IN THE NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH, COURT NO. II
KOLKATA

Company Petition (IB) No. 126/KB/2022

An Application under Section 9 of the Insolvency and Bankruptcy Code, 2016, read with Rule 4 of the National Company Law Tribunal Rules 2016.

IN THE MATTER OF:

N.V. Aluminium Cast Private Limited

... Applicant/ Operational Creditor.

Verses

APL Metal Limited

... Respondent/ Corporate Debtor.

Date of Pronouncement: January 23, 2024.

CORAM:

SMT. BIDISHA BANERJEE, HON'BLE MEMBER (JUDICIAL)

SHRI D. ARVIND, HON'BLE MEMBER (TECHNICAL)

Appearances:

For Applicant:	**Mr. Shaunak Mitra, Adv.**
	Mr. Kanishk Kejriwal, Adv.,
	Mr. Y. V. Deora, Adv.
For Respondent:	**Mr. Ratnanko Banerjee, Sr. Adv.**
	Mr. P. Bag, Adv.,
	Mr. Rishav Banerjee, Adv.,
	Mr. Patita Paban Bishwal, Adv.,

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ORDER

Per: D. Arvind, Member (Technical)

1. This Court is congregated through hybrid mode.

2. Heard the Learned Counsel and Learned Senior Counsel for both parties.

3. This Application has been filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 for brevity "I&B Code" by N.V. Aluminium Cast Private Limited, bearing CIN: U27203WB2008PTC122551, hereinafter referred to as the "Applicant"/ "Operational Creditor" against APL Metals Limited, bearing CIN: L24224WB1948PLC017455 hereinafter referred to as "Respondent"/ "Corporate Debtor" seeking the direction to initiate the Corporate Insolvency Resolution Process for brevity "CIRP" in respect of the Corporate Debtor herein.

Factual Conspectus:

4. The Operational Creditor is engaged in the business of the sale of lead ingots. The Corporate Debtor is a manufacturer and supplier of lead and lead oxides and requires lead ingots in its usual course of business.

5. The Corporate Debtor, APL Metals Limited approached the Operational Creditor, N.V. Aluminium Cast Private Limited in November 2021 for the supply of lead ingots. After negotiations ensued between the parties, it was agreed upon between the parties that the Corporate Debtor would place the Purchase Orders upon the Operational Creditors from time to time as per its requirements and the Operational Creditor would accordingly supply and deliver the raw materials to the Corporate Debtor at its desired address. The Operational Creditor would thereafter raise invoices upon the Corporate Debtor and upon receiving the invoices, the Corporate Debtor would be liable to pay the amount as per the terms of the purchase order.

6. The total amount claimed to be in default is of Rs. 2,17,34,005.86/- in which the principal amount is of Rs. 2,10,58,967/- and interest calculated at the rate of 18% per annum, being an amount of Rs. 6,75,040.86/-. It is further claimed that the default occurred on 05.12.2021, 07.12.2021, 09.12.2021, 11.12.2021 and 13.12.2021, i.e., the dates when the payment would have to be made in terms of the purchase orders.

7. The Demand notice under Section 8 of the I&B Code, has been issued on March 02, 2022, upon the Corporate Debtor by the Operational Creditor, annexed at Letter "K" to the Application.

Applicant's Contentions:

8. The Learned Counsel of the Applicant submits that the Corporate Debtor placed purchase orders upon the Operational Creditor bearing reference nos. PM-179/21-22 and PM-183/21-22 on November 25, 2021, and another purchase order bearing reference no. PM 209/21-22 on December 01, 2021, for the supply of materials at the agreed rate. Accordingly, the supply was done and the Operational Creditor issued Invoices bearing reference no. NVAL/453/21-22 and NVAL/454/21-22 both dated 26.11.2021, NVAL/456/21-22 dated 28.11.2021, NVAL/462/21-22 dated 30.11.2021, NVAL/463/21-22 dated 01.12.2021, NVAL/465/21-22 dated 02.12.2021. Copies of the Lorry Receipts evidencing the delivery of goods and the said Invoices are annexed as Letters "E" and "F" respectively.

