IN THE NATIONAL COMPANY LAW TRIBUNAL,

KOLKATA BENCH

KOLKATA

C.P.(IB) No. 2070/KB/2019

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:

Pratham Suppliers Private Limited, a company incorporated under the Companies Act, 1956, having its registered office at 17, Deshapriya Park Road, Flat No. – 201, Kolkata – 700026

…….*Operational Creditor*

Versus

In the matter of:

M/s. Ankit Metal and Power Limited, a company incorporated under the Companies Act, 1956, having its registered office at 35, Chittaranjan Avenue, 4th Floor, Kolkata – 700012 and also at SKP House, 132A, Shyam Prasad Mukherjee Road, Kolkata – 700026, West Bengal

…….*Corporate Debtor*

Date of hearing: 14.06.2022

Order pronounced :27.06.2022

Coram:

Mr. Rohit Kapoor, Member (Judicial)

Mr. Harish Chander Suri, Member (Technical)

Counsels appeared through Video Conference:

For Operational Creditor : Mr. Joy Saha, Sr. Adv

For Corporate Debtor : Mr. Ratnanko Banerji, Sr. Adv
Mr. Ankan Rai, Adv

ORDER

Per: Harish Chander Suri, Member (Technical)

1. The court is convened through hybrid mode.

2. This petition 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 has been filed by **Pratham Suppliers Private Limited** (hereinafter referred to as the Operational Creditor), seeking initiation of Corporate Insolvency Resolution Process (CIRP) in respect of **M/s. Ankit Metal and Power Limited** (hereinafter referred to as the Corporate Debtor).

3. The amount claimed as on 30th September, 2019 is -Rs. **1,75,02,219.47** pursuant to purchase order bearing no. PURCH/IOF/ 18-19/1214 dated 25.02.2019 in respect of two tax invoices dated

02.04.2019 and 04.04.2019 amounting to Rs. 77,22,813.00/- and Rs. 76,69,017.00/- respectively.

4. The submissions made by the Ld. Counsel on behalf of the Operational Creditor are as follows:

a) In conformance to purchase order bearing no. PURCH/IOF/ 18-19/1214 dated 25.02.2019 issued by the Corporate Debtor, 7478 MT Approx. of Iron Ores Fines were supplied by the Operational Creditor vide two invoices amounting to Rs. 1,56,91,830.00 from 29.03.2019 to 03.04.2019. The payment made to be paid in two phases i.e. 50% on loading of material and balance within 7 days from the receipt of goods.

b) In the present case, on the request of the seller, Trader and End User independently and separately, separate permits were issued by the Department of Steel and Mines to Times Steel and Power Private Limited, CD and OC.

c) The CD was aware of the standardized gradation made by the Department of Steel and Mines on 28.02.2019 and thereafter proceeded to accept the goods by applying for the permit himself. The CD is well aware of the average gradation made by the Department of Steel and mines. Such gradation is not sacrosanct. It is the usual practice of the seller to carry out further tests and the CD is well aware of the trade practices wherein only the test report of an independent lab is considered to assess the quality parameters and the grade provided in the permit and average standardized grade written by the Department. During the very same period, the OC had also delivered Iron Ore fines to Tata Metaliks Limited and the said Tata Metaliks Limited had analyzed the rake at their godown where the grade of Fe was found to be 61.76%.

d) The iron ore fines supplied were not of inferior quality or below the agreed contracted grade.

5. The submissions made by the Ld. Counsel on behalf of the Corporate Debtor are as follows:

a) This application is a fraudulent proceeding and has been initiated with a malicious intent and not for the resolution of insolvency or liquidation of the Corporate Debtor herein. The instant petition is squarely hit by Section 65 of the Insolvency and Bankruptcy Code, 2016, which will more fully appear from the following facts stated hereinafter. Further, the Corporate Debtor has raised serious and plausible pre-existing disputes as regards the quality of goods supplied by the Operational Creditor. Pertinently, the said disputes were raised prior to the issuance of the demand notice under Section 8 of the Insolvency and Bankruptcy Code, 2016.

b) By an offer letter dated February 23, 2019, *Annexure 'A' to the reply affidavit*, the Operational Creditor proposed to supply 8000 metric tonnes of Iron Ore fines having a Fe grade quality of 62%..

