

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

CP (IB) No. 55/CB/2022

In the matter of:

An application 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;

-And-

In the matter of:

Rashmi Cement Limited, having CIN: U14107WB199IPLC053043, and having its Office at Premlata Building, Corporate Office: 39 Shakespeare Sarani, 6th Floor, Kolkata- 700 017;

...Operational Creditor/Petitioner

-Versus-

Bhilai Jaypee Cement Limited, having CIN: U26940CT2007LC020250, and having its registered office at, Bhilai Jaypee Grinding Plant Bhilai Steel Plant Premises, Slag Road Bhilai, Chattisgarh – 490 001.

...Corporate Debtor/Respondent

Coram:

Shri P. Mohan Raj : Member (Judicial)
Shri Satya Ranjan Prasad : Member (Technical)

Appearances:

For Petitioner : Mr. Jishnu Chawdhury, Adv.
Mr. Arjun Asthana, Adv.
Mr. Sidhartha Sharma, Adv.
For Respondent : Mr. Ashish Ku. Srivatava, Sr.
Adv. for
Mr. Shakti Sekhar, Adv.

**Order reserved on: 07.08.2023
Order pronounced on: 05.09.2023**



ORDER

Per P. Mohan Raj, Member, (Judicial)

1. This application has been filed by **RASHMI CEMENT LIMITED through its Director Mr. Subhendu Biswas**, (CIN: U40105WB2003PTC095634) having its registered office Premlata Building, Corporate Office: 39 Shakespeare Sarani, 6th Floor, Kolkata- 700 017; the Operational Creditor herein, 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 for initiating Corporate Insolvency Resolution Process (**CIRP**) against **BHILAI JAYPEE CEMENT LIMITED**, (CIN: U26940CT2007PLC020250) the Respondent Corporate Debtor herein, having its registered office at Bhilai Jaypee Grinding Plant Bhilai Steel Plant Premises, Slag Road Bhilai, Chhattisgarh – 490 001.

The Brief facts of the petition are as follows:

2. The petitioner/operational creditor placed purchase orders with respondent/corporate debtor on 01.02.2022 for purchase of 1 Rake of fresh Cement Clinker approximately 4000 MT. at the rate of Rs.2,950 per MT. Upon the receipt of proforma invoice no-nil-e-mail dated 01.02.2022, the petitioner paid an advance amount of Rs.1,51,04,000/- by RTGS. The petitioner issued second purchase order dated 03.02.2022 for supply of 2 Rakes of cement clinker approximately 8000 MT. at the rate of Rs.3,000/- MT. to the respondent. On receipt of the proforma invoice no-nil-e-mail dated 03.02.2022, the petitioner paid an advance amount of Rs.3,06,96,000/- after deducting TDS of Rs.36,504/- In e-mail dated 03.02.2022 the respondent mentioned that advance amount is for 1 rake of cement clinker instead of 2 rakes of cement clinker. The petitioner paid an advance for supply of 3 rakes of cement clinker. The respondent on 16.02.2022 supplied one rake of fresh cement clinker 3915.60 MT to the value of Rs.1,47,95,095/- The respondent on 06.03.2022 supplied second Rake of Cement Clinker 3,973.60 MT to the value of Rs.1,52,74,003. The respondent failed to supply the remaining 3rd rake of cement



clinker and also not refunded the amount of Rs.1,57,54,902/-. In short, the respondent collected full payment of Rs. 4,58,24,000/- for supply of three rakes of cement clinker approximately 12,000 MT but supplied two rakes of cement clinker weighting 7889.20 to the value of Rs.30,069,098/- and failed to supply remaining one rake of cement clinker. After the several reminders the respondent replied by e-mail dated 07.04.2022. The respondent in its e-mail dated 07.04.2022 demanded the revised price hike for pending 3rd rake of cement clinker from Rs.3000/- MT to Rs.3,600/- MT. In compliance of demand of the respondent the petitioner on 09.04.2022 paid a sum of Rs.26,24,592/- by RTGS. When the respondent failed to supply the cement clinker the petitioner sent section 8 of IBC 2016 statutory notice to the respondent, even after the receipt of notice the respondent failed to supply 3rd rake of cement clinker and neglected to refund the amount. Hence the petition.

