

**IN THE NATIONAL COMPANY LAW TRIBUNAL
BENGALURU BENCH**

C.P. (IB) No.50/BB/2020
U/s 9 of the IBC, 2016
R/w Rule 6 of I&B (AAA) Rules, 2016

BETWEEN:

M/s. Chryso (India) Pvt. Ltd.
D 30/7, TTC Industrial Area,
MIDC Industrial Area,
Turbhe, Navi Mumbai,
Mumbai – 400 706.

- Petitioner/Operational Creditor

AND

**M/s. Sri Chowdeshwari
Concrete Pvt. Ltd.**
No.801, 8th Main, 5th Cross,
4th Stage, BEML Layout,
Rajarajeshwari Nagar,
Bangalore- 560 098.

- Respondent/Corporate Debtor

Order Pronounced on: 13th May, 2021

Coram: 1. Hon'ble Shri Rajeswara Rao Vittalana, Member (Judicial)
2. Hon'ble Shri Ashutosh Chandra, Member (Technical)

Parties/Counsels Present:

For the Petitioner : Ms. Asmita Deshpande

For the Respondent : Mr. Gnanesh K. Kempanna

ORDER

Per: Ashutosh Chandra, Member (Technical)

1. C.P. (IB) No.50/BB/2020 is filed by M/s. Chryso India Pvt. Ltd. (hereinafter referred to as 'Petitioner/Operational Creditor') U/s 9 of the IBC, 2016, R/w Rule 6 of the I&B (Application to Adjudicating Authority) Rules, 2016, by inter alia seeking to initiate Corporate Insolvency Resolution Process (CIRP) in respect of M/s. Sri Chowdeshwari Concrete India Pvt. Ltd., on the ground that it has committed default for total amount of Rs.70,33,907/- (Rupees Seventy



Lakh Thirty Three Thousand Nine Hundred and Seven Only) including an interest @ 24% p.a. being Rs.24,51,238/- on a Principal amount of Rs.45,82,669/- as on 25.09.2019.

2. Brief facts of the case, as mentioned in the Company Petition, are as follows:

- (1) M/s. Chryso (India) Pvt. Ltd. (Erstwhile name being 'The Structural Waterproofing Co. Pvt. Ltd.') ('Petitioner/Operational Creditor') is a Company bearing CIN: U36992WB1950PTC018695, having its registered office at D 30/7, TTC Industrial Area, MIDC Industrial Area, Turbhe, Navi Mumbai, Mumbai-400706. The Company is engaged in the business of manufacturing and supplying of Admixtures viz. PC Cryso Plast Delta D-780, Chrysor (R) Plast Delta D880, D873 etc. used in the ready concrete mixes.
- (2) M/s. Sri Chowdeshwari Concrete India Pvt. Ltd. ('Respondent/Corporate Debtor') is Company bearing CIN: U26960KA2013PTC071086, was incorporated on 20.09.2013. Its Authorised Capital is Rs.5,00,000/- and Paid-up Capital is Rs.4,98,000/-. The Company is engaged in the business of supplying ready mix concrete, concrete solid blocks, construction materials and other ancillary solutions to various individual and corporate clients/customers across Bengaluru.
- (3) It is stated that the Corporate Debtor being involved inter alia in the supply of ready mix concrete approached the Operational Creditor for purchasing products manufactured by the Operational Creditor.
- (4) The Operational Creditor agreed to supply its manufactured products to the Corporate Debtor on credit basis. Thereafter, the Corporate Debtor issued a total of 12 Purchase Orders, pursuant to which the Operational Creditor accordingly began to supply the products. Further to the Purchase Orders being issued by the Corporate Debtor the Operational Creditor raised 12 invoices against them. The Corporate Debtor issued twelve Purchase Orders to the Operational Creditor in between October 2016 and January 2018 pursuant to which the Operational Creditor supplied and delivered the products as per the appropriate quality and quantity which were agreed to

between the parties. There has never been any dispute raised by the Corporate Debtor with regards the quality and quantity of the products during the time that the products were being supplied by the Operational Creditor. The products have been accepted by the Corporate Debtor without any demur. The Operational Creditor in view of the aforementioned Purchase Orders raised twelve corresponding invoices amounting to Rs.49,57,572/-.

