



**NATIONAL COMPANY LAW TRIBUNAL
GUWAHATI BENCH
GUWAHATI**

ORDER SHEET OF THE HEARING ON 18th OCTOBER, 2024, 02:30 P.M.

CP (IB)/5/GB/2024

**Present: 1. Hon'ble Member (Judicial), Shri Deep Chandra Joshi
2. Hon'ble Member (Technical), Shri Balraj Joshi**

In the Matter of	GWC Asphalt (OC) Vs T.K. Engineering Consortium Pvt. Ltd
Under Section	U/s 9 of IBC, 2016

Appearances (via video conferencing/physically)

ORDER

None appeared either for applicant or for respondent.

Order pronounced in the open court *vide* separate sheets.

Sd/-
Balraj Joshi
Member (Technical)

Sd/-
Deep Chandra Joshi
Member (Judicial)

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CP (IB) No.5/GB/2024

An Application under Section 9 of the Insolvency and Bankruptcy Code, 2016 ("IBC") read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules,

In the matter of:

GWC Asphalt, (Represented by its partner Nitesh Agarwala) (UAIN RFS-REGPF/2021/00514), 1st Floor, Anil Plaza-II, ABC, G. S. Road, Guwahati-781005, Assam;

... Applicant/Operational Creditor

-Versus-

T.K. Engineering Consortium Private Limited (CIN: U40102AR2008PTC008252), Model Village, Naharlagun, Arunachal Pradesh- 791110.

... Respondent/Corporate Debtor

Coram:

Shri Deep Chandra Joshi : Member (Judicial)

Shri Balraj Joshi : Member (Technical)

Appearances (through video conferencing):

For the Petitioners : Dr. Swati Tejawat, CA.

For the Respondent : Mr. S.K. Deori, Adv.; Mr. D. Mazumdar, Adv.

**Order reserved on: 13.09.2024
Order pronounced on: 18.10.2024**

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ORDER

Per: Deep Chandra Joshi, Member (Technical)

1. This Company Petition is filed by **GWC Asphalt** (“**Applicant/ Operational Creditor/ OC**”) seeking to initiate Corporate Insolvency Resolution Process (“**CIRP**”) against **T.K. Engineering Consortium Private Limited**, (“**Respondent/ Corporate Debtor/ CD**”) by invoking the provisions of Section 9 of Insolvency and Bankruptcy Code, 2016 (“**Code**”) read with Rule 6 of Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for resolution of a sum of Rs. 3,03,01,592/- (Rupees Three Crores Three Lakhs One Thousand Five Hundred and Ninety-Two Only) [Principle Rs. 2,95,00,000 /- (Rupees Two Crores Ninety-Five Lakhs Only) along with interest of Rs. 8,01,592 /- (Rupees Eight Lakh One Thousand Five Hundred and Ninety-Two Only)] being an Operational Debt due and payable by CD.
2. Applicant (“**OC**”) is a partnership firm registered with the Registrar of Firms *vide* UAIN RFS-REGPF/2021/00514 (Annexure 2) and with the Ministry of Micro Small and Medium Enterprises as Medium Enterprise (Udyam Registration No. AS-03-0004634) (Annexure 3). It is engaged primarily in the business of manufacturing and trading of bitumen, bitumix etc.
3. Corporate Debtor (“**CD**”) is a private limited company, incorporated under the Companies Act 1956, bearing CIN: U40I02AR2008PTC008252, and *inter alia* engaged in the business of construction works mainly roads, highways, bridges, sports infrastructure, etc. CD procured Bitumen from OC for road construction projects executed by them from OC over the past several years for various construction sites.
4. The Petitioner submits that:
 - 4.1. According to the terms of the invoices raised by OC, the usual credit period allowed to CD was 30 days. In cases where the credit period was not

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explicitly mentioned, a maximum of 45 days was allowed in accordance with MSME regulations.

- 4.2. Despite this, CD has consistently delayed payments beyond the agreed credit period for the past two to three years, despite repeated requests from OC to regularize payments. The prolonged delays severely impacted OC's working capital cycle. OC issued a legal notice dated 27.09.2021 (Annexure 5), wherein it was informed to CD that the total outstanding amount due as on 01.09.2021 was Rs. 2.17 Crores.
- 4.3. OC subsequently issued two demand notices, dated 19.11.2021 and 07.12.2021, for outstanding payments relating to CD's construction sites at Kusumtala and Borgang. The total outstanding amount claimed was ₹4,65,14,993/ (Rupees Four Crores Sixty-Five Lakhs Fourteen Thousand Nine Hundred and Ninety-Three Only). This amount included ₹4,12,89,587/- towards the principal sum and ₹52,25,406/ as accrued interest, calculated at a rate of 2% per month (as per the terms of the invoices) on delayed payments. Both demand notices were delivered to CD on 23.11.2021.
- 4.4. CD sent a reply dated 11.11.2021 with subject stating "Intimation of Earliest Redressal of Our Dispute", which was received by OC on 30.11.2021. However, this letter was actually posted by CD on 26.11.2021, after receiving the Demand Notice on 23.11.2021. The timing of this response indicates that it was an afterthought by CD, made in reaction to the demand notices, with a malicious intent of fabricating a pre-existing dispute that did not previously exist. (A copy of the postal receipt of the letter dated 11.11.2021, along with the reply letter, is annexed as Annexure 6).
- 4.5. Apart from the letter dated 11.11.2021, no other correspondence was ever made by CD regarding any deficiency in the supply of materials. In a subsequent meeting with OC, CD assured that it would regularize the outstanding payments, committed to being timely in future payments and

