IN THE NATIONAL COMPANY LAW TRIBUNAL,

KOLKATA BENCH
KOLKATA

C.P (IB) No.276 /KB/2020

In the matter of

An application under 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:

Shri Kamal Luthra, Sole Proprietor of Lucky Minerals, having its registered office at Luthra Estates, Gate No.3, Rajokri, New Delhi-110038.

... Operational Creditor

Versus

In the matter of:

Sohan Minerals & Mining Company Pvt. Ltd., CIN: U14219WB2007PTC113650, having its registered office at 8, Ho Chi Minh Sarani, Harrington Mansion Office No. 28/8, 3rd Floor, Kolkata, West Bengal-700071.

...Corporate Debtor

Date of hearing :06/04/2022

Order Pronounced on : 24/05/2022

Coram:

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

Counsels appeared through Video Conference

1. Mr. Jishnu Chowdhury, Adv.] For Operational Creditor
2. Mr.Ritoban Sarkar, Adv.]
3. Ms.Madhuja Barman, Adv.]

4. Mr. Gautam Bajaj,Adv.]

1. Mr.Rohit Das, Adv.] For Corporate Debtor
2. Ms. Kishwar Rahman,Adv.]
3. Mr.Preetam Majumdar, Adv.]

O R D E R

Per: Harish Chander Suri, Member (Technical)

1. The Court is convened by video conference today.

2. This petition under 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 **Shri Kamal Luthra,** Sole Proprietor of Lucky Minerals, having its registered office at Luthra Estates, Gate No.3, Rajokri, New Delhi-110038 (hereinafter referred as the Operational Creditor), seeking initiation of corporate insolvency resolution process in respect of **Sohan Minerals & Mining Company Pvt. Ltd.,** having its registered office at 8, Ho Chi Minh Sarani, Harrington Mansion Office No. 28/8, 3rd Floor, Kolkata, West Bengal-700071, (hereinafter referred as the Corporate Debtor).

3. It is submitted in the petition that the Operational Creditor Shri Kamal Luthra, a sole proprietor, is engaged in the business of providing various services in the field of iron-ore mining crushing, excavation , screening etc. The Corporate Debtor is a mining company with its registered office in Kolkata. It is submitted that the Corporate Debtor had approached the Operational Creditor for availing its services at Koira Iron Ore Mines, Odisha (Work Site). Accordingly, the Corporate Debtor placed Work Orders dated 01.06.2015, 18.06.2015 and 13.07.2015 whereby the Operational Creditor was required to provide the service of excavation, screening of iron-ore, loading etc. at the Work Site. Pursuant to the Work Order,the Operational Creditor duly provided the Corporate Debtor with the services as mentioned in the Work Orders against which the Operational Creditor raised invoices dated 04/08/2015, 04/09/2015, 05/10/2015, 05/11/2015, 08/12/2015,

04/01/2016, 02/02/2016, 03/03/2016, 04/04/2016 and 25/05/2016 i.e. a total of 20 invoices totaling to an amount of Rs.2,06,06,786/- against which a total amount of Rs.1,43,70,843/- was paid / deducted. Therefore, an amount of Rs.62,35,943/- remains due and payable since 09/06/2016.The parties have exchanged correspondence since and the Corporate Debtor vide letter dated 27/12/2017 has admitted/acknowledged its liability albeit with some deductions which are prima facie spurious and nothing but a mere bluster.

4. It is further submitted that there is no dispute with regard to the operational debt.The Corporate Debtor has on multiple occasions made clear and unequivocal admissions of amounts due and payable by it to the Operational Creditor.

5. The Operational Creditor has referred to the correspondence dated 20/04/2016 whereby the Corporate Debtor had sent its ledger up to 31/03/2016. The said ledger itself shows that an amount of Rs. 31,49,816/- remains due and payable by it to the Operational Creditor. The Operational Creditor has further referred to letter dated 01/06/2016 wherein the Corporate Debtor has in paragraph stated that *" While our Client has never disputed the outstanding amount, the final amount payable is yet to be ascertained as the following heads are yet to be debited properly in mutual consultation …." ,* letter dated 27/12/2017 wherein Corporate Debtor while reiterating the contents of the letter dated 10/06/2016 in stating that its *"..client had never disputed the outstanding amount…",* the Corporate Debtor has annexed a statement of accounts whereby it has evidently made absurd deductions such as Rs.19,28,897/- on account of defamation amongst others. It is submitted that in the said statement of accounts annexed with the letter dated 21/12/2017, after making such deductions which are prima facie "made up", the Corporate Debtor has admitted to an amount of Rs.6,42,966/- as remaining due and payable to the Operational Creditor.

