

**IN THE NATIONAL COMPANY LAW TRIBUNAL,  
DIVISION BENCH - I, CHENNAI**

**CP/IB/161(CHE)/2021**

*(filed under Section 9 of the Insolvency & Bankruptcy Code, 2016)*

*Along with*

**IA(IBC)/465/CHE/2022 in CP/IB/161(CHE)/2021**

*(filed under Rule 11 of NCLT Rules, 2016)*

*In the matter of M/s. J.S. Auto Cast Foundry India Private Limited*

**K. Sampath Kumar**  
S/o. P. Kaliappan,  
D. No. 397, Aruna Nagar,  
K. Vadamadurai Post,  
Coimbatore – 641 017

*... Applicant/Operational Creditor*

*-Vs-*

**J.S. Auto Cast Foundry India Private Limited**  
S.F. No. 165/1, Sembagagundenpalayam,  
Kuppepalayam,  
Coimbatore – 641 107

*... Respondent / Corporate Debtor*

*Order Pronounced on 10<sup>th</sup> October 2023*

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**SANJIV JAIN, MEMBER (JUDICIAL)**  
**VENKATARAMAN SUBRAMANIAM, MEMBER (TECHNICAL)**

*For Petitioner :* S.R. Sundaram, Advocate

*For Respondent:* Satish Parasaran, Senior Advocate  
Athiban Vijay, Advocate

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CP/IB/161(CHE)/2021

K. Sampath Kumar –Vs- M/s. J.S. Auto Cast Foundry India Private Limited

**ORDER**  
**(Hearing conducted through VC)**

**Per: SANJIV JAIN, MEMBER (JUDICIAL)**

This application has been filed by the Operational Creditor viz. K. Sampath Kumar against the Corporate Debtor viz. J.S. Auto Cast Foundry India Private Limited under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as 'IBC', 2016) seeking thereof to initiate Corporate Insolvency Resolution Process against the Corporate Debtor.

2. IA(IBC)/465/CHE/2022 is an Application filed by the Operational Creditor viz. K. Sampath Kumar under Section 60(5) of IBC, 2016 seeking relief as follows;

*"The Applicant herein is the Operational Creditor and this instant Application is filed praying an Order, Direction and Injunction restraining the Corporate Debtor and its Directors from alienating, encumbering, transferring, or creating any third – party interest on the assets of the Corporate Debtor during pending disposal of C.P.(IB). No. 161 of 2021 by this Hon'ble Tribunal and grant such other Order or relief that may be fit, just and proper and thus render Justice."*



3. In Part – I of the Application it is stated that the Operational Creditor is an Individual. Part – II of the Application sets out the details of the Corporate Debtor, that the Corporate Debtor was incorporated on 20.08.2004 and the Registered office address of the Corporate Debtor is situated at S.F. No. 165/1, Sembagagoundenpalayam, Kuppepalayam, Coimbatore – 641 107.

4. In Part – III of the Application, it is stated that the Operational Creditor has not proposed the 'Insolvency Resolution Professional' and left it to the discretion of this Tribunal to appoint the IRP.

5. In Part – IV of the Application, the Operational Creditor has claimed a sum of Rs.1,78,22,219/- (Rupees One Crore Seventy Eight Lakhs Twenty Two Thousand Two Hundred and Nineteen Only), including interest, which is due and payable by the Corporate Debtor.

6. It is submitted that the Operational Creditor was appointed by the Corporate Debtor for the purpose of Project Management consultancy service for construction of factory premises. The Operational Creditor in his email dated 09.01.2019 had specified that he charges 10% as service

charge for the project and the Corporate Debtor also vide email dated 10.01.2019 accepted to the said terms and conditions.

7. It is submitted that the work of the Operational Creditor involves the following;

- (i) In charge for construction of new factory of Corporate Debtor in SIPCOT, Perundurai, Erode District which is now running successfully now.
- (ii) Negotiating and closing the financial accounts between the Corporate Debtor & Kumharan Infra Developers regarding the partially stopped factory construction work at Sengalipalayam Coimbatore District.
- (iii) Liaison works in selling the land of Corporate Debtor situated at Sengalipalayam Village, Kuppeyaplam, Coimbatore District.

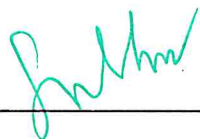
8. It is submitted that the Operational Creditor finished the entire work allotted to him in accordance with the approval email of the Corporate Debtor without any blemish.

9. It is submitted that the Operational Creditor after finishing his entire work, raised proforma invoice dated 08.08.2020 through e-mail claiming a total sum of Rs.1,48,51,849/- (Rupees One Crore Forty Eight

Lakhs Fifty one Thousand Eight hundred and Forty Nine only) to the Corporate Debtor. However, even after repeated reminders via e-mail, the Corporate Debtor failed to honour the claim of the Operational Creditor.

10. It is submitted that the Operational Creditor then issued a legal notice dated 14.09.2020 to the Corporate Debtor demanding for the payment of the above dues payable by the Corporate Debtor. It is stated that even after receipt of the notice, the Corporate Debtor did not come forward to pay the amount, however replied to the said legal notice on 06.10.2020.

