

**IN THE NATIONAL COMPANY LAW TRIBUNAL,
KOLKATA BENCH
KOLKATA**

C.P (IB) No.1708/KB/2019

In the matter of

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

And

In the matter of:

Kapoor Anjan , S/o late B.K.Sinha, residing at B-2 Astha Residency, Durga Mandir Lane, Chira Chas, Bokaro, Jharkhand-827013.

... Operational Creditor

Versus

In the matter of:

Qbuilder Sales Private Limited, CIN- U74999WB2017PTC224034, having its registered office at D-86/1, Ramkrishna Upanibesh, Ground Floor, Kolkata, West Bengal-700032.

...Corporate Debtors

Date of hearing :29/03/2022

Order Pronounced on : 10 /05/2022

Coram:

Mr. Rohit Kapoor, Member (Judicial)

Mr. Harish Chander Suri, Member (Technical)

Counsels appeared through Video Conference

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|-----------------------------|----------------------------|
| 1. Mr. Adarsh Rai, Adv. |] For Operational Creditor |
| 1. Mr. Tapas Majumder, Adv. |] For Corporate Debtor |
| 2. Mr. Amit Chowdhury, Adv. | |

ORDER

Per: Harish Chander Suri, Member (Technical)

1. The Court is convened by video conference today.
2. This petition under 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules,2016 has been filed by **Kapoor Anjan**, having his office at B-2 Astha Residency, Durga Mandir Lane, Chira Chas, Bokaro, Jharkhand-827013 (hereinafter referred as the Operational Creditor), seeking initiation of corporate insolvency resolution process in respect of **Qbuilder Sales Private Limited**, having its registered office at D-86/1, Ramkrishna Upanibesh, Ground Floor, Kolkata, West Bengal-700032, (hereinafter referred as the Corporate Debtor).
3. It is submitted that Operational Creditor Kapoor Anjan, is a reputed law abiding citizen, engaged in the business as Super Stockist , who buys stocks from a Company and then sells stocks to retailers.
4. It is further submitted that the Corporate Debtor is the company registered under the provisions of the Companies Act and is claimed to be engaged in the business of water purifiers, gas safety device, GPS tracker and Ozonizers. It is further submitted that Operational Creditor was engaged by the Corporate Debtor to be its Super Stockist, who will buy stocks from Corporate Debtor and then sell stocks to retailers in the State of Jharkhand.
5. The Corporate Debtor asked the Operational Creditor to deposit Rs.15,00,000/- with the Corporate Debtor in lieu of making the Operational Creditor as a super stockist and for billing/buying goods worth Rs.15,00,000/- as first inventory. In the interest of becoming a super stockist and buying the goods, the Operational Creditor paid the Corporate Debtor a hefty amount of Rs.7,50,000/- (Rs. Seven Lacs Fifty Thousand only) in three

instalments. The details of the transactions made by the Operational Creditor is provided hereinbelow:-

- i. That on 03/12/2018 the Operational Creditor made first payment of Rs.4,00,000/- (Rupees Four Lakh only) vide RTGS /NEFT No.YESBR52018120359146718.
- ii. That on 13/12/2018 the Operational Creditor second payment of Rs.1,50,000/- (Rupees One Lakh Fifty Thousands only) vide RTGS/NEFT No. N347180177610157.
- iii. That on 22/01/2019, the Operational Creditor made third payment of Rs.2,00,000/- (Rupees Two Lakh only) vide RTGS/NEFT No.IDIBR5201901221766007.

6. It is further submitted that the Operational Creditor thereafter constantly requested the Corporate Debtor to refund the money back through telephonic conversation, and other mails. However, all the prayers of the Operational Creditor went unheard, as the Corporate Debtor failed to repay the said amount. The Operational Creditor has sent innumerable emails to the Corporate Debtor, requesting to refund the amount of Rs.7,50,000/- (attached herewith as Annexure-A).

7. It is stated that no goods were ordered or supplied. It is submitted that the Operational Creditor on 16th February, 2019, therefore, requested them to refund the said amount of Rs.7,50,000/- (Attached herewith as Annexure-B). The Operational Creditor thereafter, sent another emails dated 18th February, 2019 requesting the Corporate Debtor to refund of Rs.7,50,000/- (Annexure – C), 25th February, 2019 (Annexure-D), 27th February, 2019, (Annexure-E), 10th March, 2019 (Annexure-F). It is submitted that the Corporate Debtor has completely ignored the emails sent by the Operational Creditor seeking refund of the said amount.

