

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH (Court– I)
KOLKATA**

I.A. 1243/KB/2023
And
C.P. (IB) 335/KB/2022

*A petition under **section 9** of the Insolvency and Bankruptcy Code, 2016, read with rule 6
of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016*

In the matter of:

G R Infraprojects Limited [L45201GJ1995PLC098652],

..... *Operational Creditor*

-versus-

Bharat Hitech (Cements) Private Limited [CIN: U51900WB1999PTC098270]

..... *Corporate Debtor*

Date of Pronouncement of the order: 30.04.2024

Coram:

Mr. Rohit Kapoor, Member (Judicial)

Mr. Balraj Joshi, Member (Technical)

Appearances (via video conferencing/physical):

For the Operational Creditor:

Mr. Ashis Prasad, Adv.

Mr. Shourjyo Mukherjee, Adv.

Mr. Vishwarup Acharyya, Adv.

For the Corporate Debtor:

Mr. Joy Saha, Sr. Adv.

Mr. Shaunak Mitra, Adv.

Mr. Ankit Agarwal, Adv.

Mr. Nilay Sengupta, Adv.

Mr. Sujit Banerjee, Adv.

ORDER

Per: Quorum

1. This Court convened through hybrid mode.
2. This is a Company Petition under section 9 of the Insolvency and Bankruptcy Code, 2016 (herein after referred as “the Code” or “IBC”) by **G R Infraprojects Limited**, hereinafter referred to as “*Operational Creditor*” seeking to initiate Corporate Insolvency Resolution Process (“CIRP”) against **Bharat Hitech (Cements) Private Limited**, hereinafter referred to as “*Corporate Debtor*”.
3. The Corporate Debtor is a private limited company incorporated on 08.02.1999. The authorized share-capital of the company ₹4,00,00,000/- and the paid-up share capital of the company is ₹2,21,76,200/-.
4. The total amount claimed to be in due to the Operational Creditor, is Rs. 2,96,52,209/-. The date of default is mentioned as 25.08.2022.
5. The Operational Creditor has relied on the various documents in support of its claims, including:
 - a) Copy of Demand Notice dated 27.10.2022, annexed as Annexure- **I**;
 - b) Copy of the Replay to the Demand notice, annexed as Annexure- **II**;
 - c) Purchase Order dated 16.02.2022, annexed as Annexure **VIII**;
 - d) Purchase Order dated 06.04.2022, annexed as Annexure **IX**;

6. Submissions on behalf of the Operational Creditor:

6.1 The case of the Operational Creditor is that G R Infraprojects (“Operational Creditor”) Limited was engaged as an Engineering Procurement and Construction (EPC) Contractor for the NHAI's project of GalgaliaBahadurganj section of NH- 327E for a stretch of 49 km in the state of Bihar on HAM basis (“Project”). For the purposes of the Project, the Operational Creditor from time-to-time placed orders on Bharat Hi-

Tech (Cements) Pvt. Ltd. ("Bharat Hi-Tech" or "Corporate Debtor") for purchasing cement.

6.2 The Operational Creditor placed Purchase Order No. 3600149655/1 dated 16.02.2022 for 56000 quantity of cement bags and gave an advance of Rs. 2,07,19,821/- to Bharat Hi-Tech. The Operational Creditor received cement worth Rs. 2,02,59,651/- from Bharat Hi-Tech in respect of the aforesaid Purchase Order. An advance amount of Rs. 4,60,170/- remained with Bharat Hi- Tech. Thereafter, Purchase Order bearing no. 3600153204 dated 5 April 2022, was placed by the Operational Creditor upon Bharat Hi-Tech for 1,10,000 bags of cement for a total amount of Rs. 4,40,00,000/-. The Operational Creditor paid an amount of Rs. 4,35,62,850/- as advance to Bharat Hi-Tech in respect of the said Purchase Order.

6.3 Eventually, in view of certain issues with the cement provided by Bharat Hi- Tech, the Operational Creditor requested for refund of the advance amount, to which Bharat Hi-Tech unequivocally agreed. In furtherance of its unequivocal admission to refund the advance amount, Bharat Hi-Tech also refunded an amount of Rs. 1,00,00,000/- on 7 May 2022 and gave cheques of an amount of Rs. 3.40 crores.

6.4 Thereafter, Bharat Hi-Tech supplied loose cement to the Operational Creditor worth Rs. 19,54,080/-, which amount was adjusted from the advance amount of Rs. 3,40,23,020/- lying with Bharat Hi-Tech. Therefore, under the said Purchase Orders, an advance amount of Rs. 3,20,68,940/- was outstanding and to be paid to the Operational Creditor. Bharat Hi-Tech unequivocally and unconditionally agreed to refund the outstanding amount in the following manner:

- i. 15 July 2022-Rs. 50 Lakhs
- ii. 25 July 2022-Rs. 50 Lakhs
- iii. 25 August 2022-Rs. I Crores
- iv. 25 August 2022-Balance amount

6.5 However, Bharat Hi-Tech has only paid an amount of Rs. 25 lacs on 16 August 2022. The total outstanding amount is Rs. 2,95,68,940/-. Further, Bharat Hi-Tech had to issue certain credit notes amounting to Rs. 83,269/- which they failed to. Therefore, an amount of Rs. 2,96,52,209/- remains outstanding and due and payable by Bharat Hi-Tech.

6.6 A demand notice¹ dated 27 October 2022 was sent by the Operational Creditor to Bharat Hi-Tech. The Corporate Debtor sent the reply² dated 10 November 2022 to the said demand notice, which was received by the Operational Creditor on 15 November 2022.

