

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 1187 of 2023

[Arising out of order dated 05.09.2023 passed by the Adjudicating Authority, National Company Law Tribunal, Cuttack Bench in CP (IB) No. 55/CB/2022]

IN THE MATTER OF:

R.B. Singh
S/o Late Shri Uma Shankar Singh
R/O: A-203, Harmony Apartment,
Plot No. 6B, Sector-23, Phase-I, Dwarka,
New Delhi-110045,
The Erstwhile Director and
Erstwhile Vice Chairman of the
Respondent No. 2/Corporate Debtor –
Bhilai Jaypee Cement Limited

.....Appellant No. 1

Alok Gaur
S/o Late Shri J.N. Gaur
R/o: 394, Sector-29, Gautam
Buddha Nagar, NOIDA – 201303
The Erstwhile Director of the
Respondent No. 2/Corporate Debtor-
Bhilai Jaypee Cement Limited

.....Appellant No. 2

Versus

Rashmi Cement Limited
Office at Premlata Building,
Corporate Office:
39, Shakespeare Sarani, 6th
Floor, Kolkata – 700 017

.....Respondent No. 1

Bhilai Jaypee Cement Limited
Through its Interim Resolution
Professional,
Mr. Gunjan Poddar
Office Address – 27/251,

**Behind Old Ganj, Ganj Line,
Rajnandgaon,
Chhattisgarh – 491 441**

.....Respondent No. 2

Present:

For Appellant: Mr Abhijeet Sinha, Senior Advocate with Mr. Anupam Chaudhary, Mr. Sarvesh Mehra, Mr. Anil Dutt, Advocates.

**For Respondents: Mr. Rishabh Singh, Mr. S. Shiva, Mr. Namit Singh, Mr. S.K. Singh, Advocates.
Mr. Arjun Asthana, Mr. Sidhartha Sharma, Ms. Shalini B., Advocates.**

J U D G M E N T

[Per: Barun Mitra, Member (Technical)]

The present appeal filed under Section 61 of Insolvency and Bankruptcy Code 2016 (**'IBC'** in short) by the Appellant arises out of the Order dated 05.09.2023 (hereinafter referred to as **'Impugned Order'**) passed by the Adjudicating Authority (National Company Law Tribunal, Cuttack Bench) in CP(IB) No. 55/CB/2022. By the impugned order, the Adjudicating Authority has allowed the Section 9 petition filed by the Rashmi Cement Limited for initiating Corporate Insolvency Resolution Process (**'CIRP'** in short) of the Bhilai Jaypee Cement Limited – Corporate Debtor. Aggrieved by this order, the present appeal has been preferred by the Appellant/Corporate Debtor.

2. Putting briefly the facts of the case, Rashmi Cement Ltd (**'RCL'** in short), placed orders for supply of cement clinker to Bhilai Jaypee Cements Ltd (**'BJCL'** in short) and for this purpose advanced payments to BJCL. RCL claims to have paid in advance for supply of three rakes of cement clinker to BJCL, however, BJCL failed to supply the third rake and also did not refund

the advance payment received by them. RCL therefore sent a letter to BJCL on 25.06.2022 seeking return of the unpaid amount of Rs.1.96 cr comprising of Rs.1.83 cr as principal amount and Rs.13 lakhs as interest amount @ 18% p.a. as on 11.04.2022. A Demand Notice under Section 8 of IBC was sent by RCL to BJCL on 15.09.2022. As the outstanding amount was not received, RCL proceeded ahead by filing a Section 9 application. The Adjudicating Authority on hearing the matter reserved the order on 07.08.2023 which was pronounced on 05.09.2023 by which order BJCL was admitted into CIRP. Aggrieved by this impugned order, the present appeal has been preferred by the Appellant.

3. Shri Abhijeet Sinha, Learned Senior Counsel appeared for the Appellant while Shri Rishabh Singh, Learned Counsel appeared on behalf of the Respondent No. 1. The Learned Counsel for the IRP was also heard.

