

**IN THE NATIONAL COMPANY LAW TRIBUNAL  
COURT No. V, MUMBAI BENCH**

**C.P. No. 720/I&B/2023**

Under section 8 & 9 of the IBC, 2016

In the matter of

**Refine Alloy Private Limited**

22/7, Manohar Pukur Road, Kolkata, WB -  
700029

**.... Petitioner / Operational Creditor**

V/s.

**Searock International Private Limited**

504, 5<sup>th</sup> Floor, Kshitij Building, Opp Andheri  
Sports Complex, Veera Desai Road, Andheri  
(West), Mumbai - 400053.

**.... Corporate Debtor**

**Order Dated: 23.02.2024**

**Coram:**

Hon'ble Reeta Kohli, Member (Judicial)

Hon'ble Madhu Sinha, Member (Technical)

**Appearances (Physically):**

For the Petitioner: Adv. Zulfiq Multani

For the Corporate Debtor: Counsel for the Respondent

**ORDER**

***Per: - Madhu Sinha, Member (Technical)***

1. This Company petition is filed by Refine Alloy Private Limited (hereinafter called "**the Petitioner**") seeking to initiate Corporate Insolvency Resolution Process (**CIRP**) against Searock International Private Limited (hereinafter called "**Corporate Debtor**") alleging that the Corporate debtor committed default in making payment to the Petitioner. This petition has been filed by invoking the provisions of Section 9 Insolvency and Bankruptcy Code (hereinafter called "**Code**") read with Rule 4 of Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016.
2. The present petition is filed before this Adjudicating Authority on the ground that the Corporate Debtor had failed to make payment of a sum of Rs. 3,23,98,539/- along with the future interest @12% P.a.

**The submissions by the Operational Creditor: -**

3. The Operational Creditor approached the Corporate Debtor for the purchase of Coal from the Corporate Debtor and had executed the 'Coal Sale and Purchase Agreement' dated 09.10.2019, bearing no. SRIPL/REFINE/2019-2020/002. Thereafter, the Operational Creditor awarded a purchase order dated 12.10.2019, bearing no. RAPL/SR/19-20/002 for 61,000MT of Indonesian steam coal for a total amount of Rs. 20,57,77,400/- in favour of the Corporate Debtor.
4. According to the Coal Sale and Purchase Agreement dated 09.10.2019, the Operational Creditor was required to pay an Earnest Money Deposit (EMD) equivalent to 30% of the contract price within 90 days of the Agreement i.e. by 07.01.2020. Thereafter, the Operational Creditor paid a total EMD of Rs.6,17,97,000/- to the Corporate Debtor by 02.01.2020. However,



after receiving the EMD from the Operational Creditor the Corporate Debtor vide letter dated 06.01.2020 informed the Operational Creditor that they would not be able to supply the coal to the Operational Creditor due to the COVID-19 pandemic and its problems in the international market.

5. Further, the Corporate Debtor vide letter dated 06.01.2020 acknowledged the receipt of the entire EMD of Rs. 6,17,97,000/-, and undertook to repay the EMD within 60 days i.e. on or before 06.03.2020, after adjusting the prior balance receivable from the Operational Creditor.
6. However, the Corporate Debtor had only refunded a sum of Rs.2,31,73,625/- and had adjusted a prior balance of Rs.1,37,73,693.04/- receivable from the Operational Creditor towards the supply of coal by the Corporate Debtor. The balance EMD of Rs. 2,48,49,682/- remains outstanding with the Corporate Debtor and the Corporate Debtor agreed to refund the balance EMD by 06.03.2020. However, failed to make the payment and thus, committed a default on 06.03.2020.
7. It is submitted that the Corporate Debtor on multiple occasions reassured the Operational Creditor about the refund of the balance EMD by giving balance confirmation dated 30.04.2022 and 31.03.2023 wherein the Corporate Debtor has acknowledge the debt of Rs. 2,48,49,682/-.
8. Thereafter, the Operational Creditor vide letter dated 23.06.2023 and 28.06.2023, sent reminders to the Corporate Debtor to repay the balance EMD. However, the Corporate Debtor failed to reply to the above letters and refrained from refunding the balance EMD amounting to Rs. 2,48,49,682/-. Therefore, due to the delay in the payment, the Operational Creditor was entitled to charge interest @12% p.a. from 01.01.2021 i.e. Rs. 75,48,857 as on 13.07.2023. The Corporate Debtor owes a total sum of Rs. 3,23,98,539/-.



9. Thereafter, the Operational Creditor issued the Demand Notice dated 13.07.2023, calling upon the Corporate Debtor for the payment of the outstanding dues of Rs. 3,23,98,539/-. The Corporate Debtor failed to respond to the said demand notice dated 13.07.2023 and failed to repay the outstanding dues of the Operational Creditor. Hence this Petition.