7 Submissions on behalf of the Corporate Debtor:

7.1 The Corporate Debtor has submitted that as per agreement between the parties, the Operational Creditor would take 56,000 cement bags from the Corporate Debtor, on regular basis. The Applicant would advance Rs. 2,07,19,821/- only for manufacturing of those requisite cements and purchasing of raw materials. In return, the Corporate Debtor would be required to supply those manufactured goods to different destination of India. including Arga, as per the prior request of the Operational Creditor.

7.2 As per this understanding by and between the parties, the Corporate Debtor forwarded a security cheque for a sum of Rs.2,07,19,821/- only, drawn on Axis Bank, Being no: 525874.

7.3 (e). Thereafter, Operational Creditor placed a purchase order on 18th February 2022 for 56,000 Cement Bags @ Rs. 370/- per bag including GST & FOR delivery basis. On the same day, the applicant deposit an advanced amount of Rs.2,07,04,101/- only after deducting the TDS of the proposed supplies to be made by this answering respondent.

7.4 The Corporate Debtor duly supplied the aforesaid requisite materials and the Operational Creditor duly appropriated the same, in their ordinary course of business. The aforesaid goods were supplied in two phases. First it was done on 9th March 2022 for 27,318 bags having invoiced³ value Rs.1,10,60,537/- only. Further in 2nd Phase, supply was made on 31 March 2022 for 27,438 bags having invoiced amount of Rs.1,01,52,078/- only. The Applicant used the aforesaid supplied goods with their full satisfaction.

¹Annexure I

²Annexure - II

³Annexure D to Reply Affidavit

- 7.5 On 5th April 2022, the applicant further placed fresh Purchase Order⁴ for 1,10,000 Bags worth Rs.4,40,00,000/- only. On 11th April 2022, applicant again remitted a sum of Rs.4,35,24,287/- only, on account of advance subject to adjustment of the final bills.
- 7.6 On 15th April 2022 and 16th April 2022, the applicant forwarded the particulars⁵ of the places where the goods were to be supplied by the Corporate Debtor.
- 7.7 On 19th April 2022, the applicant unilaterally intended to oust from the arrangement, by contending interalia that the previous supplied material were not passing their standard. Although there was no joint inspection, in the said email it was purportedly recorded interalia that, as if it was a joint inspection.
- 7.8 The Corporate Debtor duly objected to the aforesaid purported email of the applicant dated 19th April 2022 vide email⁶ dated 26th April 2022. It was due to inadequate handling and exposure of moisture, in ensuing rainy seasons, for which some materials may have damaged. Taking the advantages of the same, the applicant company wanted to delay delivery of the next lot of supply. Thus, this answering respondent is the email dated 26th April 2022, replying that the purported plea of the applicant was not proper, as because, it was within the BIS limit.
- 7.9 All Subsequent supply was made as per the specification of the applicant vide supply dated 24th April 2022, and the quality of materials was found as per their desired specification. Same can be corroborated from the copies of the emails⁷ of the Corporate Debtor dated 1st May 2022 and 4th May 2022, which remained undisputed by the applicant.
- 7.10 Thereafter by email dated 1st May 2022, the applicant further requested this answering respondent to supply the goods in truck and bulkers. As such, this Corporate Debtor manufactured whole quantities of the requisite materials for the applicant and requested the applicant for permission to dispatch. However, this answering respondent realized that due to ensuing rainy seasons, the cost of the cement dropped in the market and as such, the applicant, trying to take advantage of the same, coerced this answering respondent to agree with a reduced price by Rs.600/- per MT. As because this corporate

⁴Annexure E to Reply Affidavit

⁵Annexure F to Reply Affidavit

⁶Annexure G to Reply Affidavit

⁷Annexure H to Reply Affidavit

debtor was holding huge stock, on account of the Operational Creditor, the corporate debtor had no other alternative but to agree to such reduced price. Once this corporate debtor agreed to such reduced discounted price, on 27th May 2022 the Operational Creditor immediately placed order for 40,000 Bags to this answering respondent with stipulation that those goods will be supplied through trucks and bulkers. On 31 May 2022, this answering respondent further supplied goods to the Applicant worth Rs. 1,73,360/- and accordingly issued invoice⁸ for the same.

- 7.11 That the applicant expressed satisfaction of all those supplies made and on 4th June 2022, the applicant further placed a repeat purchase order⁹ for another 24,000 bags amounting 1200 MT worth Rs. 93,60,000/- only. Thereafter, 4th June 2022 to 10th June 2022, this answering respondent supplied Rs.15,14,240/- only bags and raised their invoices¹⁰ upon the applicant.
- 7.12 By Email¹¹ dated 6th June 2022, the applicant started demanding speedy supply of the goods through bulker with stipulation that in case of any single damage bag due to rain water, they will cancel the entire bulker. It was a rainy seasons. Thus this answering respondent always wanted to supply the cements, through Railway rakes and same was contended by email¹² of the respondent dated 7th June 2022.
- 7.13 Vide email dated 8th June 2022, the Operational Creditor took a plea that we should supply goods worth Rs. 1.00 Crore to them and return Rs. 2.40 Crore out of their remitted amount. At the time of issuing such Email, Mr. K.M. Jain of the Applicant categorically assured that they will lift the entire produced goods, gradually after the rainy seasons and keeping remitted money, till expiry of the rainy seasons would not be financial health of their company.
- 7.14 But soon thereafter vide their Email¹³ dated 10th June 2022, the Applicant change their mind and requested this answering respondent to refund of Rs.3,40,00,000/- only and to supply goods of Rs.40,00,000/- only. It was only for the reasons that the applicant