4. Making his submissions, the Learned Senior Counsel for the Appellant submitted that the entire outstanding amount of Rs.1.96 cr as claimed in the Section 9 application was paid by BJCL into the bank account of RCL on 10.08.2023 by RTGS. It was further pointed out that BJCL had filed two I.A.s before the Adjudicating Authority on 11.08.2023 to place on record all subsequent developments post reserving of orders by the Adjudicating Authority on 07.08.2023. While one I.A. was filed to apprise the Adjudicating Authority that BJCL had agreed to refund the amount of Rs.1.96 cr to RCL towards clearing outstanding dues, the second I.A. was filed for the purpose of seeking urgent listing and disposal of the I.A.s.

5. The I.A.s were not listed on account of the transfer of one of the Member. As the same Bench could not therefore assemble, a Special Bench was constituted on 30.08.2023 before which this company petition came to be listed on 05.09.2023. It has been submitted that though the legal counsel representing BJCL had mentioned before the Adjudicating Authority about the pending I.A.s, on which the Bench had deferred the matter to verify with the Registry regarding the I.A.s, but nevertheless proceeded to pronounce the impugned order. The Learned Senior Counsel for the Appellant assailed the impugned order for having failed to take cognisance of the two related I.A.s pending before it wherein critical subsequent developments had been recorded with regard to clearance of the entire outstanding dues. The impugned order was therefore vitiated by non-consideration of the I.A.s dated 11.08.2023 filed by the Appellant seeking to bring to the notice of the Adjudicating Authority the subsequent developments of payment of the entire outstanding amount of Rs.1.96 cr to RCL. Since the alleged operational debt stood satisfied and no claim of the RCL was subsisting, the Section 9 application had become infructuous and ought to have been rejected accordingly.

6. Refuting the contentions of the Appellant, the Learned Counsel for the Respondent No.1 submitted that the claim made by the BJCL that they had settled the entire outstanding dues of RCL on 10.08.2023 is not based on correct facts. Submitting that such unilateral settlement of outstanding dues by BJCL was not acceptable to RCL, it is also contended that BJCL cannot shy away from the fact that they had been clearly informed by RCL that GST

credit could not be availed by RCL because of belated filing of GST return by BJCL. RCL had categorically apprised the Corporate Debtor on 10.08.2023 by email regarding non-payment of return on GST by BJCL and that they demand payment of the total unpaid operational debt alongwith GST and accrued interest. It was further pointed out that BJCL had admitted and acknowledged their liability on account of non-payment of the returns on GST and that they had agreed to pay Rs.65.72 lakhs for this purpose. These material facts were suppressed from this Tribunal and the Appellant having therefore come with unclean hands, their appeal deserves to be dismissed. It has also been contended that the Appellants do not have locus standi to institute the present appeal as they have failed to place on record any document which substantiates or establishes proof regarding their shareholding in the Corporate Debtor.

7. We have duly considered the arguments advanced by the Learned Counsels for both the parties and perused the records carefully.

8. Before dwelling on the facts of the present case, a quick glance at the relevant statutory construct of IBC would be useful. It is pertinent to note that in terms of Section 6 of IBC, CIRP under the IBC can be initiated against a Corporate Debtor only when the Corporate Debtor commits a default. This *sine qua non* to establish that the Corporate Debtor has committed default rests both on the Financial Creditor and the Operational Creditor, as the case maybe, while seeking to initiate CIRP proceedings against the Corporate Debtor. In other words, unless a debt is due and a default thereto subsists, CIRP proceedings cannot be initiated either by the Financial Creditor or

Operational Creditor. For easy reference, Section 6 of the IBC is as reproduced below:

“6. Persons who may initiate corporate insolvency resolution process. – Where any corporate debtor commits a default, a financial creditor, an operational creditor or the corporate debtor itself may initiate corporate insolvency resolution process in respect of such corporate debtor in the manner as provided under this Chapter.”

9. Section 8 of the IBC requires the Operational Creditor, on occurrence of a default by the Corporate Debtor, to deliver a Demand Notice in respect of the outstanding Operational Debt. Section 8(2) lays down that the Corporate Debtor within a period of 10 days of the receipt of the Demand Notice would have to bring to the notice of the Operational Creditor, the existence of dispute, if any. Section 8 of the IBC is as follows:

“8. Insolvency resolution by operational creditor- (1) An operational creditor may, on the occurrence of a default, deliver a demand notice of unpaid operational debt or copy of an invoice demanding payment of the amount involved in the default to the corporate debtor in such form and manner as may be prescribed.

