

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI**

Company Appeal (AT) (Insolvency) No. 1222 of 2024

[Arising out of the Impugned Order dated 11.03.2024 passed by the Adjudicating Authority, National Company Law Tribunal, Kolkata Bench-II in CP (IB) No. 304/KB/2022]

In the matter of:

Manishaas Infratecho Solutions Pvt. Ltd

(formerly known as Manisha Infrasolutions Private Limited)
bearing CIN-U45200DL2009PTC193846 and
having its registered office At-
437, G/F, Main Road,
Mandwali Fazalpur,
Delhi-110 092 India.
Email id: sunilkumar@manishaispl.com

...Appellant

Versus

Bhonu Hulshi Real Estate Private Limited

CIN-U70109BR2018PTC038579
having its Registered Office
Rajani Ranjan, Bhonu Hulshi Nilay,
5th Floor, Ranchi Road,
Bhaisasoor, Opposite - Jaya Nursing,
Biharsharif, District-Nalanda,
Bihar-801301, India.
Email id: Rajani108.rr@gmail.com

...Respondent

Present :

For Appellant : Mr. A. Kumar Shandilya and Ms. Namrata Langade,
Advocates.

For Respondent : Mr. Himanshu Gautam, Advocate.

J U D G M E N T

(Hybrid Mode)

[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 05.03.2024 along with corrigendum dated 11.03.2024 (hereinafter compositely referred to as '**Impugned Order**') passed by the Adjudicating Authority (National Company Law Tribunal, Kolkata, Court-II) in CP (IB) 304/KB/2022/. By the impugned order, the Adjudicating Authority has dismissed Section 9 Application filed by the Appellant – Operational Creditor and imposed a penalty of Rs. One Lakh only. Aggrieved by the impugned order, the present appeal has been preferred by the Operational Creditor.

2. Making his submissions, the Learned Counsel for the Appellant submitted that the Operational Creditor – Manishaas Infratecho Solutions Pvt Ltd received a development-cum- maintenance work order from the Corporate Debtor – Bhonu Hulshi Real Estate for civil construction and miscellaneous work for a real estate project, namely, Bhonu Hulshi Nilaay Project. It is further stated that in pursuance of the work order, the Operational Creditor undertook various civil-cum-electrical works which were completed and invoices were raised aggregating an amount of Rs.4.26 cr for payment. It was further submitted that the Corporate Debtor had made part payment of Rs.2.05 cr and there was an outstanding payment of Rs.2.83 cr including interest. The Appellant submitted that it had sent

reminders to the Corporate Debtor for making payment but due to non-receipt of any response from the Corporate Debtor, the Appellant had issued Section 8 demand notice on 07.10.2022 which was served upon the Corporate Debtor on 10.10.2022. Since the Corporate Debtor did not reply to the demand notice within the prescribed ten days period, nor made any payments, the Appellant filed the Section 9 application on 30.10.2022 before the Adjudicating Authority for initiation of Corporate Insolvency Resolution Proceedings (**'CIRP'** in short) against the Corporate Debtor.

3. Elucidating on the subsequent developments, it was submitted by the Learned Counsel for the Appellant that the Adjudicating Authority wrongly dismissed the Section 9 application ignoring the complete facts and the circumstances of the case. It has been contended that the Adjudicating Authority wrongly relied upon the submission made by the Corporate Debtor that entire outstanding amount had been paid by them to the Operational Creditor at a time when no supporting documents were produced by them to show how all dues were cleared. It has been contended that the Adjudicating Authority had committed an error in not considering the default on the part of the Corporate Debtor in terms of Section 3(12) of the IBC which expressly states that when whole or any part or instalment of the amount of debt has become due and payable and is not repaid by the Corporate Debtor, such non repayment shall be treated as default. It has been further submitted that the claim of the Corporate Debtor to have cleared the outstanding dues was baseless and the default having crossed the threshold limit, this was a fit case for admission of Section 9 application.

4. It is also contended that though the Appellant had sought permission of the Adjudicating Authority to file rejoinder to controvert the claim of the Respondent that there was no pendency of payment, the same had been disallowed. Thus, denial of opportunity to place before the Adjudicating Authority relevant material in their support had prejudicially affected in protecting their interests.

5. Challenging the impugned order, the Learned Counsel for the Appellant further submitted that the Adjudicating Authority had erred in not considering the existence of operational debt merely on the ground that Shri Sunil Kumar who was a Director of the Operational Creditor had been the erstwhile Managing Director of the Corporate Debtor during the period when work order was issued by the Corporate Debtor. It has been contended that the Corporate Debtor company being a distinct and independent juristic entity, it was legally obliged to discharge its admitted legal debts and could not claim immunity from the discharge of debt liability merely on the ground that its erstwhile Managing Director was now the Director of the Operational Creditor.