⁸Annexure J to Reply Affidavit

⁹Annexure K to Reply Affidavit

¹⁰Annexure I to the Reply Affidavit

¹¹Annexure M to Reply Affidavit

¹²Annexure M to reply Affidavit

¹³Annexure O to the Reply Affidavit

- noted that price of the Cements was going to be dropped in the market, due to ensuing rainy seasons.
- 7.15 Thereafter, again the Applicant changed their mind and vide Email¹⁴ dated 14th June 2022 again changed their stand and demanded supply of requisite goods worth Rs.1.20 Crores and asked the return of balance remitted amount. At the time of issuance of the said Email it was specifically assured by said Mr. K.M. Jain, that the applicant will lift the manufactured goods, soon after expiry of the rainy season.
- 7.16 In reply, on 16th June 2022, the applicant, further placed a confirmation order¹⁵ for 30,000 bags. But to keep good relations with the applicant, on 5th July 2022, the respondent agreed to refund sum amount, if the advanced amount paid to J.P. Cements received. It was so. that, out of the remitted amount of the Applicant, this answering respondent placed order to purchase Clinker, for manufacturing the requisite cement of the Applicant.
- 7.17 Upto 16th August 2022, as per the request of the Applicant, total sum of Rs.1.25 Cr was refunded¹⁶ back to them by the respondent. It was done only to maintain cordial relationship with the applicant. Further the Respondent was under the coercion that, they may cancel the contract, when all the goods have already been manufactured and stored in the godown of this answering respondent. On 9th September 2022, the Applicant again requested this answering respondent to supply 27000 bags of cements. On 9th September 2022, the Applicant again requested¹⁷ the respondent to supply 27000 bags of cements.
- 7.18 Thus the purported statutory notice¹⁸ of the Applicant was duly replied by the respondent on 10th November 2022 and sought resolving the disputes through the Arbitration as referred in the GCC of the Applicant.
- 7.19 It is to be noted that for manufacturing huge quantities of ordered cements, this answering respondent, already incurred huge expenses. All the ordered goods are now manufactured and lying in the godown of this answering respondent. With an oblique

¹⁴Annexure P to reply Affidavit

¹⁵Annexure Q to Reply Affidavit

¹⁶Annexure R to Reply Affidavit

¹⁷Annexure S to Reply Affidavit

¹⁸Annexure T to reply Affidavit

motive, they are not issuing the order for lifting of the goods. Thus money remitted by the Applicant has already been exhausted and thus question of returning the advanced amount which has already been exhausted and used in manufacturing of the requisite goods of the applicant, are not possible.

- 7.20 It is submitted that Rs.25,00,000/- was returned back with the assurances of the Applicant's officer namely Mr. K.M.Jain, that they will not cancel the contract but the same will be adjusted with the final billing of the entire transactions. Notice dated 27th October 2022 was duly replied by this answering respondent JEE 1954 Ton 10th November 2022 and requested the Applicant to settle the disputes through Arbitration.
- 7.21 The Corporate Debtor is ready to supply the desired cements to the Operational Creditor at current prevailing market prices after deducting the aforesaid costs incurred by it.

8 Supplementary Affidavit on behalf of the Corporate Debtor:

- 8.1 The Operational Creditor has submitted that the Corporate Debtor never made full payment of even the first invoice. The payment was received only on 21 February 2020 without any payment advice. As such, the Operational Creditor had adjusted the payment amounts, details of which are already annexed as Annexure C.
- 8.2 The fact that Rs. 1.42 crores is payable is already an admitted fact as is evident from Annexure F of the Application.
- 8.3 The Corporate Debtor has given a clear admission of the outstanding debt in the email dated 21 January 2021. The enclosure to the email sets out that Rs. 1.42 crores is due and payable by the Corporate Debtor to the Operational Creditor. The email is proof that there is no pre-existing dispute.
- 8.4 It is submitted that the invoice no. 41 is not forged as alleged and was delivered by hand to the office of the Corporate Debtor in Howrah. The goods mentioned in the said invoice were duly delivered to the Corporate Debtor on 10 February 2020.
- 8.5 It is further submitted that for most of the orders of the Corporate Debtor, Krishna Roadlines was engaged to deliver the material. The Corporate Debtor had asked for delivery directly at the site of its work i.e. in the South East Central Railway at Bhilai. Accordingly, the e-Way Bill dated 06 February 2020 clearly mentions the amount