9. It is claimed that the said invoices were received and accepted by the Corporate Debtor sans raising any dispute and objection and the Corporate Debtor had also made certain part payment towards its sum lying due and payable.

10. Further, it is alleged that after the part payment, even after the expiry of the time stipulated for making payment, the Corporate Debtor failed and/or neglected to make payment of the sum due and payable. Several requests were made, but all in vain. Having no option left, the Operational Creditor issued the demand notice under Section 8 of the I&B Code on March 02, 2022, which was duly served and proof of service is on record. However, no reply was received from the Corporate Debtor to the notice.

Respondent's submissions per contra:

11. The Learned Senior Counsel for the Respondent claims that on December 07, 2021, and various subsequent dates, a search and seizure operation was conducted by the Investigating Wing, Calcutta of the Income Tax Department, Ministry of Finance, Government of India, under Section 132 of the Income Tax Act, 1961 in the residence as well as the office premises of the corporate debtor. During the course of the Search Operation, books of accounts and incriminating documents were seized and the Search Warrant was also executed in the name of the Corporate Debtor, APL Metals Limited.

12. It is contended that in the course of the said search operation, an issue of bogus purchase was raised by the Income Tax authorities. An assessment order was passed by the Assistant Commissioner of Income Tax, Circle-3 (3), Kolkata, on December 30, 2022, a copy whereof is annexed at page 4 of the supplementary affidavit filed by the corporate debtor dated February 9, 2023.

13. Further, it is contended that Shri Niraj Jaiswal director of the Operational Creditor in a proceeding before the Income Tax Authorities has admitted that he has issued and/or booked bogus bills/invoices in the name of M/s APL Metals Limited. Such admission has been duly recorded in an Assessment Order passed by DCIT Central Circle (3), Kolkata of the Office of the Assistant Commissioner of Income Tax.

14. It is alleged that the operational creditor fails to prove that it has made any payment on account of its GST liability to the concerned authorities. Despite receiving the full sum of money on account of GST as well as the price of goods from the Corporate Debtor, if the Operational Creditor does not make payment on account of the GST to the concerned authorities and subsequently pass on the input credit to the Corporate Debtor, the Corporate Debtor will be penalised by the concerned GST authorities and the Corporate Debtor will be liable to pay the GST component again to the GST authorities, which the Corporate Debtor has already made payment to the Operational Creditor.

Counter submissions made by the Applicant:

15. The Learned Counsel for the Applicant claims that the issue of the IT Department Scrutiny of the Corporate Debtor is irrelevant for the consideration of the present Application filed under Section 9 of the I&B Code, 2016. Under the provisions of Section 9 of the I&B Code, 2016, it has to only be seen that debt is due and there is default on part of the Corporate Debtor and there is no genuine dispute regarding the existence thereof. The issue of the IT penalty upon the Corporate Debtor does not in any manner affect the claim of the Operational Creditor under the I&B Code.

16. It is further submitted that in any event, the order passed by the Income Tax Department is for the Assessment Year of 2021-22, i.e., the Financial Year of 2020-21, whereas Invoices covered in the applications are relating to the Financial Year of 2021-22. Even in the statement given during the Income Tax Investigation, it has been stated by the authorised representative of the Operational Creditor that out of Invoices valued at Rs. 4,24,89,694/- shown as sales, only Invoices valued at Rs. 2,82,16,508/- are bogus in the Financial Year 2021-22.

Analysis and Finding:

17. It is evident from the order dated 30.12.2022 (DIN & Order No. ITBA/AST/S/143(3)/2022-23/1048376711(1), AY: 2021-22) passed by the Office of the Assistant Commissioner of Income Tax Central CIR 3(3), Kolkata under Section 132 of the Income Tax Act, 1961, that the Investigation Wing of IT Department, Kolkata conducted a Search and Seizure Operation at the residential and office premises of the APL Group of companies on 07.12.2021. The warrant of searching was executed in the name of the assessee, APL METALS LIMITED, the Corporate Debtor in this matter.