8. It is submitted by the Operational Creditor that the Corporate Debtor has adopted a callous attitude in not releasing the Operational Creditor's

outstanding dues even after multiple requests and reminders from the Operational Creditor.

9. The Operational Creditor sent a Statutory Notice, dated 08th May, 2019, in accordance with the provisions of the Code through its Advocate but it was returned undelivered. However, the Corporate Debtor duly received the statutory notice via email dated 10/05/2019, but failed to pay the defaulted sum within the prescribed period of 10 days from the service of Notice via Email dated 10/05/2019. The Statutory Notice dated 10/05/2019 along with proof of dispatch and delivery as Email Copy and Speed Post Receipt and tracking status etc. are collectively annexed as Annexure-G.

10. It is submitted that the Corporate Debtor has failed to reply to the Statutory Notice.

11. Since the Corporate Debtor has failed in discharging the aforesaid debt due to the Operational Creditor, which the Corporate Debtor is liable to pay, the Operational Creditor filed the present petition for initiating CIRP in respect of the Corporate Debtor.

12. In its reply affidavit, the Corporate Debtor through its Director and Principal Officer Mr. Shankar Roy, submitted that the Corporate Debtor has been served with a copy of the instant company petition being C.P.No. 1708/KB/2019. It is submitted that the Corporate Debtor is a company incorporated under the Companies Act, 2013 on 27th December, 2017 and is engaged in the business of supply of Water Purifiers, water ionizers, electric power saver, Gas Safety devises, GPS Trackers and Ozonizers in and around the State of West Bengal.

13. It is submitted that the Corporate Debtor engages interested people in and around the State of West Bengal to take bulk stocks of the said materials from the Corporate Debtor and thereafter distribution of the same to the small retailers. It is submitted in the affidavit that the Operational Creditor on being satisfied regarding the terms of taking the stock for becoming a stockist

and also knowing that minimum of Rs.15,00,000/- is to be purchased at a time, the Operational Creditor approached the Corporate Debtor to be engaged as a Stockist for the State of Jharkhand. It is submitted that the Operational Creditor was informed by the Corporate Debtor that to become a Stockist for a State, the Operational Creditor would need to purchase stock of minimum Rs.15,00,000/- and only after receiving the payment in full, the agreement between the parties shall be executed. It is stated that at the inception, the Operational Creditor was informed that the consideration amount that would be paid is non-refundable as per the company policy and the Operational Creditor duly accepted the same. It is submitted that the Operational Creditor after completely knowing about the prerequisite of becoming a stockist expressed his willingness to the Corporate Debtor and as such on assurance of the Operational Creditor, the Corporate Debtor recruited additional man power and set up to deliver the products to the office of the Operational Creditor thereby incurring a huge amount of money as an investment. It is submitted that in the beginning, the Operational Creditor remitted Rs.4,00,000/- by way of NEFT and gave commitment to pay the balance of Rs.11 lacs within 7 days but for reasons best known to the Operational Creditor, they failed to pay the amount within the stipulated date, thereafter, again on 13th December, 2018, the Operational Creditor paid an amount of Rs.1,50,000/- and requested the Corporate Debtor to grant a further time of 7 days to pay the balance of Rs.9,50,000/- but again the Operational Creditor failed to keep their commitment after a lapse of about more than 38 days, the Operational Creditor paid a sum of Rs.2,00,000/- and further again requested to grant a further time to pay the balance of Rs.7,50,000/-. It is apparently clear from the above facts that on diverse dates, the Operational Creditor has paid a sum of Rs.7,50,000/-but on some pretext or the other, the Operational Creditor failed to keep the commitments made to the Corporate Debtor of making payment of the balance sum of Rs.7,50,000/- and thus due to the non-payment of the money, the Corporate Debtor had to face extreme financial stringencies, since on the basis of the assurance and conduct of the Operational Creditor, the Corporate Debtor had

already invested a huge amount of money for arranging the setup, recruitment of additional man-power and for delivery of the products to the office of the Operational Creditor.