6. It is submitted that the Operational Creditor issued a Demand Notice under section 8 of the Code on 22/10/2019 demanding the total sum of

Rs.62,35,943/- along with interest @ 12% p.a. totaling up to Rs. 87,59,706/- with effect from 09/06/2016.

7. The Corporate Debtor replied to the Demand Notice vide its letter dated 19th November, 2019. In para 16 of the reply to the Demand Notice, the Corporate Debtor has specifically admitted that " *Our Client was willing to pay Rs.6,42,966/- (Rupees Six Lakhs, Forty Two Thousand Nine Hundred and Sixty –Six only) by way of full and final settlement of your account. Vide the same letter dated December 27, 2017 our Client had requested to provide us your written confirmation of the aforesaid amount of Rs.6,42,966/- as and by way of full and final settlement of your unwarranted claims against our Client, and upon the receipt of such written confirmation, our Client shall make payment of the aforesaid amount to you within a period of 15 days from the date of receipt of your aforesaid written confirmation. However, no written confirmation was sent by you, nor the contents of the letter dated December 27, 2017 denied, thereby amounting to a tacit admission of the contents of our Client's letter dated December 27, 2017 in accordance with the principles of non-traverse".*

8. In **reply** to the above, the Corporate Debtor denied and disputed that a total amount of Rs.2,06,06,786/- raised in the 20 invoices was due and payable under the Work Orders.It is stated that since the Operational Creditor had inflated the amount in their invoices. Only a total amount of Rs.2,00,96,045/- was allowed to the Operational Creditor, out of which an amount of Rs.51,05,000/-have been paid by Cheque, Rs. 13,55,000/- by cash, and amount of Rs. 3,95,184/- has been deducted towards Tax Deductible at Source (TDS), as also an amount of Rs. 65,60,675/- Rs, 32,32,009/- and 7,65,814/- were debited from the Operational Creditor towards HSD(Diesel), repairing of parts/ engines and salary and bonuses, an amount of Rs. 1,10,000/- was debited towards rent for parking of the Screen Plant by the Operational Creditor in the site of the Corporate Debtor after the January 13, 2016 till removal of the Screen Plant in November, 2016. Further, an amount of Rs.19,28,897/- was debited as compensation to

Corporate Debtor to Corporate Debtor for the false and defamatory allegations contained in the e-mails dated May 23,2016, May 24,2016 and others addressed to the Principles of the Corporate Debtor leading to goodwill and loss of profit. The Corporate Debtor vide its letter dated December 27, 2017 agreed to pay Rs.6,42,966/- by way of full and final settlement of the account. The Operational Creditor requested to provide written confirmation of the amount as and by way of full and final settlement, of the unwarranted claims against the Corporate Debtor. The Operational Creditor neither denied nor disputed the said amount of Rs. 6,42,966/-.However, as no written confirmation was sent nor the contents of the letter dated December 27, 2017 denied, thereby amounting to a tacit admission of the contents of Corporate Debtor's letter dated December 27, 2017 in accordance with the principles of non-traverse. Furthermore, the Operational Creditor had lastly raised invoice on May 25,2016 and also by their own admission had noted the date of default as June 9, 2016 in the purported Demand Notice dated October 22, 2019, hence the instant action of the Operational Creditor to enforce a debt after a period of three years from the date of default is barred under the principles of waiver, acquiescence an estoppel.