- specified in Invoice No. 41 and also the materials being supplied. It is clear from the e-Way Bill that the materials duly crossed the state border and reached the consignee site on 10 February 2020. The Operational Creditor also filed its GST Returns for Invoice No. 41 and uploaded the same on GST website. The Operational Creditor also gave the GST credit amounting to Rs. 5,41,094/- to the Corporate Debtor. The same is evident from the annexed GST Return.
- 8.6 The Annexure A to the Counter Affidavit submitted by the Corporate Debtor shows a tabular chart prepared by themselves which purposely does not demonstrate the GST credit of Invoice No. 41 and they have also annexed the GST- 9, which is an annual form. The Corporate Debtor has purposely not addressed the credit which was given to them amounting to a sum of Rs. 5,41,094/-. It is impossible that the Corporate Debtor would have received Invoice No. 42 and materials pertaining to the same but not receive Invoice No. 41 which was issued on the same date.
- 8.7 The documents annexed as Annexure J prove that the materials were duly supplied to the Corporate Debtor and that the invoice also stood duly delivered. The Corporate Debtor has purposely not filed their GST returns to avoid liability to make outstanding payments. The Operational Creditor has filed all the requisite forms and returns of GST.
- 8.8 The Corporate Debtor is trying to mislead this Hon'ble Tribunal by stating an alleged discrepancy of a missing invoice bearing no. BM/19-20/0034. The alleged invoice bearing no. BM/19-20/0034 was cancelled¹⁹ by the Corporate Debtor which was re-issued as BM/19-20/41 for the same sum of Rs. 35,47,174/- as was intimated to the Corporate Debtor. It is a fact that 26 invoices were issued out of which one invoice i.e. Invoice no. 34 stood cancelled upon express instructions of the Corporate Debtor.
- 8.9 The Annexure C of the Affidavit in Opposition clearly shows that the Operational Creditor has filed GST Returns which shows the Invoice No. 41 of the amount of Rs. 35,47,174/ in the GSTR-TABLE BA of the Operational Creditor. Hence, the Corporate Debtor has purposely not reflected the said invoice in their GST filings in order to avoid their liability to pay outstanding dues. I submit that for Invoice 29 the GST rate

¹⁹Annexure K to the Rejoinder

stood revised to 12% from 18% at the time of filing returns. Therefore there was a reduction in the amount.

9 I.A. 1243/KB/2023 filed by the Corporate Debtor:

9.1 The Corporate Debtor is a MSME registered company with manufacturing unit at Purulia, one of the most backward districts of West Bengal. Directly or indirectly, there are more than 1000 employees and workmen are working in the factory of the Corporate Debtor and it is all along solvent company.

9.2 It is all along contended by this CD that, they have ready and willing to supply the requisite manufactured cements, for the balance amount of Rs.2,96, 52,209/ only. If the claim amount is valued in terms of the goods agreed to be sold to the OC at the agreed rate, the same would quantify to 3706.53 MT.

9.3 At present the CD is holding stock of requisite category of cement for an estimated 3742 MT which would easily cover the quantity of cement which the OC may be entitled to.

9.4 Further, the CD has also annexed photographs²⁰ of the stocks lying in the godown of the CD, in packed condition and also a photograph of the silo wherein loose cement has been stored.

9.5 Further, to fortify the contentions made hereinabove, this applicant prays for appointment of a special officer to visit the godown in the factory of the CD, so that, it will be cleared that, the CD has manufactured the goods equivalent to work order and advanced amount placed by the Applicant, with this CD.

9.6 Unless the direction be passed upon the OC to lift those manufactured stocks for him, this applicant will suffer irreparable loss and injury.

²⁰Annexure "B" to the I.A

9.7 It may be noted further, that, during the hearing on 15th June 2013, this Hon'ble Tribunal was pleased to observe that parties should attempt a settlement. In terms of the aforesaid, on 3rd July 2023 a meeting²¹ has been held, when this CD categorically requested the Petitioner/OC to lift the ready goods lying the godown/silo of this applicant.

10 Reply to I.A 1243/KB/2023:

10.1 The instant Application for seeking appointment of a special officer by invoking inherent powers under Rule 11 of the National Company Law Tribunal Rules, 2016 ("NCLT, Rules") is clearly an abuse of process as the scope of inquiry in an application filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 ("Code") is mandated and limited to the following:

- A. there has to be an operational debt;
- B. the debt has become due and payable;
- C. there is default in repayment of the said debt; and
- D. there is no existence of dispute between the parties prior to receipt of the demand notice under Section 8 of the Code.

10.2 In the present Company Petition not only are the above requirements complied with, but there is an unequivocal and unconditional admission on the part of the Applicant, vide its email dated 05.07.2022 to refund the entire advance amount of Rs. 4.40 Crores paid by the Respondent. The CD has also made payment payment of Rs. 1 Crore on 07.05.2022 and Rs. 25 Lakh on 16.08.2022. The CD has also admitted to the said refunds in its reply to the main CP.

10.3 e. Further, through the Counter Affidavit, the Applicant has merely raised the following procedural objections:

²¹Minutes annexed as Annexure C to the I.A

- a. Application affirmed by a person with no authority;
- b. No affidavit filed under Section 9 (3) (b) to effect that there is no notice given by Corporate Debtor relating to a dispute of unpaid operational debt;
- c. No copy of certificate by a financial institution under Section 9 (3) (c) confirming that there is no payment of an unpaid operational debt;
- d. No joint inspection took place to test the quality of Cement;
- e. Advance amount refunded under coercion;
- f. Agreed to refund the amount if Jaypee Cement paid the amounts paid towards purchase of material; and Bharat Hi-Tech sought to resolve the dispute through arbitration.

The aforesaid procedural objections raised in the Counter Affidavit by the Applicant are misconceived and do not hold ground

11 Analysis and Findings:

- 11.1 Heard the Ld. Counsel on behalf of the Operational Creditor and Ld. Sr. Counsel on behalf of the Corporate Debtor and perused the record.
- 11.2 The first question that required determination is whether the claim herein will fall under the ambit of an 'operational debt' and whether the Petitioner herein qualifies as an 'operational creditor'.
- 6.1 In this regard, a simple reading of the definitions envisaged in section 3 and 5 of the Code makes the proposition clear that for a 'claim' to be classified as 'Operational Debt', it must bear nexus with a provision of goods or services, without specifying whether such goods are for sale or for hire.

