

IN THE NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD
DIVISION BENCH
COURT - I

ITEM No.302
C.P. (IB)/103(AHM)2024

Order under Section 9 IBC

IN THE MATTER OF:

K.K. Homes
(Through Its Partner Mr. Keshab Kumar Dalmia)
Vs
EYLEX FILMS PRIVATE LIMITED

.....Applicant

.....Respondent

Order delivered on 30/04/2024

Coram:

Mr. Shammi Khan, Hon'ble Member(J)
Mr. Sameer Kakar, Hon'ble Member(T)

PRESENT:

For the Applicant :
For the Respondent :

ORDER

The case is fixed for pronouncement of the order. The order is pronounced in the open court, vide separate sheet.

-Sd-
SAMEER KAKAR
MEMBER (TECHNICAL)

-Sd-
SHAMMI KHAN
MEMBER (JUDICIAL)

**BEFORE THE ADJUDICATING AUTHORITY
NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD BENCH
COURT-I**

CP (IB) No.103/9/AHM/2024

(An application filed 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: M/s. Eylex Films Private Limited

M/s. K. K. Homes

Through its partner, Mr. Keshab Kumar Dalmia
Having Registered Office at:
Quality Mension,
Naya Para, Sambalpur – 768001.

..... Applicant/ Operational Creditor

VERSUS

M/s. Eylex Films Private Limited

(CIN: U74900GJ2009PTC058406)

Having Registered Office at:
A-19, Circle-B, Above Pakwan-II Restaurant,
S. G. Road, Bodakdev,
Ahmedabad, Gujarat-380015.

..... Respondent/ Corporate Debtor

Order Pronounced On: 30.04.2024

CORAM:

SH. SHAMMI KHAN, HON'BLE MEMBER (JUDICIAL)

SH. SAMEER KAKAR, HON'BLE MEMBER (TECHNICAL)

APPEARANCE:

For the Applicant : Mr. Tirth Nayak, Ld. Advocate
For the Respondent :

O R D E R
[Per: Bench]

1. The present Application is filed on 23.02.2024 vide Diary No. E-570 by one Mr. Keshab Kumar Dalmia, the partner of the firm M/s. K. K. Homes (hereinafter referred to as **‘Operational Creditor’**) against the Respondent M/s. Eylex Films Private Limited (hereinafter referred to as **‘Corporate Debtor’**) under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as **“IBC, 2016”**) read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (hereinafter referred to as **“IB (AAA) Rules, 2016”**) for initiation of Corporate Insolvency Resolution Process (**CIRP**) against the Respondent/Corporate Debtor, to appoint Interim Resolution Professional (hereinafter referred to as **“IRP”**) and declare the moratorium for having defaulted payment of the operational debt of **Rs.4,78,56,814/-** including the interest amount Rs.1,01,01,359/-. The date of default is said to be fallen on **10.05.2021.**

2. From page-6 of the application, a perusal of Part-I of the Form-5 reveals that the Applicant/Operational Creditor is the partner of the firm, M/s. K. K. Homes, a partnership firm, bearing correspondence address as: “Quality Mension”, Naya Para, Sambalpur – 768001.
3. A perusal of Part-II of the Form-5 reveals that the Respondent/ Corporate Debtor is a company incorporated under the provisions of the Companies Act, 1956 vide CIN: U74900GJ2009PTC058406. The company was incorporated on 19.10.2009 and having its authorised share capital at Rs.2,50,00,000/- and the paid up share capital is Rs.2,50,00,000/. The Registered address of the Respondent/ Corporate Debtor is: A-19, Circle-B, Above Pakwan-II Restaurant, S. G. Road, Bodakdev, Ahmedabad, Gujarat, India, 380015.
4. A perusal of Part-III of the Form-5 reveals that the Applicant/Operational Creditor has not proposed any name of the Interim Resolution Professional, under section 13(1)(c) of the Code to act as Interim Resolution Professional (**IRP**) in-

case the Application gets admitted and left the matter to the discretion of this Bench.

5. A perusal of Part-IV reveals that total operational debt as claimed by the Applicant/Operational Creditor is Rs.4,78,56,814/-, consisting of Rs.1,01,01,359/- towards the interest part.

6. The Applicant/Operational Creditor has submitted the brief facts as below:-

(a) The Applicant/Operational Creditor, M/s. K. K. Homes has constructed a complex cum multiplex wherein, the Respondent/ Corporate Debtor, M/s. Eylex Films Private Limited vide agreement dated 04.09.2014 had agreed to occupy, operate and exhibit cinematograph films in the 4-screen multiplex cinema constructed by the Applicant/Operational Creditor, on lease as per the entered terms and agreement. The Applicant/ Operational Creditor annexed a copy of the said agreement as Annexure-A to the present petition.

