

IN THE NATIONAL COMPANY LAW TRIBUNAL,
KOLKATA BENCH, KOLKATA

CP (IB) No.283/KB/2019

In the matter of:

An application for initiation of Corporate Insolvency Resolution Process 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:

Rajmahal Quartz-Sand & Kaolin Co. having its registered office situated at 1, Netaji Subhas Road, Kolkata-700001, West Bengal

... Applicant/Operational Creditor

And

In the Matter of:

BESCO Limited, having its registered office at 5/2 Russel Street, Poonam Building, 7th Floor, Kolkata - 700071, West Bengal.

... Respondent/Corporate Debtor

Date of Hearing 21st January, 2020

Order Delivered on 27th January, 2020

Coram:

Jinan K.R., Hon'ble Member (Judicial)

Harish Chander Suri, Hon'ble Member (Technical)

For the Operational Creditor : Md. Dilawar, Advocate

For the Corporate Debtor : 1. Mr. J.Choudhary, Advocate
2. Anil Chaudhari, Advocate
3. Patita Paban Bishwal, Advocate

ORDER

Jinan K.R., Member (Judicial)

1. Rajmahal Quartz-Sand & Kaolin Co. filed this application under Sec.9 of the Insolvency and Bankruptcy Code, 2016 (in short IB Code) read with Rule 6 of the Insolvency and Bankruptcy Code (Application to Adjudicating Authority) Rules, 2016 for initiation of corporate insolvency resolution process as against

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the corporate debtor/ BESCO Limited on the allegation that the corporate debtor has committed default in payment of Rs. 17,10,795.25 (Rupees Seventeen Lakhs Ten Thousand Seven Hundred Ninety-Five and Twenty-Five paise) as the operational debt due and payable by the corporate debtor towards the supply of goods as per the invoices generated by the operational creditor at the request of the corporate debtor.

2. The brief facts for the consideration of this application are the following :-
 - i. As per the request of the corporate debtor and on the basis of the purchase order dated 30/05/2014 (Annexure-B), the operational creditor had supplied goods to the corporate debtor and the corporate debtor received the goods without any protest. As per the invoices dated 10/06/2014, the operational creditor has delivered goods namely Silica Sand amounting to Rs. 27,10,795.25. The corporate debtor has paid Rs.10 lakhs towards the outstanding amount due and the balance amount of Rs. 17,10,795.25 is due and payable by the corporate debtor on account of goods supplied to the corporate debtor against the purchase order dated 30/05/2014. The debt fell due with effect from of 13/07/2914. Despite the demand, the corporate debtor failed to pay the amount and, therefore, a demand notice was issued by the operational creditor on 28/05/2018, for which, no reply was sent by the corporate debtor. Therefore, the applicant had no other option than to file this application for initiating corporate insolvency resolution process against the corporate debtor. No name of the Insolvency Professional was proposed by the operational creditor. Upon the said contentions, the operational creditor prays for admitting the application.

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3. The Respondent/corporate debtor appeared and filed the reply affidavit contending in brief as follows:-

- i. The application has been filed by the operational creditor in abuse of process of law. The application is not maintainable in law or on facts. The claim of the operational creditor is ex-facie barred by law. The operational creditor failed to comply the mandatory requirements to be complied under the provisions of the Code. No amount is due and outstanding from the corporate debtor as claimed by the operational creditor. The interest amount claimed by the operational creditor is wholly untenable both in facts and law. There is no proper authorization given to the Mr. Satya Narayan Jalan to submit the application on behalf of the applicant. The applicant had supplied Silica Sand in the year 2014. The corporate debtor had written to the operational creditor on 23/06/2014 informing that the quality of goods supplied was of inferior quality and, therefore, it was rejected and the corporate debtor had to arrange for joint inspection of the goods supplied within the next two days. Thereafter, representative of the operational creditor had visited the site of the corporate debtor and had collected sample of sand from the yard of the corporate debtor for checking at their laboratory. But in the absence of reply, the corporate debtor again wrote letter dated 1st July, 2014 informing the operational creditor that since no reply has been received from the operational creditor, it will be agreed that the findings of the corporate debtor about the quality of the goods supplied are true and accepted.
- ii. The corporate debtor requested the operational creditor to lift the silica sand lying in their yard. The copies of letters issued to the

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operational creditor are produced and marked as Annexure-A. Repeated letters were issued by the corporate debtor even thereafter the corporate debtor is entitled to realise an amount of Rs. 23,75,000/- which the corporate debtor had paid to the operational creditor in respect of the purchase order as mentioned in the letter. Since the goods supplied to the corporate debtor has been rejected and was collected back by the operational creditor, no fresh Silica sand was supplied by the operational creditor to the corporate debtor. Thereafter, the operational creditor approached the corporate debtor for reconciliation of the accounts and it was mutually decided that the corporate debtor will pay two equal installments of Rs. 5 lakhs each as full and final settlement in respect of Silica Sand supplied to the corporate debtor. Accepting the same, the corporate debtor paid Rs. 5 lakhs on 13th April, 2015 and the second final installment of Rs. 5 lakhs was paid on 24th May, 2016 and therefore, there is no amount due and payable by the corporate debtor.