The brief facts of the reply are as follows:

3. The respondent placed order for supply of clinker pursuant to e-mail dated 03.02.2022. In the proforma invoice this respondent specifically mentioning the rate of 1 rake of clinker whereas the petitioner made payment for 2 Rakes for the reason best known to the petitioner. Further in its e-mail dated 07.04.2022 the respondent only intimated the price hike in respect of order already placed from Rs.3,000/ to 3,6000/- and offered to take fresh order at Rs.4,0000/- + GST if advance payment is made accordingly. Since the payment was made without any agreement the said payment cannot be treated as an advance payment, in consequence it does not come under the definition of “operational debt”. The unpaid amount of Rs.1,96,96,325/- consist of two counts i.e., Rs.1,57,57,592/- as Advance amount and Rs.26,24,592/- the difference of amount due to hike in price. The supra two amounts are arisen out of two different agreements hence they cannot be clubbed together as the cause of action is different. The petition is liable to be dismissed.

The point for consideration is:



(i) Whether the amount paid by the petitioner, lies with the respondent is an operational debt? And the petitioner is an operational creditor?

Pont No.1:

4. In this case there is no dispute regarding the receipt of amount by the respondent as stated by the petitioner. On the respondent side admitted the receipt of total amount of Rs.4,57,89,896/- after deducting TDS/- and supplied two rakes of cement clinker to the value of Rs.3,00,59,304/-and also receipt of Rs.26,24,592/- from the respondent after the hike in price. The respondent stated that the petitioner on its own for the reasons best known to the petitioner paid an advance amount for two rakes of cement clinker, where the invoice is for one rake of cement clinker.

5. The contention of the respondent that the amount paid by the petitioner towards 3rd rakes of cement clinker was paid without any contract, the respondent denies the contention of the petitioner that in the invoice dated 03.02.2022 issued by the respondent one rake of cement clinker is mentioned wrongly instead of two rakes of cement clinker.

6. From the available records it shows that approximate quantum of one rake is 4000MT. The petitioner placed purchase order dated 01.02.2022 for one rake of cement clinker for 4000 MT, similarly the applicant placed purchase order dated 03.02.2022 for 8000 MT. The quantum mentioned in the purchase order dated 03.02.2022 depicts that it is for two rakes of cement clinker. The advance amount paid by the applicant towards the purchase order dated 01.02.2022 is Rs. 1,50,93,896/- excluding GST, the advance amount paid by the applicant towards purchase order dated 03.02.2022 is Rs.3,06,96,000/- The quantum of amount paid towards invoice dated 03.02.2022 shows that the advance amount paid for two rakes of cement clinker. The advance amount paid by the applicant and acceptance of the same by the respondent without any murmur reflected that the respondent knows that the purchase order is for two rakes of cement clinker. The petitioner supplied the 2nd Rake of cement clinker on 06.03,2022. In between 07.03.2022 and 07.04.2022 the applicant sent reminders by 12 e-mails to the respondent for



immediate supply of remaining one Rake of cement clinkers. The respondent not responded to these reminders. Further the respondent by reply dated 07.04.2022 informed to the petitioner regarding price hike and made a request to confirm the revised price Rs.3,600/- Per MT from Rs.3,000/-. In pursuance of this communication the petitioner paid the difference of amount of Rs.26,24,592/- on 09.04.2022 and issued the amended purchase order dated 11.04.2022. The adjusted difference of amount also received by the corporate debtor without any murmur. When the respondent failed to refund the amount, nor supplied the 3rd rake of materials, the applicant sent notice dated 25.06.2022, demanding refund of advance amount. There after the petitioner sent legal notice through an advocate dated 3.08.2022 this also duly served upon the respondent, the respondent not responded to these notices, then the petitioner sent section 8 of IBC 2016 statutory notice to the respondent the same was acknowledge by the applicant but not sent any reply. Only in the reply filed to this petition the respondent taken a plea that the amount lying with the respondent is not an operational debt because it was paid by the respondent/corporate debtor without any contract or agreement. The long silence shows that the respondent taken this plea/defense as an afterthought. The e-mail sent by the respondent dated 07.04.2022 asking the petitioner to confirm the revised price from Rs.3,000/- to 3,600/- clearly established that the amount was paid by the petitioner for supply of cement clinker. The significant aspect is the respondent itself in its counter stated that still the respondent is willing to supply the clinker as soon as production resumes. The above factors shows that the amount of Rs.1,83,81,894/- paid by the petitioner is for the supply of cement clinker by the respondent at the enhanced rate at Rs.3600/- MT.