11. It is submitted that since the Corporate Debtor was unable to pay the debts to the Operational Creditor, a Demand Notice under Section 8 of IBC, 2016 was sent to the Corporate Debtor on 07.10.2020. It is stated that the Corporate Debtor sent a reply to the said Demand Notice on 16.10.2020 and thereafter, the present Application has been filed on 09.07.2021.



12. Learned Senior Counsel for the Corporate Debtor submitted that there is no contractual relationship between the Operational Creditor and the Corporate Debtor and the claim of the Operational Creditor is an imaginary claim. It was never agreed by the Corporate Debtor that it would pay 10% of the project value to the Operational Creditor.

13. Learned Counsel submitted that the email dated 09.01.2019 of the Operational Creditor is the sole basis of the claim of the Operational Creditor, which is an unilateral email that does not state anything regarding the agreed consideration. Further, in the email dated 10.01.2019 sent by the Operational Creditor to the Corporate Debtor, the Operational Creditor has clearly stated that he would accept the compensation given by the Corporate Debtor. Therefore, there is no basis behind the claim of the Operational Creditor. Learned Counsel submitted that even before the issuance of the Demand Notice under Section 8 of IBC, 2016 the Corporate Debtor had raised the issue of pre-existing dispute between the parties.



14. Heard the submissions made by the Learned Counsel for both the parties and perused the record.

15. In the present case, the claim of the Operational Creditor is based upon an email dated 09.01.2019. The operative portion of the email is extracted hereunder;

*".....with respect to JS anna, if u really want me to be with you till the completion of perundurai foundry means do let me know anna. I need to plan accordingly....*

*here with rajesh& co., I'm a working partner the more profit I make, the more money I get, 10% is what they will give me. If im coming to help u in JS, I will share my profit with mani and I can work on both the sides.. you think well and let me know anna...if you are in no need also no issues...I will sign off from here once M topic is over....."*

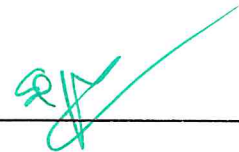
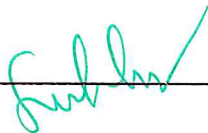
16. In reply to the said email, the Corporate Debtor on 10.01.2019 stated as follows;

*Boss,*

*Be with me until the project is complete by V and co and until we do the final settlement to them*

*Your time is shared and understand that JS will compensate as per your requirement*

*Jeeva*



17. For the aforesaid mail from the Corporate Debtor, the Operational Creditor vide email dated 10.01.2019 replied as follows;

*Ok Anna...I will plan accordingly...*

*Will update Rajesh Anna and Mani also about this...*

*My confirmation is about the work what m going to do...*

*Reg compensation Anna will accept what u give.... That too after completing the project.*

*Let's grow together Anna....*

18. A perusal of the aforesaid email would show that the entire application filed by the Operational Creditor is based upon the aforesaid exchange of emails. There is no written contract entered into between the parties. On 07.08.2020 the Operational Creditor had written an email to the Corporate Debtor. Perusal of the aforesaid email would show that there exist dispute between the parties even before the issuance of Demand Notice under Section 8 of IBC, 2016 on 07.10.2020. The operative portion of the said email is extracted hereunder;

*.....In your email dated 13th Jan 2020, you had accused me of acting with dishonest intention of cheating your company and*

*not submitted any documents related to the meetings held with Thirumoorthy of Kumharan infra developers. For your kind information it was you who paid kumharan infra developers crores of rupees in cash (our common friend Dr.Sukumar knows this) for the construction and approval and bribing purposes of the factory, and you told me not to record these statements in email, stating that you will be landed in trouble with income tax in case of any scrutiny in the future by the income tax department. I have all the relevant documents with me to prove I had not acted against your firm in the right forum when the need arises. Since all the tasks allocated to me by you for your firm are completed on time, and next i will be raising my bills on M/s.JS Autocast foundry India Private Limited for the services i had offered, it was you acting with dishonest intention with me in the clear intention of cheating me for my remuneration.*

19. A conjoint reading of the above e-mails as exchanged between the parties clearly posits the fact that there exists a 'dispute' between the parties even before the issuance of the Demand notice. Also, the issue as to whether the Operational Creditor is entitled to any service charges or whether there exists any agreement or contract between the parties are the issues which are required to be adjudicated before the Civil Court after leading the evidence and it cannot be the subject matter of the proceedings under Section 7, 9 and 10 of IBC, 2016 before this Tribunal which is summary in nature. Further, the Corporate Debtor has clearly pointed out the dispute which existed between the parties, much

prior to the issuance of the Demand Notice, which is explicit from the exchange of emails.

20. The Hon'ble Supreme Court in **Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software (P) Limited**; 2017 1 SCC Online SC 353 held as follows;;

"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.."

At paragraph 51 it is held:

"51. ....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."

21. Thus, from the above, decision of the Supreme Court in **Mobilox** (*supra*), it could be seen that this Tribunal need not be satisfied as to

whether the defence raised by the Corporate Debtor is likely to succeed or not and also need not examine the merits of the dispute. The fact that dispute truly exists between the parties in fact is sufficient for this Tribunal to reject the Application, so long as the said defence is not spurious, hypothetical or illusory.

