**IN THE NATIONAL COMPANY LAW TRIBUNAL**
**KOLKATA BENCH**
**(Court No. 1)**
**KOLKATA**

**C.P (IB) No. 1741/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.*

*In the matter of:*

**Matashree Mercantile Private Limited** [CIN U51109WB2006PTC108551], a company incorporated under the Companies Act, 1956, having its registered office at 6, Dr. Meghnad Saha Sarani, 2nd Floor, Kolkata – 700 026.

*...Operational Creditor*

*Versus*

**Sesa International Limited [CIN** U51909WB2002PLC095369**],** a company incorporated under the Companies Act, 1956, having its registered office at 31 Shakespeare Sarani (Jasmine Tower) , 6th Floor, Room No. 611 Kolkata – 700 017.

*...Corporate Debtor*

**Date of Hearing: 02.11.2022**
**Date of pronouncing the order: 03.01.2023**

***Coram:***

| | | |
|---|---|---|
| ***Shri Rohit Kapoor*** | : | ***Member (Judicial)*** |
| ***Shri Balraj Joshi*** | : | ***Member (Technical)*** |

**Appearances (through Video Conferencing/physical hearing)**

| | | |
|---|---|---|
| For Operational Creditor | : | Mr. Ranit Basu, Adv.<br>Ms. Namrata Basu, Adv. |
| For Corporate Debtor | : | Mr. Jishnu Chowdhury, Adv.<br>Ms. Noelle Banerjee, Adv.<br>Mr. Dipak Dey, Adv.<br>Mr. Dipanjan Dey, Adv.<br>Ms. Shreyasi Mannan, Adv. |

## ORDER

***Per Balraj Joshi, Member (Technical)***

***1.*** The Court convened *via* hybrid mode.

***2.*** This is a Company Petition filed under section 9 of the Insolvency and Bankruptcy Code, 2016 ***('the Code')*** read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 by Mr. Arun Kumar Mandal, Director ***('Operational Creditor')***, duly authorised *vide* Board Resolution dated 30 September, 2019[1] for initiation of Corporate Insolvency Resolution Process ***('CIRP')*** against Sesa International Limited (***'Corporate Debtor')***.

***3.*** The present Petition was filed on ***17 October, 2019*** before this Adjudicating Authority. The total amount claimed in default is Rs.17,73,04,657.53/- (Rupees Seventeen Crore Seventy Three Lakh Four Thousand Six Hundred Fifty Seven Fifty Three Paisa only) plus interest @24% per annum till 01 October, 2019.

***4.*** In part II of the Petition the authorized share capital of the Corporate Debtor is Rs.11,50,00,000/- (Rupees Eleven Crore Fifty Lakh only) with subscribed share capital of Rs.11,20,05,700/- (Rupees Eleven Crore Twenty Lakh Five Thousand Seven Hundred only).

***5.*** ***Submissions by the Ld. Counsel appearing on behalf of the Operational Creditor***.

*5.1* The Operational Creditor deals in the business of Iron Ore and Ferro Alloys materials, and came to know that the Corporate Debtor is in the possession of 1,00,000 MT of Iron Ores Fines. Subsequently, the Operational Creditor approached the Corporate Debtor for the purchase of the materials. After mutual agreements and negotiations the Operational Creditor agreed to purchase 1,00,000 MT of Iron Ore Fines. A sale of contract dated 22 February, 2019 was entered into between the parties.

*5.2* The Operational Creditor also made an initial payment of Rs.15,00,00,000/- (Rupees Fifteen Crore only) in two tranches to the Corporate Debtor for the supply of the materials.

[1]Annexure – C of the Petition, at Page 26.

| *Date* | *Amount* |
|---|---|
| 25 February, 2019 | Rs.10,00,00,000/- |
| 06 March, 2019 | Rs.5,00,00,000/- |

*5.3* As per clause 12 of the contract *[at Page 31 of the Petition]*, the Corporate Debtor should aim to supply the materials within three months of the advance payment date but in any case, delivery must be completed within six months of receipt of full advance of Rs.15,00,00,000/- (Rupees Fifteen Crore only) by the Operational Creditor. It was also agreed that, a cheque of Rs.20,00,00,000/- (Rupees Twenty Crore only) to be issued by the Corporate Debtor and the said cheque could be encashed upon non-supply of the materials.

