

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

Company Petition (IB) No. 304/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) Rule,
2016.*

IN THE MATTER OF:

Manisha Infrasolutions Pvt. Ltd.

... Operational Creditor/ Applicant.

Versus

Bhonu Hulshi Real Estate

... Corporate Debtor/ Respondent.

Date of Pronouncement: March 05, 2024.

CORAM:

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

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

Appearance:

For the Operational Creditor: Mr. Surendra Singh, Adv.

ORDER

Per: D. Arvind, Member (Technical):

1. This Adjudicating Authority convened through hybrid mode.
2. Heard Learned Counsels for both the parties.

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3. This is an application preferred by **Manisha Infr solutions Pvt. Ltd.** (hereinafter referred as **Operational Creditor/Applicant/OC**) against **Bhonu Hulshi Real Estate Pvt. Ltd.** (hereinafter referred as **Corporate Debtor/Respondent/CD**) under Section 9 of the Insolvency and Bankruptcy Code, 2016, for brevity “IBC” seeking initiation of Corporate Insolvency Resolution Process (CIRP) of the Corporate Debtor.

Factual Matrix:

4. The applicant is claiming to be engaged in the business of civil construction and miscellaneous work connected with real estate projects.
5. The applicant claims that they received a work order from the corporate debtor on 30.07.2018, for civil construction work along with miscellaneous work for the commercial building named “Bhonu Hulshi Nilay” to be built in the land owned by one Sunil Kumar, Anil Kumar and Rajni Ranjan. However, we note that no agreement or purchase order has been placed in the application in this regard and therefore, have to infer that this is an oral agreement.
6. The said work order has been claimed to have been placed by the corporate debtor based on an agreement between the corporate debtor and the owners of the land on 05.07.2018, and the said agreement dated 5-7-2018 has been placed on record.

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It has been agreed in that agreement that the corporate debtor would develop a commercial building namely, “Bhonu Hulshi Nilay” in the land owned by the owners on the basis of the terms and conditions mentioned therein. The corporate debtor, based on an agreement made with the landowners appears to have given part of civil work and miscellaneous work to the operational creditor on 30.07.2018, as claimed by the applicant.

7. It is the claim of the operational creditor that they commenced work on 14.08.2018 and completed the work as per the work order awarded to it. Consequent to this, the operational creditor issued three invoices on corporate debtor which are dated as 05.03.2019, 07.03.2019 and 24.03.2019, all of which are annexed at pages 89 to 91 to the instant application.
8. Applicant claims that out of three invoices issued for an amount of Rs. 4,26,96,948/- they have not received payment for Rs. 2,21,58,899/-. Together with interest at the rate of 18% an amount of Rs. 2,83,17,964/- has been claimed as defaulted for the purpose of this application.
9. The date of default claimed in the application is 02.04.2021 and this application has been filed on 30.10.2022 before this Adjudicating Authority.

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The Applicant's Submissions:

- 10.** The Ld. Counsel for the Applicant claims that a sum of Rs. 2,21,58,899/- against invoices raised for Rs. 4,26,96,948/- has not been received. He claims that invoices were issued pursuant to completion of civil and miscellaneous work awarded to it by the corporate debtor on 30.07.2018. He relied on the copies of invoices attached in page No. 89 to 91 of this application and also the account statement of the applicant's bank to demonstrate that balance amount indicated to be in default has not been paid by the corporate debtor.
- 11.** He submits that notice under Section 8 of IBC was issued on 07.10.2022 and the same was duly served on corporate debtor on 10.10.2022, as per the track report attached in the application at page132.
- 12.** He further submits that no response to the notice has been received by the applicant from the corporate debtor, though respondent has falsely stated in reply that Rajni Ranjan, Director of the corporate debtor, has sent the reply to the notice through an email on 04.11.2022 which is 25 days after the receipt of notice. However, the Ld. Counsel submits that the applicant never received any such reply in their email. He relied on the affidavits filed under Section 9(3)(b) and 9(3)(c) of IBC before this Adjudicating Authority for consideration.