**Reply filed by the Corporate Debtor: -**

10. The Corporate Debtor had filed their Affidavit in Reply (“**Reply**”) and denied each and every statement, contention and allegation made by the Petitioner.
11. It is submitted that the Present Petition filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 is not maintainable and untenable in the eyes of law since the Petitioner has filed the present Petition for the recovery of the balance earnest money deposit (EMD) of Rs. 2,48,49,682/- along with the interest of Rs.75,48,857 .
12. The respondent has relied on the Judgement of the **Supreme Transport Organisation Private Limited Vs. Maharashtra Airport Development Company Limited** wherein the Hon’ble NCLAT upheld the Hon’ble NCLT’s dismissal Order on the ground that the EMD does not fall within the definition of the ‘Operational Debt’ under Section 5 (21) of the Insolvency and Bankruptcy Code 2016. Therefore, the Petition deserves to be dismissed.

**Findings:**

13. We have heard the Counsel for the parties and perused the documents available on the record.
14. From a perusal of the record, it is revealed that the Petitioner and the Respondent executed the Coal Sale and Purchase Agreement dated 09.10.2019 bearing no. SRIPL/REFINE/2019-2020/002.



Subsequently, the Petitioner awarded a purchase order dated 12.10.2019, bearing no. RAPL/SR/19-20/002 for 61,000MT of Indonesian steam coal for a total amount of Rs. 20,57,77,400/- in favour of the Corporate Debtor.

15. As per the terms of the Coal Sale and Purchase Agreement dated 09.10.2019, the Operational Creditor was required to pay an Earnest Money Deposit (EMD) equivalent to 30% of the contract price. The Operational Creditor paid a total EMD of Rs.6,17,97,000/- to the Corporate Debtor by 02.01.2020. However, The Corporate Debtor failed to supply the coal to the Operational Creditor due to the COVID-19 pandemic and its problems in the international market.
16. The Corporate Debtor vide letter dated 06.01.2020 has acknowledged the receipt of the EMD of Rs. 6,17,97,000/-, and undertook to repay the balance EMD within 60 days. The relevant extract is as under:

*“Therefore, on adjusting our prior balance receivable from you, we undertake to pay the balance EMD amount lying with us to you within a period of 60 days from the date of this letter i.e. on or before 06.03.2020.”*

17. However, the Respondent had only refunded a sum of Rs.2,31,73,625/- and had failed to make the payment of the balance EMD of Rs. 2,48,49,682/-. The Corporate Debtor agreed to refund the balance EMD by 06.03.2020.
18. The counsel for the Respondent raised the contention that the present Petition is not maintainable and deserves to be dismissed as the EMD does not fall within the definition of the ‘Operational Debt’ under Section 5 (21) of the Insolvency and Bankruptcy Code 2016.




19. Therefore, it is important to read the definition of Operational Debt to find out whether the amount claimed by the Operational Creditor falls within the definition of “Operational Debt”. Section 5(21) of the Code defines “Operational Debt” as under:

*“5(21) “operational debt” means **a claim in respect of the provision of goods or services** including employment or a debt in respect of the (payment) of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority;”*


20. It becomes clear from the reading of the above definition that the Operational Debt includes a claim in respect of the provision of goods or services. This includes those who receive goods or services from the Corporate Debtor and make advance payment for the same.
21. This bench further rely on the ***Hon’ble Supreme Court in the matter of M/s Consolidated Construction Consortium Limited v. M/s Hitro Energy Solutions Private Limited, Civil Appeal No. 2839 of 2020 (judgment dated February 4, 2022)***, wherein the Apex Court held that advance paid for receiving goods or services also comes within the ambit of “Operational Debt”. The relevant extracts of the judgement are as under:-

*“42 It is then that we come to the core of the dispute – while the appellant has argued that the debt is in the nature of an operational debt which makes them an operational creditor, the respondent has opposed this submission. The respondent’s submission, which was accepted by the NCLAT, **seeks to narrowly define***



**operational debt and operational creditors under the IBC to only include those who supply goods or services to a corporate debtor and exclude those who receive goods or services from the corporate debtor. For reasons which shall follow, we reject this argument.**

43 First, Section 5(21) defines ‘operational debt’ as a “claim in respect of the provision of goods or services”. **The operative requirement is that the claim must bear some nexus with a provision of goods or services, without specifying who is to be the supplier or receiver.** Such an interpretation is also supported by the observations in the BLRC Report, which specifies that operational debt is in relation to operational requirements of an entity. Second, Section 8(1) of the IBC read with Rule 5(1) and Form 3 of the 2016 Application Rules makes it abundantly clear that an operational creditor can issue a notice in relation to an operational debt either through a demand notice or an invoice. As such, the presence of an invoice (for having supplied goods or services) is not a *sine qua non*, since a demand notice can also be issued on the basis of other documents which prove the existence of the debt. This is made even more clear by Regulation 7(2)(b)(i) and (ii) of the CIRP Regulations 2016 which provides an operational creditor, seeking to claim an operational debt in a CIRP, an option between relying on a contract for the supply of goods and services with the corporate debtor or an invoice demanding payment for the goods and services supplied to the corporate debtor. While the latter indicates that the operational creditor should have supplied goods or services to the corporate debtor, **the former is broad enough to include all forms of contracts for the supply of goods and services between the**