6. It was also contended that the Adjudicating Authority wrongly took the view that the Section 9 application could not have been filed by the Appellant since the default in respect of the third invoice raised by the Appellant amounting Rs.2.47 cr arose after 24.03.2020 and hence attracted Section 10A of the IBC. The Adjudicating Authority thus committed another mistake in holding that the default of the Corporate Debtor was hit by Section 10A of the IBC.

7. Refuting the submissions made by the Appellant, the Learned Counsel for the Respondent submitted that the Corporate Debtor had cleared all payments to the Operational Creditor and to their vendors and labourers. It was also asserted that detailed submissions have been made before the Adjudicating Authority to show that the entire payment had been made against the bills of the Operational Creditor either directly from the project account or from the account of one of the Directors of the Corporate Debtor. Moreover, during the period when work order was issued by the Corporate Debtor to the Operational Creditor, both these entities were being jointly managed by members of the same family and Sunil Kumar, the Managing Director of the Corporate Debtor was also serving as the Director of the Operational Creditor. This arrangement continued till July, 2021 while settlement talks were taking place amongst the family members on the modalities of vesting of control and ownership of the Corporate Debtor company and the Operational Creditor entity amongst members of the family. Subsequent to settlement amongst the family members on 07.07.2021, the ownership of the Corporate Debtor and Operational Creditor got separated and the Managing Director of the Corporate Debtor resigned from this position to become the owner of the Operational Creditor.

8. Citing this background, it is the contention of the Respondent that the three invoices raised by the Appellant which have been claimed by them to have remained unpaid were not genuine invoices raised by Sunil Kumar. Since the Corporate Debtor went out of the hands of Sunil Kumar following the family settlement, the three invoices were raised by him as operational

debt with a view to unduly extract money from the Corporate Debtor so as to settle scores with other family members because of business reorganisation.

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

10. The short point for our consideration is whether any operational debt qua the Corporate Debtor has been proven to have become due and payable and if there has been a default in the payment thereof and whether there is any pre-existing dispute between the parties. This examination would be in line with the test which has been laid down by the Hon'ble Supreme Court in **Mobilox Innovations (P) Ltd. v. Kirusa Software (P) Ltd. (2018) 1 SCC 353** ('Mobilox' in short) which is as reproduced below :-

"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 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.”

11. On the issue of outstanding operational debt payable by the Corporate Debtor, we notice that in all fairness, the Appellant has admitted that the Corporate Debtor has consistently denied debt and default. The Appellant has also admitted that it is the contention of the Corporate Debtor that all due payments have been made either to the Operational Creditor and/or to the labourers and vendors of the Operational Creditor directly. The same submissions of having cleared all payments were made by the Corporate Debtor before the Adjudicating Authority. This has been captured at para 24 of the impugned order along with details of the various accounts from which payments have been disbursed by them. The Adjudicating Authority in the impugned order, in its own analysis and findings, has also therefore noted that the Corporate Debtor has made detailed submissions based on bank statements to substantiate that payments were made by them to the Operational Creditor and to vendors/labourers of the Operational Creditor either from the joint project account of Anil Kumar and Sunil Kumar and/or from the account of Mr. Rajini Ranjan, another Director of the Corporate Debtor.

12. At this stage it may be useful to notice the relevant excerpts of the impugned order as placed below:

“28. We note that the Operational Creditor has not dealt with specific arguments made by the Corporate Debtor with reference to payments made as per the tables mentioned in para 24 of this Order, other than making sweeping contention that operational Creditor has not received the balance amount and the claims of the

Corporate Debtor that all payments have been made is incorrect and false.

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32. *While operational creditor has claimed that a work order has been issued by the corporate debtor on dated 30.07.2018, we do not find any such work order/agreement between the corporate debtor and the operational creditor in the application. During the course of hearing, this bench asked the applicant to provide details of e-bills, Lorry receipts, GST Returns, proof of GST payments, packing lists / delivery challans etc but no such documents have been placed on record. Therefore, Genuity of the Invoices raised by Operational Creditor is not free from doubt.*

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40....*In this application, the Operational creditor has claimed that the claim of the Corporate Debtor that payments made have been made to the vendors and labourers of the operational creditors are unsubstantiated without any supporting/bills/written agreements between corporate debtor and operational creditor. However, in the ledger account of the Corporate Debtor maintained in the books of the Operational Creditor, which is annexed at page 148 to this application, operational creditor has accounted all such payments to employees and various vendors of the operational creditor, claimed to have been made by Rajni Ranjan. Thus, we see contradiction with their own pleadings and the ledger maintained in their books.”*