(2) The corporate debtor shall, within a period of ten days of the receipt of the demand notice or copy of the invoice mentioned in sub-section (1) bring to the notice of the operational creditor—

(a) existence of a dispute, if any, or record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoice in relation to such dispute;

(b) the payment of unpaid operational debt—

(i) by sending an attested copy of the record of electronic transfer of the unpaid amount from the bank account of the corporate debtor; or

(ii) by sending an attested copy of record that the operational creditor has encashed a cheque issued by the corporate debtor.

Explanation. —For the purposes of this section, a “demand notice” means a notice served by an operational creditor to the corporate debtor

demanding payment of the operational debt in respect of which the default has occurred.”

10. This now brings us to the statutory construct of IBC post issue of demand notice by the Operational Creditor as laid down in Section 9 of IBC. Under Section 9(1), if the Operational Creditor does not receive payment from the Corporate Debtor or notice of the dispute under Sub-section (2) of Section 8, he may file an Application under Section 9(1) of the Code. It is an undisputed fact in the present matter that RCL did not receive any payment from the Corporate Debtor after service of Section 8 Demand Notice and therefore proceeded to file an application under Section 9 of IBC.

11. For convenience, we reproduce Section 9 of IBC which is to the following effect:

“9. Application for initiation of corporate insolvency resolution process by operational creditor.- (1) After the expiry of the period of ten days from the date of delivery of the notice or invoice demanding payment under sub-section (1) of section 8, if the operational creditor does not receive payment from the corporate debtor or notice of the dispute under sub-section (2) of section 8, the operational creditor may file an application before the Adjudicating Authority for initiating a corporate insolvency resolution process.”

(2) The application under sub-section (1) shall be filed in such form and manner and accompanied with such fee as may be prescribed.

(3) The operational creditor shall, along with the application furnish-

(a) a copy of the invoice demanding payment or demand notice delivered by the operational creditor to the corporate debtor;

(b) an affidavit to the effect that there is no notice given by the corporate debtor relating to a dispute of the unpaid operational debt;

(c) a copy of the certificate from the financial institutions maintaining accounts of the operational creditor confirming that there is no payment of an unpaid operational debt by the corporate debtor, if available;

(d) a copy of any record with information utility confirming that there is no payment of an unpaid operational debt by the corporate debtor, if available; and

(e) any other proof confirming that there is no payment of any unpaid operational debt by the corporate debtor or such other information, as may be prescribed.

(4) An operational creditor initiating a corporate insolvency resolution process under this section, may propose a resolution professional to act as an interim resolution professional.

(5) The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), by an order—

(i) admit the application and communicate such decision to the operational creditor and the corporate debtor if, -

(a) the application made under sub-section (2) is complete;

(b) there is no payment of the unpaid operational debt;

(c) the invoice or notice for payment to the corporate debtor has been delivered by the operational creditor;

(d) no notice of dispute has been received by the operational creditor or there is no record of dispute in the information utility; and

(e) there is no disciplinary proceeding pending against any resolution professional proposed under sub-section (4), if any.

(ii) reject the application and communicate such decision to the operational creditor and the corporate debtor, if –

(a) the application made under sub-section (2) is incomplete;

(b) there has been payment of the unpaid operational debt; (c) the creditor has not delivered the invoice or notice for payment to the corporate debtor;

(d) notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility; or

(e) any disciplinary proceeding is pending against any proposed resolution professional:

Provided that Adjudicating Authority, shall before rejecting an application under sub-clause (a) of clause (ii) give a notice to the applicant to rectify the defect in his application within seven days of the date of receipt of such notice from the Adjudicating Authority.

(6) The corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (5) of this section.