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- requested the continued supply of materials. However, despite this assurance, CD only made a single payment of ₹50,00,000/ (Rupees Fifty Lakhs Only) on 12.07.2022 and failed to make any further payments.
- 4.6. Due to the continued non-payment of dues by CD, OC issued two demand notices on 15.10.2022 in Form 3, as per Section 8 of the Code concerning CD's construction sites at Kusumtala and Borgang. The total outstanding amount as per the demand notices was ₹6,02,24,552/ (Rupees Six Crores Two Lakhs Twenty-Four Thousand Five Hundred and Fifty-Two Only), comprising ₹4,57,33,334/- towards the principal amount and ₹1,44,91,218/- as accrued interest at a rate of 2% per month, calculated as per the invoice terms for each day of delay up to 15.10.2022.
- 4.7. The said notices, were sent to the Registered office of CD *vide* Registered Post on 21.10.2022 (Postal Receipts dated 15.10.2022 is annexed as Annexure 8). The notices were also sent to the City Office of CD on 07.11.2022 and duly delivered as per the postal receipts (Postal Receipt confirming delivery of Demand Notices dated 15.10.2022 at the City Office of CD at National Games Village, Lalmati, Guwahati is annexed as Annexure 9). The demand notices were also mailed to CD and the Directors *vide* email dated 09.11.2022 (Annexure 10).
- 4.8. OC emailed ledgers to CD stating that if no reply is received within 7 days, it shall be deemed that the amount reflected in the books of accounts of OC as receivable from CD is correct and undisputed. (Copy of email dated 18.11.2022 is annexed as Annexure 11).
- 4.9. CD sent a Reply to Demand Notice by mail dated 24.11.2022, after the statutorily allowed period of 10 days from the receipt of the notice dated 15.10.2022.
- 4.10. OC filed a petition under Section 9 of the Code before this Tribunal *vide* CP (IB) No. 34/9/GB/2022. The matter was heard by the Bench. In the meantime, CD requested OC to enter into a mutual settlement.

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Consequently, a Settlement Agreement was executed on 24.03.2023, under which CD agreed to pay ₹3.95 Crores as full settlement of the principal dues of ₹4.57 Crores. The settlement was to be paid in seven instalments as furnished below (Copy of Settlement Agreement dated 24.03.2023 is annexed as Annexure 12):

Date of Payment	Amount (in Lakhs)
15.04.2023	100.00
25.05.2023	50.00
25.06.2023	50.00
25.07.2023	50.00
25.08.2023	50.00
25.09.2023	50.00
25.10.2023	45.00

- 4.11. Out of the agreed amount of ₹3.95 Crores, CD only made a payment of ₹1.00 Crore on 22.06.2023, which was due on 15.04.2023. No further payments were made by CD, in breach of the settlement terms.
- 4.12. Aggrieved by CD's failure to honour the settlement, OC issued a demand notice dated 16.10.2023 in Form 3 as per Section 8 of the Code for claiming the principal amount with interest calculated @ 9% for each delayed days till 15.10.2023 (Annexure 13). Along with the same, OC is entitled for future interest for each delayed days till realization of the amounts due. The demand notice was mailed to CD and its Directors *vide* email dated 16.10.2023 (Annexure 14). Despite regular follow ups, no reply was received against the said notice nor was any payment received.
- 4.13. CD has neglected and failed to make full and final payment as raised in said demand notice. CD has accepted delivery of all materials supplied to them and liability as per invoices raised. All transactions between the OC and CD have been duly acknowledged. Hence, debt due against CD is undisputed

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and has become admitted. Accordingly, CD is duty bound to pay the outstanding dues of OC along with interest and other costs/taxes/charges.

4.14. The aforesaid operational debt recoverable from CD is not time barred and is well within the period of limitation.

4.15. From the above noted facts and averments, it is evident that CD has defaulted within the meaning of Section 5(a) of the Code. CD has failed to repay the admitted and undisputed principal amount of Rs. 2,95,00,000/- along with interest of Rs. 8,01,592 accrued as per the settlement agreement for each delayed day till 15.10.2023. Thus, the present application under Section 9 of the Code is filed.

5. CD submits that there are bona fide pre-existing disputes between the parties, rendering the present application untenable and not maintainable.

5.1 CD entered into a business relationship with OC in 2015 to procure Bitumen of various grades for construction projects and continued to have regular business transactions. The last payment of Rs. 50,00,000/- (Annexure-R/3).