22. It is pertinent to note here that the Operational Creditor had raised proforma invoice dated 08.08.2020 against the Corporate Debtor by way of an e-mail claiming a total sum of Rs.1,48,51,849/- (Rupees One Crore Forty Eight Lakhs Fifty one Thousand Eight hundred and Forty Nine only). The said proforma invoice raised by the Operational Creditor on 08.08.2020 falls within the period mentioned under Section 10A of IBC, 2016. Section 10A of IBC, 2016 reads as follows;

***10A. Suspension of initiation of corporate insolvency resolution process.***

*Notwithstanding anything contained in sections 7, 9 and 10, no application for initiation of corporate insolvency resolution process of a corporate debtor shall be filed, for any default arising on or after 25<sup>th</sup> March, 2020 for a period of six months or such further period, not exceeding one year from such date, as may be notified in this behalf:*

*Provided that no application shall ever be filed for initiation of corporate insolvency resolution process of a corporate debtor for the said default occurring during the said period.*

*Explanation. - For the removal of doubts, it is hereby clarified that the provisions of this section shall not apply to any default committed under the said sections before 25<sup>th</sup> March, 2020.]*

23. Thus, it is clear that no Application under Section 7, 9 and 10 of IBC, 2016 can be filed for the default committed during the period mentioned under Section 10A of IBC, 2016. In the present case, proforma invoice raised by the Operational Creditor is dated 08.08.2020.

24. In this connection, it is significant to refer to the Judgment of the Hon'ble Supreme Court in the matter of **Ramesh Kymal v. Siemens Gamesa Renewable Power (P) Ltd., (2021) 3 SCC 224** where it has held as under;

27. *Adopting the construction which has been suggested by the appellant would defeat the object and intent underlying the insertion of Section 10-A. The onset of the COVID-19 Pandemic is a cataclysmic event which has serious repercussions on the financial health of corporate enterprises. The Ordinance and the Amending Act enacted by Parliament, adopt 25-3-2020 as the cut-off date. The proviso to Section 10-A stipulates that "no application shall ever be filed" for the initiation of the CIRP "for the said default occurring during the said period". The expression "shall ever be filed" is a clear indicator that the intent of the legislature is to bar the institution of any application for the commencement of the CIRP in respect of a default which has occurred on or after 25-3-2020 for a period of six months, extendable up to one year as notified. The Explanation which has been introduced to remove doubts places the matter beyond doubt by clarifying that the statutory provision shall not apply to any default before 25-3-2020.*

28. *The substantive part of Section 10-A is to be construed harmoniously with the first proviso and the Explanation. Reading the provisions together, it is evident that Parliament intended to impose a bar on the filing of applications for the commencement of the CIRP in respect of a corporate debtor for a default occurring on or after 25-3-2020; the embargo remaining in force for a period of six months, extendable to one year. Acceptance of the submission of the appellant would defeat the very purpose and object underlying the insertion of Section 10-A. For, it would leave a whole class of corporate debtors where the default has occurred on or after 25-3-2020 outside the pale of protection because the application was filed before 5-6-2020.*

29. *We have already clarified that the correct interpretation of Section 10-A cannot be merely based on the language of the provision; rather it must take into account the object of the Ordinance and the extraordinary circumstances in which it was promulgated. It must be noted, however, that the retrospective bar on the filing of applications for the commencement of CIRP during the stipulated period does not extinguish the debt owed by the corporate debtor or the right of creditors to recover it.*

30. *Section 10-A does not contain any requirement that the adjudicating authority must launch into an enquiry into whether, and if so to what extent, the financial health of the corporate debtor was affected by the onset of the COVID-19 Pandemic. Parliament has stepped in legislatively because of the widespread distress caused by an unheralded public health crisis. It was cognizant of the fact that resolution applicants may not come forth to take up the process of the resolution of insolvencies (this as we have seen was referred to in the recitals to the Ordinance), which would lead to instances of the corporate debtors going under liquidation and no longer remaining a going concern. This would go against the very object of the IBC, as has been noted by a two-Judge Bench of this Court in its judgment in Swiss Ribbons (P) Ltd. v. Union of India [Swiss Ribbons (P) Ltd. v. Union of India, (2019) 4 SCC 17].*

25. As to the facts of the present case, there exists dispute between the parties before the issuance of the Demand Notice itself and the contentions raised by Corporate Debtor are a plausible contention which require further investigation. In the said circumstances and also the fact that the default in the present application falls within the period of Section 10A of IBC, 2016. Hence we are constrained to dismiss the Application. As a result, CP(IB)/161(CHE)/2021 stands **dismissed**. Connected Application IA(IBC)/465/CHE/2022 also stands **closed**. No order as to costs.

— Sd —

**VENKATARAMAN SUBRAMANIAM**  
MEMBER (TECHNICAL)

— Sd —

**SANJIV JAIN**  
MEMBER (JUDICIAL)

*Raymond*