***operational creditor and corporate debtor, including ones where the operational creditor may have been the receiver of goods or services from the corporate debtor.*** Finally, the judgment of this Court in *Pioneer Urban (supra)*, in comparing allottees in real estate projects to operational creditors, has noted that the latter do not receive any time value for their money as consideration but only provide it in exchange for goods or services. Indeed, the decision notes that “[e]xamples given of advance payments being made for turnkey projects and capital goods, where customisation and uniqueness of such goods are important by reason of which advance payments are made, are wholly inapposite as examples vis-à-vis advance payments made by allottees”. **Hence, this leaves no doubt that a debt which arises out of advance payment made to a corporate debtor for supply of goods or services would be considered as an operational debt.”**

22. In the present case the Applicant has entered into the Coal sale and Purchase Agreement dated 09.10.2019 and the Operational Creditor awarded a purchase order dated 12.10.2019 for supply of 61,000MT of Indonesian steam coal to the Petitioner for which he has submitted the advance Earnest Money Deposit (EMD) of Rs.6,17,97,000/- to the Corporate Debtor and the Corporate Debtor had also acknowledge the same vide its letter dated 06.01.2020. Hence, on the Strength of the above Judgment and the facts and circumstances of the present case the amount advanced made to the Corporate Debtor for supply of goods falls within the definition of the ‘Operational Debt’ under Section 5 (21) of the Insolvency and Bankruptcy Code 2016. Therefore, the contention of the Corporate Debtor does not survive.

23. This Bench further observes that the date of default mentioned in



the Part IV of the Company Petition is 06.03.2020 and the same is also reflected in the NeSL report annexed as 'Exhibit N' to the Company Petition. The Corporate Debtor has further admitted the claim vide balance confirmation dated 30.04.2022 and 31.03.2023. The present Petition is filed on 08.08.2023. Hence well within the period of limitation.

24. Further the Operational Creditor issued the Demand Notice dated 13.07.2023 for the payment of the outstanding dues however, the Corporate Debtor failed to respond to the said demand notice nor raised any dispute to the same. Therefore, we are of the considered view that the Petitioner has been able to establish that there is an existence of “**operational debt**” and “**default**” committed by the Corporate Debtor and an **absence of the Pre-Existing dispute** in this case.
25. This Bench is of the opinion that the Petition deserves to be admitted under Section 9 of the Code.
26. The Operational Creditor has proposed the Resolution Professional in Part III of the Company Petition.
27. Accordingly, the above Company Petition is '**admitted**' by passing the following:

**ORDER**

- a. The above Company Petition No. 720/IBC/MB/2023 is hereby allowed and initiation of Corporate Insolvency Resolution Process (CIRP) is ordered against **Searock International Private Limited**
- b. **Mr. Sanjay Mehra**, having registration No. IBBI/IPA-001/IP-P-01818/2019-2020/12784, having email Id- sanjay.mehra64@gmail.com, having address - B-11, Third Floor, Geetanjali Enclave, Opp Aurbindo College, New Delhi, National Capital Territory of Delhi, 110017 having Mobile Number- +919871692592, is hereby appointed as Interim Resolution Professional to conduct the Insolvency Resolution Process as mentioned under the Insolvency & Bankruptcy Code, 2016.



- c. The Operational Creditor shall deposit an amount of Rs. 5 Lakhs towards the initial CIRP costs by way of a Demand Draft drawn in favor of the Interim Resolution Professional appointed herein, immediately upon communication of this Order.
- d. That this Bench hereby prohibits 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; transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein; 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; the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the Corporate Debtor.
- e. That the supply of essential goods or services to the Corporate Debtor, if continuing, shall not be terminated or suspended or interrupted during moratorium period.
- f. That the provisions of sub-section (1) of Section 14 shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.
- g. That the order of moratorium shall have effect from the date of pronouncement of this order till the completion of the corporate insolvency resolution process or until this Bench approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, as the case may be.



- h. That the public announcement of the corporate insolvency resolution process shall be made immediately as specified under section 13 of the Code.
- i. During the CIRP period, the management of the corporate debtor will vest in the IRP/RP. The suspended directors and employees of the corporate debtor shall provide all documents in their possession and furnish every information in their knowledge to the IRP/RP.
- j. Registry shall send a copy of this order to the Registrar of Companies, Pune, for updating the Master Data of the Corporate Debtor.

Accordingly, CP 720 of 2023 is **admitted**.

SD/-

**Madhu Sinha**

**Member (Technical)**

/Abhay/

SD/-

**Reeta Kohli**

**Member (Judicial)**