18. It is evident from para 5, page 2 of the said IT assessment Order that the Operational Creditor has supplied the bogus bills of Rs. 4,89,97,357/- to the APL Metals Limited, Corporate Debtor herein in F.Y. 2020-21, reproduced herein:

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4. Thereafter, the case was selected for compulsory scrutiny assessment u/s 143(3) of the Income Tax Act, 1961. Accordingly, notice u/s 143(2) of the I.T. Act dated **22.06.2022** and notice u/s 142(1) of the I.T. Act dated **30.08.2022** along with detailed Questionnaire were issued and duly served upon the assessee. In response to the said notices, documents, explanations etc. were submitted by the assessee which were perused.

5. **Issue of Bogus Purchase:**

5.1. Following are the details of some parties with amount of bogus bills supplied to M/s APL Metals Limited during financial year 2020-21.

Name of persons/entities	Amount of bogus purchase booked by M/s APL Metals Limited in F.Y. 2020-21
Soorajmull Mohanlal Private Limited, PAN: AAECS8258F	11,59,04,852
N V Aluminium Cast Pvt Ltd, PAN: AACCN7304D	4,89,97,357
Jai Prakash Jaiswal (Propreitor of Om Traders), PAN: ACRPJ0004C	30,64,70,741
Shri Bimal Kumar Goenka (Proprietor of M/s Platina Metals, PAN: AGXPG9045L	8,59,71,036
Onix Vyapaar LLP, PAN: AAGFO6931N	17,57,82,831
Aurix Tradelink LLP , PAN: ABQFA4046F	12,55,21,881
Utkarsh Lead	*25,67,42,293*
Total:-	1,11,53,90,991

6. The assessee submitted party wise summary of alleged bogus purchase along with raw material and finished goods. The assessee was also requested to furnish evidence for consumption of raw material purchased from alleged bogus parties. As per the seized material APLO/4 pages from 471 to 475, one vehicle at one time carrying material from multiple parties from multiple places in excess of capacity of loading of such vehicle. The assessee was requested to explain such transaction from Sl. No. 155 to 260 which are related to two Financial Year. Further, as per as per statement of Bimal Kumar Goenka, Aurix Tradelink LLP and Onix

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19. Further from Para 7 at page 3 of the IT assessment Order, it is evident that the IT Department in the said matter has observed as under:

> "*7. The Stock Register found during the course of search operation and seized vide identification mark **APL-P/15.** The assessee could not tally the stock register i.e., **APL-P/15** with the above seven parties, namely, Soorajmull Mohanlal*

Private Limited, N.V. Aluminium Cast Pvt Ltd Cast Pvt Ltd, Utkarsh Lead, Jai Prakash Jaiswal (Proprietor of Om Traders), Onix Vyapaar LLP and Aurix Tradelink LLP. It is also pertinent to mention here that the assessee is a manufacturer and there is no corresponding sales against these purchase."

20. Further, from para 6 at page 17 of the IT assessment Order, it would be evident that during the Survey under Section 133A of the I.T. Act, 1961, Shri Niraj Jaiswal director of the company admitted that his company has issued bogus purchase bills in the name of M/s APL Metals Limited and during F.Y.2020-2021, M/s N. V. Aluminium Cast Private Limited material sold to M/s APL Metals Limited amounting to Rs.5,78,38,652/-.

The Pages 17-19 of the IT assessment Order are reproduced herein:

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name of M/s APL Metals Limited, funds are received in the bank accounts of Soorajmull Mohanlal Pvt Ltd and group entities which are further withdrawn in cash and handed over to certain persons as per direction of the beneficiary and remaining part of the cash is returned to key persons of APL Group after deducting commission.