12. Before we proceed further, we would like to keep in mind the well settled proposition of law as laid down by the Hon'ble Supreme Court in ***Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software (P) Limited 2017 1 SCC OnLine SC 353*** on the tests to be employed by the Adjudicating Authority while examining an application under Section 9 which is as follows:

"34. Therefore, the adjudicating authority, when examining an application under Section 9 of the Act will have to determine:

(i) Whether there is an "operational debt" as defined exceeding Rs.1 lakh? (See Section 4 of the Act)

(ii) Whether the documentary evidence furnished with the application shows that the aforesaid debt is due and payable and has not yet been paid? And

(iii) Whether there is existence of a dispute between the parties or the record of the pendency of a suit or arbitration Proceeding filed before the receipt of the demand notice of the unpaid operational debt in relation to such dispute? If any one of the aforesaid conditions is lacking, the application would have to be rejected. Apart from the above, the adjudicating authority must follow the mandate of Section 9, as outlined above, and in particular the mandate of Section 9(5) of the Act, and admit or reject the application, as the case may be, depending upon the factors mentioned in Section 9(5) of the Act."

13. Coming to the facts of the present case, we find that RCL has issued a Section 8 Demand Notice in Form 3 under Rule 5 of the IBBI (Application to Adjudicating Authority) Rules, 2016 and alongwith the Section 9 application also submitted Form 5 under Rule 6(1) of the IBBI (Application to Adjudicating Authority) Rules, 2016. It may be useful to note at this stage the contents of Form 3 and Form 5 with respect to the particulars of the operational debt claimed by the RCL in the present case which is as extracted below:

FORM 3

PARTICULARS OF OPERATIONAL DEBT	
1.	<p>TOTAL AMOUNT OF DEBT</p> <p>Total amount due as on 02nd September, 2022. Rs.1,96,96,325/- (Rupees One Crore Ninety-Six Lakhs Ninety-Six Thousand Three Hundred and Twenty-Five only). Amount Break-up: PRINCIPAL AMOUNT: Principal claim for non-supply of cement clinker against advanced payment made to the corporate debtor to a tune of Rs.1,83,81,894/- as on 11th April, 2022. INTEREST ACCRUED @ 18% p.a. Interest on the aforesaid amount @18% from 11th April, 2022 to 02nd September, 2022 for 145 day is Rs.13,14,431/- and the same is continuing till date and shall be claimed upto the date of realisation.</p>

PART IV of FORM 5

PARTICULARS OF OPERATIONAL DEBT	
2.	<p>AMOUNT CLAIMED TO BE IN DEFAULT AND THE DATE OF WHICH THE DEFAULT OCCURRED (ATTACH THE WORKINGS FOR COMPUTATION OF AMOUNT AND DATES OF DEFAULT IN TABULAR FORM)</p> <p>Rs.1,96,96,325/- (Rupees One Crore Ninety-Six Lakhs Ninety-Six Thousand Three Hundred and Twenty-Five only). The above amount includes: Principal: Rs.1,83,81,894/- (Rupees One Crore Eighty-Three Lakhs Eighty-One Thousand Eight Hundred Ninety-Four Only). Interest: Rs.13,14,431/- (Rupees Thirteen Lakh Fourteen Thousand Four Hundred and Thirty-One Only) @ 18% p.a. from 11th April, 2022 to 02nd September, 2022. (Calculated till 02.09.2022)</p>

		<p>The date on which the default occurred is 11th April 2022 and is continuing.</p> <p>The dates on which the default occurred and the workings for computation of default in tabular form can be referred to in “Annexure C”.</p>
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14. It is the case of the Learned Senior Counsel of the Appellant that when BGCL had already made payment of the complete outstanding amount as claimed by RCL in Form 3 accompanying the demand notice under Section 8 and Form 5 of Section 9 application, no claim of the RCL was outstanding and this should have rendered the Section 9 application infructuous. The said payment, which the Appellant had endeavoured to bring to the knowledge of the Adjudicating Authority by way of filing I.A.s, should have led to the closure of Section 9 application had they been considered prior to the passing of the impugned order. Assailing the impugned order, it is the contention of Appellant that there is no subsisting default as the alleged operational debt stands satisfied. It has also been contended by the Appellant that though Mr. R.B. Singh had ceased to be Director of the Corporate Debtor, as he continues to be shareholder of the Corporate Debtor, he is fully entitled to file this appeal as he continues to be affected by the impugned order being a shareholder of BJCL.