- 6.2 Section 5(20) defines ‘Operational Creditor’ as a person to whom operational debt is owed. Section 5(21) states that an ‘Operational Debt’ is a claim in respect of the provision of goods or services. And, sec 3(6) defines ‘claim’ as either a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured or unsecured; or a right to remedy for breach of contract under any law for the time being in force, if such breach gives rise to a right to payment, whether or not such right is reduced to judgment, fixed, matured, unmatured, disputed, undisputed, secured or unsecured.
- 6.3 As such, the definition of ‘operational creditor’ under the code is not limited only to a vendor of goods, rather, it covers any person to whom a claim in respect of provision of goods or services is owed.
- 6.4 In this regard, we would like to refer to the decision of the Hon’ble Supreme Court in the matter of ***Consolidated Construction Consortium Limited v. Hitro Energy Solutions Private Limited***²², wherein the Hon’ble Apex Court has widened the ambit of the term ‘operational creditor’. The relevant paragraphs are provided hereinafter:

“30. It is thus clear that operational creditors are those whose debt arises from operational transactions, i.e., transactions which are undertaken in relation to the operation of an enterprise. As the examples in the BLRC Report suggest, these generally include transactions involving goods or services which are considered necessary for the operational functioning of an entity.

.....

43. First, Section 5(21) defines 'operational debt' as a "claim in respect of the provision of goods or services". The operative requirement is that the claim must bear some nexus with a provision of goods or services, without specifying who is to be the supplier or receiver. Such an interpretation is also supported by the observations

²²Civil Appeal No. 2839 of 2020

in the BLRC Report, which specifies that operational debt is in relation to operational requirements of an entity.....”

- 6.5 As such, it is clear that the advanced amount due from the Corporate Debtor to the Petitioner in this case will be covered under the aegis of “operational debt” and the petitioner does qualify as an ‘Operational Creditor’.
- 6.6 Coming to the merits of the case, we see three purchase orders (P.O) placed on record the particulars of which are provided herein after:

P.O. No.	Issue Date	Delivery Schedule	Amount
3600149655/1 ²³	17.02.2022	30.03.2022	Rs. 2,07,19,821/-
3600153204 ²⁴	08.04.2022	30.04.2022	Rs. 4,40,00,000/-
3600158126 ²⁵	04.06.2022	30.06.2022	Rs. 93,60,000/-

- 6.7 Upon perusal of all three P.O., it is seen that the amount raised in the same were inclusive of the transportation costs of the goods, and the same was to be borne by the supplier of the goods *i.e* Corporate Debtor herein. It is further mentioned in the aforesaid P.O that the goods would be dispatched within 12 hours from date of schedule delivery from the respective plant.
- 6.8 The claim of the Operational Creditor is primarily in respect of P.O. No. 3600153204 (“2nd P.O.”), under which goods had been delivered by the CD but the same were rejected by the OC due to quality issues. As a result, the advance payment made by the OC in respect of the said P.O. became refundable.
- 6.9 It is seen that a large part of the negotiations held between the parties subsequent to the issuance of the Purchase Orders were held *vide* emails and to that effect, it become pertinent to take a note of the same. Upon perusal of the emails exchanged between the parties, the following chain of events emerges:

Date	Event/Contents of Email
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²⁴Page 33 of Petition

²⁵Page 90 of Reply Affidavit

**In the National Company Law Tribunal,
Kolkata Bench (Court- I)**

C.P (IB) 335/KB/2022

16.02.2022	OC sends draft purchase order for OPC 43 grade cement- P.O. 3600149655/1 (1 st P.O)
05.04.2022	OC sends draft purchase order for OPC 43 grade cement - P.O. No. 3600153204 (2 nd P.O)
15.04.2022	OC asks CD to dispatch 1 full railway rack on immediate basis and provides the camp wise requirement break-up
19.04.2022 ²⁶	OC intimates the CD that it has rejected the rake sent by the CD under P.O. 3600153204 due to quality issues. OC orders the CD to take back the supplied bags and hold the ordered quantity
26.04.2022 ²⁷	CD addresses the issues regarding the quality of the goods and mention that they have arranged for transportation of the material delivery through bulker. The CD says that they have sent 1 bulker that was unloaded on 24.04.2022. Further, the CD says that it was ready to dispatch against P.O. 2 nd P.O. The CD also offers to lift and replace the material from the site of the OC.
01.05.2022 ²⁸	CD says that it is waiting for confirmation of the OC to start dispatch of the produced materials and says it has arranged for bulkers.
04.05.2022	CD mentions in email that some quantity of the cement under 2 nd P.O has been delivered and accepted by the OC. It further seeks positive instructions from the OC to schedule delivery of materials.