5.2 From the outset, no formal terms regarding payments were agreed upon, and lump sum payments were made as per mutual consent. On several occasions, CD also paid advances against the supply of goods at OC's request. A detailed report of the outstanding balances and advance payments at the end of each financial year is provided below:

<i>Year</i>	<i>Outstanding Balance</i>	<i>Advance Payment</i>
<i>31.03.2016</i>	<i>29,16,096/-</i>	
<i>31.03.2017</i>	<i>93,17,487/-</i>	
<i>31.03.2018</i>	<i>49,14,587/-</i>	
<i>31.03.2019</i>	<i>49,14,587/-</i>	

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31.03.2020		30,97,100/-
31.03.2021	27,726,403.68/-	
31.03.2022	25,335,643.25/-	

- 5.3 The Purchase Order (“PO”) issued by CD distinctly indicated that the payment will be made within 30 days of delivery of the entire material. Yet the terms of payment were arbitrarily altered as 30 days, 7 days and some were left blank, putting CD in a disadvantaged position.
- 5.4 Due to the COVID-19 outbreak, there was a temporary halt in trade between the parties. Business resumed when CD placed a PO on 06.12.2020 in favour of OC. As a routine process, both goods and disputed invoices were supplied to the respective sites by OC, thereafter, disputed invoices were forwarded to the Accounts Department of the CD's office for accounting records.
- 5.5 Upon scrutiny, the Finance Department discovered a significant mismatch between the disputed invoices and the corresponding POs, particularly concerning deficiencies in quantity and inflated rates. For example, a PO for Bitumen placed on 06.03.2021 for 600 MT at ₹56, 280/- per MT was invoiced at ₹60,109/- per MT on the very same day. The pattern of inflated rates continued with subsequent invoices. (PO against the disputed Invoices is annexed as Annexure-R/8).
- 5.6 The discrepancies were immediately communicated verbally to OC, and based on OC's verbal assurance, the business relationship continued. (A copy of PO dated 06.12.2020 and the corresponding disputed Invoices are annexed in Page Nos. 74-78.)
- 5.7 CD acknowledges the receipt of legal Notice dated 27.09.2021 and Demand Notice dated 19.11.2021 which were settled by both the entities over oral communication and trade arrangement resumed in the Month of June and July, 2022.

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- 5.8 The 'disputes' were communicated to OC through a separate letter dated 11.11.2021. CD had clearly expressed its intent to settle the dispute amicably in the letter. The letter was intended to initiate an amicable resolution of the existing disputes and was not a mere reply to the legal notice dated 27.09.2021 or the demand notice dated 19.11.2021 issued by OC. (Copy of letter subjecting "Intimation of earliest Redressal of Dispute" is attached as Annexure-R/7).
- 5.9 To the surprise of CD, OC issued separate demand notices for both Kusumtola and Borgang sites on 15.10.2022, under Section 8 of the Code. In response, CD filed a detailed reply dated 24.11.2022, disputing the accuracy of the amounts claimed as due and payable by OC, as well as the legitimacy of the goods supplied. [A copy of CD's reply to the demand notice dated 24.11.2022, and further requests for reconciliation of accounts (Reminder-I & II) dated 05.12.2022 and 20.12.2022 for both the sites separately are annexed as Annexure-R/11]]
- 5.10 The legal notice dated 27.09.2021 (*vide* Page Nos. 50-52 of Annexure-5 of Form No. 5), sent by OC, did not include any claim for interest on the disputed debt. However, in the demand notice dated 15.10.2022, OC claimed a lump sum amount of interest for the disputed invoices issued on or after 12.01.2021. Despite this, CD had made the following payments during the same period:

<i>Date</i>	<i>Amount</i>
<i>29.01.2021</i>	<i>Rs. 75,00,000/- (Rupees Seventy-Five lakhs only)</i>
<i>17.02.2021</i>	<i>Rs. 50,00,000/- (Rupees Fifty Lakhs only)</i>
<i>19.02.2021</i>	<i>Rs. 30,00,000/- (Rupees thirty Lakhs only)</i>

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04.03.2021	Rs. 70,00,000/- (Rupees Seventy Lakhs only)
17.03.2021	Rs. 75,00,000/- (Rupees Seventy-Five Lakhs only)
08.04.2021	Rs. 95,00,000/- (Rupees Ninety-Five Lakhs only)
09.04.2021	Rs. 50,00,000/- (Rupees Fifty Lakhs Only)
13.04.2021	Rs. 35,00,000/- (Rupees Thirty-Five Lakhs only)
06.05.2021	Rs. 1,00,00,000/- (Rupees one Crore only)
08.06.2021	Rs. 50,00,000/- (Rupees Fifty Lakhs only)
24.06.2021	Rs. 50,00,000/- (Rupees Fifty Lakhs Only)
12.07.2021	Rs. 1,00,00,000/- (Rupees one Crore only)
20.08.2021	Rs. 1,00,00,000/- (Rupees one Crore only)
12.07.2022	Rs. 50,00,000/- (Rupees Fifty Lakhs Only)
22.06.2023	Rs. 1, 00, 00, 000/- (Rupees One Crore Only)

5.11 OC, on multiple occasions, failed to deliver the goods in due time and as per specifications in respect of quality, quantity and price causing delays in the completion of CD's ongoing projects and leading to significant financial setbacks.