9. It is further stated that the Operational Creditor had time and again and lastly on December 27,2017 provided the ledgers pertaining to their account and the Operational never raised any objection and /or challenge the same in the entire 3 years from the due date of the last invoice raised on May 25, 2016 i.e. June 9, 2016. It is denied that the Corporate Debtor made any false and frivolous deductions under various heads without providing basis of any such deductions. It is submitted that the Operational Creditor had accepted the deductions made by the Corporate Debtor without any demur or protest and had never challenged the same. It is denied that the request of the Corporate Debtor to provide written confirmation of an amount of Rs.6,42,966/- after reconciliation of the account is in essence the only extent of acknowledgement of the actual payable outstanding to the Operational Creditor. It is submitted that the balance amounts claimed by the Operational Creditor are entirely false, frivolous, malicious and inflated. In fact, the

Operational Creditor had never contradicted the amount of Rs.6,42,966/- and challenged the same until the belated filing of the instant Insolvency Application beyond the period of limitation. It is submitted that the Corporate Debtor had repeatedly clarified in their emails and subsequent letters that amounts pertaining to repair of engine, grizzly bar etc, parking charges and other such charges shall be debited from the account of the Operational Creditor, and the later accepted the same without any demur or protest until belated filing of the instant application. It is denied that the letter dated June 01, 2016 is mere rues and an attempt to wriggle out of the liabilities. It is denied and disputed that deduction made by the Corporate Debtor under defamation, rent/parking charges, gratuity, PF expenses, stores and spares is arbitrary or that the Corporate Debtor cannot make such deductions unilaterally. It is again repeated and reiterated that the Operational Creditor is trying to enforce a debt after a period of three years from the date of default is barred under the principles of waiver, acquiescence and estoppel.

10. While denying all the allegations of the Corporate Debtor in its reply affidavit, the Operational Creditor has denied that the Corporate Debtor had time and again provided the ledgers and that the Operational Creditor never raised any objection or challenged the same. It is denied that the Operational Creditor accepted the deductions made by the Corporate Debtor without any demur or protest and had never challenged the same. Without prejudice to the amounts due, the Corporate Debtor has accepted its liability to the extent of Rs.6,42,966/- and on this ground alone, the corporate insolvency resolution proceedings deserve to be initiated. It is denied that the balance amounts claimed by the Operational Creditor are entirely false, frivolous, malicious and inflated. In fact, the corporate debtor vide its letters dated 01.06.2016 as well as 27.12.2017 has accepted the same to be due and payable. It is denied that the Operational Creditor had never contradicted the amount of Rs.6,42,966/- and that it was not challenged or that there is any belated filing of the instant Insolvency Application beyond the period of limitation. It is denied that the Corporate Debtor was not using the machines till April, 2016 and that it did not refuse to clear bills and /or provide details

of accounts. It is denied that the Corporate Debtor has not admitted the amounts due and payable to the Operational Creditor. It is denied that the Operational Creditor accepted any deductions or grizzly bars etc. as alleged by the Corporate Debtor. As stated hereinabove, the said deductions as alleged by the Corporate Debtor are illusory, spurious, and afterthought, baseless, bogus and unsubstantiated. The Operational Creditor reiterated that the deductions made by the Corporate Debtor under defamation, rent/parking charges, gratuity PF expenses, stores and spares are arbitrary, unilateral and wrongful and the Operational Creditor seeks to refer to and rely upon the submissions made in the Application. It is denied that the Operational Creditor is trying to enforce a debt after a period of three years from the date of default or that it is barred under the principles of waiver, acquiescence and estoppel.

11. During the course of arguments, Ld. Counsel for the Corporate Debtor submitted that the Corporate Debtor has on multiple occasions clear and unequivocal admissions of amounts due and payable by it to the Operational Creditor . In this regard reference may be made to (a) the correspondence dated 20.04.2016, whereby the Corporate Debtor had sent its ledger up to 31.03.2016. the said ledger itself shows that an amount of Rs.31,49,816/- remains due and payable by it to the Operational Creditor, (b) letter dated 01/06/2016 (Page 96-98 @ Paragraph 8) wherein the Corporate Debtor has stated that " *While our Client has never disputed the outstanding amount, the final amount payable is yet to be ascertained as the following heads are yet to be debited properly in mutual consultation* ….." It is pertinent to mention that the Corporate Debtor only alleged certain false and frivolous deductions under "various heads" without providing the basis of any such deductions or substantiating the same and till date no such deductions have been made,(c) letter dated 27.12.2017 (Page 113-116 of the Application @ Paragraph 7) wherein the Corporate Debtor while reiterating the contents of the letter dated 01.06.2016 that its "…. Client had never disputed the outstanding amount…." the Corporate Debtor has also annexed a statement of accounts (Page 117-