²⁶Page 83 of Reply

²⁷Page 85 of Reply

²⁸Page 85 of Reply

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07.05.2022 ²⁹	OC asked the CD to <u>refund the entire amount of Rs. 4.40 Crore</u>
27.05.2022	OC, in reference to the supposed discussions held between the parties, asks the CD to confirm the LOI at final mentioned rates. The OC mentions that it is will issue system P.O. on 30.05.2022 against the aforesaid LOI.
04.06.2022	OC issues P.O. No. 3600158126 (3 rd P.O)
06.06.2022	OC asked the CD to arrange the quotation for the same for documentation purpose. It further mentioned that despite raising schedule for 405 bulkers on 04.06.2022, only 2 bulkers had been dispatched by the CD. As such, the OC asked the CD to dispatch the material as instructed.
07.06.2022 [6.34 PM]	The CD communicated that it has already stated dispatch of 2/3 bulkers and 2/3 trucks per say as per the instructions of the OC. It further mentioned its intention to dispatch the <u>entire previous and current order quantity</u> through railway rake only.
08.06.2022 ³⁰	OC mails the CD that the dispatch was still not done as per schedule and requested the CD to dispatch 4-5 trucks on daily basis. OC communicated to the CD that out of the advance payment of Rs. 3.4 Crore that is lying with the CD, Rs. 2.4 Crore was to be returned and the balance amount was to be adjusted against the supplies under the 3 rd P.O.
10.06.2022 ³¹	OC communicates to the CD to cover up the previous backlog

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³¹Page 67 of Petition

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	<p>along with the daily current basis dispatch schedule.</p> <p>Further, the OC instructed the CD to return Rs. 3 Crore out of the R.3.4 Crore advance lying with them on immediate basis and adjust the balance amount against the supplies under the 3rd P.O.</p>
14.06.2022	<p>OC instructed the CD to continue the dispatch of 4-5 bulkers on daily basis and to refund the advanced money lying with it. It also instructed the CD to plan half rake of 30,000 bags (1500 MT) on immediate basis.</p>
15.06.2022	<p>OC asked the CD to confirm the dispatch of half railway rake of cement bags and also to arrange for the refund of the advanced money lying with it.</p>
16.06.2022	<p>OC asked the CD to confirm the dispatch of half railway rake of cement bags and also to arrange for the refund of the advanced money lying with it.</p>
05.07.2022 ³² [2:10 PM]	<p>CD communicated to the OC that the material processed as per the order of the OC was still stored in the Cd's silo and the CD had also made a payment of more than Rs. 3 Crores for clinker to M/s Jaypee Cement which was yet to supply.</p> <p>The CD had asked Jaypee Cement to refund the paid amount directly to the OC's account and in case of delay of the same, the CD would refund the advanced money to the OC in tranches.</p>
05.07.2022 [6:25 PM]	<p>OC communicated to the CD that the latter had agreed to the refund of Rs. 3.27 Crore. It further mentioned that its refund was not to be treated as linked with M/s Jaypee Cement or any third party.</p>

³²Page 41 of the petition

09.09.2022	OC asked the CD to confirm the dispatch of 27000 cement bags as per the previous day's discussions and also to refund the balance payment.
10.09.2022	CD informed the OC that it planned to dispatch half rake cement bags subject to permeable weather.
27.10.2022	OC issued a demand notice under section 8 of the Code
10.11.2022	CD issued the reply to the demand notice dated 27.10.2022

- 6.1 From the aforesaid emails, it is clear that, upon rejection of the goods supplied by the Corporate Debtor, the Operational Creditor had put on hold the 2nd P.O vide email dated 19.04.2022. While the Corporate Debtor sought to replace the same vide email dated 26.04.2022, the goods remained undelivered as on 30.04.2022, thereby causing the contract to be breached.
- 6.2 Subsequently, the parties exchanged various emails and the Operational Creditor on various occasions demanded the refund of the advance payment lying with the Corporate Debtor against the 2nd P.O.
- 6.3 The Corporate Debtor, vide email dated 05.07.2022, agreed to refund the amount of Rs.4.4 Crores in tranches in case of delay on part of M/s Jaypee Cements in transferring the said amount to the Operational Creditor's account. The Corporate Debtor has also refunded Rs. 1,25,00,000/- as on 16.08.2022³³.
- 6.4 By doing so, the Corporate Debtor has acknowledged the debt owed to the Operational Creditor at the behest of the aforesaid advance payment.
- 6.5 It is seen that the last tranche of such refund was to be paid by the Corporate Debtor on 25.08.2022. As such, on failure to repay the same, the default took place on 25.08.2022. As such, both 'debt' and 'default' stand established in the instant matter.
- 6.6 The Corporate Debtor, in its defense, has made the following contentions:

³³Annexure "R" to Reply Affidavit

- i) The Corporate Debtor was always willing to supply the cement and the breach of contract was due to the actions of the Operational Creditor;
- ii) The contract was never terminated as such there was no default;
- iii) The Corporate Debtor's promise to return money was subject to finding purchaser for the produced cement and the said promise was subsequently withdrawn;
- iv) The disputes between the parties ought to have been decided by the means of arbitration.
- v) Application affirmed by a person with no authority;
- vi) No affidavit filed under Section 9 (3) (b) has been filed;
- vii) No copy of certificate by a financial institution under Section 9 (3) (c) confirming that there is no payment of an unpaid operational debt;
- viii) No joint inspection took place to test the quality of Cement;
- ix) Advance amount refunded under coercion;

6.7 The contentions of the Corporate Debtor are dealt with hereinafter:

On the issue of breach of contract:

- a) The Corporate Debtor has contended that it had always been willing to perform the Contract and it was the Operational Creditor who had breached the contract. However, the determination of the said issue is not germane to the adjudication of the matter in hand. For the purpose of adjudication of a petition under section 9 of the Code, the adjudicating authority, within its jurisdiction under IBC, has to take into account, only the following ingredients:
 - i. existence of debt;
 - ii. existence of default;
 - iii. existence of a genuine pre-existing dispute.

The question of breach of contract needs to be dealt with in a forum having the jurisdiction to do so.