5.12 CD has been regularly procuring similar goods of same range and quality from various other trading agencies. The rates charged by these other suppliers were significantly lower compared to those of OC. The other supplier had supplied the material from Haldia, West Bengal whereas OC

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had supplied the material from Goalpara, Assam. The Invoices (inclusive of transportation cost and cost of material) of both OC and other supplier remarkably shows a significant difference in the rates charged from the CD. (Invoices of both the suppliers is attached as Annexure-R/9.)

- 5.13 A formal visit was made to the office of OC at Guwahati in the Month of January, 2022 to amicably settle the dispute regarding rate variation and short supply of bitumen/ emulsion and accordingly both the parties agreed to settle the dispute and restart the business transaction.
- 5.14 As per the assurance given by OC, CD transferred a sum of Rs. 50,00,000/- on 12.07.2022 to reorganize the trade. However, between 10.06.2022 and 22.07.2022, OC again raised disputed invoices at escalated rates, significantly higher than the PO dated 09.06.2021 *vide* P.O.No. TKCPL/PO/GWC/05/21-22 for 500 MT at Rs. 60,001/- per MT. The disputed invoices dated 10.06.2022, 14.06.2022, 14.07.2022, 16.07.2022, 20.07.2022 and 22.07.2022 were billed by OC at Rs. 69,363/- per MT. (A copy of disputed invoices from the period dated 10.06.2022 to 22.07.2022 are attached in Page Nos. 147- 153).
- 5.15 OC had previously filed a similar application under Section 9 of the Code, being CP (IB) No. 34/9/GB/2022. That application was withdrawn after this Tribunal directed OC to file an affidavit addressing specific disputes regarding the invoices and the rates in question. (A copy of the Order dated 03.03.23 in CP (IB) No. 34/9/ GB/ 2022 is annexed as Annexure-R/12). However, OC did not file the required affidavit and instead opted to settle the matter without resolving the core disputes.
- 5.16 OC had not disputed affidavit filed by CD in C.P.(IB) No.34/9/GB/2022 raising the issues on disputed bills are as follows-
- a) *Rates disputes as per purchased order,*
 - b) *Short supply of quantities disputes,*
 - c) *GST disputes on transportations and goods, and*

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d) *To provide approved test certificate against the supplied billed invoices.*

- 5.17 Subsequently, OC issued a fresh demand notice dated 16.10.2023 in Form 3 under Section 8 of the Code, to which the CD did not reply, as the issues raised therein were identical to those raised in the earlier notice, to which a reply had already been filed and are same as Annexure-R/6, 7 & 11. OC had never disputed or responded to the disputes raised by CD through the said reply to the demand notices.
- 5.18 Upon reviewing the ledgers from 01.04.2015 to 23.07.2022, CD noticed discrepancies that raised concerns about OC's intentions. The outstanding balance of OC in the ledger of CD is usual as per the trade arrangements with OC and other suppliers. (The copy of ledger from the year 2015 till 2023 is annexed hereto and marked as Annexure-R/10).
- 5.19 OC has neither charged nor demanded any Interest on the outstanding balances ever which may be well established from the Whatsapp chat *vide* page no 36-49 of Form No.5 between OC and the staff of the CD. Furthermore, if the interests have ever been charged by OC it should have been accounted in the books of account for which OC should submit their audited financial statement of the relevant period. That being the case we can conclude that interest as assessed and imposed is entirely unwarranted since no earlier disclosures were made. (The copy of ledger from the year 2015 till 2023 is annexed hereto and marked as Annexure-R/10).
- 5.20 Despite the settlement agreement dated 24.03.2023, issues/disputes remain unresolved. The following issues/ disputes remains unresolved due to OC's failure to fulfill the verbal assurance and as such CD has not been able to address OC:
- a) **Invoice Rates:** The rates claimed by OC in the invoices were not supported by any PO. The head office of the CD has no record of any POs for the items supplied by OC.

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- b) **Bitumen Supply Rates:** The dispute with regard to the rate at which the bitumen was supplied as the rates were not in consonance with the purchase rates of Jamuguri project and the inconsistent rates were never settled/ finalized between the parties.
- c) **Quality Test Reports:** OC failed to provide test report/ approved test certificate of the bitumen supplied which is a vital document for verifying the quality of bitumen supplied by OC.
- d) **Lack of POs:** The Bitumen VG-30 and Emulsion was supplied without a proper PO issued by the CD and the bills raised for the same were about 10%-12% higher than the prevailing market cost of the bitumen at that point of time. As such, without amicable settlement of the disputed rates without a PO, the supplied bills cannot be finalized.
- e) **GST Overcharge:** OC has charged the cost of bitumen which is inclusive of transportation charges up to the project site plus 18% GST. OC has transported the materials from Goalpara to the project site at Biswanath Chariali without segregating the transport charges and charged GST at 18% on the combined cost of Bitumen and transportation charge, whereas transportation only attracts 12% GST. Without amicable settlement of the aforesaid issue of overcharging GST in the bills, the supplied bills cannot be finalized.
- f) **Interest Claims:** OC has claimed interest on the bills of the supplied materials in the demand notice which is not maintainable as the parties never amicably settled the subsisting disputes between the parties.
- g) **Quantity Variations:** Quantity variation between quantity billed and the actual weight of goods supplied by OC. Weigh bridge note with regard to disputed bills are as follows:
- i. Invoice No. 807 dated 19.12.2020 - 250 kg
 - ii. Invoice No. 903 dated 02.01.2021- 470 kg
 - iii. Invoice No. 1123 dated 08.02.2021 - 210 kg