118 of the Application) admitting its liability. It is pertinent to mention that the frivolous nature of the Corporate Debtor's refusal to make payment of the amounts due and payable to the Operational Creditor is reflected in the said statement of accounts as the Corporate Debtor has made absurd deductions such as deduction of Rs.19,28,897/- on account of defamation, gratuity and PF amongst others. Without prejudice to the amounts having been claimed in the present application, it is submitted that in the said statement of accounts annexed with the letter dated 21/12/2017, after making such deductions which are prima facie "made up" to say the very least, the Corporate Debtor has admitted to an amount of Rs.6,42,966/- as remaining due and payable to the Operational Creditor . (Case Law/ Proposition: ' As long as there is a 'default' and 'debt due'/ amount payable is more than Rs. 1 lakh, the Application is liable to be admitted: The ***Dhar Textitle Mills Limited v. Asset Reconstruction Company (India) Limited NCLAT Company Appeal (AT) (Insolvency) No. 11 of 2019***.

12. It is submitted that the Operational Debt became due on 09.06.2016 as last bill was raised on 25/05/2016 and payment as per the work orders were to be made within 15 days of the invoices; however, there is an acknowledgement of liability vide letter dated 27.12.2017 thereby extending limitation under Section 18 of the Limitation Act. (*Case Law/Proposition: 'Acknowledgement of Debt as per Section 18 of Limitation Act extends period of limitation for the purposes of calculating date of default under IBC: Yogesh kumar Jashwantlal Thakkar v. Indian Overseas Bank NCLAT Company Appeal (AT) (Insolvency)No. 236 of 2020*).

13. While responding to the arguments of the Corporate Debtor, the Ld. Counsel for the Operational Creditor has submitted that the Corporate Debtor has acknowledged its liability as late as on 27.12.2017 as stated hereinabove. The said acknowledgement of liability is before the expiry of the three year period from the date when the debt became due i.e. 3 years from 09.06.2016. Consequently, the present Application is within limitation by virtue of the applicability of Section 18 of the Limitation Act.

14. It is the case of the Corporate Debtor that there was frequent breakdown of machinery on account of which certain deductions were to be made from the invoices. It is stated that the alleged beakdown is irrelevant in much as the same were routine in nature and the expenses incurred by Corporate Debtor have been deducted already as reflected in the ledger statements. Furthermore, deductions allegedly pending are for grizzly bar and stop gap arrangements which the Corporate Debtor never deducted, no details have been provided on account of the said alleged deductions and the same remain unsubstantiated till date. Evidently, no such expenses were ever incurred by the Corporate Debtor and therefore no deductions could be made either. It is submitted that the payments were never refused, contemporaneously, owing to alleged beakdown of machinery. In fact, to the contrary, it is pertinent to note that the Corporate Debtor continued to avail the services of the Operational Creditor till 30.04.2016 and the Operational Creditor raised the last invoice on 25.05.2016 as per the Work Orders against which payments, though sporadic, were made up till 28.04.2016 without any demur. The defense now alleged on account of breakdown is nothing but an attempt to create and make up a dispute when clearly there is none. There is clear admission of liability time and again by the Corporate Debtor.