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- 13.** He further submits that the claim of the corporate debtor that all payments have been made and nothing is due to the applicant is completely false. He submits that the claim of the corporate debtor in its reply, that from the bank account of Rajni Ranjan (one of the directors of the corporate debtor) payments to the vendors and laborers of operational creditors and also to the directors of the operational creditors had been made, is false and not correct.
- 14.** He further submits that this claim of the corporate debtor is baseless as corporate debtor neither produced any bills of such vendors or laborers of operational creditors nor any written consent of the applicant for making such payments, if at all such payments have been made.
- 15.** In view of above, he submits that the claim of the corporate debtor is baseless and seeks admission of the corporate debtor under CIRP in terms of Section 9 of IBC, considering the fact that amount in default is in excess of threshold limit, no pre-existing disputes and the application has been filed within the period of limitation.

Per contra, the Respondent's Submissions:

- 16.** The Ld. Counsel submits that till July 2021; Sunil Kumar was the managing director of the corporate debtor as well as director of the operational creditor. Only on 07.07.2021, Sunil Kumar resigned as managing director of the corporate debtor as a

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result of family settlement between Sunil Kumar and Anil Kumar.

- 17.** As per the family settlement, ownership of the corporate debtor remained with Anil Kumar (who is another director of the corporate debtor) and the ownership of the operational creditor with Sunil Kumar. Therefore, during the relevant period it was Sunil Kumar who was managing the affairs of the corporate debtor. He submits that when that being the case how come Sunil Kumar as MD of the corporate debtor did not make payment to the operational creditor's invoice No 3 if the dues were genuinely payable, that too when the Invoice No. 3 is dated 24.03.2020 which was 15 months old at the time of his resignation as Managing Director on July 7th, 2021.
- 18.** He submits that, the part payment was made from the Joint account of Anil Kumar and Sunil Kumar maintained for the purpose of the project "Bhonu Hulshi Nilay" as detailed in the charts relied in the reply affidavit. This apart Ld. Counsel submits that Mr. Rajini Ranjan (another director of the corporate debtor) has paid the laborers and vendors of the operational creditor directly to make sure that the project is completed on time. He further submits that the payments were made directly instead of routing it through the Corporate Debtor, as during that period family settlement talks were going on and there was no clarity as to who will become the owner of the Applicant and Respondent.

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- 19.** He further submits that all such payments were made only with the instructions of the operational creditor. He submits that no amount is due to the operational creditor as they have already been paid as per the instruction of the applicant in the form of direct payment from the Joint project Account and in the form of payments directly to vendors and laborers from the Account of Rajini Ranjan.
- 20.** During the course of hearing, he admits that the project commenced and progressed and therefore payments will have to be made to operational creditor and their vendors and laborers and accordingly were made as mentioned in tables mentioned in para 24 of this Order. However, he doubted the three Invoices raised on the Corporate Debtor by the Operational Creditor during the period when Sunil Kumar was the Managing Director of the Corporate Debtor. He submits that there is no resemblance of supply of any supply of goods or services, against the said invoices.
- 21.** He submits that instant application has been affirmed by the son of Sunil Kumar who was a common director in the corporate debtor and the operational creditor during the relevant period and since the Corporate Debtor has gone out of the hands of Mr. Sunil Kumar due to family settlement, operational creditor is claiming said three Invoices as “operational” debt and making an attempt to extract more money from the current owners of corporate debtor, when nothing is due to the operational creditor as on date.