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41. *Therefore, in absence of any supporting with any other documents as required in Regulation 7 (2) (b) of IBBI (Insolvency Resolution Process for Corporate persons) Regulations 2016 which requires operational creditor to provide contract for supply of goods, financial accounts, copies of GSTR-1 and GSTR -3B etc to be confirmed as operational debt, the invoices relied cannot be taken at face value, considering the facts and circumstances enunciated in this order.”*

13. From the above extracts it is clear that the Adjudicating Authority had applied its mind while considering the contention of the Appellant that the Respondent’s claim of payments having been made by them was false.

However, this contention of the Appellant was not found sustainable by the Adjudicating Authority and held to be a mere sweeping statement by the Appellant for reasons of being unsubstantiated with supporting documents. We also notice that the Adjudicating Authority has noticed contradiction in the pleadings made by the Operational Creditor with regard to outstanding payments and the ledger account of the Corporate Debtor maintained by the Operational Creditor in their books of account which reflect that payments have been made by the Corporate Debtor.

14. In the absence of any credible proof put forth by the Operational Creditor to controvert the contention of the Corporate Debtor that the entire debt has been cleared and that there was no default, we have no reason to disagree with the above findings of the Adjudicating Authority that the allegations of debt and default raised by the Appellant is facile and lacks substance.

15. Besides holding that the contention of the Operational Creditor that payments were not made to them by the Corporate Debtor as a sweeping statement lacking foundational basis, the Adjudicating Authority has also dealt at length on the tenability of the three invoices dated 05.03.2019, 07.03.2019 and 24.03.2020 basis which debt and default has been raised by the Appellant in the Section 8 demand notice. These three invoices have been captured at para 29 of the impugned order which is as reproduced below:

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

<i>Invoice No.</i>	<i>Date</i>	<i>Amount</i>
1	05.03.2019	Rs. 1,55,05,151/-
2	07.03.2019	Rs. 24, 43, 190/-
3	24.03.2019	Rs. 2,47,48,607/-

16. Perusal of the above three invoices show that they aggregate to an amount of Rs.4.26 cr. The Operational Creditor has admittedly received Rs.2.05 cr. It has therefore been correctly inferred by the Adjudicating Authority that since the first two invoices aggregated Rs.1.79 cr, the same stood cleared while only the third invoice amounting Rs.2.47 cr could at best be treated as having remained unpaid. However, the Adjudicating Authority after careful consideration has held that this third invoice cannot establish debt since this invoice was hit by Section 10A of the IBC and consequently no application under Section 9 of IBC could have been filed on the strength of this invoice. The ground for holding this invoice to have been hit by prohibitory period imposed under Section 10A was that the third invoice was dated 24.03.2020, which was one day prior to the period covered under Section 10A of the IBC. Payment against this invoice would have arisen after 24.03.2020 by which time Section 10A period was already in force.

17. Given this backdrop, it will be useful to find out how the Adjudicating Authority has considered the spectrum of facts and passed the impugned order to hold the third invoice as non-maintainable under Section 10A of the IBC, rejecting the Section 9 application on the grounds of pre-existing disputes. The relevant portions of the impugned order is as extracted hereunder:

“33. Further we find that there is nothing on record to prove that the date of default is 02.04.2021. There is nothing in the invoices on payment terms, in the absence of which, we can only infer that the invoices are due for payment within reasonable time, from the date of receipt of such invoices. We are of the view that as per the trade practice of this Industry 30 days from the date of receipt of such invoices, is reasonable.

34. Based on admission made in the Notice issued under Section 8 of IBC by the corporate debtor that an amount of Rs.2,05,38,049/- has been received, we infer that first two Invoices have been paid in full. Therefore, substantial amount claimed to be due is with reference to invoice No. 3 and the said invoice is dated 24.03.2020, which is one day prior to the date of commencement of period covered under Section 10A of IBC.

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

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

38. *As per Section 10A of IBC, no application under Section 7, 9 and 10 of IBC can be filed for any default arising on or after 25.03.2020 to 24.03.2021. Proviso to Section 10A clearly states that no application shall ever be filed for initiation of the Corporate Insolvency Resolution Process (CIRP) of a corporate debtor for the default occurring during the said period.*

39. *Under the above facts and circumstances, we are of the view that invoice no. 3 amounting to Rs. 2,47,48,607/- would be hit by Section 10A of the IBC and consequently, no application under Section 9 of IBC can be filed.”*

18. Since the above finding of the Adjudicating Authority in the context of Section 10A has been challenged by the Appellant, we choose to dwell upon this issue at this juncture. To begin with, we may go through the provisions of Section 10A of IBC and understand its intent and objective.