c) Consequently, by a Purchase Order dated 25.02.2019, having reference no PURCH/IOF/1-19/1214, the Corporate Debtor placed an order for the aforesaid iron ore fines having Fe grade quality of 62%.

d) Thereafter, upon receipt of the goods and/or the iron ore fines, it transpired that the quality of the goods supplied were much below the quality standard specifications as mentioned in the offer letter as well as the purchase order.

e) The aforesaid deficiency in quality will also be apparent from the two Form-I permits *(@ pg 9-10 and 11-12 of the affidavit in opposition)* issued by Department of Steel and Mines in favour of the Operational Creditor for the purpose of supplying the said crushed fines. From a bare perusal of the said permit, it will be evident that the quality of goods acquired by the Operational Creditor was much below the contracted quality of 62%. The permit on the basis of which the Operational Creditor had procured the said goods clearly states that the grade quality of the Iron Ore fines obtained by the Operational Creditor, which were to be supplied to the Corporate Debtor, were having Fe content of 58.30%and 58.42% respectively and hence, was below the contracted quality.

f) Under such circumstances, by letters dated 25th April, 2019 and 15th May, 2019, the Corporate Debtor rejected the fines supplied to them and requested the lifting of the same from their premises. However, since the Operational Creditor neither lifted the material nor replied to the letters of rejection, the Corporate Debtor issued several reminder letters dated 31/03/2019 and including dt. 21/09/2019 requesting the Operational Creditor to lift the materials.

g) Further the Operational Creditor has sought to raise a two fold plea in so far as the permit (Form 1) issued by the Department of Steel and Mines is concerned. The Operational Creditor purports to contend that the permit (Form 1) issued by Steel and Mines Department was within the knowledge of the petitioner before the delivery of goods and, therefore, the Corporate Debtor cannot dispute the quality and as such the dispute is a feeble and spurious one.

h) In this regard, it is submitted by the Corporate Debtor that it is a well-known trade practice in the industry that the goods are not rejected merely on the basis of the Fe content mentioned in the Form 1 issued by the Department of Steel and Mines, but after conducting the quality analysis and inspection of the goods by the purchaser (Corporate Debtor) after delivery. In other words, it is a familiar and well known standard practice that the goods are rejected pursuant to quality inspections carried out by the purchaser i.e. the Corporate Debtor in the instant case. The aforesaid practice is well within the knowledge of the Operational Creditor and will also be evident from the quality reports of Tata Metaliks disclosed by the Operational Creditor in its application to contend that at the relevant point when goods were supplied to the Corporate Debtor, the Operational Creditor also supplied goods to

Tata Metaliks and the goods met the standard specifications. In this regard it is submitted that upon a bare perusal of the said reports of Tata Metaliks *(@pg 17-21 of rejoinder)*, the following will be apparent :

i. The goods are not rejected only on the basis of the Form 1 Permit and is rejected after conducting an analysis inspection by the Purchaser. The quality inspection of the goods (Iron Ore fines) is carried out by the purchaser after delivery and the inspection is not to be done by any third party;

ii. Further, from a meaningful reading of the said quality reports of Tata Metaliks, it will be manifest that the Iron Ore fines supplied to Tata Metaliks was also not of desired quality and had severe deficiencies. Moreover, upon detection of such deficiencies, Tata Metaliks had also sought for appropriate reduction in its bills. In light of the above, it is incontrovertible that the dispute raised by the Corporate Debtor as regards the quality of goods supplied is genuine, plausible and bonafide as the Corporate Debtor is not the only one who raised issues with regard to the quality of goods supplied by the Operational Creditor. However, since the Corporate Debtor herein is and was not placed equally with Tata Metaliks, reduction in bills would not have served their purpose as the goods/iron fines were stated to be unusable.