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- 22.** The elaborate arguments were made based on the reply filed by the corporate debtor regarding various payments made to the applicant, applicant's directors, vendors of the operational creditor and the laborers of the operational creditor based on the instructions claimed to have been received by the corporate debtor from time to time, from operational creditor.
- 23.** The Ld. Counsel for the corporate debtor made detailed submissions based on the records and bank statements and relied on the chart produced in paragraph 4(a) and 4(b) of the reply which is in page No. 8 and 9, same is reproduced for ready reference.
- 24.** He also relied on the chart produced in Page 13 of the reply with detailed year-wise remittance from the joint account of Sunil Kumar and Anil Kumar to the operational creditor amounting to Rs. 1,90,42,371/- and another chart with detailed remittance from Rajni Ranjan's account to various parties claiming to the laborers of the applicant and another chart detailing remittance of Rajni Ranjan's account to several vendors of the applicant.

Year	For BHN work to Axis Bank (912010010899491)	Transferred to MISPL accounts. 17414015001187 and 13971131001607) from Axis Bank (912010010899491)
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2017-2018	Rs. 22,72,215.00	—
2018-2019	Rs. 1,22,45,135.00	Rs. 1,23,99,312.7
2019-2020	Rs. 59,37,000.00	Rs. 56,12,799.22
2020-2021	Rs. 10,32,000.00	Rs. 10,30,259.90
Total	Rs. 2,14,85,350.40	Rs. 1,90,42,371.82

Year	Amounts paid for BHN work from Axis Bank account no. (914010037002241) of Ms. Rajni Ranjan	Amounts paid to labours of MISPL and directors of MISPL (Mr. Sunil Kumar, Mr. Shashi Kant Mehta, Mr. Abhishek Narayan & Mr. Sunil Kumar Banbag) from Axis Bank of Ms. Rajni Ranjan, co-owner of BHN building.
2017-2018	Rs. 3,26,906.90	Rs. 3,26,906.90
2018-2019	Rs. 16,76,966.10	Rs. 16,76,966.10
2019-2020	Rs. 47,02,791.13	Rs. 47,02,791.13
2020-2021	Rs. 15,40,692.00	Rs. 15,40,692.00
Total	Rs. 82,47,356.13	Rs. 82,47,356.13

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Year	Uma Sahani (labour contr.)	BMW Enter	Barun Traders	Sanjay Trading	Jaffar Brick	Remarks (through bank accounts of)
2018-2019		Rs. 10,00,000/-				M.P. Jain Renu Kush
2019-2020	Rs. 7,50,000/-			Rs. 2,00,000/-		Rajni Ranjan
2020-2021	Rs. 3,66,000/-		Rs. 70,000/-		Rs. 1,25,000/-	Rajni Ranjan
Total	Rs. 11,16,000/-	Rs. 10,00,000/-	Rs. 70,000/-	Rs. 2,00,000/-	Rs. 1,25,000/-	Rs. 25,11,000/-

Particulars	2018 - 2019	2019-2020	2020-2021	2021-2022	Total
MISPL: 174140150 01187	-	Rs. 77,50,258/-	Rs. 16,62,000/-		Rs. 94,12,258/-
MISPL: 139711310 01607	-	Rs. 34,90,120/-	Rs. 30,70,100/-		Rs. 65,60,220/-
Sunil Kumar: Director	-	Rs. 4,03,000/-	Rs. 6,70,400/-		Rs. 10,73,400/-

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Connect Key	-	Rs. 18,00,09 0/-			Rs. 18,00,090/-
Koshi	-	Rs. 3,78,176 /-			Rs. 3,78,176/-
Jonshon	-	Rs. 13,37,66 6/-			Rs. 13,37,666/-
Jakson	-	Rs. 9,75,054 /-			Rs. 9,75,054/-
SJCL	-		Rs. 25,28,000 /-	Rs. 9,00,0 00/-	Rs. 34,28,000/-
Miscellaneous	-	Rs. 10,82,65 8/-	Rs. 3,23,181. 60/-		Rs. 14,05,839.6 0/-
Total		Rs. 1,72,17, 022/-	Rs. 82,53,681 .60/-	Rs. 9,00,0 00/-	Rs. 2,63,70,703 .60/-

25. The Ld. Counsel submits that thus, the entire payment has been made against the bills of the operational creditor either directly from the project account or to the labourers and vendors of the operational creditors from Mr Rajni Ranjan, one of the Director of the corporate debtor.