5.1.8. In his statement, Shri Satish Bansal also stated that he has issued bogus bills not only in the name of M/s APL Metals Limited, but also in names of some intermediary parties such as M/s Soorajmull Mohanlal Pvt Ltd and M/s Sunam Metal Udyog Pvt Ltd. Moreover, when asked to provide the details of transporters whose services have been availed by his entities in their business, Shri Satish Bansal explained that as there is no need of physical movement of any goods; no transportation services are required. Following is the relevant portion of his statement;

Q.23	**Please give the name and details of transporters to whom you have sent goods to either M/s. APL Metals Ltd or Soorajmull Group.**
Ans.	Sir, as I stated in response of earlier questions no physical movement of actual goods question of transportation does not arise.

from the above discussion and deposition of Shri Satish Kumar Bansal, it is quite evident that M/s Ramawatar Bansal Steels Private Limited and M/s Ram Awatar Bansal & Co. have issued bogus bills not only in the name of M/s APL Metals Limited but also in the name of some intermediary parties such as M/s Soorajmull Mohanlal Private Limited, M/s Sunam Metal Udyog Pvt Ltd and M/s Soorajmull Mohanlal without actual supply of any goods or services.

6. N V Aluminium Cast Pvt Ltd, PAN: AACCN7304D :

6.1. During the Survey u/s 133A of the I.T. Act, 1961, Shri Niraj Jaiswal director of the company admitted that his company has issued bogus purchase bills in the name of M/s APL Metals Limited.

6.2. During F.Y. 2020-2021 M/s N. V. Aluminium Cast Private Limited material sold to M/s APL Metals Limited amounting to **Rs.5,78,38,652/-**.

6.3. During the Survey proceedings u/s 133A of the IT Act, 1961, the director Shri Niraj Jaiswal, of the company M/s NV Aluminium Cast Private Limited in his statement dated 07.12.2021 replied in **Q. no. 29** is as under:

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Q.29. Please give the details of sales made by you in relation to the goods/ materials to M/s APL Metals Limited from Financial Year-2014-15 to till date.

Ans. Sir, the details are as under:

F.Y.	Total Sales	Bogus sales out of total sales
2017-18	7,33,61,779	2,26,29,515
2018-19	13,43,09,181	8,08,52,641
2019-20	3,25,48,952	1,69,63,252
2020-21	5,55,34,718	2,99,16,689
2021-22	4,24,89,694	2,82,16,508
	33,82,44,324	17,85,78,605

Sir, details are not available for F.Y. 2015-16 and 2016-17. However, during F.Y. 2015-16 sales of Rs. 2,72,99,264/- and in F.Y. 2016-17 sales of Rs. 3,45,23,843/- were made. I want to clarify that the total bogus billings of sale issued to M/s APL Metals Limited from Financial is of Rs.17,85,78,605/- for the years mentioned in the chart above.

From the above it is clear that the total bogus billing of sale by M/s NV Aluminium Cast Private Limited to M/s APL Metals Limited

6.4. In the course of survey proceedings, statement of Shri. Niraj Jaiswal, who is a director of the company, was recorded on oath u/s 131 of the Income-Tax Act, 1961 wherein he has admitted that his company has issued bogus purchase bills in the name of M/s APL Metals Limited. Following is the relevant portion of statement of Shri Niraj Jaiswal clarifying that his company M/s N.V. Aluminium Cast Pvt Ltd is engaged in bogus billing and the same has issued bogus invoices to M/s APL Metals Limited too;

6.5. Summons were also issued in the name of some of the parties from whom M/s N.V. Aluminium Cast Private Limited has reported its purchases, during the course of post search proceedings. The said summons were issued to Amit Kumar Chatterjee, Hemlata Traders Private Limited, Amit Saraf, Bandana Chatterjee, Pranay Nevatia, Suprakash Mondal, Leela Dhar Poddar, Ramawatar Jhunjhunwala, Devi Prasad Pandey. Most of these parties were found did not comply to the notices served and rest of the parties which responded, could not render any satisfactory explanation regarding sales booked in the name of M/s N.V. Aluminium Cast Private Limited.

6.6. **APLO/2 (Page 1 to 60)**

The page No. 12-13 related to purchase made by M/s APL Metals Limited from M/s N V Aluminium Cast Private Limited. During the Survey u/s 133A of the I.T. Act, 1961, Shri Niraj Jaiswal director of the company admitted that his company has issued bogus purchase bills in the name of M/s APL Metals Limited.