- (b) As per the Clause 3(b) of the Agreement, the Respondent/ Corporate Debtor was to pay monthly lease rental by the 10th day of every month as per clause 3(c) of the agreement. The Respondent was to pay the common area charges.
- (c) As stated, the Applicant/ Operational Creditor and the Respondent/ Corporate Debtor maintained a running account in respect of the above stated amounts.
- (d) It is stated that the payments have not been made as per the agreement mentioned above and various amounts pertaining to the charges of rent, maintenance etc. were remained unpaid/due and payable amounting to Rs.4,78,56,814/- as on 02.12.2023. The Applicant/ Operational Creditor has given the details of the amounts unpaid towards dues as under:
- (a) A principal amount - Rs.3,77,55,455/- as on 02.12.2023.
- (b) Interest amount @18% - Rs.1,01,01,359/- on 02.12.2023

- (e) It is stated that the said debt is only in respect of the minimum guarantee as per Clause 3(b) which is the minimum amount undisputedly due and payable towards the lease, rental, maintenance charges, taxes and electricity charges. As stated that said amounts were paid as per the agreement dated 04.09.2014.
- (f) The Applicant/ Operational Creditor annexed a working for computation of default in tabular form, which is enclosed to the present petition as Annexure-B.
- (g) It is stated that the Applicant/ Operational Creditor sent various reminders to the Respondent by email and made telephonic as well as physical conversations for the payment of the outstanding amount. As submitted, the Respondent was failed and neglected to pay the sum.
- (h) The Applicant/ Operational Creditor, finally issued a demand notice in Form-3 & Form-4 dated 15.12.2023 under Section 8 of the Insolvency and Bankruptcy Code, 2016, calling upon the

Respondent to pay the outstanding amount due with interest to the Applicant within 10 days.

- (i) It is stated that the Respondent/ Corporate Debtor replied the aforesaid demand notice and made general denials and doubting to raise any earlier dispute. The Applicant/ Operational Creditor annexed the copy of the said reply to the present petition as Annexure-F.

7. The said reply of the demand notice served under Section 8 of the I.B. Code, 2016, the Respondent, through his Learned Advocate, Mr. Pankaj Kumar, sent a reply dated 03.01.2024 by stating following facts:

(a) The Respondent admits that the notice u/s. 8 of IBC has been received by his client through a speed post vide EG368221697IN on 26.12.2023 at the office of M/s. Eylex Films Private Limited, Hinoo Main Road, Shukla Colony, Ranchi.

(b) In reply to Para-1, it is contended that the notice does not bear any counter signature of M/s. K. K. Homes and hence, it is invalid, as being unauthorised to issue such demand.

(c) In reply of Para-4, the Respondent denies the claim without any documentary evidence or voucher/invoice etc.

(d) The Respondent further mentions to withdraw the said demand notice dated 15.12.2023 thereby doubting some pre-existing dispute.

8. This Bench, vide its order dated 04.03.2024 directed to clarify certain facts by stating as under:

“The claim of alleged operational debt and default of the Applicant is solely based on unregistered Agreement dated 04.09.2014 and Computation Chart annexed with the Petition. However, on perusal of the petition as well as statutory Demand Notice issued in Form-3 & Form-4, neither any invoices, qua claimed rent, CAM charges, GST or Electricity Charges are attached nor shown to have sent to the Respondent in terms of Rule 5(1) of the IB (AAA) Rules, 2016.

The Applicant is required to furnish along with the application copies of relevant extracts of Form GSTR-1 and Form GSTR-3B filed under the provisions of the relevant laws relating to Goods and Service Tax. In terms of Regulation 2B & 2D of the IBBI (IRPCP) Regulation, 2016. Further, there is no proof on record to show such GST of qua claimed rent or CAM Charges or

Electricity Charges were actually deposited by the Applicant.

The Applicant has also not filed a copy of the certificate from the financial institutions maintaining accounts of the Applicant confirming that there is no payment of an unpaid alleged operational debt. Or any other proof confirming that there is no payment of any unpaid alleged operational debt by the Respondent in terms of Section 9(3) (d) or (e) of the IBC, 2016

Ld. Counsel for the applicant requests adjournment in the matter to take instructions in the matter.

At the requests of the Counsel for the applicant, the matter stands adjourned in terms of provision of Section 9(5) (a) (ii) of the IBC, 2016 to rectify the defect in the application.”

9. In compliance of our order dated 04.03.2024, the Applicant/ Operational Creditor filed an additional affidavit for submitting GSTR-1 forms on date 01.04.2024 vide Diary No.D2364.

(a)The Applicant/ Operational Creditor, by the said affidavit submitted that the present petition is filed under Section 9 based on outstanding lease rent pertaining to the period between 10.05.2021 and 10.01.2023 as per the agreement dated 04.09.2024.

(b)As per the Applicant, the Respondent has made part payments towards lease rentals from time to time between 2014 and 2024.

(c)It is further stated that even after the issuance of notice dated 15.12.2023 and filing of the present petition, the Respondent/Corporate Debtor has continued to make part payment towards the lease rentals. The Applicant further annexed details of payments made through various modes, in a tabulated form in the said affidavit, which periods between 02.12.2023 to 15.03.2024.

