



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

**C.P (IB) No. 30/CB/2023**

***In the matter of:***

An application filed 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;

***In the matter of:***

**Apex Exports**, having registered office Airtel Point, Main Road, Barbil, Kendujhar, Odisha – 758 035;

**...Petitioner/Operational Creditor**

**-Versus-**

**SSAB Energy & Minerals Limited**, having its registered office at Plot No. 404/612 and 406/613, 2<sup>nd</sup> Floor, Madhapur, Infront of Ankita Hotel Keonjhar Odisha- 758 001 and having Plant Address- Dhanurjaypur, Horomotor Village, Bolani, Dist- Kenojhar, Odisha- 758 040.

**...Respondent/Operational creditor**

***Coram:***

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

***Appearances***

For the applicant	:	Ms. Payal Agarwal, CA
For the respondent	:	Mr. Gopinath Nayak, CS. Mr. P.P. Bishwal, Adv. Mr. Madhusmita Senapati, Adv.

**Order reserved on: 07.08.20223**

**Order Pronounced on: 05.09.2023**

**ORDER**

***Per P. Mohan Raj, Member, (Judicial)***

1. This petition has been filed under Section 9 of the Insolvency and



Bankruptcy and Bankruptcy Code, 2016 (“IBC, 2016” for brevity) by the Petitioner/Operational Creditor (OC) herein i.e., Apex Exports for initiation of Corporate Insolvency Resolution Process (in short “CIRP”) against the Respondent/Corporate Debtor (CD) i.e., SSAB Energy & Minerals Limited on the basis of an alleged Operational Debt of Rs. 2,80,79,981/- due and payable by the Corporate Debtor to the Operational Creditor.

**Brief contents of petition are as follows:**

2. The operational creditor/petitioner placed a purchase order on 01.03.2022 with the corporate debtor/respondent for purchase of iron ore (1-5) mm of 60% Fe grade quantity-7700 MT. The petitioner also made an advance payment of Rs.3,50,00,000/- After made the advance payment the petitioner could not contact the respondent through phone calls, WhatsApp and e-mails. The petitioner contacted the respondent for refund of amount but the respondent not responded. On 17.08.2022 the petitioner received from e-mail i.d. [ssabenergyandminerals@gmail.com](mailto:ssabenergyandminerals@gmail.com) to provide details of the destination plant to apply for mining permission. The petitioner replied to the e-mail informing the cancellation of the contract and demanded refund of advance amount. The respondent refunded Rs.55,00,000/- on 03.12.2022 but failed to pay the balance amount of Rs.2.88 crores. The petitioner sent demand noticed dated 28.03.2023. After that the respondent paid a sum of Rs.38,00,000/- on 04.04.2023, Rs.10,00,000/- on 18.04.2023 and Rs.10,00,000/- on 25.04.2023. The respondent is liable to pay balance amount with 18% interest of at Rs.2,80,79,981/-.

**Brief contents of reply are as follows:**

3. The present petition is not maintainable in the absence of existence of ‘operational debt’ The petitioner is not an operational creditor as defined under section 5(20) of IBC, 2016. The demand notice sent by the petitioner is misleading and erroneous. The demand notice is devoid of merits. The petitioner avoided to provide the details of transactions in part IV of petition. No work order, purchase order or agreement is attached with the petition. In the absence of providing the required documents, the petition is liable to be dismissed. The petitioner in terms



of purchase orders supplied the coal to the extent of 7667.84 MT iron ore fines to the respondent in two occasions and raised tax invoices. The respondent communicated the petitioner to take supply of materials at the prevailing enhanced rate but the petitioner avoided taking delivery of materials. When the petitioner failed to take delivery of materials the respondent forced to sell some materials to other parties at throw away price and suffered considerable loss. However, respondent on its own volition and good will refunded Rs.1,63,00,000/-till filing of this reply. The petitioner failed to establish any default in terms of section 3(12) of IBC, 2016. The present petition is a gross abuse of the process of law, the petitioner illegally resorting to arm twisting tactics to coerce respondent. The petition is filed with *mala fide* intention abusing the code. Hence, liable to be dismissed.

**The Points for consideration are: -**

(i) Whether the petitioner has proved the service of statutory demand notice to the respondent and complied other requirements to maintain petition under section 9 IBC, 2016?