On the issue of non- termination of contract:

- b) Upon the rejection of the goods under the 2nd P.O, the said order was put on hold at the instanc of the Operational Creditor and the supply in respect thereof was never resumed. The Operational Creditor had even asked for a full refund of the advance payment onvarious occasions including 05.07.2022. As such, it is clear from the conduct of the Operational Creditor that the contract was held terminated. Further, the default in the instant case is not a result of the failure to deliver the goods within time, but the failure to repay the advance payment as per the agreed timeline. As such the said contention of the Corporate Debtor is untenable.

On the issue of the promise of the Corporate Debtor being conditional:

- c) In the reply dated 10.11.2022 issued by the Corporate Debtor to the Operational Creditor's demand notice dated 27.10.2022, the Corporate Debtor had contended that while it had initially agreed to refund the balance advanced amount subject to availability of any other buyer for the manufactured cement , it had also subsequently informed the Operational Creditor that the said refund was not possible and the Operational Creditor was requested to accept the materials. However, the Corporate Debtor has failed to substantiate its contention with any proof. As such, the said contention is not maintainable.
- d) Further, it is contended by the Corporate Debtor that the progress report³⁴dated 11.09.2023 filed by the investigators under Kalighat P.S. Case No. 94 of 2022 revealed that the Operational Creditor was complicit with Bhilai Jaypee Cements Ltd. in cheating the Corporate Debtor. Regarding the same it is contended that the criminal prosecution case being Kalighat P.S. Case No. 94 of 2022 was filed by the Corporate

³⁴Page 7-9 of the Supplementary Affidavit dated 23.11.2023

Debtor against Bhilai Jaypee Cements Ltd. on 19.07.2022. The Operational Creditor was not a party to the same. The findings of the aforesaid progress report only came out on 11.09.2023 and cannot be considered to be a pre-existing dispute since the same came into existence after the issuance of the demand notice on 27.10.2022.

On the issue of the arbitration clause:

- e) It is seen that an arbitration clause was present in the purchase order issued by the Operational Creditor however, neither party invoked the same before the issuance of the demand notice on 27.10.2022, nor was it invoked thereafter. As such, the failure to resolve the disputes between the parties falls under the ambit of contractual breaches and cannot be considered to be a pre-existing dispute for the purpose of adjudication of the instant petition.

On the issue of non-compliance of section 9(3)(b) and 9(3)(c)

- f) As per the applicable procedure for preferring a petition under Section 9 of the Code, an Affidavit dated 29.11.2022 verifying the Company Petition is also filed along with the present Company Petition, wherein amongst other things, it is declared that, "no such dispute in relation to the existence of the amount of the unpaid operational debt due to the operational creditor herein in any manner whatsoever was brought into the notice of Operational Creditor by the Corporate Debtor even after receiving the Demand Notice...". The aforesaid declaration is in terms of Section 9 (3) (b) of the Code.
- g) Further, Section 9 (3) (c) of the Code directs that the Respondent / Operational Creditor shall along with the petition furnish a copy of the certificate from the financial institutions maintaining accounts of the Respondent / Operational Creditor confirming that there is no payment of an unpaid operational debt by the corporate debtor, if available. However, the said requirement is not mandatory and by the plain

language of the said provision it can be clearly construed that the said certificate be filed if available.

On the Issue lack of authorization of the person filing the petition on behalf of the Operational Creditor:

- h) The present Company Petition has been affirmed after being duly authorised by the Respondent / Operational Creditor in this regard and the same is evident from the Letter of Authority³⁵ dated 27.10.2022. As such this defence taken by the Corporate Debtor is not maintainable.

On the contention that no joint inspection of the goods took place:

- i) The cement supplied by the Applicant was sampled and tested on 17.04.2022 as has been mentioned in the email dated 19.04.2022 and upon checking the cement was not found to be of the required standards. Upon completion of the testing a report was also drawn which was presented to the representatives of the Applicant and Respondent and the same also bears their respective signatures along with date and time. The email dated 19.04.2022 has also not been contested by the Corporate Debtor, thereby indicating that the said contention of the Corporate Debtor is without merits.

6.1 On the plea of the Corporate Debtor in regard to Pre-existing dispute, we would like to refer to the decision of the Hon'ble Supreme Court in the matter of ***Mobilox Innovations Private Limited Vs. Kirusa Software Private Limited***³⁶ wherein it was held that:

“The scheme of Section 7 stands in contrast with the scheme Under Section 9 where an operational creditor is, on the occurrence of a default, to first deliver a demand notice of the unpaid debt to the operational debtor in the manner provided in Section 8(1) of the

³⁵ Annexure V- Page 91 of the Petition

³⁶ Mobilox Innovations Private Limited vs. Kirusa Software Private Limited (21.09.2017 - SC) : MANU/SC/1196/2017

Code. Under Section 8(2), the corporate debtor can, within a period of 10 days of receipt of the demand notice or copy of the invoice mentioned in Sub-section (1), bring to the notice of the operational creditor the existence of a dispute or the record of the pendency of a suit or arbitration proceedings, which is pre-existing - i.e. before such notice or invoice was received by the corporate debtor. The moment there is existence of such a dispute, the operational creditor gets out of the clutches of the Code.” (Para 29)

The Apex Court, in Mobilox Innovations Private Limited (Supra) further held that:

“...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. It is important to separate the grain from the chaff and to reject a spurious defence which is mere bluster. However, in doing so, the Court does not need to be satisfied that the defence is likely to succeed. The Court does not at this stage examine the merits of the dispute except to the extent indicated above. So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application.” (Para 40)