26. He further submits that in any event, in the absence of any proof such as GST returns, proof of GST payments, the e-

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waybills, work orders, packing lists, lorry / rail receipts etc. the three Invoices appears to be bogus and therefor this application filed by the operational creditor is with an evil intention to extract more money from the current owners of the corporate debtor and therefore liable to be set aside.

Analysis and Findings:

- 27.** We find that it is an undisputed fact that Mr Sunil Kumar remained as managing director of the corporate debtor till 07.07.2021, whereas the work order claimed to have been performed by the applicant is in the early months of 2019 and 2020. In fact, invoices have been issued in March 2019 and March 2020. If the invoices are genuine, we see no reason as to why, Mr Sunil Kumar who was the managing director of the corporate debtor at the relevant time did not make payment from corporate debtor account to the operational creditor. It may be relevant to note that operational creditor is now fully owned by Mr. Sunil Kumar, consequent to the family settlement.
- 28.** We note that the Operational Creditor has not dealt with specific arguments made by the Corporate Debtor with reference to payments made as per the tables mentioned in para 24 of this Order, other than making sweeping contention that operational Creditor has not received the balance amount and the claims of the Corporate Debtor that all payments have been made is incorrect and false.

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- 29.** Be that as it may, we find that three invoices were issued by the operational creditor for a sum of Rs. 4,26,96,948/- as stated hereinbelow:

Invoice No.	Date	Amount
1	05.03.2019	Rs. 1,55,05,151/-
2	07.03.2019	Rs. 24,43,190/-
3	24.03.2020	Rs. 2,47,48,607/-

- 30.** We find that Invoice No. 3 has been issued after more than one year. It appears that in between there was no other invoice raised by the operational creditor on anyone, leave alone the corporate debtor.
- 31.** We note that the Operational creditor has claimed in his notice under Section 8 of IBC that the corporate debtor has paid 2,05,38,049 and has not paid the balance sum of Rs. 2,21,58,899/- only. While the first two invoices were raised in month of March 2019, the third invoice was issued in the month of March 2020. The date of default claimed in the application is 02.04.2021. This application has been filed on 19.11.2022.
- 32.** While operational creditor has claimed that a work order has been issued by the corporate debtor on dated 30.07.2018, we do not find any such work order/agreement between the

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corporate debtor and the operational creditor in the application. During the course of hearing, this bench asked the applicant to provide details of e-bills, Lorry receipts, GST Returns, proof of GST payments, packing lists / delivery challans etc but no such documents have been placed on record. Therefore, Genuity of the Invoices raised by Operational Creditor is not free from doubt.

- 33.** Further we find that there is nothing on record to prove that the date of default is 02.04.2021. There is nothing in the invoices on payment terms, in the absence of which, we can only infer that the invoices are due for payment within reasonable time, from the date of receipt of such invoices. We are of the view that as per the trade practice of this Industry 30 days from the date of receipt of such invoices, is reasonable.
- 34.** Based on admission made in the Notice issued under Section 8 of IBC by the corporate debtor that an amount of Rs.2,05,38,049/- has been received, we infer that first two Invoices have been paid in full. Therefore, substantial amount claimed to be due is with reference to invoice No. 3 and the said invoice is dated 24.03.2020, which is one day prior to the date of commencement of period covered under Section 10A of IBC.
- 35.** We would further note that as per Section 4 of the Indian Contract Act, the communication of a proposal is complete when it comes to the knowledge of the person to whom it is made. As per Section 46 of the Indian Contract Act, 1872

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whereby the contract, a Promisor is to perform his promise without application by the Promisee and no time for performance is specified, the engagement must be performed within a reasonable time. As per the explanation to the said Section of the Indian Contract Act, what is reasonable time in each particular case is a question of fact. Applying this analogy, we have examined whether the Invoice No. 3 dated 24.03.2020 is hit by Section 10A of IBC.

