

**IN THE NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH, COURT NO. II
KOLKATA**

Company Petition (IB) No. 122/KB/2022

*An Application 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:

Kodak India Private Limited [CIN: U99999MH1973PTC016767], a company incorporated under the provisions of the Companies Act, 1956, having its registered office in Mumbai, Maharashtra – 400 098.

... Applicant/ Operational Creditor.

Verses

M.S. Graphics Pvt. Ltd. [CIN: U22219WB1991PTC052177], a company incorporated under the provisions of the Companies Act, 1956, having its registered office in Kolkata, West Bengal – 700 001.

... Respondent/ Corporate Debtor.

Date of Pronouncement: December 19, 2023.

CORAM:

SMT. BIDISHA BANERJEE, HON'BLE MEMBER (JUDICIAL)

SHRI D. ARVIND, HON'BLE MEMBER (TECHNICAL)

Appearance:

For the Operational Creditor:

1. Mr. Ratnanko Banerji, Sr. Adv.,
2. Mr. T. Ray, Adv.,
3. Ms. R. Prakash, Adv.,
4. Mr. A. Choudhury, Adv.

For the Corporate Debtor:

1. Mr. Jishnu Chowdhury, Adv.,
2. Mrs. O. Chatterjee, Adv.,
3. Mr. S. Basu, Adv.

**IN THE NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH, COURT NO. II
KOLKATA**

Company Petition (IB) No. 122/KB/2022

ORDER

Per: D. Arvind, Member (Technical)

1. This Court is congregated hybrid mode.
2. Heard the Learned Senior Counsel and Learned Counsel for both parties.

Factual Matrix:

3. This instant application is preferred under Section 9 of Insolvency and Bankruptcy Code, 2016 for brevity “I&B Code”, by Kodak India Pvt Ltd, (Operational Creditor/ Applicant / OC) against MS Graphics Pvt Ltd (Corporate Debtor/ Respondent /CD), seeking direction from this Adjudicating Authority to initiate Corporate Insolvency Resolution Process (for brevity “CIRP”) in respect of the Corporate Debtor.
4. Kodak India Pvt Ltd had business relationship with MS Graphics Pvt Ltd the respondent corporate debtor herein. During the course of business, based on various orders placed by the CD, the Operational Creditor has sold and supplied digital plates and chemicals to the Corporate Debtor.
5. Work / Purchase orders were placed by the Corporate Debtor in a running and continuous manner during the period from 27.06.2018 to 01.10.2021.
6. The invoices were raised by the Operational Creditor towards the sale and supply of goods which were accepted and acknowledged by the Corporate Debtor without raising any protest, demur, or objection.
7. The payments were made by the Corporate Debtor from time to time on ad-hoc basis on few occasions and on Invoice basis on few other occasions depending upon the fund’s availability and also in terms of an agreement dated 19.02.2019 which is called as “Payment Plan Agreement” executed between CD and OC.
8. In the course of business from 25.09.2020 to 09.08.2021 the Operational Creditor has raised several invoices against supply of goods amounting to sum of Rs. 6,26,93,986/- pursuant to the orders issued by the Corporate Debtor. Copies of

**IN THE NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH, COURT NO. II
KOLKATA**

Company Petition (IB) No. 122/KB/2022

the purchase orders issued along with invoices & debit notes for sale of goods are annexed as **Annexure D** to the application.

9. As per the work orders payment will have to be made within 120 days from the date of invoice. The Operational Creditor from 29.09.2020 to August 2021 received Rs.11,20,229/- as part payment towards the invoices raised by the Operational Creditor. However, till date a sum of Rs. 6,31,49,0000 is due as per the table mentioned below:

Sr. No	Particulars	Amount in INR
1.	Invoices raised from 25 th September 2020 to 9 th August 2021.	6,26,93,986/-
2.	Debit notes towards the Bank charges and interest charges etc. deducted by Bank for opening the Letter of Credit.	15,75,606/-
Total (1+2)		6,42,69,592/-
3.	Part payment received towards the outstanding invoices as stated herein above	11,20,229/-
Total outstanding (1+2-3)		6,31,49,363/-

Chart indicating invoices and debit notes raised from 27.06.2018 to 09.09.2021 is in **Annexure F** to the application.

10. It is the claim of the Operational Creditor that the Corporate Debtor failed to make payment for the period 27.06.2018 to 31.10.2019 amounting to Rs. 12,11,16,376/-, consequent to which both parties executed a “Payment plan agreement” wherein the Corporate Debtor agreed to make payment of outstanding dues as per the terms and conditions mentioned therein.