(d)The Applicant/ Operational Creditor relied on the judgment of the Hon'ble Apex Court in the matter of M/s. Consolidated Construction Consortium Limited V/s. M/s. Hitro Energy Solutions Private Limited, reported in (2022)7 SCC 164 and stated in para-3 of the additional affidavit that:

“It is submitted that the said agreement at Page 21-24 of the Petition there is a clear liability on the Corporate Debtor to make payment for lease rental, common area charges, electricity and all applicable charges thereon.

Moreover there is no requirement on the Applicant to raise an invoice for the same.”

- (e) The Applicant further tabulated the bifurcation of the charges viz. claim of rent, CAM, Interest GST and electricity charges as below:

Details	Amount (in Rs.)
Rent	2,75,66,929
Interest	1,10,68,703
SGST	34,55,785
CGST	34,55,785
CAM	1,08,30,567
Electricity	58,95,624
Total	6,22,73,393
Amount Received during this period against the dues	1,44,16,579
Balance as on Date: 02.12.2023	4,78,56,814

- (f) The Applicant in Para-5 mentions that there is no pre-existing dispute in respect of any of the facts. It is further contended by the Applicant that the Respondent, itself in its reply of the demand notice has not raised any pre-existing dispute.

- (g) The Applicant further by giving the reference of the agreement terms stated that the Respondent has the

liability to make payments of “other duty/tax attributes” and hence, the onus to pay the amounts of CGST and SGST lies on the Respondent/ Corporate Debtor.

10. The Applicant has annexed a list of supporting judgments pertaining to the averments made as under:

Sr. No.	Annexure	Relevant Paras
Presence of Invoice not sine qua non to prove existence of debt		
1.	Consolidated Construction Consortium Limited Vs. Hitro Energy Solution Private Limited (2022) 7 SCC 164	50.2
If part of debt is undisputed and above minimum threshold Application to be admitted		
2.	Next Education India Private Limited Vs. K12 Techno Services Private Limited, 2023 SCC Online SC 1117	2
3.	Kodeboyina Srinivas Krishna Vs. PVM Innvensys Pvt. Ltd., 2020 SCC OnLine NCLAT 667	4, 22 and 23
Submission of Banker’s Certificate not Mandatory		
4.	Quippo Infrastructure Limited Vs. M.R. Nirman Private Limited, 2022 SCC Online NCLAT 3899	10 and 11
5.	Macquaire Bank Limited Vs. Shilpi Cable Technologies, (2018) 2 SCC 674	18-24. 26
In the absence of a registered instrument, court may other evidence on record as well as the conduct of the parties.		

11. We heard the Learned Counsels from both sides. We perused the material available on record.
12. The applicant is relying upon the alleged operational debt and default solely on the basis of unregistered agreement dated 04.09.2014 and computation chart annexed with the petition. Ld. Counsel for the Applicant during Couse of hearing categorically stated that no invoice was ever raised for claiming Rent, CAM Charges, GST or Electricity Charges from the respondent. The applicant has relied upon the aforementioned judgment that there is no requirement of filing any invoices along with a petition to prove operational debt and default.
13. However, on perusal of the judgment qua unregistered documents makes it clear that unregistered documents cannot be relied upon as an evidence to prove the facts. Therefore, in order to establish the operational debt and default, the applicant was rightly asked to place on record to Form GSTR-1 and Form GSTR-3B in terms of regulation of 2B and 2D of the IBBI (IRPCP) Regulations, 2016.

14. Further, the applicant has also relied on the decision of Hon'ble Supreme Court that there is no requirement to place on record the banker's certificate to prove no payment unpaid alleged operational debt was received from the Respondent in terms of relevant provisions or act and rules made thereunder.
15. However, on perusal of the Form GSTR-1 filed by the applicant clearly reflects that the invoices were raised by the applicant while depositing the GST with the concerned GST department against each invoice with specific number mentioned therein.
16. As per the reply of the statutory demand notice issued by the Applicant, the Respondent has categorically denied the claim of the applicant raised in statutory notice. As the Respondent has specifically submitted the claim of the applicant is not supported by any voucher or invoices to establish the contents of the demand notice.
17. Therefore, in the absence of invoices or bank statements, it cannot be ascertained that any operational debt is due

towards the Respondent/Corporate Debtor and default has occurred which could meet the threshold limit of Rs.1.00 Crore as per section 4 of the Code.

18. Therefore, in order to trigger the CIRP under Section 9 of the I.B. Code, 2016, as the unregistered documents cannot be taken into consideration while adjudicating the issue of operational debt and default thereunder.
19. Accordingly, **CP (IB) No.103 of 2024** is hereby dismissed being incomplete. A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

-Sd-
SAMEER KAKAR
MEMBER (TECHNICAL)

-Sd-
SHAMMI KHAN
MEMBER (JUDICIAL)

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