14. It is submitted that the sudden demand of the Operational Creditor vide email dated 6th February, 2019 for refund of money is impracticable and absurd in view of the fact that based on the assurance of the Operational Creditor, the Corporate Debtor has caused an investment of a considerable amount of money. It is further submitted that the allegation that the Corporate Debtor is not willing to complete the agreement is totally false and devoid of any merit, since the Corporate Debtor has always stressed on the execution of the agreement of the agreement and is still ready and willing to supply all the materials subject to payment of the balance consideration and execution of the agreement. It is submitted that Director on behalf of the Corporate Debtor signed the agreement and handed over the same to the Operational Creditor in order to finalize the terms of the supply and payment and the Agreement was duly received by the Operational Creditor herein in the office of the Corporate Debtor but the Operational Creditor has failed to sign the agreement and return it to the Corporate Debtor and thus the agreement that had been signed by the Corporate Debtor is still lying in the custody of the Operational Creditor.

15. In the Rejoinder, the Operational Creditor has submitted that the reply affidavit filed by the Corporate Debtor is devoid of any merit and is entirely false and frivolous and should not be entertained or admitted as a reply. It is submitted that no notice of the dispute was received from the Corporate Debtor by the Operational Creditor within 10 days of receipt of the Demand Notice 10th May, 2019. It is submitted that the Corporate Debtor has not denied or disputed having received the amount of Rs.7,50,000/- from the Operational Creditor. It is submitted that the Corporate Debtor is resorting to delaying tactics and concocting false, bogus allegation against the Operational Creditor and falsely stating that the amount given to the Operational Creditor was non refundable or that the Corporate Debtor has suffered any loss. The

Operational Creditor has more or less repeated and reiterated the facts mentioned by him in the petition.

16. During the Course of arguments, the Operational Creditor raised the grievance against the Corporate Debtor that the amount of Rs.7,50,000/- paid to the Corporate Debtor has not been refunded and that the Corporate Debtor is raising a false plea that the said amount is non-refundable. It is submitted that since the Corporate Debtor has not given any notice as regards pre-existing dispute between the parties to the Operational Creditor, there is no defence available to the Corporate Debtor in this matter and the prayer of the Operational Creditor deserves to be allowed.

17. The Operational Creditor has relied upon the judgments in support of its case are as under:-

- i. **Innoventive Industries Ltd. Vs. ICICI Bank (2018) 1 SCC 407**, the Hon'ble Supreme Court held that:
"As opposed to this, an operational creditor means a person to whom an operational debt is owed and an operational debt under Section 5(21) means a claim in respect of provision of goods or services."
- ii. **Mobilox Innovations (P) Ltd. Vs. Kirusa Software (P) Ltd. (2018) 1 SCC 353.**
- iii. **Neeraj Jain V/s Cloud Walker Streaming Technologies(P) Ltd. & Anr. Company Appeal (At) (Insolvency) No.1354/2019. NCLAT dt. 24.02.2020.**
"47. ... The applicability of Form 3 or Form 4 depends on whether the invoices were generated during the course of transaction or not. It is also made clear that the copy of the invoice is not mandatory if the demand notice is issued in Form 3 of the Insolvency and Bankruptcy Code (Application to Adjudicating Authority)Rules, 2016 provided the documents to prove the existence of operational debt and the amount in default is attached with the application."

18. During the Course of arguments, the Ld. Counsel for the Corporate Debtor submitted that the Operational Creditor had approached the Corporate Debtor to become Super Stockist for the State of Jharkhand and it was informed that upfront non refundable payment of Rs.15,00,000/- is required, the Operational Creditor agreed and based on the understanding, the Corporate Debtor executed an agreement after receiving the payment of Rs. 4,00,000/- and handed it over to the Operational Creditor. The total amount given by the Operational Creditor is Rs.7,50,000/- to the Corporate Debtor. It is submitted that the Corporate Debtor would like to cite section 7 & 8 of the Indian Contract Act, 1872 and relied upon the judgment of Hon'ble Andhra Pradesh High Court;

1. *AIR 2005 AP 260 (B.Rajamani versus Mrs. Azhar Sultana & Ors.*
2. *(2000)3 SCC 715 (Travancore Rubber and Tea Company Limited versus Commissioner of Income Tax, Trivandrum)*
3. *Hon'ble National Company Law Tribunal in Company Appeal (AT) (Insolvency) No.98 of 2019 (M/s Next Education India Pvt. Ltd. versus M/s K12 Techno Services Pvt.Ltd.*

19. Ld. Counsel for the Corporate Debtor further submitted that on the basis of the assurance of the Operational Creditor, the Corporate Debtor incurred huge expenses for the materials, taking new office on rent of Rs. 1.5 Lakhs per month, staff salary and the amounts paid by the Operational Creditor though contrary to the terms of the Agreement, can be treated as an earnest money paid, which can be forfeited because of the default on the part of the Operational Creditor in adhering to the terms of the Agreement between the parties, the custody of which lies with the Operational Creditor. In this context, the Corporate Debtor would like to rely on a Judgment of the Hon'ble Apex Court reported in [(2000) 3 SCC 715 (Travencore Rubber and Tea Company Limited versus Commissioner of Income Tax, Trivandrum)] wherein the Hon'ble Apex Court in the facts of that case has held that in the event of default of the Purchaser to pay the consideration amount, the Vendor shall be

liable to forfeit the advance amount paid, as earnest money.

