

**IN THE NATIONAL COMPANY LAW TRIBUNAL  
DIVISION BENCH, COURT NO. II  
KOLKATA**

**Company Petition (IB) No. 58/KB/2023**

***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:**

**M/s. Sunrise Movers**

**... Applicant/ Operational Creditor.**

***Versus***

**Rashmi Cement Limited**

**... Respondent/ Corporate Debtor.**

**Date of Pronouncement: April 01, 2024.**

**CORAM:**

**SMT. BIDISHA BANERJEE, HON'BLE MEMBER (JUDICIAL)  
SHRI D. ARVIND, HON'BLE MEMBER (TECHNICAL)**

**APPEARANCE:**

**For the Applicant:**

**Mr. Vinay Kumar Jain, Adv.  
Ms. Shruti Shukla, Adv.  
Ms. Pallavi Tikariha, Adv.**

**For the Respondent:**

**Mr. Ratnanko Banerji, Sr. Adv.  
Mr. Shaunak Mitra, Adv.  
Mr. Siddhartha Sharma, Adv.  
Mr. Rishav Dutt, Adv.  
Mrs. Debarati Das, Adv.**

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**ORDER**

***Per: Bidisha Banerjee, Member (Judicial)***

1. This Court congregated through hybrid mode.
2. Heard the Learned Counsels, Mr. Vinay Kumar Jain along with Ms. Shruti Shukla and Ms. Pallavi Tikariha appearing on behalf of the Applicant and the Learned Senior Counsel, Mr. Ratnanko Banerji along with the Learned Counsels Mr. Shaunak Mitra, Mr. Siddhartha Sharma, Mr. Rishav Dutt, and Mrs. Debarati Das appearing on behalf of the Respondent.
3. This instant application is preferred under Section 9 of the Insolvency and Bankruptcy Code, 2016, for brevity "I&B Code" by the M/s. Sunrise Movers, after this, referred to as the "**Applicant**"/ "**Operational Creditor**" against **Rashmi Cement Limited**, after this, referred to as "**Respondent**" / "**Corporate Debtor**" seeking direction from this Adjudicating Authority to initiate Corporate Insolvency Resolution Process, (for brevity "CIR Process") in respect of the Corporate Debtor.
4. The amount claimed to be in default is **Rs. 1,17,84,051/-** such amount becomes due on 02.01.2023 which includes the outstanding principal amount of Rs. 1,03,49,456/- and compound interest at the rate of 3 times the bank rate till 02.01.2023, amounting to Rs. 14,34,595/-. The date of default is claimed on **24.06.2022**.

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**Factual Conspectus:**

- 5.** The Operational Creditor is a registered MSME engaged in the proprietorship business of services for the transportation of coal and the Corporate Debtor is a public limited company.
- 6.** The Corporate Debtor issued Service Order No. C321363024 for transportation of coal from Magadh to RCL Jhargram on 05.10.2021, annexed at Pages 27-30 to the application and under the terms of the service, the Operational Creditor rendered services to the Corporate Debtor.
- 7.** The Applicant issued four invoices, annexed at Pages 31-34 to the application, out of which some part payment has been made by the Corporate Debtor. The total outstanding liability of the principal amount claimed due and payable to the Applicant is Rs. 1,03,49,456/-.
- 8.** Despite repeated reminders and follow ups for release the outstanding payment, the Corporate Debtor has neglected to make the outstanding payment. Being aggrieved by the action of the Corporate Debtor, a statutory notice for demanding the outstanding payment under Section 8 of the I&B Code, 2016 has been issued by the applicant on 02.01.2023, annexed at Pages 40-48 to the application. The Reply to the Demand Notice dated 02.01.2023, has been received by the applicant from the respondent on 12.01.2023, annexed at Pages 49-57 to the application.

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**Applicant's Submissions:**

9. The Learned counsel for the applicant submits that the respondent is liable to pay 1,17,84,051/- comprising of principle amount of Rs. 1,03,49,456/- and compound interest amounting to Rs. 14,34,595/-.
10. It is further submitted that the last payment made by the respondent was on 10/05/2022. The applicant is a registered MSME, and as per Section 15 of the MSMED Act, 2006, the due date for payment is appointed as 45 days from the date of the invoices. Therefore, the date of default is claimed as on 24/06/2022.
11. It is alleged that Reply to the Demand Notice dated 02.01.2023, is discontenting the claim of the demand notice sans any proof to substantiate such discontentment.