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i) The Operational Creditor also purports to deny the existence of the letters issued by the Corporate Debtor on and after 31st March 2019 rejecting the goods of the petitioner and requesting them to collect the same from their plant. In this regard, it is most humbly submitted that upon a bare perusal of Permit (Form-1) issued by the Department of Steel and Mines, it will ex-facie appear that the goods acquired by the Operational Creditor were not of the contracted quality. The Operational Creditor also purports to contend that the rejection letters issued by the Corporate Debtor, on and after 31st March 2019, were forged and fabricated. In this regard, it is stated that even if it is assumed for the sake of argument that the said letters were not in existence, even then, the dispute with regard to the quality cannot be proved to be a feeble and a spurious dispute in view of the Form 1 issued by the Department of Steel and Mines, which, in categorical terms, records and demonstrates that the goods acquired by the Operational Creditor were not of the contracted quality and on the contrary, were below the standard specifications mentioned in the offer letter and purchase order. The said form 1 ex facie / prima facie establishes the fact that the quality of goods was blemished and not as per purchase order, and has resulted into a dispute between these parties.

j) The Operational Creditor has further purported to rely on independent analysis report of a third party to show that the goods supplied were of the contracted quality. However, in this regard, it is submitted that the Form-1 issued by the department of steel and mines is a public document by virtue of Section 74 of the Indian Evidence Act, 1872 and has much more evidentiary and persuasive value than any private document and no reliance whatsoever should be given to the said private report.

7. ***Analysis and Findings:***

7.1 We have heard the Ld. Counsel for the Operational Creditor and the Ld. Counsel for the Corporate Debtor and perused the record.

7.2 From the records produced before us, it is clearly evident the operational creditor agreed and contracted to supply crushed iron ore fines for a grade quality of 62%, however, it has been categorically stated in the Form 1(permit) obtained from the Department of Steel and Mines that the operational creditor are allowed to procure iron ore fines having a Fe content of 58.42%. Thus, it is apparent that the quality of goods supplied was not in accordance with standard specifications as agreed between the parties. Further, also the quality report of the Tata Metalliks relied by the operational creditor discloses that the iron ore fines supplied by the Operational Creditor to Tata Metaliks was also not of desired quality and had severe deficiencies. The deficit in quality is axiomatic from the Form – 1 (permit) disclosed by the Corporate Debtor which is a public document and is presumed to have more evidentiary and persuasive value by virtue of Section 74 of the Indian Evidence Act, 1872 as opposed to the private test report relied by the Operational Creditor which is a private document.

7.3 Further, from the records, we find that the Corporate Debtor had rejected the goods by its letters dated April 25, 2019 and May 15, 2019 alleging deficient supply of the quality of iron ore fines. All these disputes were raised by the respondent much prior to issuance of demand notice under Section 8(1) issued on 3rd October, 2019. There is nothing on record to suggest that any correctional measures were taken by the operational creditor. On the other hand, Corporate Debtor pleaded before us that there was an 'existence of dispute'.

7.4 The Operational creditor has disputed the existence of the said letters. However, the said letters are genuine or not, cannot be decided by this Adjudicating Authority, sitting in summary jurisdiction. It is virtually impossible to determine whether a letter is genuine or not and as such the same is a matter of trial and evidence and ought to be determined before a Civil Court and not in a summary proceeding. In this regard, we may refer and rely upon the law laid down by the Hon'ble NCLAT in ***Universal Woollen Mills V. Winsome Yarns Ltd [2019 SCC Online NCLAT 641]*** wherein it was held that:

"2……………Learned counsel appearing on behalf of the appellant submits that the email dated 4th August, 2015 is not a genuine email and is a fabricated copy of the email. On the

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other hand, learned counsel for the respondent submits that it is genuine one. However, the question whether the email is fabricated or not cannot be decided by this Appellate Tribunal."

"3. In view of the aforesaid existence of dispute the Adjudicating Authority rightly rejected Section 9 application. In the circumstances no relief can be granted."

"4.*The appeal is dismissed. No cost."*

Therefore on this ground alone, the present petition is dismissed. We may also refer and rely upon the law laid down by the **Hon'ble Supreme Court** in **Mobilox Innovations Private Ltd vs Kirusa Software Private Ltd** reported in **(2018) 1 SCC 353.**

8. There being disputed questions of facts as to whether subsequently the iron ore fines were removed, and claim by the Operational Creditor was corrected or amount deducted or reduced, all such issues cannot be determined by us.

9. Accordingly, it is hereby ordered as follows***:***
   a) The application bearing CP (IB) No. 2070/KB/2019 filed by Pratham Suppliers Pvt. Ltd. (Operational Creditor), under section 9 of the Code read with rule 6 of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating CIRP against Ankit Metal & Power Ltd, the Corporate Debtor, is hereby **rejected.**

10. A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

(Harish Chander Suri) (Rohit Kapoor)
Member, Technical Member, Judicial

Order signed on 27th day of June, 2022

PJ