20. It is submitted that from the said application, it would be clear that the allegations of the Operational Creditor are contrary to each other, as the Operational Creditor has failed to produce a single piece of document from where it can be demonstrated that the Operational Creditor has asked the Corporate Debtor to act in terms of the Agreement between the parties. It is pertinent to mention in this connection that the Operational Creditor has instituted this instant proceeding only for recovery of the amount paid which has been clarified by the **Hon'ble National Company Law Tribunal in Company Appeal (AT) (Insolvency) No. 98 of 2019 (M/s Next Education India Pvt. Ltd. Versus M/s K12 Techno Services Pvt. Ltd.)** relying on other judgments of the Hon'ble Supreme Court, where in it has been held that the Code is a beneficial legislation to put the Corporate Debtor back on its feet and is not a mere money recovery legislation. Furthermore, in the light of the above judgments, the Corporate Debtor cannot be penalized for the default in payment by the Operational Creditor. It is stated that the Operational Creditor cannot be allowed to get away from obligations under a Contract on his own whims and fancies and that too after extending an absolute and unqualified acceptance which is further strengthened from the fact that the Operational Creditor had made payments which shows the absolute and unqualified acceptance of the Operational Creditor to become a super-stockist for the State of Jharkhand.

21. It is submitted that the Corporate Debtor is still ready and willing to provide the materials subject to payment of the balance consideration and the amount of loss that occurred because of the delay in payment by the Operational Creditor and such an act of the Operational Creditor to claim refund is absolutely illegal and contrary to the provisions of the Indian Contract Act, 1872. The Corporate Debtor has time and again requested the Operational Creditor for execution of the agreement and payment of balance consideration but no heed was paid to such request for reasons best known to the Operational Creditor.

22. During the course of arguments, when the Ld. Counsel for the Corporate Debtor was asked to produce any document, agreement or any books of account relating to the Corporate Debtor, the Corporate Debtor could not produce anything to indicate that they are either manufacturers or trader or in any way dealing with any such product, for which the Operational Creditor had been promised to be made as a super stockiest. The Corporate Debtor could not satisfy the bench as regards any activity relating to the business of the Corporate Debtor. On query from the bench, the Ld. Counsel for the Corporate Debtor could not produce any list of any other stockist of their products. The Ld. Counsel even could not produce or show any document that the Corporate Debtor is actually involved in any activity. We were really surprised to know as to on what basis the Corporate Debtor had lured or prompted the Operational Creditor to shell out Rs.7,50,000/- and was demanding more amount from the Operational Creditor. All these allegations raised by the Corporate Debtor against the Operational Creditor appear to be false in the absence of any document produced before this Adjudicating Authority.

23. The Corporate Debtor has not been able to show us any receipt of rent paid as stated in its reply, any proof of staff members appointed by it pursuant to any alleged promise to pay further amount of Rs.7,50,000/- by the Operational Creditor. The Corporate Debtor has not even shown any agreement agreeing to supply any goods or any proof of any goods having been supplied or even made ready to be sold or sent to the Operational Creditor after receiving a sum of Rs.7,50,000/-. On the other hand, the Operational Creditor has proved its case having paid Rs.7,50,000/- to the Corporate Debtor as an advance payment for supplying of goods as a stockist but since the goods could not be supplied, he immediately sought refund of the said amount which the Corporate Debtor has failed to pay in spite of repeated demands and requests made by the Operational Creditor.

24. The Operational Creditor has placed on record the proof as regards

payment of Rs.7,50,000/- to the Corporate Debtor but in return, the Corporate Debtor has not either supplied any goods nor even has attempted to supply any goods. The Corporate Debtor could not produce any document relating to any business activity like manufacturing, or trading of any products, or any books of account or balance sheet of the previous years.

