

NATIONAL COMPANY LAW TRIBUNAL

KOLKATA BENCH

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CP(IB) No. 1141/KB/2018

In the matter of:

Naresh Kumar & Co. Pvt. Ltd.

..Operational Creditor

Versus

Jharkhand State Mineral Development Corporation Limited

.. Corporate Debtor

Coram: Shri Jinan K.R., Member(Judicial)

Shri Harish Chander Suri, Member(Technical)

For the Operational Creditor:

1. Mrs. Manju Bhuteria, Advocate
2. Mrs. Iram Hassan, Advocate
3. Mr. Debayan Sen, Advocate

For the Corporate Debtor:

1. Mr. Rudraman Bhattacharyya, Advocate
2. Mr. Souvik Mazumder, Advocate

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3. Mr. Sourojit Dasgupta, Advocate

Date of Pronouncement of the Order : 25-10-2019

### ORDER

Per Shri Jinan KR, Member(Judicial)

1. The CP(IB) No. 1141/KB/2018, is an Application filed by M/s. Naresh Kumar & Co. Pvt. Ltd. / Operational Creditor, under Section 9 of the Insolvency & Bankruptcy Code, 2016, read with Rule 6 of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating Corporate Insolvency Resolution process (in short CIRP) as against Jharkhand State Mineral Development Corporation Limited /Corporate Debtor, alleging that an amount of Rs. 1,45,40,211.23p.( Rupees One Crore Forty five Lakh forty thousand two hundred eleven and paise twenty three only) is the unpaid debt due to the Operational Creditor as on 07-04-2018, inclusive of interest @ 12% per annum from the Corporate Debtor. Despite demand, the Corporate Debtor failed in discharging the debt and therefore, filed this Application for initiating the CIRP process against the Corporate Debtor.

2. The averments in brief for the consideration of this case, are the following :

The Operational Creditor was awarded a work order by the Directorate of Geology, Department of Mines & Geology, Government of Jharkhand for core drilling, geophysical logging and geophysical survey in Latehar & Budhakhap Coal blocks. In terms of the work

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order, all payments were to be made by the Corporate Debtor. The Operational Creditor had duly carried out the works at the two coal blocks. The Operational Creditor raised, in total, 5 invoices for the works executed by it. The said invoices were duly accepted by the Corporate Debtor. On 11-06-2012, the Corporate Debtor made part payment of a sum of Rs. 65,10,969/-. On 21<sup>st</sup> April, 2017, the Corporate Debtor made another part payment of a sum of Rs. 53,20,809/- on account of its outstanding dues to the Operational Creditor. The Corporate Debtor has acknowledged its debt and from time to time promised to pay its outstanding dues to the Operational Creditor. The Operational Creditor issued a demand notice dated 13<sup>th</sup> April, 2018, under Section 8 of the Insolvency & bankruptcy Code, 2016, calling upon the Corporate Debtor to clear the outstanding dues along with accrued interest. The said notice was duly received by the Corporate Debtor. There is no response to the said notice from the Operational Creditor till date. The claim of the Operational Creditor remains undisputed. The Corporate Debtor was in receipt of demand notice on 17-04-2018. The Corporate Debtor has not chosen to reply to the notice received by the Corporate Debtor. As per the invoices, the Operational Creditor is entitled to claim interest @ 12% per annum. In support of the contention in the Application, the Applicant has produced the following documents :

- i) Annexure – A : Copy of the work order dated 4<sup>th</sup> December, 2010 bearing No. Bhu.Ni.Anve-85/2010/2335
- ii) Annexure – B – Copies of the invoices dated 17<sup>th</sup> February, 2011, 4<sup>th</sup> march, 2011 and 11<sup>th</sup> July, 2011

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- iii) Annexure - C - Copies of correspondences exchanged between the operational creditor and the corporate debtor
- iv) Annexure - D- Copies of the bills indicating the part payment
- v) Annexure - E - - Copy of the demand notice dated 13<sup>th</sup> April, 2018
- vi) Annexure - G - - Bank statement of the account of the Operational Creditor maintained with Union Bank of India, Camac Street Branch and
- vii) Written communication in Form 2 by Insolvency Resolution Professional dated 8<sup>th</sup> August, 2018

On the strength of the above said documents and upon the above said contentions, the Applicant prays for passing an Order of Admission under Section 9 of the Code.