4. The petitioner submitted that petitioner had placed purchase order dated 01.03.2022 with the respondent for supply iron ore (1-5) mm of 60% Fe grade quantity of 2 Rakes (7700 MT). The petitioner also made an advance payment of Rs. 3,50,00,000/- It is submitted that after the payment of advance amount, the petitioner could not contact the respondent. When the respondent has failed to supply the materials as agreed the petitioner cancelled the purchase order on 17.08.2022 and demanded refund of advance amount.

5. On the respondent side submitted that the respondent supplied iron Ore Fines to the extent of 7667.87 MT and raised invoices dated 29.02.2022 and 30.03.2022. The petitioner in fact declined to take delivery of materials due to escalation of price. Further on the respondent side denies the allegation of the petitioner that the respondent was unable to contact through phone calls, WhatsApp and E-mails further challenge the unilateral cancellation of the purchase orders.



6. In this matter very significant fact is regarding the service of mandatory section 8(2) notice under IBC, 2016. To file a petition under section 9 IBC, 2016, prior notice under section 8 IBC is must. In this case petitioner stated in the petition the demand notice dated 28.03.2023 Annexure “E” of petition was sent to the respondent demanding Rs.2,88,07,795/-. On the respondent side denies the receipt of any statutory notice from the respondent. The onus proof lies upon the petitioner.

7. On the petitioner side failed to state the mode of service of notice, whether the service was effected by post or by e-mail or by hand delivery. No acknowledgement has been filed to prove that the notice has been sent or notice has been delivered/served to the respondent. Annexure “E” of petition is a printout copy of notice; this is not an e-mail copy. This factor shows that notice was not sent by e-mail. No postal receipt or courier has been produced, it shows that notice was not sent by post or courier. In the affidavit filed under section 9(3)(b) of IBC, 2016 Annexure “G” of the petition the petitioner has not stated the mode of service, simply deposed that notice was served. Further in the affidavit the deponent not specifically stated that no notice of dispute was given by the corporate debtor as required under section 9(3)(b) of IBC, 2016. Thus, on the petitioner side failed to prove the service of statutory demand notice to the respondent, this is fatal to the case of the petitioner.

8. On the petitioner side submitted that the respondent confirmed the default and agreed to repay the amount in this regard sent e-mail dated 21.03.2023 agreeing to repay the amount in four months’ time. The petitioner replied to the said e-mail to disclose the identity of the sender.

9. The respondent denies this statement of petitioner and stated that they have not sent Annexure “H” of the petition E-mail dated 21.03.2023. On the respondent side further stated that their e-mail I.d. is ‘ssab.rkl@gmail.com’ in support of this company Master Data copy has been produced. But e-mail referred by the petitioner side dated 21.03.2023 was sent from E-mail I.d. of ‘[ssabenergyandminerals@gmail.com](mailto:ssabenergyandminerals@gmail.com)’ Further on the petitioner side it is also stated



that they have received e-mail from the respondent on 17.08.2022 in the same E-mail I.d. of [ssabenergyandminerals@gmail.com](mailto:ssabenergyandminerals@gmail.com) demanding the details of destination plant to obtain dispatch permission. For the said communication the petitioner replied that the order was cancelled by their buyer M/s Tata Metaliks Ltd and demanded refund of advance amount. On the respondent side denies this contention. On the petitioner side not produced the said e-mail communications dated 17.08.2022. In the absence of any materials on the petitioner side it is not proved that Annexure 'H' of the petition and alleged e-mail dated 17.08.2022 were sent by the respondent.

10. On the petitioner side also stated in the synopsis of petition that they have attempted to contact the respondent through phone calls, WhatsApp and e-mails but not produced any of the messages sent through WhatsApp and e-mail, thus, petitioner side not proved that they have any communication with the respondent after the submission of purchase orders as stated in the petition.

11. On the petitioner side submitted that when the respondent failed to supply the materials in time, the purchase order was cancelled, hence the respondent is liable to refund the advance amount. On the petitioner side not filed the purchase order and any communication sent to the respondent prior to cancelation of purchase order and notice sent to respondent intimating the cancellation of purchase order.