- iii. The copy of the ledger statement as in the books of the operational creditor is denied and disputed. The certificate from the statutory auditors certifying the amount due from the corporate debtor is further disputed. The order of the Hon'ble Court of Jharkhand Micro Small and Medium Enterprises Facilitation Council (MSMEFC) is without jurisdiction and is an *ex-parte* order and is, therefore, disputed because the corporate debtor did not present their case. The purchase orders of the corporate debtor clearly state that the jurisdiction of all disputes is in Kolkata. Upon the given circumstances, the corporate debtor prays for passing an order for

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dismissal.

4. The operational creditor filed Rejoinder denying the allegations leveled by the corporate debtor in the reply affidavit and reiterated the case of demand made by the operational creditor to the corporate debtor and contended that the contention raised regarding pre-existing disputes is false and frivolous and no correspondence in this regard has been received by the operational creditor and the documents produced on the side of operational creditor along with the reply affidavit are fabricated and fraudulent and could not be relied upon to uphold the contentions on the side of the corporate debtor.

5. It further contends that there is no courier company by name www.courierexpressinc.com in existence and the proof of non-existence is produced as Annexure-B along with the Rejoinder. The operational creditor further stated that the notice of arbitration proceeding having been issued by the Arbitrator and the corporate debtor has responded to the letter issued by the Arbitrator and sought time to represent the case before the Arbitrator. The corporate debtor did not contest the arbitration proceedings. The corporate debtor has got knowledge about the arbitration proceedings and the copy of the award has been delivered on the corporate debtor at the instance of the Arbitrator. Therefore, the contention that the Award passed by the Jharkhand Micro Small and Medium Enterprises Facilitation Council is without jurisdiction and is an ex-parte order and therefore is not binding on it is un-sustainable under law. The contentions raised in the reply affidavit being frivolous and devoid of any merits are liable to be rejected and the application is liable to be admitted.

6. Heard both sides, perused the documents, and the citations referred to on the side of the corporate debtor.

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7. The operational creditor has claimed an amount of Rs. 17,10,795.25 with interest to the tune of Rs. 10,80,508.73 as the outstanding amount due from the corporate debtor on account of goods supplied to the tune of Rs. 27,10,795.25. The operational creditor contends that despite delivery of the goods, the corporate debtor failed to pay the entire outstanding amount due but paid only Rs.10 lakhs by way of two installments and therefore, the balance outstanding due is Rs.17,10,795.25 and that the applicant being MSME is entitled to claim interest and as per the Award dated 13.12.2018 passed by the Jharkhand Micro Small and Medium Enterprises Facilitation Council, the total amount with interest due is Rs. 27,91,303.98.

8. The corporate debtor disputed its liability. According to the learned counsel for the corporate, debtor the above said amount is not due and payable. It is further submitted that there is a pre-existing dispute. Admittedly, the corporate debtor was in receipt of a demand notice issued under section 8 (1) of the Code by the operational creditor. No explanation is forthcoming as to why no reply was sent by the corporate debtor informing the existence of disputes to the operational creditor. In the said peculiar circumstances lets us take the contentions on the side of the corporate debtor.

9. To substantiate the contentions of the corporate debtor that there were pre-existing disputes, the documents relied upon are Annexures A, B & C. It is submitted by the Ld. Counsel for the operational creditor that Annexures A, B & C annexed to the reply affidavit were fabricated by the operational creditor for stage managing that the goods delivered to the corporate debtor were not usable as per the laboratory report and thereby the corporate debtor has rejected the goods and intimated the facts to the operational creditor.

10. It is submitted on the side of the corporate debtor that the entire



materials delivered to the corporate debtor were of inferior quality and sample taken by the corporate debtor has been tested but no reply has been given by the operational creditor to the corporate debtor and therefore finally a reconciliation of account was done and the corporate debtor has agreed to pay Rs. 10 lakhs by way of two installments and paid one installment to the tune of Rs. 5 lakhs on 13th April, 2015 and the last installment on 24th May, 2016 and thereby there is no amount is due and payable.