- (5) It is also stated that the said products were duly received and accepted by the Corporate Debtor but only a part payment of Rs.3,74,910/- has been made against its liability. Such part payment on behalf of the Corporate Debtor clearly shows that there exists a liability with regards the invoices raised by the Operational Creditor. The remaining amount of Rs.45,82,669/- remains due and payable from the Corporate Debtor to the Operational Creditor. Additionally, the Corporate Debtor is also liable to pay contractual interest at 24% as stipulated in the invoice for non-payment of the invoice amount after the due date. The Corporate Debtor vide its email dated 8th January, 2018 has confirmed its liability towards the Operational Creditor. The balance confirmation further solidifies the claim that the Operational Creditor has against the Corporate Debtor for non-payment of the former's legitimate dues.
- (6) It is stated that the Operational Creditor made several requests to the Corporate Debtor for payment of the invoice raised against the latter. Despite the same the Corporate Debtor showed no inclination towards clearing its debt against the Operational Creditor, due to which the Operational Creditor was constrained to issue a Demand Notice dated 14th March, 2019 under the IBC, 2016. The Corporate Debtor upon receiving the Demand Notice verbally communicated/requested for a discount of Rs.9,48,672/- in the form of a credit note to the Operational Creditor. The Operational Creditor sent a Credit Note and an accompanying covering letter to the Corporate Debtor by which they were intimated that the latter had seven days to accept the Credit Note and clear the pending dues towards the Operational Creditor. Despite being in receipt of the Demand



Notice and the Credit Note the Corporate Debtor has not made any further payments towards their liability against the Operational Creditor. The Corporate Debtor has miserably failed to comply with the said Demand Notice or acted upon the Credit Note which was sent subsequently at the request of the Corporate Debtor.

3. The Company Petition is opposed by the Corporate Debtor by filing Statement of Objections and Written Arguments dated 12.02.2021 & 19.04.2021, by inter alia contending as follows:

- (1) The Corporate Debtor is a profit-making Company with sufficient financial strength and is actively doing business. There is no admitted debt or liability in the present instance. The Corporate Debtor has already paid an amount of Rs.1,43,25,668/- towards the undisputed Invoices raised by the Operational Creditor and, due to certain unresolved dispute in respect of the Quality Standards in the Products so supplied by the Operational Creditor, a sum of Rs.27,13,021/- is with-held until resolution of the reported disputes/Quality Standards. Therefore, the present Petition seeking initiation of Insolvency proceedings against the Corporate Debtor, on the ground that it has no money to pay the Operational Creditor and to meet its current and existing demands/liabilities are baseless, frivolous, bereft of truth and filed with mala fide intentions. The documents furnished by the Operational Creditor along with its Petition does not indicate any debt is due and payable by the Corporate Debtor, and there is no occurrence of any deliberate default on the part of the Corporate Debtor.
- (2) It is contended that the Operational Creditor had approached the Corporate Debtor expressing its desire and interest in sale and supply of Admixtures/Products and accordingly had provided Demos in respect of the Products proposed to be supplied to the Corporate Debtor. The Corporate Debtor placed / used to place Purchase Orders on the Operational Creditor for the supply of the Admixtures/Products and upon receipt of such Purchase Orders, the Operational Creditor was at liberty to either accept or reject the Purchase Orders. During October 2016 to



January 2018 the Corporate Debtor has made prompt payments of Rs.1,43,25,668/- towards those of the Admixtures/Products supplied and against those deliveries meeting the Corporate Debtor's Quality Specifications and, certain sum are withheld as against unresolved disputes for those supplies not meeting the agreed Master Samples or Ordered Specifications as per the Trial samplings and Corporate Debtor's Purchase Orders. All supply of sub-standard quality of Admixtures/ Products were promptly brought to the knowledge of the Operational Creditor.

- (3) The Corporate Debtor vehemently disputes for having placed the following Purchase Orders for the supply of Products, on the Operational Creditor, viz.,

SCC/KUM/01/2017-17	06-07-2017	Rs.4,40,253
SCC/KUM/0066/2017-17	06-07-2017	Rs.4,40,253
Total		Rs.8,80,506

The Operational Creditor has tweaked the number of quantities ordered by the Corporate Debtor and has created additional Purchase Orders as if the same were raised by the Corporate Debtor and is trying to make false claims for the same from the Corporate Debtor without any proof of the same. The Corporate Debtor has not placed the above Purchase Orders for Admixtures.

- (4) On the other hand, it is submitted that owing to short-fall of *Chemical-Dosage of Admixtures* so supplied by the Operational Creditor, the Corporate Debtor in order to meet the requisite quality standards was required to add additional dosage of Admixtures into its final product/ Concrete, e.g., in place of 0.5% dosage per 300 Kgs. of Cement, the Corporate Debtor was forced to use ~0.8% Dosage per 300 Kgs of Cement, thereby causing huge shortage of Admixtures in its proposed ready-mix concrete manufacturing processes. Accordingly, the Corporate Debtor vide its e-mail dated 21.03.2018 had brought its concerns regarding Admixtures over-dosage reconciliation to a tune of Rs.9,48,672/-.