- 6.2 It is clear from the aforesaid judgment that the “dispute” raised by the Corporate Debtor should not be feeble argument or a spurious defense. It should be “a plausible contention which requires further investigation”.
- 6.3 Further, the Hon’ble National Company Law Appellate Tribunal (NCLAT), in the matter of *Deepak Modi v. Shalfeyo Industries (P) Ltd.*³⁷, has also held as follows:

³⁷2023 SCC OnLine NCLAT 169

“It is true that under the provisions of Code if Adjudicating Authority is satisfied with pre-existing dispute at the time of entertaining an application filed under Section 9 of the Code there is no reason to initiate the same or admit the application. However, law is settled on the point that there must be pure pre-existing dispute. Meaning thereby that genuine pre-existing dispute must exist in rejecting an application Section 9 of the code.”

6.4 It is clear from the above discussion that the goods were not delivered as per the delivery schedule and the Corporate Debtor having agreed to refund the amount advanced by the Operational Creditor had paid 2 installments as well. It is also clear that the Corporate Debtor could not stick to the payment schedule agreed upon and defaulted in the same. Further, it is also seen that none of the contentions made by the Corporate Debtor were raised before the issuance of the notice under section 8 of the Code. As such, the same can not be called ‘pre-existing dispute’ and rather amount to ‘moon shine defence’ and ‘feeble arguments’.

6.5 In light of the aforementioned facts, circumstances and precedents cited above, this Adjudicating Authority is satisfied that the Corporate Debtor has defaulted in the repayment of its debt due to the Operational Creditor and as such the instant petition ought to be admitted. Further, in light of such admission, the I.A. 1243/KB/2023 becomes infructuous and is dismissed as such.

6.6 It is, accordingly, hereby ordered as follows:-

- i. The application bearing **CP (IB) No. 335/KB/2022** filed by **G.R. Infraprojects Limited** (*Operational Creditor*), under section 9 of the Code read with rule 6 of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating CIRP against **Bharat HiTech (Cements) Private Limited** (CIN: U51900WB1999PTC098270), the Corporate Debtor, is *admitted*.

- ii. There shall be a moratorium under section 14 of the IBC.
- iii. The moratorium shall have effect from the date of this order till the completion of the CIRP or until this Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 of the IBC or passes an order for liquidation of Corporate Debtor under section 33 of the IBC, as the case may be.
- iv. Public announcement of the CIRP shall be made immediately as specified under section 13 of the Code read with regulation 6 of the Insolvency & Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.
- v. **Mr. Soumitra Lahiri**, having registration number IBBI/IPA-001/IP-P00734/2017-2018/11232 email: slahiri0207@gmail.com, Mobile-8420969857 , appearing at the IBBI Panel for West Bengal at S.No. 4 is hereby appointed as Interim Resolution Professional (IRP) of the Corporate Debtor to carry out the functions as per the Code subject to submission of a valid Authorisation of Assignment in terms of regulation 7A of the Insolvency and Bankruptcy Board of India (Insolvency Professional) Regulations, 2016.
- vi. The fee payable to IRP or the RP, as the case may be, shall be compliant with such Regulations, Circulars and Directions as may be issued by the Insolvency & Bankruptcy Board of India (IBBI). The IRP shall carry out his functions as contemplated by sections 15, 17, 18, 19, 20 and 21 of the Code.
- vii. During the CIRP period, the management of the Corporate Debtor shall vest in the IRP or the RP, as the case may be, in terms of section 17 of the IBC. The officers and managers of the Corporate Debtor

shall provide all documents in their possession and furnish every information in their knowledge to the IRP within one week from the date of receipt of this Order, in default of which coercive steps will follow.

- viii. The IRP/RP shall submit to this Adjudicating Authority periodical reports with regard to the progress of the CIRP in respect of the Corporate Debtor.
- ix. The Financial Creditor shall initially deposit a sum of ₹ 3,00,000 /- (**Rupees Three lakh only**) with the IRP to meet the expenses arising out of issuing public notice and inviting claims. These expenses are subject to approval by the Committee of Creditors (CoC). Further, the Fees of the IRP will be subject to the approval of the COC in accordance with Notification No. IBBI/2022-23/GN/REG091 dated 13.09.2022, issued by the Insolvency and Bankruptcy Board of India, as published in the in the Official Gazette.
- x. In terms of section 7(5)(a) of the Code, Court Officer of this Court is hereby directed to communicate this Order to the Financial Creditor, the Corporate Debtor and the IRP by Speed Post, email and WhatsApp immediately, and in any case, not later than two days from the date of this Order.
- xi. Additionally, the Financial Creditor shall serve a copy of this Order on the IRP and on the Registrar of Companies, West Bengal, Kolkata by all available means for updating the Master Data of the Corporate Debtor. The said Registrar of Companies shall send a compliance report in this regard to the Registry of this Court within seven days from the date of receipt of a copy of this order.

**In the National Company Law Tribunal,
Kolkata Bench (Court- I)**

C.P (IB) 335/KB/2022

- 6.7 **CP (IB) No. 335/KB/2022** to come up on **14-06-2024** for filing the progress report. **I.A. 1243/KB/2023** is dismissed as infructuous.
- 6.8 A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

Balraj Joshi
Member (Technical)

Rohit Kapoor
Member (Judicial)

Signed on this, the 30th day of April, 2024

SM(LRA)