11. The documents referred to above are disputed on the side of the operational creditor. The operational creditor has produced Annexure-B along with Rejoinder proving that there is no courier company in existence under the name of www.courierexpressinc.com. To disprove the said contention the Ld. Counsel for the corporate debtor at the time of hearing brought to our notice a copy of an agreement purportedly executed by the M/s Express Courierinc showing change of its name as Shree Mahabalie Express Private Ltd. and also produced the registration certificate issued by the Ministry of Company Affairs. The copies of the above documents referred to at the time of hearing have not been given to the Learned Counsel appearing for the operational creditor for his perusal in advance and therefore he was prevented from verifying its authenticity. According to him, all these documents were created at the instances of the corporate debtor and therefore cannot be relied upon as proof to prove that the disputed courier company was in existence as alleged by the corporate debtor.

12. At this juncture, referring to an Award an argument was advanced on the side of the operational creditor that the entire allegation as to the pre-existing dispute would be found not true if the Award is relied upon to prove the subsequent event having taken place subsequent to the purported letters issued

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by the corporate debtor. Though this case was instituted on the strength of supply of goods as per purchase orders admittedly issued by the corporate debtor, it is fair and just to have a look at the award to test the creditworthiness of the submission on the side of the corporate debtor. The operational creditor has produced the copy of the Award got in favour of the operational creditor.

13. The Ld. Counsel for the corporate debtor objected to the award submitting that it was an ex-parte award without notice to the corporate debtor. According to him the Arbitrator has not served signed copy of the award to the corporate debtor as per section 31(5) of Arbitration and Conciliation Act, 1996 and since the award was passed by the Council ex-parte, the award cannot be relied upon for any purpose. The application being not filed on the strength of the Award, it appears to us that to test the credibility of the contentions raised on the side of the operational creditor and the corporate debtor in regard the pre-existing disputes, award can be relied upon. A reading of the Award, made it clear that several notices were issued by the arbitrator to the corporate debtor. In response to one notice the corporate debtor had sent a reply to the Council bringing to its notice that the corporate debtor is trying for opening the factory and normalize the activities as well as the reconciliation of disputes and requested to place the case in the month of June. In response to the letter dated 19/03/2018 the Arbitration Council has decided to hear the case in the month of June, 2018 and repeated notice of hearing and despite repeated notice by the Arbitration Council, the corporate debtor die not turn up or contest the case and thereby the Council inferred that the corporate debtor has no defence to substantiate its case and thereby passed an award with interest. The copy of the award produced before us proves that Council had itself issued copy to operational creditor as well as to the corporate debtor and the track

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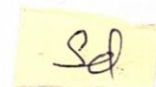
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consignment annexed to the order proves delivery of the award to the corporate debtor on 17/01/2019.

14. At this juncture the, Ld counsel for the corporate debtor referred to the below cited decisions stressing an argument that an award of which signed copy is not served to the corporate debtor is not binding on the corporate debtor. The citations are: *State of Maharashtra and Ors. Vs Ark Builders Pvt. Ltd. passed in Civil Appeal No. 2152 of 2011 dated 28/02/2011, Assam State Weaving & Manufacturing Co. Ltd. Vs. Vinny Engineering Enterprise(P) Ltd. 2011 SCC Online Cal 1613 dated June 20,2011 and Assam State Weaving and Manufacturing Co. Ltd. Vs Vinny Engineering Enterprise (P) Ltd. and Ors. Passed in E.C. No. 147 of 2009 dated 02/12/2009.*

15. The above judgements are in no way helpful to the learned counsel for the corporate debtor to substantiate the corporate debtor's contention. The letter dated 19/03/2018 received by the council shows that the corporate debtor had notice of arbitration proceedings initiated at the instances of the operational creditor. The track consignment note annexed to the award copy also proves delivery of copy of award to the corporate debtor. The award is silent about any objections regarding the quality of the goods evidently received by the corporate debtor. What is shown before the Council is its inability to pay the debt due to non-operation of the factory. If the corporate debtor had disputed the liability as attempted to prove as per the letters produced in the case in hand, it is certain that the corporate debtor would have raised the very same defence before the arbitrator. It is good to read the relevant para in the award for better understanding about the letter received by the arbitrator. It read as follows:-

" The opposite party vide its letter dated 19.02.2018 has informed that



Factory at Baruipur 24 parganas (S), West Bengal is under suspension of work due to strike by workmen since 20th April, 2017 and has sought adjournment of the hearing on 22.02.2018 and requested for next date during April, 2018”.