Accordingly, as against the reported short-falls/sub-standard Admixtures so supplied to the Corporate Debtor, the Operational Creditor having admitted its 'Quality Issues' vide Credit Note Ref. MUPJOV19-0454 dated 06.04.2019, had reconciled its outstanding statement with the reduction of Rs.9,48,672/-. Relevant portion of email dated 08.09.2018 which refers to the communication dated 21.03.2018 and again reiterates the issues is extracted hereinbelow for ready reference:

"This has reference to your mail dated 26th August 2018, mentioning as last reminder and if payment issue is not solved, the same shall be handled by your Legal Team

In this regard we request you to refer to our mail dated March 21, 2018, as below, which is self-explanatory.

Further Please note that,

- 1. For our above mail we did not receive any confirmation, but later we received a letter dt 4th May 2018, offering credit note of 15%.*
- 2. The proposed credit note of 15% amounting Rs.7.5 Lacs (approximate) is not acceptable by us as we have incurred huge loss using your supplied inferior quality admixture as compared to the proposed credit note.*
- 3. Due to Quality issue/low performance in your supplied admixture leading to mix problem, which further lead to rectification of supplied concrete like crack filling, water proofing and strengthening of concrete using carbon wrapping of columns at several sites, in our clients have held our payments to around 1.50 crores, which we are yet to receive.*
- 4. Though your company technical representatives, had visited our plants and sites on above technical complaints for resolving quality issues they were unable to resolve the same.*
- 5. In consideration of the business relation that we have been having with Chryso we had not shared the details of financial implications /losses that we had incurred due to Quality issues of your admixtures as detailed above.*



Since you have now indicated of going legal, it will purely be your decision and we will submit our claim for all the losses and expenses we have incurred at the legal forum as there is a considerable variation in the quality of supplied admixture and the master sample given to us while conducting the trials before the approval of admixture.

In the interest of the good Vendor customer relationship, we were willing to resolve the pending payment issue mutually, provided if you were acceptable to our request of credit note for Rs.9,48,672 which we had been discussing during all your visits and now that you have indicated to go legal, the settlement on receipt of credit note for Rs.9,48,672/- is null and void and we will claim for the actual losses while it is discussed legally.

6. Further Despite the pendency of decision from your end we have made payment of Rs. 4,15,786/- Vide Cheque no.239636 dt 07.07.2018 of Yes Bank.

(5) It is also contended that in the foregoing circumstances, the Operational Creditor has failed to produce any authentic Purchase Orders in support of the aforesaid disputed Purchase Orders and the non-accounting of amounts as per Credit Note dated 06.04.2019 clearly shows that the alleged claim of Rs.70,33,907/- is false and the same are denied by the Corporate Debtor. The Corporate Debtor has cleared all undisputed dues payable to the Operational Creditor based on the Invoices raised by the Operational Creditors for the Admixtures/Products delivered by them based on the Purchase Orders raised by the Corporate Debtor in accordance with the Purchase Order.

(6) It is further contended that owing to the Operational Creditor's supply of sub-standard Admixtures, quality issues and low performance in the supplied Admixtures thereby leading to mixing problems in the end produce has further led the Corporate Debtor to rectification of supplied concrete like crack filling, water proofing and strengthening of concrete using carbon wrapping of columns at several of its customer's sites, thus

rendering the Corporate Debtor's customers withholding its payments to a tune of Rs.1.50 Crores, which are yet to be recovered by the Corporate Debtor. There are huge disparities with respect to the sums claimed, invoices raised, and illegal demands of the Operational Creditor. The 'Disputes' between the parties are to be adjudicated by a competent Civil Court upon appreciating the evidence placed on record by the parties against each other's claim. In the absence of full-fledged trial, this Petition cannot be adjudicated and the same deserves to be dismissed.

4. The Operational Creditor has filed Written Submissions dated 09.04.2021, by inter alia stating as follows:

- (1) It is stated that the liability of the Corporate Debtor arising from the unpaid invoices of the Operational Creditor clearly falls within the ambit of an 'operational debt' as defined U/s 5(21) of the IBC. The Operational Creditor herein has a claim in respect of the invoices for the manufacturing products that he has provided to the Corporate Debtor. Accordingly, the Corporate Debtor owes a 'debt as defined U/s 3(11) of the IBC to the Operational Creditor herein since the Corporate Debtor has an obligation in respect of the Operational debtor mentioned above. This obligation towards the 'debt' has even been acknowledged by the Corporate Debtor in an email dated 08.01.2018.
- (2) The Corporate Debtor has in its Statement of Objections raised a plea that the Operational Creditor has annexed incorrect Purchase Orders. The plea has never been raised before on the multiple email correspondences between the parties with respect to the outstanding debt. Further, the Corporate Debtor has not substantiated such an averment with any documentation or basis. The same is clearly an afterthought. The main issue that the Adjudicating Authority has to look into is whether there has been any 'default' as defined U/s 3(12) under the IBC. Default has been defined as the non-payment of debt when the whole or any part of the amount of debt has become due and payable and is not repaid by the Corporate Debtor. As has been enumerated above there is a valid existing 'debt which has become due and payable on the date of default of the



respective invoices enumerated in the Petition. Hence, the provisions of the IBC can be triggered and it is fit case for the Corporate Debtor to be admitted into insolvency.