*5.4* On the failure of the Corporate Debtor to supply the material within three months of the initial payment, the officials of the Operational Creditor contacted the Corporate Debtor to inquire about the shipment of the materials, to which the Corporate Debtor informed that they is shortage of supplies with them. They also requested the Operational Creditor to terminate the sale contract dated 22 February, 2019.

*5.5* At the time of termination of the sale contract, the Corporate Debtor made a refund of the nominal amount of Rs.1,50,00,000/- (Rupees One Crore Fifty Lakh only). Thereafter, several requests were made by the Operational Creditor to the Corporate Debtor to refund the whole amount but the Corporate Debtor failed to do so. However, as soon as the Operational Creditor mentioned to deposit the cheque, the Corporate Debtor maliciously in its letter dated 07 August, 2019 requested the Operational Creditor to take the supply of the materials.

*5.6* After due discussion and intimation to the director of the Corporate Debtor, the Operational Creditor deposited the cheque on 23 August, 2019 for encashment but to the utter dismay of the Operational Creditor, the cheque was dishonored with the remarks *'Exceeds Arrangement'*.

*5.7* Till date only one small payment has been made even after several reminders, however, the Corporate Debtor started acting in a malicious manner after demand of the outstanding and discussions of deposit of the cheque. In the said circumstances the Operational Creditor was constrained to issue demand notice dated September 16, 2019 in Form 3, claiming principal amount of Rs 13,50,00,000/ (Rupees Thirteen Crore Fifty Lakh only) along with Interest @24% p.a along with penalty inter-alia, calling upon the Corporate Debtor to make payment of the outstanding Principal sum. The said notice was duly received by the Corporate Debtor on 17 September, 2019.

*5.8* Subsequent to the same, the Corporate Debtor issued a letter dated 26 September, 2019, being a purported reply to the statutory notice. The Operational Creditor was shocked by the allegations made in the letter. The reply is an afterthought and has been issued with mala fide intention and with a view to avoid making payment to the Operational Creditor.

*5.9* The Corporate Debtor in its purported reply, inter-alia, denies any termination of the Contract in an unexplainable manner. Further the Corporate Debtor very conveniently shifts the blame for not lifting the material upon the Operational Creditor in total disregard of the fact that the contract was terminated and an amount was refunded and no communication as to the readiness of the material was ever given.

***6. Submissions by the Ld. Counsel appearing on behalf of the Corporate Debtor*.**

*6.1* The Application suffers from gross suppression of material facts and, is ex-facie not maintainable in law. There is also no compliance with the mandatory provisions of section 9(3)(b) and 9(3)(c) of the Code.

*6.2* The Application is suffering from pre-existing dispute, which has not been resolved by the Operational Creditor. The Corporate Debtor had previously informed the Operational Creditor about the clearance of the balance amount for the supply of materials.

*6.3* The Corporate Debtor has never shown their inability to supply the goods nor terminated the Agreement dated 22 February, 2019. As per clause 23 of the Agreement, it is clear that the said Agreement cannot be altered by mean of a supplementary agreement.

*6.4* The Corporate Debtor neither breached the terms and conditions of the Agreement nor informed the Operational Creditor to terminate the arrangement between the parties. On the contrary, the Corporate Debtor asked the Operational Creditor to lift the materials from the site of the Corporate Debtor in Orissa, the same was acknowledged by the Operational Creditor.

*6.5* The Operational Creditor has failed to maintain the agreed terms and conditions, which show the malafide intention of the Operational Creditor to take undue advantage from the Corporate Debtor. Further in clause 12 (iv) of Contract of Sale dated 22 February, 2019 the rate was provisionally decided between the parties @ Rs. 2000/MT and the same were agreed to be negotiated at the time of delivery.

*6.6* Further, on negotiation between the parties it was concluded that the price of goods to Rs. 1900/ MT plus GST. The reduction of Rs. 100/ MT from the provisional price and further discount of Rs.50/ MT, as provided under the clause 12 of the contract of sale.

*6.7* The Corporate Debtor further informed the Operational Creditor *vide* letter dated 07.08.2019 which was acknowledged by the Operational Creditor. Vide the said letter the Corporate Debtor has informed the Operational Creditor to give program for the payment of the balance amount, along with lifting of materials.

***Analysis & Findings***

***7.*** We have heard the Ld. Counsel appearing on behalf of the Operational Creditor and the Ld. Counsel appearing on behalf of the Corporate Debtor and perused the record.