7. Thus, it is held that the petitioner paid the amount of Rs.1,83,81,894/- to the respondent in pursuance of purchase order for supply of goods i.e., cement clinker approximately 4000MT at the rate of Rs.3,600/ PM.by the respondent. The respondent failed to supply the goods for the amount received from the petitioner. In this regard on the petitioner side relies upon the Apex court citation **Consolidated Construction Consortium Limited vs Metro Energy Solutions**



Private Limited (2022) 7 SCC 164 there it is held that an “operational debt” will include a debt arising from contract in relation to the supply of goods or services from the corporate debtor. In this case debt arises because of non-supply of goods after the receipt of advance amount.

8. the petitioner and respondent had only trade relationship, they had money transactions only in respect of Purchase of Cement clinker, in such a situation the onus proof lies upon the respondent to prove that the amounts of Rs. 1,57,54,902 and additional amount of Rs. 26,24,592/- lies with it was paid for the purpose other than the Purchase of Cement Clinker, but the respondent failed in this regard. In the situation it is answered that the amount lies with the respondent is operational debt and the petitioner is operational creditor.

9. The contention of the respondent is that the payment of Rs.1,57,57,302/- made by the petitioner towards the supply of 3rd Rake of cement clinker and an additional payment of Rs.26,24,592/- being the difference of amount between the rate of cement clinker enhances from Rs.3000/ per MT to Rs.3,600/- per M.T. are separate under two different heads hence both cannot be clubbed in a single petition. This contention is not acceptable the second payment of Rs.26,24,592/- was made by the petitioner on 09.04.2022 in pursuance of e-mail of respondent dated 07.04.2022 in continuation of earlier payment made on 03.02.2022 because of hike in price. This is single and continuing cause of action. Further there is no bar to file a single petition in respect of due arises out of similar and several transactions between the same parties.

10. In view of the forgoing, discussions this Adjudicating Authority is of the view that CIRP needs to be initiated against the Corporate Debtor. The Operational Creditor has not suggested the name of any Interim Resolution Professional. Therefore, this Tribunal appoints **Mr. Gunjan Poddar**, having Registration No: IBBI/IPA-001/IP-P-02282/2020-2021/13471, E-mail Id gunjanpoddar@yahoo.com and office address- 27/251, Behind Old Ganj, Ganj Line, Rajnandgaon, Chhattisgarh, 491 441 from the list of Interim Resolution



Professional, Liquidator, Resolution Professional and Bankruptcy Trustee for Cuttack Zone, issued by the Insolvency and Bankruptcy Board of India. There is nothing on record to say that any disciplinary proceedings against the proposed Interim Resolution Professional is pending.

In view of the above, we are inclined to **ADMIT** the application by following Order.

ORDER

- (i) The application filed by the Operational Creditor under Section 9 of the Insolvency & Bankruptcy Code, 2016 is hereby admitted for initiating the Corporate Insolvency Resolution Process against **Bhilai Jaypee Cement Limited.**
- (ii) Moratorium Order is passed for a public announcement as stated in Sec. 13 of the IBC, 2016. The moratorium is declared for the purposes referred to in Section 14 of the Insolvency & Bankruptcy Code, 2016. The IRP shall cause a public announcement of the initiation of Corporate Insolvency Resolution Process and call for the submission of claims under Sec.15. The public announcement referred to in clause (b) of sub-section (1) of Insolvency & Bankruptcy Code, 2016 shall be made immediately.
- (iii) Moratorium under Sec.14 of the Insolvency & Bankruptcy Code, 2016 prohibits the following:
 - a) The institution of suits or continuation of pending suits or proceedings against the Corporate Debtor including execution of any judgment, decree or order in any Court of law, Tribunal, Arbitration Panel or other authority;
 - b) Transferring, encumbering, alienating or disposing of by the Corporate Debtor any of its assets or any legal right or beneficial interest therein;