**Respondent's Submission per contra:**

12. The Learned Senior Counsel for the respondent would contend that the applicant has clandestinely suppressed material facts and the pre-existence of dispute between the parties owing to the breach of covenants of the Service Order being no. C321363024 dated 05.10.2021 issued by the applicant. It is claimed that the applicant has placed four invoices annexed at Pages 31-34 to the application. Three out of four invoices placed on record by the applicant do not pertain to the Service Order in dispute. The invoices which are not pertain to the Service Order placed on record by the applicant are as follows:

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<b>SN</b>	<b>Invoice Number</b>	<b>Date</b>	<b>Invoice Amount</b>
<b>1.</b>	21-22/02/373	18.01.2022	Rs. 2,01,00,643/-
<b>2.</b>	21-22/03/384	20.02.2022	Rs. 12,11,546/-
<b>3.</b>	22-23/01/059	10.05.2022	Rs. 16,57,636/-

- 13.** The Learned Senior Counsel for the Respondent has further contended that one invoice arising out of Service Order Bearing Reference No. C321363024 dated 5<sup>th</sup> October 2021 i.e., invoice bearing reference number as 22-22/01/369 dated 14.01.2022 for a cumulative sum of Rs. 54,43,578/- which fails to meet the minimum pecuniary threshold of Rs. One Crore as prescribed under the I&B Code.
- 14.** Further it is contended that the applicant has wilfully suppressed the fact regarding issuance of another service order bearing reference number C321364073 dated 09.12.2021 as the applicant has breached the terms of the said Service Order dated 09.12.2021 and has become liable for damages stipulated in the said service order dated 09.12.2021 annexed at Page 28 to the Reply Affidavit.
- 15.** It is submitted that the three invoices dated 18.01.2022, 20.02.2022 and 10.05.2022 placed on record claiming as Operational debt upon which a sum of Rs. 1,55,00,000/- has already paid to the applicant. The proof of payment in the form of relevant bank statement is annexed to the Reply Affidavit at Pages 29-30. The following transactions are as under:

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<b>SN</b>	<b>RTGS/Transaction Number</b>	<b>Date</b>	<b>Amount (Rs.)</b>
<b>1.</b>	SBIN221348348509	14.12.2021	50,00,000/-
<b>2.</b>	SBIN521362254145	28.12.2021	80,00,000/-
<b>3.</b>	SBIN522111463598	21.04.2022	25,00,000/-
<b>Total</b>			<b>1,55,00,000/-</b>

- 16.** Further, it is claimed that specific quantity of specified coal is required for the plant to operate on most optimal and efficient basis and owing to the aforesaid reasons, penalty clause was specifically incorporated in the service order.
- 17.** It is submitted that there is an existence of dispute and the fact of short supply of coal in contravention to of terms of the service order to the tune of 829 MT of coal was duly admitted by the applicant's representative during the meeting held on 14<sup>th</sup> July 2022.
- 18.** It is further submitted that the copies of the reports of quality of lifting at Magadh issued by Cotecna Inspection India Private Limited clearly reveal that the quality of the coal supplied by the Applicant was also not in conformity with the service orders issued by the respondent and annexed at pages 35-42 to the Reply Affidavit.
- 19.** It is contended that the Respondent has further issued legal notice dated 04<sup>th</sup> May 2023 invoking arbitration under Section 21 of the Arbitration and Conciliation Act, 1996 for adjudication of disputes between the parties of Rs. 6,76,57,603/- annexed at Pages 71-82 as Annexure 'J' to the Reply Affidavit.

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**In Counter, the Applicant submits:**

- 20.** That, objection raised in the Reply is frivolous and misconceived in nature.
- 21.** That, the Respondent issued Service Order dated 05.10.2021 being No. C321363024 for transportation of coal from Magadh to Rashmi Cement Limited, Jhargram. There is no dispute that the applicant has rendered the service and issued the invoices towards the Corporate Debtor. There was an outstanding liability of principal amount of Rs. 1,03,49,456/- with interest due and payable.
- 22.** The Learned Counsel at hearing has submitted that there is no shortage in quality, and it was beyond the scope of the applicant. It was well addressed to the respondent by email dated 18/10/2022 that the petitioner transported coal from Magadh to Balumath by road thereafter the coal was loaded to the railway wagons at Balumath and was covered with tarpaulin and was provide an escort. Thus, the Applicant's entire operation was to load coal from mines and then load them in rakes and the same was carried out under the direct supervision of respondent's employees.