3. The Respondent/Corporate Debtor, entered appearance and objected this Application. The Corporate Debtor filed affidavit in reply contending in brief is the following :

The Corporate Debtor mainly objected this Application contending that there was no privity of contract between the Operational Creditor and the Corporate Debtor and accordingly, the Application of this nature would not lie as against the Corporate Debtor and that the claim of the Operational Creditor is hopelessly barred by limitation. Thirdly, it contended that the claim of the Operational Creditor is disputed. There is no operational debt due or payable by the Corporate Debtor to the



Operational Creditor and that the Application is in abuse of the process of law or suffers from suppression of material facts. The Corporate Debtor further contended that the Operational Creditor has clothed the Corporate Debtor with the obligation of the Government of Jharkhand, Directorate of Geology, which is made impermissible in law, since initiation of CIRP process is not permissible against the Directorate of Geology of the Government of Jharkhand. The Operational Creditor has conveniently chosen the Corporate Debtor to proceed against and therefore, this Petition is liable to be dismissed on the said ground alone. In addition to the above said contentions, the Corporate Debtor contends that the work Order dated 04-12-2010 includes a clause to refer any dispute between the parties to arbitration under the Arbitration and Conciliation Act, 1996. Since there already exists an arbitration agreement between the parties, whereby the default, if any, committed by the said Department or the Corporate Debtor, can be adjudicated in an arbitration. The Operational Creditor cannot refrain from such agreement and proceed to initiate CIRP against the Corporate Debtor. The Operational Creditor had never raised any invoices in the name of the Corporate Debtor and therefore, the Corporate Debtor has no liability to pay the amount as claimed by the Operational Creditor. The claim put forward by the Operational Creditor is a stale claim. The Corporate Debtor is not liable to pay any amount, as claimed by the Operational Creditor, since there is no debt due and payable to the Operational Creditor. This Application is liable to be dismissed with costs.



4. The Operational Creditor has filed a rejoinder denying the contentions raised in the reply affidavit and reiterated the contentions raised in the Application and further would submit that the work order clearly indicates that the verified bills will be paid by the Corporate Debtor and that the work order proves that the security deposit amount was given in the name of the Corporate Debtor and the Corporate Debtor, being the beneficiary of the work done by the Operational Creditor, in the coal block of the Corporate Debtor, the privity of contract is existing between the Operational Creditor and the Corporate Debtor and since the Corporate Debtor has paid part payment and acknowledged the liability within the period of limitation, the Application filed is perfectly maintainable and is liable to be admitted.

5. Heard both sides. Perused the records and the citation referred to on the side of the Corporate Debtor.

6. Naresh Kumar & co. Pvt. Ltd./the operational creditor, is a Company to whom the work order for core drilling, geophysical logging and geophysical survey in Latehar (4.52 sq.mtr.) coal block) & Budhakhap (0.58 sq.mtr.) coal block was given by the Government of Jharkhand, Department of Mines and Geology, Directorate of Geology. It is an admitted fact. The claim of the Operational Creditor is based on the terms and conditions stipulated in the work order. The work order is dated 04-12-2010. The copy of the work order is annexed along with the Application as Annexure-A. The term regarding Payment and Termination of Work Order reads as below :

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*"Payment and Termination of Work Order :*

- i) The company shall submit monthly bill for the work carried out in every 30 days to the Directorate of Geology, 2<sup>nd</sup> floor Engineers' Hostel no. 1, Dhurwa Ranchi.*
- ii) After Physical verification within ten days, the verified bill will be sent to M/s. JSMDC Ltd. for payment.*
- iii) In case of failure of per day target of drilling suitable action will be taken on the company.*
- iv) Any breach of term & condition mentioned in work order or in the tender document the work order will be canceled and the security amount and payment will be forfeited after giving 15 days notice.*
- v) Any dispute will be mutually settled by the parties on the basis arbitration. In case any further legal dispute, jurisdiction will be Ranchi only."*

7. As per the above said work order, the Operational Creditor shall submit monthly bill as stipulated to the Directorate of Geology for their physical verification and the verified bill will be submitted to the Corporate Debtor, JSMDC Ltd. for payment. The coal block, being belonged to JSMDC Ltd., the drilling work being carried by the Operational Creditor within the coal block of the Corporate Debtor, it cannot be held that there is no privity of contract in between the Operational Creditor and the Corporate Debtor.