Section 10A of IBC reads as under:

Section 10A: Suspension of initiation of corporate insolvency resolution process. - *Notwithstanding anything contained in sections 7, 9 and 10, no application for initiation of corporate insolvency resolution process of a corporate debtor shall be filed, for any default arising on or after 25th March, 2020 for a period of six months or such further period, not exceeding one year from such date, as may be notified in this behalf:*

Provided that no application shall ever be filed for initiation of corporate insolvency resolution process of a corporate debtor for the said default occurring during the said period.

Explanation. – *For the removal of doubts, it is hereby clarified that the provisions of this section shall not apply to any default committed under the said sections before 25th March, 2020.*

Thus, from a plain reading of the above statutory provision, it becomes clear that the aim and objective of Section 10A was to protect a Corporate Debtor from the filing of any insolvency application against it for any default committed during the period when Covid-19 pandemic was prevailing.

19. We now come to the rationale followed by Adjudicating Authority in holding the third invoice as one hit by Section 10A of IBC. The Adjudicating Authority has opined that even though the invoice was issued one day prior to the commencement of prohibited period under Section 10A, it cannot escape the clutches of Section 10A since the date of issue of invoice cannot become the date of default since nothing has been placed on record by the Operational Creditor to show that the invoice had been delivered to the Corporate Debtor on the same date. Furthermore, there is no document/agreement between the two parties which has been placed on record to establish the fact that payment was to be made by the Corporate Debtor on the date of the invoice. The Adjudicating Authority has also opined that it is common business practice that some reasonable time is always available for making payment after invoices are issued. In the instant case since the third invoice was dated 24.03.2020, payment qua the invoice would expectedly run from a date subsequent to 24.03.2020 which would therefore clearly bring it within the ambit of the Section 10A prohibition period.

20. In our considered opinion, we are inclined to agree with the finding of the Adjudicating Authority that the third invoice attracted Section 10A embargo. Mere insertion of any date in the Section 8 demand notice or in the Section 9 application does not make that date of default valid and binding especially when there is no agreement between the two parties as to what shall constitute an event of default. In the absence of any agreement available on record, the alleged date of default cannot be whimsically and

arbitrarily decided by the Operational Creditor. The Operational Creditor needs to be put to strict proof to establish the date of default. Neither in their pleadings nor in the course of oral arguments, any evidence has been placed on record by the Appellant to show how the default qua the third invoice did not arise during the Section 10A prohibited period.

21. This brings us to the last limb of the argument that the Appellant was denied adequate opportunity to file their rejoinder and relevant material before the Adjudicating Authority. It was contended that during the hearing before the Adjudicating Authority on 30.03.2023, the Learned Counsel for Appellant had requested that the Operational Creditor be allowed to file rejoinder to the reply of the Corporate Debtor but the said prayer was refused. On the other hand, on 25.09.2023 the Adjudicating Authority allowed the Corporate Debtor to file Sur-rejoinder and on 20.11.2023 taken on record. To decide on the tenability of this contention, we have gone through the interim orders passed by the Adjudicating Authority on 30.03.2023, 12.05.2023, 27.06.2023, 31.07.2023, 05.09.2023, 25.09.2023, 10.10.2023, 20.11.2023 and 14.12.2023 as placed at pages 178-186 of the Appeal Paper Book. We find that the Operational Creditor was represented by their legal counsel on each of these dates. We also notice that opportunity was given to both the parties to file their written notes of arguments after pleadings were completed. We thus do not find any substance in the contention of the Operational Creditor of having been denied an opportunity of hearing or an opportunity to make any written submission. We are satisfied that the Adjudicating Authority had offered

equal opportunity to both the parties and there is no evidence of any infringement of the principles of natural justice in the proceedings conducted by the Adjudicating Authority.

22. In sum, we are satisfied with the findings of the Adjudicating Authority that debt and default above the threshold limit has not been established by the Appellant qua the Respondent. Further from the sequence of events and the factual matrix, we are of the considered view that the Section 9 application has been filed with malicious intent to settle score between members of the family and not for the resolution of insolvency. We therefore affirm the decision of the Adjudicating Authority rejecting the Section 9 application and imposing penalty of Rs. one lakh only upon the Appellant. The Appeal fails and stands dismissed.

**[Justice Ashok Bhushan]
Chairperson**

**[Barun Mitra]
Member (Technical)**

**[Arun Baroka]
Member (Technical)**

**Place: New Delhi
Date: 18.07.2024**

Ashok Kumar