**Analysis and finding:**

- 23.** It is a discernible fact that:
- i.** Service Order No. C321363024 was issued by the Corporate Debtor on 05.01.2021 for transportation of coal from Magadh to RCL Jhargram.

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- ii.** the Applicant issued invoices on 14.01.2022, 18.01.2022, 20.01.2022 and 10.05.2022.
  - iii.** Demand Notice under Section 8 of the Code issued by the Applicant on 02.01.2023.
  - iv.** Reply to the Demand Notice issued by the Corporate Debtor on 12.01.2023 raising the dispute regarding the quantity of goods and services.
- 24.** We find that Reply to the Demand Notice has been issued within the stipulated time wherein the Corporate Debtor raised the dispute regarding the quantity of dispute. The extract of the Reply is reproduced hereunder:

*“3. It is stated that during the ordinary course of business, you approached our Client and made an offer with numerous representations and assurances for obtaining an order for transportation of **50,000 MT of coal from Magadh to our Client's plant at Jhargram.***

***4. Based upon your representations and assurances and believing on the credentials claimed by you, our Client duly placed Service Order bearing No. C321363024 dated 5th October 2021 for a net consideration of 2,15,35,000/- (Rupees Two Crore Fifteen Lakh and Thirty Five Thousand only). It is imperative to state here that the terms of the service were duly stated in the said Service Order dated 5th October 2021 (hereinafter referred to as the 'Service Order).***

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5. *It is imperative to state here that it was always understood and agreed to between the parties that you shall be liable to supply the entire quantity of 50,000 MT of coal and accordingly, express contractual covenants were recorded in the Service Order in order to reflect the intention and understanding of the parties.*

6. *At this juncture, it is imperative to note here that Clause 14 of the Service Order expressly records the understanding and agreement between the parties and the same is reproduced herein for your ready reference:*

*“14. Penalty: You have to transport deliver the coal within validity days as mentioned in the Sale Order issued by Central Coalfields Limited from its issue date of Sale Order. In case of failure to lift & transport the material due to negligence from your side. We shall deduct Rs. 200 PMT and their charges which is applicable by CCL for un-lifted quantity within the validity of Sale Order from your account.”*

7. *It is also pertinent to mention here that owing to the industrial requirements of our Client, specific quantity of specified coal is required for the plant to operate on the most optimal and efficient basis. It is stated that owing to the aforesaid reasons, a penalty clause was specifically incorporated in the Service Order under Clause 14, as aforesaid, as well as under the Terms of Payment clause of the Service Order. It is further imperative to state here that in order to ensure that specified quantity of coal is received at the plant of our Client, our Client further incorporated in the Service Order that you are free to put your own agency or representative for inspection at our Client's end.*

8. *It is stated that while you started transporting the coal from Magadh in terms of the Service Order, you failed to*

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*supply the specified quantity of coal, i.e., 50,000 MT coal to our Client's plant at Jhargram in accordance with the Service Order and thus breached the express terms of the Service Order.*

*9. It is a matter of record maintained by our Client that a total quantity of 829 MT of Coal has not been supplied by you in terms of the Service Order. Consequently, in light of your breach of the express terms of the Service Order, our Client duly notified you through verbal communications leading to physical meeting on 14th July 2022 and subsequent email communications dated 18th July 2022 and 23rd September 2022, which you have purposely and with mala fide suppressed in order to give effect to your nefarious objectives.*

*10. Vide the aforesaid emails dated 18th July 2022 and 23rd September 2022, our Client has expressly notified you regarding existence of dispute in accordance with Section 8 (2) (a) of the Insolvency and Bankruptcy Code, 2016 and has further called upon you to make payment of a sum of Rs. 57,21,162.18/- (Rupees Fifty Seven Lakh Twenty One Thousand One Hundred and Sixty Two and Eighteen paisa only) in accordance with the penalty clause stipulated under Clause 14 read with clause under the payment terms of the Service Order. However, it is a matter of record that you have failed to remit the said penal payment of Rs. 57,21,162.18/- (Rupees Fifty Seven Lakh Twenty One Thousand One Hundred and Sixty Two and Eighteen paisa only) to our Client despite clear non-performance of the Service Order on your end. It is noteworthy to mention here that in order to maintain commercial relations between the parties, our Client did not claim any damages due to your breach and non-performance of the Service Order.*