25. In view of the failure of the Corporate Debtor to satisfy the Bench, we are really surprised as to how this company has been surviving just by sending false offers to the public at large to become its super stockist, even though it has no business activity at all. The advocate appearing for the Corporate were totally blank and could not give any document on repeated enquiries to show what type of activity manufacturing, trading or sale of goods is being carried out by the them.

26. The Operational Creditor has proposed the name of **Mr. Prabhakar Kumar**, to act as an IRP having Registration No. **IBBI/IPA-002/IP-N00774/2018-19/12373**, who has consented vide his affidavit and Form-2 and submitted that he has agreed to accept the appointment as IRP if an order admitting the present application is passed by this Adjudicating Authority. He has further submitted that no disciplinary proceedings are pending against him with the Board or Institute of Insolvency Professionals of ICAI.

27. The application is otherwise complete in all respects.

28. In view of the arguments, we are convinced that the amount given as advance by the Operational Creditor to the Corporate Debtor being advance payment for buying goods from the Corporate Debtor has to be refunded and it is an outstanding operational debt owed by the Corporate Debtor to the Operational Creditor and on its failure to clear the outstanding debt, the petition deserves to be admitted and the Corporate Debtor is liable to be put under CIRP, we, therefore, pass the following orders:

ORDERS

- i) The application filed by the Operational Creditor under Section 9 of the Insolvency & Bankruptcy Code, 2016 for initiating Corporate Insolvency Resolution Process against the Corporate Debtor, is hereby **admitted**.
- ii) We hereby declare a moratorium and public announcement in accordance with Sections 13 and 15 of the I & B Code, 2016.
- iii) Moratorium is declared for the purposes referred to in Section 14 of the Insolvency & Bankruptcy Code, 2016. The I.R.P. shall cause a public announcement of the initiation of Corporate Insolvency Resolution Process and call for the submission of claims under Section 15. The public announcement referred to in clause (b) of sub-section (1) of Section 15 of Insolvency & Bankruptcy Code, 2016 shall be made immediately.
- iv) Moratorium under Section 14 of the Insolvency & Bankruptcy Code, 2016 prohibits the following:
 - a) The institution of suits or continuation of pending suits or proceedings against the Corporate Debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;
 - b) Transferring, encumbering, alienating or disposing of by the Corporate Debtor any of its assets or any legal right or beneficial interest therein;
 - c) Any action to foreclose, recover or enforce any security interest created by the Corporate Debtor in respect of its property including any action under the Securitisation and

Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);

- d) The recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.
- v) The supply of essential goods or services rendered to the corporate debtor as may be specified shall not be terminated, suspended, or interrupted during the moratorium period.
- vi) The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.
- vii) The order of moratorium shall have effect from the date of admission till the completion of the corporate insolvency resolution process.
- viii) Provided that where at any time during the Corporate Insolvency Resolution Process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of Section 31 or passes an order for liquidation of the corporate debtor under Section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be.
- ix) **Mr. Prabhakar Kumar, IRP**, registered with Insolvency and Bankruptcy Board of India, having Registration No. **IBBI/IPA-002/IP-N00774/2018-19/12373**, **Email- Prabhakar_acs@rediffmail.com** and holding AFA under Regulation 7-A of the IBBI (Insolvency Professionals) Regulations, 2016, is hereby appointed as Interim Resolution Professional for ascertaining the particulars of creditors and convening a

Committee of Creditors for evolving a resolution plan subject to production of written consent within one week from the date of receipt of this order.

- x) The Interim Resolution Professional should convene a meeting of the Committee of Creditors and submit the resolution passed by the Committee of Creditors and shall identify the prospective Resolution Applicant within 105 days from the insolvency commencement date.
- xi) The Operational Creditor/Applicant is directed to deposit **Rs.1,00,000/- (Rupees One Lakh only)** with the IRP appointed hereinabove within **three** days from this order. IRP can claim the preliminary expenses and fees subject to the approval by the CoC and after constitution of CoC.

29. Registry is hereby directed to communicate the order to the Operational Creditor, the Corporate Debtor, the I.R.P. and the jurisdictional Registrar of Companies by Speed Post as well as through email.

30. List the matter on 01/07/2022 for filing of **Progress Report**.

31. Certified copy of the order may be issued to all the concerned parties, if applied for, upon compliance with all requisite formalities.

(Harish Chander Suri)
Member (Technical)

(Rohit Kapoor)
Member (Judicial)

Order signed on the 10th day of May, 2022

PJ