15. It is submitted that the frivolous nature of the defence being raised herein is highlighted by the contrary stands taken by the Corporate Debtor. Firstly, despite the alleged termination, the Corporate Debtor continued to utilize the machinery and invoices were raised thereon against which part payments were made without any demur. Further vide its email dated 31.03.2016 (Page 82 of the Application), the Corporate Debtor admits to utilizing the machinery at the very least till 01.04.2016. Contrary to this, vide its letter dated 01.06.2016 , the Corporate Debtor relies on its alleged termination in December, 2015 to state that nothing is payable despite utilizing the services of the Operational Creditor till April, 2016 (inclusive of the month of April) and admitting to utilizing till 01.04.2016 at the very least. Reference may also be made to the ledger annexed by the Corporate Debtor

with its letter of 27.12.2017 whereby it admits to utilizing the machinery in April, 2016 as well. Consequently, having utilized the services, the Corporate Debtor has belatedly and as an afterthought sought to change its stands.The Corporate Debtor has sought to levy "parking charges" even though the said machinery/service was being utilized by it. This further highlights the absurdity of the defence being raised.

16. It is the case of the Corporate Debtor that the debt amount claimed is allegedly frivolous as there is an unexplained increase of Rs. 4 lakhs from the letter of 23.05.2016 claiming an outstanding of Rs.58,41,476/- to the letter of 05.10.2017 claiming an outstanding of Rs.62,35,943/-. It is submitted that increase is owing to the invoices of April 2016 which were raised only on 25.05.2016 i.e. after the letter of 23.05.2016 and certain deductions which were not taken into account on 23.05.2016.

17. It is submitted that it is the case of the Corporate Debtor that invoices are over stated and total invoices ought to be only Rs. 2,00,96,045/-. It is submitted that this defence has been taken for the first time in the reply herein and no contemporaneous objections have ever been raised. All bills were duly provided to the Corporate Debtor. This is clearly an afterthought. Furthermore, no proof has been provided as to how the invoice value is overstated. In fact, the entire breakup given by the Corporate Debtor is for the first time in the reply and there is no supporting documents of the same.

18. From the above reply, it is very much clear that the Corporate Debtor owed at least a sum of Rs.6,42,966/- to the Operational Creditor. The admission of the Corporate Debtor and its default to pay part of the amount claimed by the Operational Creditor which is also above the threshold limit of Rs.1,00,000/- as on the date of filing, prompts us to admit this petition. We, therefore, pass the following orders.

O R D E R S

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, is hereby **admitted**.

ii) We hereby declare a moratorium and public announcement in accordance with Sections 13 and 15 of the I & B Code, 2016.

iii) Moratorium is declared for the purposes referred to in Section 14 of the Insolvency & Bankruptcy Code, 2016. The I.R.P. 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 any action under the Securitisation 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 rendered to the corporate debtor as may be specified shall not be terminated, suspended, or interrupted during the 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 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.

ix) The Operational Creditor has not proposed name of any Insolvency Resolution Professional. Therefore, as per the provisions of Section 16(3) (a) of the IBC, so, we appoint **Mr. Rajesh Kumar Agarwal, IRP** having Reg. No. **IBBI/IPA-001/IP-P01023/2017-2018/11722,** Mobile No. 9830201612, email ID. Rajesh521@yahoo.com act as Interim Resolution Professional (IRP). He shall file Form-2, and that no disciplinary proceedings are pending against him with the Board.

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x) **Mr. Rajesh Kumar Agarwal, IRP,** is hereby appointed as Interim Resolution Professional for ascertaining the particulars of creditors and convening a Committee of Creditors for evolving a resolution plan subject to production of written consent within one week from the date of receipt of this order.

xi) 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.

xii) The Operational Creditor/Applicant is directed to deposit **Rs.1,00,000/- (Rupees One Lakh only)** with the IRP appointed hereinabove within **three** days from this order. IRP can claim the preliminary expenses and fees subject to the approval by the CoC and after constitution of CoC.

19. Registry is hereby directed to communicate the order to the Operational Creditor, the Corporate Debtor, the I.R.P. and the jurisdictional Registrar of Companies by Speed Post as well as through email.

20. List the matter on **11/07/2022** for filing of **Progress Report**.

21. 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
Digitally signed by HARISH CHANDER SURI
Date: 2022.05.24 16:18:54 +05'30'

(Harish Chander Suri)
Member (Technical)

ROHIT KAPOOR
Digitally signed by ROHIT KAPOOR
Date: 2022.05.24 15:29:05 +05'30'

(Rohit Kapoor)
Member (Judicial)

Order signed on the 24th day of May, 2022

PJ