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- iv. Invoice No. 1198 dated 16.02.2021 - 130 kg
- v. Invoice No. 1257 dated 24.02.2021 - 390 kg
- vi. Invoice No. 1519 dated 29.03.2021 - 160 Kg
- vii. Invoice No. 056 dated 13.04.2021 - 120 kg
- viii. Invoice No. 068 date 15.04.2021 - 140 Kg
- ix. Invoice No. 079 dated 25.04.2021 - 130 Kg
- x. Invoice No. 080 dated 25.04.2021 - 180 Kg
- xi. Invoice No. 226 dated 16.05.2021 - 300 Kg

5.21 Despite that, after the lapse of 90-day(s) CD had shown their intent to close this dispute and paid a sum of Rs. 1,00,00,000/- (Rupees One Crore Only) dated 22.06.2023. (A copy of payment dated 22.06.2023 is annexed hereto and marked as Annexure-R/13).

5.22 CD submits that OC had given a verbal assurance at the time of settlement agreement, initiated, and drafted by OC, to correct and rectify the disputes. However, even after 431 days, since OC did not fulfill its verbal assurances, CD withdrew its consent to the settlement agreement through a letter dated 29.05.2024, which was duly notified to OC through Email. (A copy of Withdrawal of the Settlement Consent *vides* Letter dated 29.05.2024 is annexed hereto and marked as Annexure-R/140). Any debit note as per settlement agreement is nullified owing to non-fulfillment of OC verbal assurance or to amicably mitigate the disputed bills invoices

5.23 OC is attempting to drag CD into an unnecessary insolvency process without resolving the ongoing disputes. It is well established that the object of operational debt under the Code was to ensure that debts smaller than financial debts do not put CD into Insolvency or enable initiation of CIRP for extraneous consideration. One of the pre- requisites to be examined to understand 'existence of a dispute is the validity of claim made by OC'

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*[Mobilox Innovation Private Limited V/s Kirusa Software Private Limited,
AIR 2017 SC Civil Appeal No. 9405].*

5.24 That the CD respectfully submits that it is a solvent entity with a net worth of about Rs. 245 Crores as per the latest Audited financial statement for the year ended 31.03.2023 (Annexure R/4).

5.25 CD has ongoing Projects of State & Central Govt. Amounting to Rs 732.40 Cr. (Seven Hundred Thirty-Two Crores and Forty Lakhs approximately). (Annexure R/2). List of active projects of CD:

- a) *Project Name: Four Laning of Jamagurihat to end of Biswanath Chariali Bypass (From Km 182.000 to Km 208.000) NH-52 in Assam.*
- b) *Project Cost: 303,49,00,000/- (Rupees Three Hundred Three Crore Forty-Nine Lakh only)*
- c) *Project Name: 4 Laning of Itanagar to Bandardewa, NH 415 (From km 40+430 to km 31+735) Pkg-B in Itanagar, Arunachal Pradesh.*
- d) *Project Cost: 341,71,74,400/- (Rupees Three Hundred Forty-One Crore Seventy-One Lakh Seventy-Four Thousand Four Hundred only).*
- e) *Project Name: - Tedadege to Henker (from km 0.000 to km 28.550) in West Siang, Arunachal Pradesh.*
- f) *Project Cost: - 263,45,25,000/- (Rupees Two Hundred Sixty-Three Crore Forty-Five Lath Twenty-Five Thousand only).*
- g) *Project Name: Outdoor Stadium at Aalo, Chimpu & Tezu, Arunachal Pradesh.*
- h) *Project Cost: 163,56,62,782/- (Rupees One Hundred Sixty-Three Crore Fifty-Six Lakh Sixty-Two Thousand Seven Hundred Eighty-Two only).*

5.26 The Turnover details of CD for the last five years –

<i>Financial Year</i>	<i>Turnover (in Rs.)</i>
2018-19	3,806,342,767.00

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<i>2019-20</i>	<i>5,023,003,474.90</i>
<i>2020-21</i>	<i>5,453,179,928.38</i>
<i>2021-22</i>	<i>2,878,786,000.00</i>
<i>2022-23</i>	<i>1,234,328,000.00</i>

5.27 The accounts of Financial and Operational Creditors are regular in nature since the inception of the business. (A copy of Index of Charge Registered on the MCA is annexed as Annexure-R/5). Hence, CD is solvent and willing to clear any undisputed amounts once the pending issues are resolved. OCs by way of filing the instant application under section 9 of the Code are dragging such a company to Insolvency and bankruptcy without addressing the disputes subsisting between the parties.