**IN THE NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH, COURT NO. II
KOLKATA**

Company Petition (IB) No. 122/KB/2022

11. It was agreed by the Corporate Debtor that they will continue to pay monthly dues within the credit period of 120 days from the date of invoice apart from paying the past dues within the time frame mentioned in the said agreement.
12. Subsequent to this agreement Operational Creditor received some payments which were adjusted towards the outstanding dues as per the agreed payment structure and after all the adjustments as stated above a sum of Rs. 6,49,36,363/- is still due towards invoices raised from 25.09.2020 to 09.08.2021.
13. Since the Corporate Debtor failed to make payments as per the payment plan agreement and also due to the Covid situation both parties agreed by way of an E-Mail dated 10.08.2020 that the mechanism of 1:1.3 will be put in place so that 100% will go towards current invoice and balance 30% will be adjusted towards outstanding payments. For Example, if OC sell and supply goods and issue Invoice for Rs.1 Lac, CD will pay Rs. 1.3 Lac out of which 1 Lac will be for the Invoice raised for the current supply and Rs.0.3 Lac for payment against dues. Operational Creditor claims that the running account has been maintained for this purpose.
14. Since the Operational Creditor failed to make payment even as per this renewed arrangement, the Operational Creditor intimated to the Corporate Debtor on 15.06.2020 that whatever payment that has been paid would be adjusted against the past dues and not based on 1:1.3 as earlier agreed. The copy of the said E-Mail 15.06.2020 is Annexed in **Annexure J** to the application.
15. After this the Corporate Debtor issued several cheques from August 2021 to September 2021 for an amount of 1,33,91,112/- out of which 64,12,000 was dishonoured and other cheques worth Rs. 40,00,000 were dishonoured with a remark "*Payment stopped by Drawer*". Due to the dishonour of cheques, a criminal complaint was filed before Metropolitan Magistrate 58th Court Bandra by the OC and the same is still pending for disposal.
16. Given the above situation Operational Creditor issued a notice under Section 8 of the I&B Code on 27.10.2021.

**IN THE NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH, COURT NO. II
KOLKATA**

Company Petition (IB) No. 122/KB/2022

17. The Corporate Debtor on 11.11.2021 replied to the Operational Creditor and denied the existence of debt, alleging misrepresentation and suppression of facts by the OC. Copy of the notice issued under Section 8 and reply by Corporate Debtor to the said notice is annexed in **Annexure O & P** respectively.
18. In view of above this application has been filed by the Operational Creditor under Section 9 of I&B Code seeking commencement of CIRP of the CD.

Submissions made by the Applicant:

19. The Learned Senior Counsel of the Applicant took us through **Annexure E** to the application which contains the list of invoices that are pending to be paid.
20. The Learned Sr. Counsel further took us through **Annexure F** to the application which contains details of invoices and debit notes raised from 27.06.2018 till 09.08.2021 and adjustment of part payment made by CD from 01.02.2019 till 01.10.2021 towards such invoices.
21. The Learned Sr. Counsel relied on the Pre-Payment Agreement executed by the parties. On 19.02.2019 CD acknowledged the total outstanding as of 31.01.2019 to the tune of Rs. 6,51,18,815/- out of which Rs. 3,40,98,075/- are overdue as on 31.01.2019. Accordingly, a repayment schedule was drawn up in the agreement for an amount of Rs. 4,11,16,376/-
22. It was also agreed that from June 2019 onwards CD will continue to pay its monthly dues every month within 120 days from the date of invoice. The learned Sr. counsel submits that the CD breached the terms and conditions contained in this agreement. Despite that, the OC renewed and agreed on new payment mechanism of 1:1.3 where 100% of current invoices will be paid within 120 days and 30% extra payments will be paid and adjusted towards past dues. Copy of E-Mail exchanges between the parties from 24.12.2020 to 11.08.2021 are in **Annexure H** to the application.

**IN THE NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH, COURT NO. II
KOLKATA**

Company Petition (IB) No. 122/KB/2022

23. Further it is submitted that despite the agreement on this arrangement the CD communicated its inability to meet the renewed payment mechanism also vide E-Mail dated 10.08.2020 which is in **Annexure I** to the application.
24. On 27.08.2021 the Corporate Debtor sent a mail to the Operational Creditor complaining that postdated cheques given by them should have been deposited only after checking with them, but the OC has deposited without checking which has resulted in dishonour of cheques. Even in this E-Mail, there is an acknowledgement of debt and there is no dispute about the payments that are due.
25. The Learned Sr. Counsel claim that in reply to the Section 8 notice of the Operational Creditor, the Corporate Debtor did not raise any dispute with reference to the supply of goods but only raised certain business disputes alleging that the OC has been directly supplying to some of his customers affecting his business.
26. Therefore, the Learned Sr. Counsel contents that all the ingredients for a Section 9 application such as default being more than Rs. 1 Crore., acknowledgement of debt, no pre-existing dispute concerning the supply of goods and the application filed within the time limit prescribed under I&B Code exist and accordingly the application may be admitted.