8. Citing (1995) 3 Supreme Court Cases 250, Aries Advertising Bureau Vs. CT Devaraj(Dead) by LRS., the Ld. Counsel for the

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Corporate Debtor attempted to prove that there is no privity of contract in between the Operational Creditor and the Corporate Debtor. He relied upon Paragraph 2, which reads as follows :

"2. *Shri Sampath, learned counsel for the appellant has strenuously contended that in view of the agreement (Ex. A-3) executed by the respondent and Balakrishnan wherein clause (4) states about the respondent undertaking to pay the advertisement charges, he is bound to pay the same to the appellant. Proposal sent for advertisement by the appellant was admittedly approved by the respondent. Thereby there emerged a concluded oral contract between appellant and the respondent. It is also contended that since the respondent agreed to receive the benefit of 30% of the profit from the income derived by running of the circus, he had derived benefit pursuant to the advertisement made by the appellant and, therefore, the respondent is bound to reimburse the appellant by operation of Section 70 of the Act.*"

It appears to us that the facts in the case in the above cited decision is entirely different than that of the facts in the case in hand. On the other hand the ingredients to be satisfied under S.70 seen meted out in the case in hand. It is good to read Section 70 of the Indian Contract Act, 1872. It reads as follows :

"70. *Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.*"

9. In the instant case, the transaction falls within the purview of Section 70. As we discussed above, the Operational Creditor has to carry out drilling work in two coal blocks. One at Latehar coal block and another at Budhakhap coal block within the stipulated time. No argument was advanced on the side of the Corporate

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Debtor that the work, as per the work order, has not been carried out by the Operational Creditor. The Operational Creditor has to submit its bills to the Directorate of Geology, only for physical verification and its approval. The due date of payment, as per the terms, is the date of verification and submission of the verified bill to the Corporate Debtor by the Directorate of Geology . The Corporate Debtor, admittedly, paid part payment of the bill generated by the Operational Creditor after completion of the drilling work and upon submission of verified bills to the Corporate Debtor by the Department of Geology. On 11-06-2012, the Corporate Debtor made part payment of a sum of Rs. 65,10,969/- and on 21<sup>st</sup> April, 2017, the Corporate Debtor made another part payment of a sum of Rs. 53,20,809/- on account of its outstanding dues to the Operational Creditor. The said payment also not denied by the corporate debtor. On what account the corporate debtor had paid the above said part payment of the bills no valid explanation is forthcoming from the side of the corporate debtor. The undisputed letter dated 16-05-2017, addressed to the Operational Creditor refers to payment details, as follows :

*" Please refer to your letter dated 12-05-2017 we are submitting payment details against your bills for Drilling & Geophysical Logging in Latehar Coal Block of JSMDC Ltd. as follows :*

Gross Billed amount		Rs. 1,09,88,795=00
Paid 50% as Advance		Rs. 54,94,397=00
Deduction TDS	1,09,888.00	
H. Rent for	63,700.00	Rs. 1,73,588=00

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*Net Paid* *Rs. 53,20,809=00*

*(Rupees Fifty three lakh twenty thousand eight hundred nine only)"*

10. The operational creditor also relied upon various other letters exchanged between the parties. Letter dated 14-05-2015 of the Directorate of Geology to the Operational Creditor shows that some of the bills submitted by the Operational Creditor for verification and submission to the Corporate Debtor, has been returned by the Corporate Debtor for re-submission after certain clarification. The documents produced on the side of the operational creditor proves that on several occasion the bills submitted to the corporate debtor were returned for clarification from the Operational Creditor and for re-submission. So, the bills produced here, in the case in hand, are the final bills verified and submitted to the Corporate Debtor for payment. Out of the total payment due, as per the Bills referred to in this Application, the Corporate Debtor has paid only Rs.53,20,809/- (Rupees fifty three Lakh twenty thousand eight hundred nine only) as on 21-04-2017 and remaining amount of Rs. 1,45,40,211.23p. is due according to the Operational Creditor, as per Annexure F computation statement. This computation statement is also not under challenge.

11. The above said factors lead to a legitimate conclusion that there was privity of contract in between the Operational Creditor and the Corporate Debtor as provided under Section 70

of the Indian Contract Act, 1872. The work done by the Operational Creditor is for the benefit of the Corporate Debtor and therefore, the Corporate Debtor is found liable for the payment. Accordingly the contention that there was no privity of contract and that since bills were not issued in the name of the corporate debtor no debt is due and payable by the corporate debtor is found devoid of any merit.