- 36.** In the case in hand, the Invoice No. 3 relates to the construction of work. Even assuming for the sake of analysis, that this invoice is genuine, the corporate debtor will have to at least verify the completion of the work order claimed to have been executed. The verification would involve quality, of civil work performed, measurement etc. Therefore, payment of invoice would require at least couple of days from the receipt of invoice, even it is proved that invoice dated 24.03.2020 was delivered on the same day. Transactions covered in these kinds of Invoices cannot be “cash and carry” transaction.

- 37.** However, in the case in hand there is nothing on record to prove that Invoice has been delivered on the same day. Next date to the date of the Invoice is the starting date of the period covered under Section 10 A of IBC. If one take above into consideration, then we are of the view that the default, if at all, would fall during the period covered under Section 10A of IBC.

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- 38.** As per Section 10A of IBC, no application under Section 7, 9 and 10 of IBC can be filed for any default arising on or after **25.03.2020 to 24.03.2021**. Proviso to Section 10A clearly states that no application **shall ever be filed** for initiation of the Corporate Insolvency Resolution Process (CIRP) of a corporate debtor for the default occurring during the said period.
- 39.** Under the above facts and circumstances, we are of the view that invoice no. 3 amounting to Rs. 2,47,48,607/- would be hit by Section 10A of the IBC and consequently, no application under Section 9 of IBC can be filed.
- 40.** We also record that in the notice issued under Section 8, the corporate debtor has admitted receipt of payment to the tune of Rs. 2,05,38,049/-. In this application, the Operational Creditor has claimed that the claim of the Corporate Debtor that payments made have been made to the vendors and labourers of the operational creditors are unsubstantiated without any supporting/bills/written agreements between corporate debtor and operational creditor. However, in the ledger account of the Corporate Debtor maintained in the books of the Operational Creditor, which is annexed at page 148 to this application, operational creditor has accounted all such payments to employees and various vendors of the operational creditor, claimed to have been made by Rajni Ranjan. Thus, we see contradiction with their own pleadings and the ledger maintained in their books.

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- 41.** Therefore, in absence of any supporting with any other documents as required in Regulation 7 (2) (b) of IBBI (Insolvency Resolution Process for Corporate persons) Regulations 2016 which requires operational creditor to provide contract for supply of goods, financial accounts, copies of GSTR-1 and GSTR -3B etc to be confirmed as operational debt, the invoices relied cannot be taken at face value, considering the facts and circumstances enunciated in this order.
- 42.** Thus, looking from any angle, we are of the view that this application being **C.P. (IB) No. 304/KB/2022** is not sustainable and accordingly **dismissed**.
- 43.** We are of the view that the application has been filed to settle score between members of the family and the applicant with malicious intention, has preferred this application, other than for the resolution of Insolvency. Therefore, we are of the view that this is a fit case to invoke the provision under Section 65 of the IBC and accordingly, impose a penalty of **Rs. One Lakh** upon the Applicant herein.
- 44.** The Applicant is directed to pay the penalty amount to the **“National Defence Fund” (NDF)** within fifteen (15) days from the pronouncement of the order. Delaying payment of the penalty amount beyond fifteen (15) days shall carry a rate of Interest at 18% per annum from the date of pronouncement to the date of payment.

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- 45.** The Affidavit of Compliance shall be filed within seven (7) days upon the payment of penalty amounts with the Registry of this Adjudicating Authority. The Registry is directed to consign the Affidavit of Compliance to the record.
- 46.** The **Registry of this Adjudicating Authority** is further directed to send e-mail copies of the order forthwith to all the parties and their Learned Counsel(s) for information and for taking necessary steps. Further, a copy of the order shall be served upon the Insolvency and Bankruptcy Board of India (IBBI) for their record and upon the Registrar of Companies (ROC), West Bengal, Kolkata by all available means.
- 47.** 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 05th Day of March, 2024.

PH [PS]/ Bose, R. K. [LRA]