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**11. It is yet imperative to state here that existence of dispute and the fact that you failed to supply 829 MT of coal in terms of the Service Order was duly admitted by your representative in the meeting held on 14th July 2022 and the same is duly reflective from your own email communication of 18th July 2022 to our Client wherein you have categorically stated that you had made a request for 1% shortage tolerance for the Service Order in dispute during the physical meeting with our Client's representative and your representative further prayed for 2% shortage tolerance. The relevant extracts of your email communication dated 18th July 2022 is reproduced herein below for your ready reference:**

*“As per the last meeting on 14.07.22 at your HO in Kolkata with Shri Sanjeev Agarwal, it was agreed that quantity shortage tolerance of 1% on the entire quantity will be allowed by your good self. However, we had again clarified to Shri Agarwal that the shortage, if any, was beyond our control & scope, and hence at least 2% shortage tolerance be considered. He assured us that the matter will be finalized after further discussions with the higher management.”*

- 25.** We have noted the contention of the Respondent claiming that the three invoices dated 18.01.2022, 20.02.2022 and 10.05.2022 have not been arisen from the Service Order dated 05.10.2021. Only one invoice dated 14.01.2022 is arisen from the Service Order in question. Further it is claimed that the three invoices dated 18.01.2022, 20.02.2022 and 10.05.2022 placed on record claiming as Operational debt upon which a sum of Rs. 1,55,00,000/- has already paid to the applicant through RTGS on 14.12.2021, 28.12.2021 and 21.04.2022. We

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have noted that the invoices were issued in 2022, however, the payment was made on 2021-2022 prior to the issuance of invoices, which is not reliable to us.

- 26.** However, noting the contention placed in Reply to the Demand Notice, we would infer that there is a pre-existing dispute, and such has been raised as Section 9(5)(ii)(d) of the Code envisages and that was duly received by the Operational Creditor.
- 27.** Section 5(6) of the Code defines a "dispute" as inclusive of a suit or arbitration proceedings relating to (a) the existence of the amount of debt; (b) **the quality of goods or service**; or (c) **the breach of a representation or warranty**. The Hon'ble Apex Court in *Mobilox Innovations Private Limited Vs. Kirusa Software Private Limited* reported at **MANU/SC/1196/2017: (2018)1SCC353**, held that:

*“40. It is clear, therefore, **that once the operational creditor has filed an application, which is otherwise complete, the adjudicating authority must reject the application Under Section 9(5)(2)(d) if notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility.** It is clear that **such notice must bring to the notice of the operational creditor the "existence" of a dispute or the fact that a suit or arbitration proceeding relating to a dispute is pending between the parties.** Therefore, all that the adjudicating authority is to see at this stage is whether there is a plausible contention which requires further investigation and that the "dispute" is not a patently feeble legal*

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*argument or an assertion of fact unsupported by evidence. It is important to separate the grain from the chaff and to reject a spurious defence which is mere bluster. However, in doing so, the Court does not need to be satisfied that the defence is likely to succeed. The Court does not at this stage examine the merits of the dispute except to the extent indicated above. So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application.”*

**(Emphasis Added)**

- 28.** In terms of the foregoing discussions, we are of the considered opinion that there was a “Pre-existing Dispute” as on the date of filing of this application and so long as a dispute exists in fact relating to payment between the parties that would fall within the **inclusive** definition contained in Section 5(6) of the Code the application is liable to be rejected.
- 29.** Hence, we **dismiss** this Application sans further probe in the merits of the dispute.
- 30.** The **Registry of this Adjudicating Authority** shall serve a copy of this Order upon the Insolvency and Bankruptcy Board of India (IBBI) for their record and also upon the Registrar of Companies (ROC), to whom the company(ies) are registered with, by all available means. The said Registrar of Companies shall send a compliance report in this regard to the Registry of this Court within seven days from the date of receipt of a copy of this order.

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- 31.** Certified copy of this order, if applied for with the Registry, be supplied to the parties, subject to compliance with all requisite formalities.

**D. Arvind  
Member (Technical)**

**Bidisha Banerjee  
Member (Judicial)**

**This order is signed on 01<sup>st</sup> Day of April, 2024.**

Bose, R. K. [LRA]  
Tiwari, V. [LRA]