5. Heard Ms. Asmita Deshpande, learned Counsel for the Petitioner and Mr. Gnanesh H Kempanna, learned Counsel for the Respondent. We have carefully perused the pleadings of the Parties and the extant provisions of the Code and the Law.
6. We may state at the very outset that it is a settled position of law that the provisions of Code cannot be invoked for justified reasons as per the Code. The Hon'ble Supreme Court in the case of *Mobilox Innovations Private Limited v. Kirusa Software Private Limited*¹ has inter alia held that I & B Code, 2016 is not intended to be a substitute to a recovery forum and cannot be used to jeopardise the financial health of an otherwise solvent company by pushing it into insolvency. It is also pertinent to mention here that the Hon'ble Supreme Court in the case of *K. Kishan v. Vijay Nirman Company Private Limited*² clarified that the Petitioners cannot use IBC either prematurely or for extraneous considerations or as substitute for debt enforcement procedures.
7. In the light of above discussion, the Petitioner has to make a case that there is a clear and undisputed debt, a default and also that the Respondent is insolvent and has lost its ability to pay its debts, the proceedings become mere recovery proceedings which is not intended by the legislature in introducing the I & B Code, 2016.
8. From the facts of the case it is seen that the Email dated 08.09.2018 issued by the Respondent to the Petitioner categorically pointing out that the credit note of 15% issued by Petitioner in response to the mail dated 21.03.2018 by Respondent pointing out quality issues of the materials supplied, was not acceptable as the Respondent incurred huge losses. The Respondent states "*due to quality issue / low performance in your supplied admixture leading to mix problem, which concrete using carbon wrapping of columns at several*

¹ 2018 (1) SCC 353

² (C A) No.9597 of 2018 dated 23rd October, 2018, (147 CLA 112 (SC)



sites, and our clients have held our payments to around 1.50 crores, which we are yet to receive”.

9. It is further stated in the email dated 08.09.2018 as follows *“In the interest of the good vendor customer relationship We were willing to resolve the pending payment issue mutually, provided if you were acceptable to our request of credit note for Rs.9,48,672/- which we had been discussing during all your visits and now that you have indicated to go legal, the settlement on receipt of credit note for Rs.9,48,672/- is null and void and we will claim for the actual losses while it is discussed legally.*
10. It is also noted that from 2016-2018 the Respondent has also paid amount of Rs.1,43,25,668/-. As per the Respondent a sum of Rs.27,13,021/- has been withheld until resolution of the reported disputes/Quality Standards. Further stating that the Respondent is not liable to pay the 24% interest levied by the Petitioner.
11. On perusal of the audited financial statements of the Respondent for the years 2017-18, 2018-19, 2019-20, it is seen that the Respondent Company has been in good financial condition. It is seen that in the year 2019-20, the Company has Reserves and Surplus of Rs.93,47,251/-, tangible assets of Rs.7,38,64,654/- and net worth of the company is Rs.98,45,251/-. It is seen that the Respondent has generated Rs.61,91,22,172/- revenue from its operations, and profits of Rs.78,04,144/-, as per the last available accounts. Part payments having been made to the Petitioner, and the withholding of payments are clearly not on account of the Respondent's inability to pay but because of the disputes as seen from the email dated 08.09.2018 which appear to be bonafide, regarding the materials supplied. It is not the object of the Code to push profit making and viable units into the rigours of insolvency resolution especially when the objective in the instant case is only recovery of disputed debt.
12. We are therefore of the considered view that this petition has been filed to recover disputed debt, which is not the object of the Code, treating this AA as a debt recovery forum. An undisputed debt is a sine qua non for an application

filed u/s 9 of the Code. Allowing such a petition against a profit-making viable unit would defeat the purpose of the Code.

13. Hence, C.P. (IB) No.50/BB/2020 fails and is dismissed. No order as to costs.



**ASHUTOSH CHANDRA
MEMBER, TECHNICAL**



**RAJESWARA RAO VITTANALA
MEMBER, JUDICIAL**

Puja