- c) Any action to foreclose, recover or enforce any security interest created by the Corporate Debtor in respect of its property including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);
- d) The recovery of any property by an owner or lessor where such property is occupied by or in possession of the Corporate Debtor.
- (iv) The supply of essential goods or services to the Corporate Debtor as may be specified shall not be terminated or suspended or interrupted during the moratorium period.
- (v) The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.
- (vi) The order of moratorium shall affect the date of admission till the completion of the Corporate Insolvency Resolution Process. Provided that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of Sec.31 or passes an order for liquidation of corporate debtor under Sec.33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be.
- (vii) Necessary public announcement as per Sec.15 of the IBC, 2016 may be made by the Resolution Professional upon receipt of the copy of this order.
- (viii) **Mr. Gunjan Poddar**, having Registration No: IBBI/IPA-001/IP-P-02282/2020-2021/13471, E-mail Id gunjanpoddar@yahoo.com and office address- 27/251, Behind Old Ganj, Ganj Line, Rajnandgaon, Chhattisgarh, 491 441 is appointed as Interim Resolution Professional



registered with the ICSI Insolvency Professionals Agency, as Interim Resolution Professional for ascertaining the particulars of Creditors and convening a meeting of Committee of Creditors for evolving a resolution plan subject to production of written consent within one week from the date of receipt of this Order. He shall file Form-2, and that no disciplinary proceedings are pending against her with the Board.

- (ix) We direct the Operational Creditor to deposit a sum of ₹ 1,00,000/- (Rupees One Lakh only) with Interim Resolution Professional to meet out the expenses to perform the functions assigned to her in accordance with Regulation 6 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Debtor) Regulations, 2016. The needful shall be done within three days from the date of receipt of this Order by the Operational Creditor. The amount, however, is subject to adjustment by the Committee of Creditors as accounted for by Interim Resolution Professional and shall be paid back to the Operational Creditor.
- (x) Directions are also issued to the ex-management to provide all documents in their possession and furnish every information in the knowledge within a period of one week from the date of admission of the petitioner to the IRP, otherwise coercive steps to follow.
- (xi) The Interim Resolution Professional should convene a meeting of the Committee of Creditors and submit the resolution passed by the Committee of Creditors.
- (xii) Registry is hereby directed to communicate the order under Section 9 (5) (i) of the I.B. Code, 2016 to the Operational Creditor, Corporate Debtor and to the Interim Resolution Professional by Speed Post as well as through E-mail.

10. Interim Resolution Professional to file 1st Progress Report, List the matter on 09.10.2023.



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In re: Rashmi Cement Limited vs. Bhilai Jaypee Cement Limited

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11. The Registry is directed to send e-mail copies of the order forthwith to all the parties and their Ld. Counsel for information and for taking necessary steps,
12. Certified Copy of this order may be issued, if applied for, upon compliance of all requisite formalities.

**SATYARANJAN
PRASAD**

Digitally signed by SATYARANJAN PRASAD
DN: cn=IN, postalCode=753014, st=ODISHA, l=CUTTACK, o=NATIONAL COMPANY
LAW TRIBUNAL, ou=00,
serialNumber=4b28c278cc3bccc366c4f51a4692899c128270646765af27df1b
%c7777f, pseudonym=30868cc2864885a261229a37a58c4f,
2.5.4.20=b6a524be6c6d30acd3cb6f69152364aa5887a8f0a402c8d550f8117c6b
39, email=MBT.MUMBAI@NCLT.GOV.IN, cn=SATYARANJAN PRASAD
Date: 2023.09.05 15:42:39 +05'30'

**Satya Ranjan Prasad
Member (Technical)**

**PANDIAN
MOHAN RAJ**

Digitally signed by PANDIAN
MOHAN RAJ
Date: 2023.09.05 14:40:57
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**P. Mohan Raj.
Member (Judicial)**

Signed on this, 05th day of September, 2023.

Kaushal_P.S