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The page nos. 36-41 related to purchase invoice and way bill for M/s APL Metals Limited from M/s N V Aluminium Cast Private Limited. During the Survey u/s 133A of the I.T. Act, 1961, Shri Niraj Jaiswal director of the company admitted that his company has issued bogus purchase bills in the name of M/s APL Metals Limited.

Page No. 471-475 In these pages: -

(a) It is found that date of Entry of Truck is of an earlier date than the Receipt Date e.g. Sl. No. 25-26, 80-81, 89-92, 103-108, 143-144 etc.

(b) These entries imply that a single vehicle number has been used for multiple entries on the same date for transporting goods for two separate parties on the same date which does not seem practically feasible e.g. Sl. No. 13-14, 38-39, 93-95 etc.

(c) It is seen that the e way bill has been generated a day before from its delivery date/truck's entry date e.g. Sl. no. 31 of page no. 475, truck entry on 21.11.2018 while its corresponding voucher and e way bill at page numbers 398 and 397 found to be generated on 20.11.2018.

(d) It is found that the truck with consignment arrived at factory before generation of e way bill e.g. Sl. no. 37 of page no. 475 of M/s Priyam Enterprises truck's entry on 29.12.2018 at 1.30 P.M. while the e way has been found to be generated on 29.12.2018 at 5.35 P.M. Further, it is seen that the sellers are Onix Vyapar LLP, Platina Metals, Aurix Tradelink LLP, Soorajmull Mohallal Pvt Ltd, N V Aluminium Cast Pvt Ltd, Om Traders, New M.K. Traders etc. which all are also involving in bogus billing The above facts shows that the modus operandi of M/s APL Metals Limited is to resort to bogus purchases on a large scale. In reply of Q. No. 46, the director of the company M/s APL Metals Limited agreed that some of the purchases may be bogus and the company conduct genuine business and all the transactions are not bogus.

6.7. **AML/01 (Page 1 to 19)**

The page No. 16 related to purchase of material by M/s APL Metals Limited from M/s N V Aluminium Cast Private Limited. During the Survey u/s 133A of the I.T. Act,1961, Shri Niraj Jaiswal director of the company admitted that his company has issued bogus purchase bills in the name of M/s APL Metals Limited.

The page no. 17 related to purchase of material by M/s APL Metals Limited from M/s N V Aluminium Cast Private Limited. During the Survey u/s 133A of the I.T. Act,1961, Shri Niraj Jaiswal director of the company admitted that his company has issued bogus purchase bills in the name of M/s APL Metals Limited.

The page No. 18 related to purchase of material by M/s APL Metals Limited from M/s N V Aluminium Cast Private Limited. During the Survey u/s 133A of the I.T. Act,1961, Shri Niraj Jaiswal director of the company admitted that his company has issued bogus purchase bills in the name of M/s APL Metals Limited.

The page no. 19 related to purchase of material by M/s APL Metals Limited from M/s N V Aluminium Cast Private Limited. During the Survey u/s 133A of the I.T. Act,1961, Shri Niraj

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21. We find that the IT assessment Order dated 30.12.2022 passed by the Office of the Assistant Commissioner of Income Tax Central CIR 3(3), Kolkata and there has been no stay granted by the appellate fora on the order of the assessment dated December 30, 2022.

22. Thus, in terms of the IT assessment order dated 30.12.2022 and the submissions made by the Learned Counsel, we would infer that the claim of the Operational Creditor filed in this application based on the bills is disputed by the Income Tax Authority itself and there is no stay order on the assessment order dated 30.12.2022.

23. The Income Tax Assessment order dated 30.12.2022 for the AY 2021-2022 categorically reveals evasion of GST, in Para 12 at Page 7 of the order. In Para 12.2. of the Assessment order dated 30.12.2022, mentions as under:

> "*12.2. From the above incident reports, it was ample clear that the entities against which incident reports have been generated by the DGGI, Kolkata were in bogus billing and since M/s APL Metals Limited was found reporting purchases from these entities,* ***the same are also bogus***."

24. Even for the Financial Year of 2021-22 as recorded in the IT Assessment Order, more than 67% of the sales made by the operational creditor to the corporate debtor is bogus which is also contended by the authorized representative of the operational creditor. The Operational Creditor has not been able to conclusively prove that the defaulted Invoices are not the bogus Invoices.