Submission made by the Respondent per contra:

27. The Learned Counsel for the Respondent submits that this application has been filed claiming that invoices from 25.09.2020 to 02.08.2021 for a sum of Rs. 6,26,93,986/- apart from debit notes raised during this period for a sum of Rs. 15,75,606/-raised, remain unpaid totalling to Rs. 6,31,49,363/- as per Annexure E to the application and Part-4 of Form 5 filed in terms of Sub-Rule 1 of Rule 6 of IBBI (Application to Adjudicating Authority Rules), 2016.
28. Further the Learned Counsel took us through Sl No. 5 of Part-4 of the said form to substantiate his claim that this application has been filed only for invoices

**IN THE NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH, COURT NO. II
KOLKATA**

Company Petition (IB) No. 122/KB/2022

raised during the period mentioned above, alleged not to have been paid by the CD.

29. Further, Learned Counsel has brought to our attention that payments were made against invoices mentioned above which is evident from the Letters of Credits issued. The LCs are specific and refer to the invoices which is a mandatory document. The Bill of Exchange supporting the specific invoices are accepted by the creditors on their letterhead and duly signed by them and forms part of the LC. To demonstrate that payments for Invoices alleged to be due at the time of filing the application have been paid mostly by Letter of Credit (LCs), he took us to the page 104 of the reply which contains a chart containing Invoice wise details and payments of such Invoices thru LCs and Cheques. The Invoices mentioned in the chart are Invoices issued from 25.09.2020 to 09.08.2021 alleged to be due as per Part-4 of Form 5 filed in terms of Sub-Rule 1 of Rule 6 of IBBI (Application to Adjudicating Authority Rules), 2016
30. Further it is submitted that even in respect of cheque payments, reading of the chart at Page No. 104 of the Reply would show that the payments were made against those specified invoices.
31. In any event he submits that the payment made were against Invoices, “Invoice wise” and consequently Section 59 of the Contract Act would apply if payments are made against specific invoices and accepted by the creditor, such payment can only be appropriated against the Invoices.
32. Therefore, the argument made by the Operational Creditor that the payment of Rs. 6,31,49,363/- has been adjusted against past dues is contrary to Section 59 of Contract Act.
33. Learned Counsel also submits that the parties entered into a payment plan agreement dated 28.05.2020 and agreed to pay at a 1:1.3 ratio, i.e. Corporate Debtor will pay the entire invoice value for the current supply and 30% of payment over and above the invoice value would be paid and adjusted against the past dues.

**IN THE NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH, COURT NO. II
KOLKATA**

Company Petition (IB) No. 122/KB/2022

34. This Payment Plan Agreement was operative during the period September 2020 to July 2021 after which the Operational Creditor wrongly repudiated the same.
35. During the period under reference September 2020 to August 2021 most of the payment were received by the OC in the ratio of 1:1.3. He once again reiterated that the parties have agreed to make payment to be appropriated only against current dues at 100% and 30% extra against past dues. Now to contend that the entire amount has been appropriated against past dues is contrary to the "Payment Plan Agreement".
36. Further it is submitted that the Operational Creditor has wrongly contended that the Corporate Debtor has agreed to the adjustment of all payments against past dues and in this connection an E-Mail dated 13.06.2020 was referred, annexed at **Page 82** of the Reply affidavit which says that the same is related to only May, June & July 2020. Therefore, the contention of the Operational Creditor is absolutely incorrect.
37. The Learned Counsel has relied upon the decision held in *Pankaj Kumar Goyal Vs. Steel Projects Ltd reported in 2018 SCC Online NCLT 23364* to strength his case.
38. It is claimed that there are pre-existing disputes in the matter and finally contended that since the present matter is only relating to the period September 2020 till August 2021, statutorily the period not mentioned in the notice or **Form-5** is irrelevant for the proceeding. As for as Invoices raised during the above period mentioned shown as defaulted in Form 5, have been mostly paid and the balance payable is much less than the threshold limit. He submits that if in future proceedings are brought for the past dues, the Corporate Debtor shall deal with the same.
39. Accordingly, the Learned Counsel submits that this application is liable to be dismissed.