16. Taking note of the letter addressed to the Council by the corporate debtor, the learned Council deferred the hearing of the case to the next date and thereafter repeatedly adjourned by issuing repeated notice and finally decided the case against the corporate debtor. So, in the above said peculiar circumstances, even if, Annexure-A to Annexure-C disclosing the disputes regarding the quality of goods had been served upon the operational creditor, it will legitimately come to a conclusion that there was no reconciliation of the accounts as on 26/05/2016 as referred to in Annexure-C annexed to the reply affidavit. If there was such reconciliation of accounts as attempted to be established on the side of the corporate debtor, then there was no occasion on the side of the corporate debtor to issue a letter to the Arbitration Council at Jharkhand on 19/02/2018. In the said letter, there is nothing to mention about the reconciliation of accounts as per the award brought to the notice of this bench. In the above said circumstances, it appears to us that the attempt on the side of the corporate debtor that there were pre-existing disputes and thereby no amount is due and payable to the operational creditor by the corporate debtor, is found devoid of any merits.

17. The evidence led on the side of the corporate debtor is found not at all reliable and creditworthy. In the above said circumstances, we can come to the only conclusion that an amount of Rs. 17,10,795.25 as claimed by the operational creditor is due and payable by the corporate debtor. However, the claim for interest is found not sustainable for want of agreement between the

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parties to pay interest for the delayed payment. None of the invoices or the purchase orders stipulates the liability on the side of the corporate debtor to pay interest @ 12% in case there is default in payment. However, being satisfied that the corporate debtor has not paid the outstanding amount found due even after the demand the claim of the operational creditor is found sustainable.

18. One another contention raised by the corporate debtor is that the claim of the operational creditor is barred by law of limitation. It is an admitted fact that last payment of Rs. 5 Lakhs by the corporate debtor was on 24th May,2016. The period of limitation therefore, would run from 24th May,2016. This application has been filed on 18/02/2019, accordingly, this application is perfectly maintainable. None of the contentions raised by the corporate debtor is therefore found sustainable under law. The corporate debtor failed to prove that there was a pre-existing dispute on the side of the corporate debtor. Accordingly, this application is liable to be admitted.

19. Though, in the application, the operational creditor has not proposed the name of Resolution Professional, a supplementary affidavit has been filed proposing the name of Resolution Professional along with Form-2 and written communication by proposing Mr. Manish Jain, (Reg. No. IBBI IPA-001/IP-P00582/2017-2018/11023). The written communication shows that there is no disciplinary proceeding pending against him. The operational creditor also succeeded in proving that the application met out all the requirements under section 9(3) (b) & 9(3) (c)of the Code. Accordingly, this application is liable to be admitted.

20. In the result, we admit this application on the following orders:-

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ORDER

- i. The application filed by the Operational Creditor under section 9 of the Insolvency & Bankruptcy Code, 2016 for initiating Corporate Insolvency Resolution Process against the Corporate Debtor, BESCO Limited is hereby admitted.
- ii. We declare a moratorium and public announcement in accordance with Sections 13 and 15 of the IBC, 2016.
- iii. 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 Section 15. The public announcement referred to in clause (b) of sub-section (1) of Section 15 of Insolvency & Bankruptcy Code, 2016 shall be made immediately.
- iv. Moratorium under Section 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

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- 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 the possession of the corporate debtor.
 - v. The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated, suspended, or interrupted during moratorium period.
 - vi. 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.
 - vii. The order of moratorium shall have effect from the date of admission till the completion of the corporate insolvency resolution process.
 - viii. 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 Section 31 or passes an order for liquidation of corporate debtor under Section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be.
 - ix. Necessary public announcement as per Section 15 of the IBC, 2016 may be made.
 - X. Manish Jain, IP Registration No. IBBI/IPA-001/IP-P00582/2017-2018/11023 is appointed as Interim Resolution Professional for ascertaining the particulars of creditors and convening a Committee of Creditors for evolving a resolution plan.
 - xi. The Operational Creditor is directed to deposit Rs. 2,00,000/- (Rs. Two Lakhs only) in the ESCROW Account in SBI to be operated

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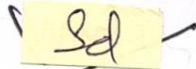
through the Registrar NCLT, Kolkata Bench, for the purpose of meeting the preliminary expenses for initiating the CIR Process by the IRP. IRP can claim the preliminary expenses and fees subject to the approval by the CoC and after constitution of CoC.

xii. The Resolution Professional shall conduct CIRP in time bound manner as per Regulation 40A of IBBI (Insolvency Resolution Process for Corporate Persons) Regulation, 2016.

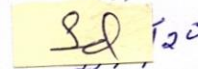
xiii. Registry is hereby directed under section 9(5) of the I.B.Code, 2016 to communicate the order to the Operational Creditor, the Corporate Debtor and to the I.R.P. by Speed Post as well as through e-mail.

21. List the matter on 28/02/2020 for the filing of the progress report.

22. Certified copy of the order may be issued to all the concerned parties, if applied for, upon compliance with all requisite formalities.



Harish Chander Suri
Hon'ble Member (T)



(Jinan K.R.)
Hon'ble Member (J)

Signed on 27th January, 2020

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