15. The short point for our consideration is whether the operational debt claimed by RCL was due and payable and if any default thereto was committed by the Respondent No.1/BJCL. We have already noticed from the statutory construct of IBC that in the case of Section 9 application, it is necessary for **Company Appeal (AT) (Insolvency) No. 1187 of 2023**

the Operational Creditor to indicate the particulars of the crystallised debt qua the Corporate Debtor. From the given particulars in the Section 8 demand notice, it is clear that the total amount of operational debt claimed by RCL is Rs.1,96,96,325/- of which the principal amount for non-supply of cement clinker against advance was Rs.1,83,81,894/-. In addition, interest was claimed at the rate of 18% per annum from 11.04.2022 for 145 days amounting Rs.13,14,431/- only. In the Section 9 application, in Part IV also, the total amount of debt has been similarly shown as Rs.1,96,96,325/- only and interest has been calculated with effect from 11.04.2020 to 02.09.2022. It is therefore an undisputed fact that the crystallised amount of operational debt is Rs 1.96 cr only including interest and we do not find any other sum included in Form 3 or Form 5 submitted by the RCL. It is an undisputed fact that RCL had never sought any GST amount in the Section 8 demand notice or Section 9 application or at any time when the matter was pending adjudication before the Adjudicating Authority.

16. We also notice that a communication dated 09.08.2023 was sent by BJCL to RCL to amicably settle the dispute by proposing to repay the operational debt. It is also an admitted fact that BJCL had already refunded Rs.1.96 cr via RTGS on 10.08.2023 though it is the contention of the RCL that this amounted to a unilateral settlement which was not agreed to by them as it did not reflect the ITC dues.

17. Pursuant to the remittance of the operational debt of Rs 1.96 cr to RCL via RTGS transaction, the BJCL filed I.A. before the Adjudicating Authority on 11.08.2023 informing about this subsequent development which date albeit

was after the Adjudicating Authority had reserved the matter for orders on 07.08.2023. Be that as it may, it is also pertinent to notice that before the pronouncement of the order, due to certain administrative exigencies, one of the Members of the Bench of Adjudicating Authority who had heard the matter on 07.08.2023 was transferred and a Special Bench was set up on 30.08.2023 before which the company petition came to be listed on 05.09.2023. In effect, the two I.A.s filed by BJCL remained pending before the Adjudicating Authority since 11.08.2023 and one of them was filed for the purpose of seeking urgent listing and disposal of the I.A.s. Finally, when the matter came to be listed on 05.09.2023, though the legal counsel representing BJCL had mentioned before the Adjudicating Authority about the pending I.A.s., the Bench after deferring the matter to verify with the Registry regarding the pending I.A.s, nevertheless proceeded to pronounce the impugned order without disposing of the I.A.s. Non-consideration of the I.A., especially when it dealt with the subsequent developments in respect of repayment of the entire operational debt is a pointer to a grave infirmity in the impugned order.

18. This brings us to the contention of RCL that in response to the email dated 09.08.2023 in which BJCL had proposed to make certain payments for seeking withdrawal of the Section 9 application, it was clearly pointed out by return email dated 10.8.2023 that they had suffered loss in the availment of Input Tax Credit (**ITC** in short) amounting Rs.65.72 lakhs. It was contended that BJCL had belatedly filed the GST return for the month of March 2002 in June 2023 due to which RCL could not avail ITC. Hence, RCL having been

denied the benefit of ITC, the Corporate Debtor cannot be absolved from paying the operational debt arising out of unpaid GST return. It has been stressed that BJCL in response on 10.08.2023 had duly admitted its liability towards payment on account of unpaid GST Returns. However, BJCL failed to honour the unpaid operational debt arising out of non-payment of GST return even after having duly acknowledged and admitted the same. Hence, when an amount of Rs.65.72 lakhs remain unpaid till date, the default continues to subsist. Thus, when there is clear admission of acknowledgement of debt by the Corporate Debtor towards non-payment of the return on GST, which amount qualifies to be treated as operational debt, non-payment thereof makes it sufficient ground for admission of Section 9 application by the Adjudicating Authority and that that the Adjudicating Authority had correctly passed the impugned order.