5.28 After the outbreak of the COVID-19 Pandemic, revenue from operations of CD plummeted as the above table indicates. CD is regular in fulfill its obligations, however, without prejudice to the right of contention of CD, it is most respectfully submitted that owing to the economic slowdown triggered by the COVID-19 pandemic, payment to OC has been kept in abeyance due to the commercial dispute with respect to rate variation, delay in supply of goods & short supply of goods. (A copy of brief detailing of Commercial dispute in Comparative chart of both the sites, namely Kusumtola/ Karchantola & Borgang, with reference to disputed invoice and PO is annexed hereto and marked as Annexure-R/6.)

5.29 Despite multiple subsisting disputes between the parties, CD has made a payment of Rs. 10,00,000/- (Rupees Ten lakh only) via NEFT on 12.09.2024 against the claim of OCs. Unless, OC resolves the aforesaid disputes, the CD would not be in a position to clear the disputed bills.

5.30 Given the existence of genuine disputes between the parties, CD respectfully submits that the appropriate forum for the resolution of these

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disputes is not through the initiation of a Corporate Insolvency Resolution Process under the Code.

5.31 That in light of the aforesaid, instant petition filed by OC under Section 9 of the Code is in violation of the provision of the Code and abuse of the process of law. The Code was enacted with the objective of providing resolution of insolvency of an entity by continuation of its operation, maximizing its assets and balancing the interest of its stakeholders. OC by setting into motion the present proceedings is attempted to misuse the provision under the Code as a recovery mechanism. The present petition is "fraudulent" and "malicious" as provided under section 65 of the Code.

5.32 CD submits that the Application filed by OC is not maintainable as -

- i. The demand notice was illegal and non-est, and
- ii. There was no default either on the date of filing of the present petition or even till date since the claimed debt amount is disputed.

5.33 Since no default has been established by the material on record, the present application merits dismissal in Liminie. In light of the foregoing, it is respectfully prayed that this Tribunal may be pleased to—

- a) *dismiss the present application filed under Section 9 of the Code;*
- b) *direct OC to resolve the pre-existing disputes with the CD through the appropriate forum; and/or*
- c) *Pass any other orders as this Tribunal deems fit in the interest of justice.*

Analysis and findings

6. Heard Ld. Counsels on both sides appearing for the OC/Petitioner and CD/Respondent respectively and perused the available records.

7. Before we proceed with the facts of the present case, the statutory framework regarding the Application under Section 9 of the Code needs to be recapitulated. An application under Section 9 of the Code can only be filed after the delivery of

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a demand notice as provided under Section 8 of the Code. Section 8 of the Code requires the Operational Creditor, upon the occurrence of default, to deliver a Demand Notice for unpaid Operational Debt. Furthermore, Section 8(2) specifies that the Corporate Debtor must, within 10 days of receiving the Demand Notice, inform the Operational Creditor of any existing dispute.

8. Under Section 9(1), if Operational Creditor does not receive payment from the Corporate Debtor or notice of the dispute under Sub-section (2) of Section 8, may file an Application under Section 9(1) of the Code.

Section 9(1) is as follows:

“Section 9: Application for initiation of corporate insolvency resolution process by operational creditor.- (1) After the expiry of the period of ten days from the date of delivery of the notice or invoice demanding payment under sub-section (1) of section 8, if the operational creditor does not receive payment from the corporate debtor or notice of the dispute under sub-section (2) of section 8, the operational creditor may file an application before the Adjudicating Authority for initiating a corporate insolvency resolution process.”

Section 9(5)(ii) is as follows:

“(5) The Adjudicating Authority shall, within fourteen days of the receipt of the application under subsection (2), by an order—

(i).....

(ii) reject the application and communicate such decision to the operational creditor and the corporate debtor, if—

(a) the application made under sub-section (2) is incomplete;

(b) there has been [payment] of the unpaid operational debt;

(c) the creditor has not delivered the invoice or notice for payment to the corporate debtor;

(d) notice of dispute has been received by the operational creditor

or there is a record of dispute in the information utility; or

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(e) any disciplinary proceeding is pending against any proposed resolution professional:

Provided that Adjudicating Authority, shall before rejecting an application under sub-clause (a) of clause (ii) give a notice to the applicant to rectify the defect in his application within seven days(i) of the date of receipt of such notice from the adjudicating Authority.”

9. In the present case, the Applicant has been supplying bitumen of various grades for road construction projects executed by the Corporate Debtor. As per the terms of the invoices raised against the supply materials, the credit period usually allowed to the Corporate Debtor was 30 days. In some invoices, where the credit period was not mentioned, a period of 45 days can be maximum allowed. However, the Corporate Debtor has delayed payments beyond the agreed credit period for the past two to three years. Consequently, the Applicant sent a legal notice dated 27.09.2021 to the Corporate Debtor for clearing the outstanding dues.
10. Further, the Applicant issued two demand notices dated 19.11.2021 and 07.12.2021, respectively for outstanding total amount of Rs. 4,65,14,993 (Rupees Four Crore Sixty-Five Lakh Fourteen Thousand Nine Hundred Ninety-Three Only) including interest accrued @2% per month as per term of invoices. In the meantime, the Corporate Debtor sent a reply letter dated 11.11.2021. However, this letter was actually posted by the Corporate Debtor on 26.11.2021 after receiving the demand notices. Subsequently, following the demand notices sent by the Applicant, the Corporate Debtor had a meeting with the Applicant and assured that it would regularize the payments, requesting the Applicant to supply further materials. Additionally, the Corporate Debtor made a single payment of ₹50,00,000 (Rupees Fifty Lakhs only) on 12.07.2022 and failed to make any further payments.