25. Further, we have noted that in the course of argument, the Learned Counsel for the Operational Creditor has referred a decision passed by Hon'ble ITAT in ***Lalithaa Jewellery Mart Pvt Ltd v. Assistant Commissioner of Income Tax CC-1(4)*** reported in **2019 SCC OnLine ITAT 16734**, wherein, it is held that *under Section 131 of the Act, the authorities are not empowered to administer oath to the deponent. Therefore, such a statement recorded under Section 131 of the Act has no evidentiary value.* We could have agreed to this argument if the IT Proceedings are at the stage of show-cause notice. We are of the view that the statement of Shri Niraj Jaiswal, director of the N.V. Aluminium Cast Private Limited has been recorded during the survey under Section 133A of the I.T. Act, 1961, and the same has been noted in the Assessment Order dated 30.12.2022 passed by the Assistant Commissioner of the IT Department, after considering all such statements and evidences. There is no stay order on that assessment order. Thus, we cannot simply ignore this fact.

26. Given such findings, we are of the considered view that no reliance can be placed on the Invoices raised by the Operational Creditor to ascertain the disputed amount. Even the transporter documents are found to be fake and hence, the delivery order and transport documents too cannot be relied upon. When the Sale (Supply) of goods is itself in dispute, and there is a finding by a Government Authority (Income Tax Department) that such sales are bogus, we cannot shut our eyes to the facts recorded in the Assessment order. Neither can we conduct a roving and fishing enquiry to cull out the sanctity of transactions in a summary proceeding under the I&B Code, 2016. As such, we find no reason to treat the disputed debt as an operational debt to initiate a CIR Process.

27. It is evident that vide an order dated **January 08, 2024**, in **C.P. (IB) No. 114/KB/2022,** in ***Jaiprakash Jaiswal v. APL Metals Limited***, reported in **(2024) ibclaw.in 38 NCLT**, we have taken a similar view and the facts and circumstances are identical. Thus, without further probe into the mechanics of the dispute raised by the Income Tax Department, we infer that the supply of goods by the Operational Creditor has not been conclusively proved. This Adjudicating Authority is not meant to decide the veracity and the genuineness of bills in issue.

28. In terms of the foregoing discussion, we **dismiss** this company petition being ***C.P. (IB) No. 126/KB/2022*** accordingly.

29. It appears that this application has been filed under Section 9 of the I&B Code, 2016 based on bogus and disputed invoices raised by the Learned Assistant Commissioner of Income Tax Central CIR 3(3), Kolkata and thus, the application is a frivolous and hypothetical one with malicious intent for any purpose other than for the resolution of insolvency. Hence, we are of the considered view that to prevent the parties from coming up with such an application, we feel it appropriate to impose a penalty by invoking the provisions of Section 65 of the Code, of **Rs. One Lakh** upon the Applicant herein.

30. The Applicant is directed to pay the penalty amount to the **"National Defence Fund" (NDF)** within ten (10) days from the pronouncement of the order. Delaying payment of the penalty amount beyond ten (10) days shall carry a rate of 10% per annum from the date of pronouncement to the date of payment.

31. The Affidavit of Compliance shall be filed within seven (7) days upon the payment of penalty amounts with the Registry of this

Adjudicating Authority. The Registry is directed to consign the Affidavit of Compliance to the record.

32. The Registry of this Adjudicating Authority is directed to send e-mail copies of the order forthwith to all the parties and their Learned Counsel for information and for taking necessary steps. Further, a copy of the order shall be served upon the Insolvency and Bankruptcy Board of India (IBBI) for their record and also upon the Registrar of Companies (ROC), West Bengal, Kolkata by all available means.

33. Certified copies of this order, if applied for with the Registry of this Adjudicating Authority, be supplied to the parties upon compliance with all requisite formalities.

D. Arvind
Member (Technical)

Bidisha Banerjee
Member (Judicial)

This Order is signed on the 23rd Day of January, 2024.

Bose, R. K. [LRA]