the date of default mentioned by the Operational Creditor on page 9 of the petition is 05.03.2018 which is

for default relating to an invoice dated 26.02.2019 *i.e.* a future date. Further, the said invoice dated 26.02.2019 has not been put on record. Therefore, the instant petition is an incomplete one.

8.3 Also, keeping in mind that the date of default is 05.03.2018, a perusal of Annexure E of the Reply Affidavit shows that various payments have been made by the Corporate Debtor to the Operational Creditor on 27.03.2018, 06.04.2018, 07.04.2018, 20.04.2018 and so on. As such, the date being 05.03.2018 cannot be considered as date of default and therefore the instant petition is defective in nature.

8.4 The first defence taken by the Corporate Debtor is that the demand notice was not delivered to it. The Operational Creditor has claimed that the demand notice sent by post to the Corporate Debtor has returned as “not claimed”. The Corporate Debtor, on the other hand has produced a letter dated 08.04.2022 by the Deputy Director, PO (BD & MKTG) Kolkata GPO which suggests that the demand notice was return-delivered on 19.11.2019.

8.5 Regarding the service of the demand notice by email, the Corporate Debtor has contended that the Operational Creditor has deliberately sent the demand notice to wrong email addresses. The Corporate Debtor has contended that the email id being rupukp2003@gmail.com belongs to its statutory auditor and therefore, the communication of the Demand Notice to said email id cannot be held as a valid delivery of the same. However, it is to be noted that the said email id is registered with the Registrar of Companies and the Operational Creditor, having notice of the said fact, has sent the Demand Notice to the above-mentioned email id.

8.6 Regarding the said issue, this Adjudicating Authority is satisfied that since the above-mentioned email id is registered with the ROC as the email-id of the company, the service of the demand notice to the said email id is

valid. As such, the demand notice was successfully delivered to the Corporate Debtor and no reply was given by it.

8.7 At the same time, the fact that no reply to the demand notice was issued by the Corporate Debtor, would not prevent the Corporate Debtor from bringing on record facts to establish pre-existing disputes relating to the instant petition.

8.8 In this regard, we would like to rely on the decision taken by the Hon'ble NCLAT in the matter of **M/s. Brand Realty Services Ltd. Vs. M/s. Sir John Bakeries India Pvt. Ltd.** [Company Appeal (AT) (Insolvency) No. 958 of 2020] wherein the following was held:

“[...] We thus are of the considered opinion that mere fact that Reply to notice under Section 8 (1) having not been given within 10 days or no reply to demand notice having been filed by the Corporate Debtor does not preclude the Corporate Debtor to bring relevant materials before the Adjudicating Authority to establish that there are pre-existing dispute which may lead to the rejection of Section 9 application. In the above context, we may refer to Judgement of this Tribunal in “Neeraj Jain Vs. Cloudwalker Streaming Technologies Private Limited” (Company Appeal (AT) Ins. No. 1354 of 2019) decided on 24th February, 2020 in paragraph 50 following observations have been made by this Tribunal: “...Even otherwise, mere failure to reply to the demand notice does not extinguish the rights of the Operational Creditor to show the existence of a pre-existing dispute...” (para 13)

8.9 Now dealing with the Corporate Debtor's contention of pre-existing disputes, it can be seen that the dispute relating to the weight of the reels supplied was first raised by the Corporate Debtor vide letter dated 01.10.2018 i.e. much prior to the issuance of the demand letter by the

Operational Creditor on 02.09.2019. the said dispute has also been acknowledged by the Operational Creditor vide email dated 01.10.2018.

8.10 Thereafter, several correspondences have been shared between the parties relating to the abovementioned dispute and other disputes including disputes regarding the short supply of the quantity of paper reels, excess rates for different quality of paper reels and art boards, non-furnishing of original challans and reel charts.

8.11 Therefore, without going into the merits of the said disputes, this adjudicating authority is satisfied that there are pre-existing disputes in the instant petition.

8.12 In regard to maintainability of the petition in light of such pre-existing disputes, we would like to refer to the decision of the Hon'ble Supreme Court in the matter of ***Mobilox Innovations Private Limited Vs. Kirusa Software Private Limited***¹ wherein it was held that:

“The scheme of Section 7 stands in contrast with the scheme Under Section 9 where an operational creditor is, on the occurrence of a default, to first deliver a demand notice of the unpaid debt to the operational debtor in the manner provided in Section 8(1) of the Code. Under Section 8(2), the corporate debtor can, within a period of 10 days of receipt of the demand notice or copy of the invoice mentioned in Sub-section (1), bring to the notice of the operational creditor the existence of a dispute or the record of the pendency of a suit or arbitration proceedings, which is pre-existing - i.e. before such notice or invoice was received by the corporate debtor. The moment there is existence of such a dispute, the operational creditor gets out of the clutches of the Code.” (Para 29)

¹ Mobilox Innovations Private Limited vs. Kirusa Software Private Limited (21.09.2017 - SC) : MANU/SC/1196/2017

The Apex Court, in *Mobilox Innovations Private Limited (Supra)* further held that:

“...Therefore, all that the adjudicating authority is to see at this stage 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 unsupported by evidence. It is important to separate the grain from the chaff and to reject a spurious defence which is mere bluster. However, in doing so, the Court does not need to be satisfied that the defence is likely to succeed. The Court does not at this stage examine the merits of the dispute except to the extent indicated above. So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application.” (Para 40)

8.13 Keeping in mind the aforementioned judgment, we are of the opinion that the pre-existing disputes in the instant case are not mere feeble arguments, instead they are backed by evidence. As such, in presence of pre-existing disputes, the instant petition is not maintainable.

8.14 In light of the above-mentioned facts and circumstances, this Adjudicating Authority is satisfied that the instant petition is liable to be **rejected**.

8.15 Consequently, **C.P.(IB) No. 140/KB/2020** shall stand **dismissed**. Needless to say, the Operational Creditor is free to pursue its remedies under any other law, and the dismissal of the present petition shall not stand in the way of such pursuit of remedies.

8.16 The registry is directed to send e-mail copies of the order forthwith to all the parties and their Ld. Counsel for information and for taking necessary steps.

In the National Company Law Tribunal,
Kolkata Bench (Court- II)

International Paper Concern vs. B.K. Podder Printing Pvt. Ltd.
C.P (IB) 140/KB/2020

8.17 Certified Copy of this order may be issued, if applied for, upon compliance of all requisite formalities.

Balraj Joshi
Member (Technical)

Rohit Kapoor
Member (Judicial)

Signed on this, the 19th day of September, 2022

SM[LRA]