***8.*** The Ld. Counsel appearing on behalf of the Operational Creditor contended that the Corporate Debtor had requested the Operational Creditor to terminate the Contract of Sale dated 22 February, 2022 because there were running short of supply. Further, after the termination of the Contract the Operational Creditor requested to the Corporate Debtor for the refund of the advance. However, be that as it may, there are no correspondences are on record which would substantiate the same. Hence, this contention of the Operational Creditor cannot be considered.

***9.*** Further, as per the Contract of Sale dated 22 February, 2022, clause 12 *(at page 30 of the Petition)* states that;

*'the said goods shall be delivered by the seller* (i.e., the Corporate Debtor) *to the buyer* (i.e., the Operational Credito*r) within six months from the date of advance payments of Rs.1,50,00,000/- (Rupees One Crore Fifty Lakh only).*

...

*Final price to be negotiated at the time of delivery.'*

***10.*** From the record at page 06 of the Petition, it is evident that the Operational Creditor has made an advance of Rs.15,00,00,000/- (Rupees Fifteen Crore only) in two tranches to the Corporate Debtor on the following dates.

| ***Date*** | ***Amount*** |
|---|---|
| 25 February, 2019 | Rs.10,00,00,000/- |
| 06 March, 2019 | Rs.5,00,00,000/- |

***11.*** Hence, as per the contract the last date for the delivery of goods would be ***06 September, 2019***, i.e., six months from 06 March, 2019, the date on which full advance money was received by the Corporate Debtor. We would also like to bring attention to the letter dated 07 August, 2019 *(at page 36 of the Petition),* where the Corporate Debtor has categorically requested the Operational Creditor to give them the name of the transporter for lifting the material. And the Operational Creditor may also appoint a third party for the inspection of the the material.

***12.*** Further, upon perusal of the letter, it is apparent that after negotiation between the parties the final price was agreed at Rs.1900/- PMT plus GST, ex – mines Odisha and exclusive of Rs.50/- PMT discount for advance payment. Hence, the total price for 100000 MT of iron ore fines was Rs.19.95 Crore, out of which the Operational Creditor had paid a sum of Rs.15,00,00,000/- (Rupees Fifteen Crore only) as an advance payment. It is also pertinent to mention that after negotiation of the final rate a sum of Rs.1,50,00,000/- (Rupees One Crore Fifty

Lakh only) was refunded by the Corporate Debtor to the Operational Creditor in three tranches.

***13.*** in pursuance of the letter dated 07 August, 2019 of the Corporate Debtor, the Operational Creditor replied *vide* letter dated 10 September, 2019, where in they have stated that the letter dated 07 August, 2019 of the Corporate Debtor is an after thought, because the corporate debtor terminated the Contract, as there were unable to supply the materials. However, with no documents on record, we are unable to ascertain such fact. Whereas, on the contract, the letter dated 07 August, 2019 of the Corporate Debtor reflects the willingness of the Corporate Debtor to provide the material.

***14.*** In view of the above facts and circumstances, the following issue arises;

a. Whether the advance payment by the Operational Creditor to the corporate debtor for supply of goods or services would be considered as an operational debt?
b. Is there any default by the Corporate Debtor?

***15.*** However, the first issues has been settled by the Hon'ble Supreme Court *vide* its landmark judgment in ***M/s Consolidated Construction Consortium Limited v. M/s Hitro Energy Solutions Private Limited***[2]**,** wherein the Supreme Court has stated that;

'*50.2. Second, Section 8(1) IBC read with Rule 5(1) and Form 3 of the 2016 Application Rules makes it abundant lyclear 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 Regulations 7(2)(b)() and (il) of the 2016 CIRP Regulations which provide 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*

[2] (2022) 7 SCC 164

*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****.'*

***16.*** With respect to the default, there are not enough documents on record which shows that the Corporate Debtor failed to supply the material, rather as per the letter dated letter dated 07 August, 2019 of the Corporate Debtor it reflects a failure on the part of the Operational Creditor. Hence, C.P **(IB) No. 1741/KB/2019** is ***rejected.*** Needless to say that the Operational Creditor is at liberty to resort to other remedies that may be available to it under any other law.

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

**Balraj Joshi**
**Member (Technical)**

**Rohit Kapoor**
**Member (Judicial)**

The order is pronounced on 03rd day of January, 2023

*SA [LRA]*