19. The scheme of the IBC is to ensure that when a default takes place, in the sense that the debt becomes due and is not paid, the insolvency resolution process begins. Default is defined in Section 3(12) in very wide terms as meaning non-payment of a debt, once it becomes due and payable, which includes non-payment of even part thereof or an instalment amount. When we look at the facts of the present case, we have no hesitation to opine that BGCL had already made payment of the entire operational debt as claimed by RCL in Section 8 Demand Notice and debt as reflected in Form 5 of Section 9 application. To that extent the alleged operational debt stands satisfied and clearly there is no default. It is also an undisputed fact that RCL had not sought any GST amount in the Section 8 demand notice or Section 9

application. RCL has of course clarified that this amount could not be reflected in Form 3 and Form 5 since the GST Return had been filed belatedly by the Corporate Debtor. Be that as it may, we need not go into the reasons adduced by RCL as to why they failed to demand payment of unpaid return on GST in the Section 9 application. It only suffices to note that no such GST refund and ITC claim was included in the Section 8 Demand Notice or the Section 9 application by the RCL and hence it cannot become a ground of default on which CIRP can be initiated.

20. We are of the considered view that in the factual matrix of the case at hand, when the dues in terms of Form 3 and Form 5 have been cleared by BJCL, endeavours on the part of RCL to seek initiation of CIRP by raising claims which do not find place in Form 3 and Form 5 filed by them, clearly manifests the intention of the RCL to invoke the provision of IBC to enforce recovery of debts against the Corporate Debtor. Allowing such claims which never formed part of the claim of operational debt before the Adjudicating Authority to be considered at the appeal stage is not tenable. This cannot be commended as it militates against the spirit and essence of IBC.

21. The Preamble of IBC is carefully worded and depicts the point and purpose of the IBC to be 'Reorganisation' and 'Insolvency Resolution', specifically omitting the word 'Recovery'. As stated in its Object and Reasons, the objective of the IBC is to consolidate and amend the laws relating to reorganisation and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner, for maximization of the value of the assets of such persons, to promote entrepreneurship, availability of

credit and to balance the interest of all the stakeholders. The Hon'ble Supreme Court has also time and again observed that the underlying intent and spirit of IBC is maximising the value of assets in the process of resolution. When the creditor is using insolvency as a substitute for debt recovery procedures and the intent is to make an attempt to obtain an advantage or an upper hand in recovering their dues, this needs to be stone-walled as IBC cannot be allowed to be misused as a substitute forum for collection of debt.

22. This brings us to contention of the Learned Counsel of the IRP – Respondent No. 2 seeking payment of fees and expenses incurred by him. It was submitted that the Adjudicating Authority has directed RCL to deposit Rs.1 lakh only to meet the expenses incurred by him. It has been contended by Learned Counsel of Respondent No.1/RCL that Corporate Debtor should be liable to pay IRP fee since the proceedings were triggered due to default committed by the Corporate Debtor. We do not subscribe to this view of the Learned Counsel of Respondent No.1 and direct that RCL will pay the expenses and fees of Rs. One lakh within 15 days as no default has been proven to have occurred on part of the BJCL/Corporate Debtor. Further, since the impugned order was communicated to the IRP on 11.09.2023 which order was thereafter stayed by this Tribunal on 13.09.2023, we are not in a position to accept that much substantial work was performed by the IRP or expenses incurred which would entitle him to any amount exceeding Rs. One lakh only.

23. Having regard to the facts and circumstances of the case on hand, this Appeal is allowed and the Impugned Order of the Adjudicating Authority is

set aside. In effect, all other Order(s) passed by the Adjudicating Authority pursuant to the impugned order are set aside. The Corporate Debtor is released from the rigours of CIRP and is allowed to function independently through its Board of Directors with immediate effect. However, the Respondent will have the liberty to avail other remedies in accordance with law to recover its dues before the appropriate legal forum. No costs.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

[Arun Baroka]
Member (Technical)

Place: New Delhi
Date: 10.05.2024
Ashok Kumar