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11. Consequently, due to the continued non-payment of dues by the Corporate Debtor, the Applicant has again issued two demand notices on 15.10.2022 and filed an Application under Section 9 of the Code before this adjudicative authority *vide CP (IB) No. 34/9/GB/2022*. The matter was heard by the Bench. In the meantime, the Corporate Debtor and the Applicant entered into an amicable settlement of debt due along with interest thereon and accordingly a Settlement Agreement was executed on 24.03.2023, under which the Corporate Debtor agreed to pay Rs. 3.95 Crores against the principal outstanding of Rs. 4.57 Crores.
12. It was agreed that the amount of Rs. 3.95 Crores would be paid by the Corporate Debtor in seven instalments. However, the Corporate Debtor paid an amount of Only Rs. 1.00 Crore being the first instalment on 22.06.2023. The Corporate Debtor failed to make any other payments as agreed upon in the Settlement Agreement. Subsequently, the Applicant issued a demand notice dated 16.10.2023 and claimed an amount of Rs. 3,03,01,592/- (Rupees Three Crores Three Lakhs One Thousand Five Hundred and Ninety-Two Only) out of which Rs. 2,95,00,000/- (Rupees Two Crores Ninety-Five Lakhs Only) is the principal amount outstanding as per settlement agreement.
13. At this juncture, it is germane to refer the Judgement of the Hon'ble Apex Court in *Mobilox Innovations Private Limited Vs Kirusa Software Private Limited* wherein in para 34 the Hon'ble Supreme Court laid down the guidelines for adjudicating Section 9 Application. Para 34 is as follows: -

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

(i) Whether there is an “operational debt” as defined exceeding Rs 1 lakh? (See Section 4 of the Act)

(ii) Whether the documentary evidence furnished with the Application shows that the aforesaid Debt is due and payable and has not yet been paid? and

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(iii) Whether there is existence of a dispute between the parties or the record of the 15 Company Appeal (AT) (Insolvency) No. 256 of 2021 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. Further, it is no more *res-integra* that for non-admission of a Section 9 Application, the existence of a dispute must be plausible, and it must not appear as a moonshine defence. In the present matter, the Corporate Debtor did not raise any dispute prior to the issuance of the first Demand Notice dated 19.11.2021 by the Operational Creditor. The letter dated 11.11.2021 from the Corporate Debtor was, in fact, posted on 26.11.2021, after the demand notice had been received. The Corporate Debtor has placed sole reliance on the dispute raised through this letter dated 11.11.2021. Subsequently, the dispute was also raised in an earlier application filed by the Applicant, which was eventually settled between the parties through a settlement agreement. However, in the present application, the Corporate Debtor has not responded to the fresh demand notice sent by the Applicant. The Corporate Debtor, in this application, is attempting to raise a dispute based on the letter dated 11.11.2021, which indicates that, under the guise of this letter, a Moonshine defense has been set up to deny the legitimate dues of the Operational Creditor.
15. At this juncture it is also important to quote the judgment of the Hon'ble Supreme Court in *M/s S.S. Engineers & Ors. vs. Hindustan Petroleum Corporation Limited*, which reads as follows:

“32. On a reading of Sections 8 and 9 of the IBC, it is patently clear that an Operational Creditor can only trigger the CIRP process, when there

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is an undisputed debt and a default in payment thereof. If the claim of an operational creditor is undisputed and the operational debt remains unpaid, CIRP must commence, for IBC does not countenance dishonesty or deliberate failure to repay the dues of an Operational Creditor. However, if the debt is disputed, the application of the Operational Creditor for initiation of CIRP must be dismissed.”

16. In so far as the debt is concerned, a bare perusal of the Settlement Agreement dated 24.03.2023 which indicates the Corporate Debtor undertook to pay a sum of Rs. 3,95,00,000/- (Rupees Three Crores Ninety-Five Lakhs Only) as final settlement amount to the outstanding operational debt payable by the Corporate Debtor. However, the Corporate Debtor paid an amount of Rs. 1.00 Crore Only being the first instalment was paid on 22.06.2023. Apart from this, the Corporate Debtor failed to make any payments as agreed upon.
17. Thus, from the above facts and averments it can be seen that the Corporate Debtor has defaulted within the meaning of Section 5(a) of the Code, repayment of admitted and undisputed payment of Rs. 2,95,00,000/- (Rupees Two Crore Ninety-Five Lakh Only) towards principal amount of invoices outstanding and Rs. 8,01,592/- (Rupees Eight Lakh One Thousand Five Hundred Ninety-Two Only) towards interest accrued as per the settlement agreement.
18. At this stage, it is relevant to refer the Judgement of the Hon'ble NCLAT in *“Mr. Keshav Kantamneni v. M/s Kishan Chand Suresh Kumar and Ors. CA (AT)(CH)(INS.) No. 260/2021”* which reads as follows:

“54. In the instant case, although on the side of the ‘Appellant’, a plea is taken, that the ‘Unpaid Dues’, under a ‘Settlement Agreement’, is not an Operational Debt’, and also that, a ‘Violation’ of the Memorandum of Compromise’ dated 30.04.2019, cannot be a basis to initiate ‘Corporate Insolvency Resolution Process’, against the ‘Corporate Debtor’, it is evident from the ‘Memorandum of Compromise’ dated 30.04.2019, and other materials available on record that the ‘Outstanding Principal Amount’, remains ‘Unpaid’

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and on this ground alone, the instant 'Appeal', deserves to be dismissed, in the considered opinion of this 'Tribunal'."