12. Another contention put forward on the side of the Corporate Debtor is that the invoices generated were generated on 04-12-2010 and therefore, the claim is hopelessly, barred by limitation. The above said contention seems to have no force at all, because the Corporate Debtor has not paid the bill wise payment to the Operational Creditor. The due date for payment, as per the work order, is the date of submission of verified bill by the Directorate of Geology to the Corporate Debtor. The corporate debtor has no case that the part payment evidently paid is on the basis of any particular bill. The mode of payment by the corporate debtor undoubtedly indicates that the payment was adhoc and that it is a running account. It has come out in evidence that last payment on the side of the corporate debtor was on 12-05-2017. The Corporate Debtor has sanctioned part payment for the work done in Latehar coal block of the Corporate Debtor. Out of the gross bill amount, the Corporate Debtor has paid Rs. 54,94,397/- (Rupees Fifty four Lakh ninety four thousand three hundred ninety seven only) as advance to the Operational Creditor. That itself is an admission of liability and therefore, the period of limitation



would start from 12-05-2017 and not from 04-12-2010. This application was filed on 16-08-2018. Therefore, it is perfectly within the period of limitation and therefore, this Application is maintainable.

13. There are several other allegations raised on the side of the Corporate Debtor. The Corporate Debtor admittedly has not sent a reply to the demand notice received by the Corporate Debtor. No pre-existing dispute, coming under the purview of Section 5(6) of the Code, has been established on the side of the Corporate Debtor. A contention also was stressed on the side of the corporate debtor that there is an arbitration clause in the work order and since the claim is disputed by the Corporate Debtor, the remedy available to the Operational Creditor is to refer the dispute to the Arbitrator. The above said submission is also found has no force in the absence of evidence of a pre existing disputes regarding the work done by the operational creditor.

14. The objections, on the side of the corporate debtor being found not sustainable under law, the question is whether the Application filed is complete. An affidavit to the effect that there is no notice given by the Corporate Debtor relating to dispute of unpaid operational debt, in compliance of Section 9(3)(b), is filed in the case in hand. So also, the copy of statement of Bank account from the Union Bank of India seen produced by the Operational Creditor, confirming that there is no payment of unpaid operational debt as claimed by the Operational Creditor in compliance of Section 9(3)(c ) of the Code is also seen produced.

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The Resolution Professional, by name, Mr. Rakesh Kumar Agarwal, has been proposed on the side of the Operational Creditor. Written communication and Form 2 proves that there is no disciplinary proceeding pending against the Insolvency Professional. Being satisfied that all the requirements to be meted out under Section 9(3), were satisfied, this Application is liable to be admitted under Section 9(5) (i) of the Code. Accordingly, the Application CP(IB) No. 1141/KB/2018, is admitted, among the following :

### **ORDERS**

- 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, Jharkhand State Mineral Development Corporation Limited, is hereby admitted.
- ii) 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.
- iii) 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 judgement, 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 the 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, suspended, or interrupted during moratorium period.
  
- v) The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central

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Government in consultation with any financial sector regulator.

- vi) The order of moratorium shall have effect from the date of admission till the completion of the corporate insolvency resolution process.
- vii) 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 the 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.
- viii) **Mr. Rakesh Kumar Agarwal, 20, NS Road, Block – A, Room No. – 15, 1<sup>st</sup> Floor, Kolkata – 700001, an Insolvency Professional, registered with ICAI Insolvency Professionals Agency, having registration number IBBI/IPA-001/IP-P00443/2017-18/10786, E-mail ID: [rakesh202@hotmail.com](mailto:rakesh202@hotmail.com), Mobile No. 9831070962,** is hereby appointed as Interim Resolution Professional by this Tribunal for ascertaining the particulars of creditors and convening a meeting of Committee of Creditors for evolving a resolution plan.
- ix) The Interim Resolution Professional should convene a meeting of the Committee of Creditors and submit the



resolution passed by the Committee of Creditors and shall identify the prospective Resolution Applicant within 105 days from the insolvency commencement date and follow Regulation 40A strictly.

- x) The Operational Creditor is directed to deposit Rs. 2,00,000/- (Rupees Two Lacs Only) in the ESCROW Account in SBI to be operated through the Registrar, NCLT, Kolkata Bench, for the purpose of meeting the preliminary expenses for initiating the CIR Process by the IRP with in one week of the date of this order.
- xi) Registry is hereby directed under section 7 (4) of the I & B Code, 2016 to communicate the order to the Financial Creditor, the Corporate Debtor and to the I.R.P. by Speed Post as well as through E-mail.
- xii) List the matter on 28-11-2019 for filing of the progress report.

15. The free copy/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)

**Member(Technical)**

  
(Jina K.R.)

**Member(Judicial**

Signed on this, the 25<sup>th</sup> day of October, 2019

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