**IN THE NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH, COURT NO. II
KOLKATA**

Company Petition (IB) No. 122/KB/2022

Analysis and Findings:

40. It is not in dispute that the Operational Creditor has supplied goods to the Corporate Debtor and the total amount in default is Rs. 6,31,49,363/-.
41. When we examined the reply of the Corporate Debtor in response to the Section 8 notice which is in Pages No. 4660 to 4665 of the application, we don't find any dispute with reference to the quality or quantity, or price or delivery of the goods supplied.
42. It is not the case of the Corporate Debtor that Operational Creditor has supplied goods without work orders or without an agreement between the parties.
43. Corporate Debtor has disputed only the adjustment of payment made by him against past dues by the Operational Creditor instead of adjustment based on 1:1.3 payment mechanism agreed between the OC and CD. It is the claim of the Corporate Debtor that the Operational Creditor should have adjusted 100% against current supplies and 30% against the past dues as per payment plan agreement made between the parties on 28.05.2020. Instead, OC wrongly cancelled the said arrangement unilaterally and adjusted all the payments made towards past dues.
44. The Corporate Debtor has disputed about losing business because of the Operational Creditor supplying goods directly to the customers of the Corporate Debtor and few others which are nothing to do with the supply of goods, but are business related. Therefore, this cannot be a ground to say that there were pre-existing disputes between parties in terms of the code with reference to supply of goods.
45. It is evident that the "Payment Plan Agreement" was executed on 19.02.2019 and there has been the continuous exchange of mails between the parties from 24.12.2020 to August 2021 on adjustment of such payments by the Corporate Debtor to Operational Creditor. Therefore, there is a clear acknowledgement of debt of the past dues by the Corporate Debtor.

**IN THE NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH, COURT NO. II
KOLKATA**

Company Petition (IB) No. 122/KB/2022

46. During the course of the hearing, this Bench has directed the Corporate Debtor to place the latest balance sheet to see whether liability towards the Operational Creditor in respect of past dues were carried forward or not. On the next date of hearing, the Learned Counsel for the Corporate Debtor has brought the balance sheet and fairly conceded that there is an acknowledgement of debt owed to the Operational Creditor in the latest financials of the Corporate Debtor, for the year ended 31.03.2023.
47. Therefore, there is no difficulty in stating that there is an acknowledgement of debt by the Corporate Debtor to the Operational Creditor in respect of past dues, as on 31.03.2023.
48. Further, the amount in debt is not disputed and there are no pre-existing disputes as claimed, concerning the supply of goods.
49. However, it is evident from the application filed through **Form-5** under Rule 6(1) of the application to the Adjudicating Authority Rule 2016, that the Operational Creditor has claimed that an amount of Rs. 6,31,49,363/- is pending to be paid by giving details of such invoices, annexed as **Annexure F** to the application, which covers Invoices from 25th Sept 2020 to 9th Aug 2021.
50. However, we find that these invoices have been paid invoice-wise through the letter of credit & cheque payments which is annexed at **Page No. 104-114 to the** reply affidavit, and this has not been disputed. Therefore, the question of default on these invoices does not arise. The said payments are covered by Section 59 of the Contract Act according to which payment against Invoices will have to be appropriated by the Creditor against such Invoices only.
51. In view of the above finding, we would infer that these invoices are not pending to be paid and consequently this application based on such a claim in **Form-5** of the application cannot be maintained.
52. However, it is made clear that the acknowledgement of debt of the past dues is not disputed by the corporate debtor and the same is acknowledged in the latest Financials of the CD. Therefore, the operational creditor is at liberty to file

**IN THE NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH, COURT NO. II
KOLKATA**

Company Petition (IB) No. 122/KB/2022

another fresh application under Section 9 of I&B Code and if OC choose to do so, this Adjudicating Authority will deal with the same, as per law.

53. As far as the present application is concerned the past dues for the period prior to **25.09.2020** is irrelevant and therefore we **dismiss** this application as not maintainable.
54. Accordingly, we find no merit in this application being **C.P. (IB) No. 122/KB/2022** and are accordingly **dismissed**.
55. No Costs.
56. **The Registry of this Adjudicating Authority** is hereby directed to communicate this Order to the Operational Creditor and the Corporate Debtor by Speed Post and through email immediately, and in any case, not later than two days from the date of this Order.
57. Further, the **Registry of this Adjudicating Authority** shall serve a copy of this Order upon the Insolvency and Bankruptcy Board of India (IBBI) for their record and also upon the Registrar of Companies (ROC), West Bengal, Kolkata by all available means. The said Registrar of Companies shall send a compliance report in this regard to the Registry of this Court within seven days from the date of receipt of a copy of this order.
58. Certified copies of this order, if applied for with the Registry of this Adjudicating Authority, be supplied to the parties upon compliance with all requisite formalities.

D. Arvind
Member (Technical)

Bidisha Banerjee
Member (Judicial)

This Order is signed on the 19th Day of December 2023.

Bose, R.K. [LRA]
Tiwari, V. [LRA]