19. Moreover, it is pertinent to note that the settlement agreement discussed in this case pertains to the prior financial obligations of the Corporate Debtor, which were due and formed the basis for negotiations between the parties. Therefore, it is important to recognize that the settlement agreement was not created in isolation but as an extension of the liabilities that underpin it. In the present matter, the default occurred and the Corporate Debtor through the settlement agreement acknowledges the debt and has made partial payments in accordance with the agreement. This clearly indicates that only a part of the debt has been paid towards the full and final settlement of the Applicant's claim with the balance to be paid as per the terms of the settlement agreement.
20. Furthermore, it is clear from the judgment mentioned above, as well as the judgment of the Hon'ble NCLAT in *Ahluwalia Contracts (India) Ltd. v. Logix Infratech Pvt. Ltd., CA(AT)(Insolvency) No. 696 of 2022*, where the Hon'ble NCLAT held that a default in the instalments of a settlement agreement will be construed as a default of an operational debt. In view of facts and records in the present Application it is undisputed fact that there is debt and default. Thus, we are of the view that in the present matter, all the ingredients laid out under Section 9 are fulfilled and there is no impediment in admitting the petition.
21. Under sub-section (4) of Section 9 of the Code, the Operational Creditor may propose the name of a Resolution Professional to be appointed as Interim Resolution Professional ('IRP') but it is not obliged to do so. In the instant case, the Operational Creditor has not proposed that any person may be appointed as IRP. Hence, this bench can appoint the RP from the pool of RPs empaneled with the IBBI.
22. In view of this, **Mr. Purshotam Gaggar**, duly registered with the Insolvency and Bankruptcy Board of India, with Registration No. IBBI/IPA-001/IP

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P00487/2017-2018/10875, Email Id: purshotamgaggar@hotmail.com is hereby appointed as the IRP. The said IRP is directed to file her written consent to act as a resolution professional in Form-2 provided under Rule 9 of the Insolvency and Bankruptcy Board of India (Application to Adjudicating Authority) Rules, 2016.

23. The IRP is directed to take all such steps as are required under the statute, inter-alia in terms of Sections 15, 17, 18, 19, 20 and 21 of the Code and transact proceedings with utmost dedication, honesty and strictly in accordance with the provisions of the Code, and Rules and Regulations thereunder.

24. Consequences of initiation of CIRP shall be inter-alia as follows:

24.1. The IRP appointed by the Adjudicating Authority, **Mr Purshotam Gaggar**, is directed to take over the affairs of the Corporate Debtor and duties as required to be performed by her under the provisions of Code including issue of publication in widely circulated Newspapers as contemplated under the provisions of the Code and calling for claims from the creditors of the Corporate Debtor; and collation of the same shall be done.

24.2. Further, as a sequel of admission, moratorium as envisaged under Section 14 of the Code is invoked in relation to the Corporate Debtor which will be in vogue during the CIRP of the Corporate to Debtor. The IRP shall carry out CIRP strictly as per the timelines specified and as envisaged under the provisions of the Code in relation to the Corporate Debtor.

24.3. The said IRP shall act strictly in accordance with the provisions of the Code and with a view to defray her expenses to be incurred and fees on account, the Applicant is directed to deposit a sum of Rs. 3,00,000 (Three Lakhs) within seven days from the date of this order. This amount shall be proportionately contributed and reimbursed to the Applicant upon formation of the Committee of Creditors. In terms of Section 17 and 19 of the Code all personnel of the Corporate Debtor including promoters

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NATIONAL COMPANY LAW TRIBUNAL
GUWAHATI BENCH
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CP (IB) No.5/GB/2024

and Board of Directors, whose powers shall stand suspended, shall extend all cooperation to the IRP during his tenure as such and the management of the affairs of the Corporate Debtor shall vest with the IRP.

- 24.4. In terms of Section 9 of the Code, this order shall be communicated at the earliest, not exceeding one week from today, to the Applicant, Corporate Debtor as well as the IRP appointed by this Adjudicating Authority to carry out CIRP. A copy of this order shall also be communicated to IBBI for its records.
25. Accordingly, **CP (IB) No. 5/GB/2024, is admitted.** In view of the foregoing, pending applications, if any, shall stand disposed of.
26. The Registry is directed immediately to send a soft copy of the instant Application along with this order to the parties along with the RP nominated herein.



Balraj Joshi
Member (Technical)



Deep Chandra Joshi
Member (Judicial)

Signed this on 18th Day of October, 2024

Madhurita T. (LRA)