12. On perusal of purchase order referred by the petitioner dated 01.03.2022 filed by the respondent as Annexure 'A' of reply, in which no time period is prescribed for the supply of materials, only quantum is mentioned. Further in the absence of any time is fixed in the purchase order to supply the goods, if the goods are not supplied within reasonable time, prevailed in the trade practice, then the party to the contract can cancel the agreement after issuing notice. Time is essence with respect to delivery of Goods where the time period is fixed. The buyer can cancel the agreement upon notice to supplier at any time prior to delivery date. In the absence of any date is fixed for delivery the purchase order can cancel by the purchaser after giving prior notice. But in our case, there is no prior



notice is given and also not sent any communication to the respondent informing the cancellation of purchase order. In the absence any materials the petitioner had failed to prove its case.

13. The petitioner stated that the date of default is 17.08.2022, but there is no explanation by the petitioner how the said date is arrived. In the synopsis of case the petitioner stated that on 17.08.2022 the petitioner received e-mail from the respondent from e-mail i.d. [ssabenergyandminerals@gmail.com](mailto:ssabenergyandminerals@gmail.com) demanding the details of destination plant to obtain dispatch permission. For the said communication the petitioner replied that the order was cancelled by their buyer M/s Tata Metaliks Ltd and demanded refund of advance amount. Section 3(12) of the IBC provides for the meaning of default as “non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not paid by the debtor or the corporate debtor, as the case may be”.

14. The default arises when the debtor failed to pay the amount on demand either immediately or in a date fixed for payment or non-payment of due, in breach of terms of contract. In this case no document has been produced that the petitioner has made demand for return of advance amount paid in pursuance of purchase order and there is no covenant in the purchase order regarding date of supply of materials etc., Even though on the petitioner side it is stated that on 17.08.2022 demanded refund of advance amount but not proved the said contention.

15. The respondent content that the petitioner avoided taking delivery of the materials from the premises of the respondent due to increase in price, in support of this the respondent filed monthly rate charge chart Annexure “C” of reply, the chart depicts the increase of price of materials. The respondent also stated that when the petitioner was reluctant to take delivery of materials on the enhanced rate the respondent agreed to return the advance amount accordingly started to repay the amount and part of the amount also paid but to harass the respondent, if possible, to extract more amount, the petitioner filed this petition and also simultaneously filed criminal compliant to coerce the respondent. On the petitioner



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side admitted during the time argument that criminal complaint is preferred against the respondent and FIR also registered.

16. The petition also filed in bereft manner, without supporting documents. The facts of the case also not properly explained in part IV of the petition. The copy of record of information utility not filed, only acknowledgement receipt from NeSL has been filed.

17. For the reasons and discussion made above on the petitioner side not established the main ingredients to file a petition under section 9 of IBC, 2016, such as (1) Cancellation of purchase order (2) Default & Date of default (3) Service of statutory demand notice under Section 8(2) of IBC, 2016. In the scenario it is answered that the petitioner has not proved the service of statutory demand notice to the respondent and not complied other requirements to maintain petition under section 9 IBC, 2016.

18. In view of the answer arrived to the point framed, the petition is **DISMISSED**.

19. The Registry is hereby directed to send e-mail copies of the order forthwith to all the parties and their counsel for information and for taking necessary steps.

20. Let the certified copy of the order be issued upon compliance with requisite formalities.

21. File be consigned to records.

SATYARANJAN PRASAD

Digitally signed by SATYARANJAN PRASAD  
DN: cn=, postalCode=753014, o=CODICAL, ou=CUTTACK, ou=NATIONAL COMPANY LAW TRIBUNAL,  
ou=00, serialNumber=4628427862386c2ba63346d55af6289991282704467654d27af1b1e17777,  
givenName=SatyaRanjanPrasad, email=prasad@nclt.gov.in, c=IN  
2.5.4.20=6ae24b06c06e38aeef5cb688113236aa38f7aff6d4902c8d5509f1716b310, email=MBT-  
M0088@nclt.gov.in, cn=SATYARANJAN PRASAD  
Date: 2023.09.05 15:41:08 +05'30'

**Satya Ranjan Prasad**  
**Member (Technical)**

PANDIAN  
MOHAN RAJ

Digitally signed by PANDIAN  
MOHAN RAJ  
Date: 2023.09.05 14:39:28 +05'30'

**P. Mohan Raj**  
**Member (Judicial)**

Signed on this, the 05<sup>th</sup> day of September, 2023.

*Kaushal\_P.S.*