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BEFORE THE ADJUDICATING AUTHORITY
NATIONAL COMPANY LAW TRIBUNAL
INDORE BENCH at AHMEDABAD
COURT 1

TP 3 of 2019 [CP(IB) 202 of 2018]

Coram: **Hon'ble Ms. HARIHAR PRAKASH CHATURVEDI, MEMBER (JUDICIAL)**
Hon'ble Mr. PRASANTA KUMAR MOHANTY, MEMBER (TECHNICAL)

ATTENDANCE-CUM-ORDER SHEET OF THE HEARING OF INDORE BENCH OF THE NATIONAL COMPANY LAW TRIBUNAL ON 20.03.2020

Name of the Company: Oriental Coal Corporation
V/s
Decore Exxoils Pvt Ltd

Section: Section 9 of insolvency & Bankruptcy Code

S.NO.	NAME (CAPITAL LETTERS)	DESIGNATION	REPRESENTATION	SIGNATURE
1.				
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OR[illegible]

The case is fixed for pronouncement of orde[illegible]

The Order is pronounced in the open court, [illegible] heet.

(PRASANTA KUMAR MOHANTY)
MEMBER (TECHNICAL)

([illegible] RAKASH CHATURVEDI)
[illegible] BER (JUDICIAL)

Dated this the 20th day of March, 2020.

VC

BEFORE THE ADJUDICATING AUTHORITY
(NATIONAL COMPANY LAW TRIBUNAL)
INDORE BENCH at AHMEDABAD

C.P. (I.B.) No. 202/9/NCLT/AHM/2018

Coram: Hon'ble Mr. Harihar Prakash Chaturvedi, Member (Judicial)
Hon'ble Mr. Prasanta Kumar Mohanty, Member (Technical)

<u>In the matter of:</u>

M/s. Oriental Coal Corporation,
Having its registered office at:
65, East High Court Road,
Ramdaspeth,
Nagpur – 440010,
Maharashtra.

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

Versus

M/s. Decore Exxoils Pvt. Ltd.
Office Block 1A, 5th Floor,
DB City, Corporate Park, Arera Hills,
Opp. M.P. Nagar, Zone-1,
Bhopal – 462016,
Madhya Pradesh, India.

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

<u>Appearance:</u>

Ms. Natasha Dhruman Shah, Advocate, for the Petitioner.
Mr. N.S. Tahilramani along with Mr. Manu Sainani, Advocates for the Respondent.

Order delivered on 20th March, 2020.

ORDER

[Per: Shri Harihar Prakash Chaturvedi, Member (Judicial)]

1. The present I.B. Petition is preferred by M/s. Oriental Coal Corporation being an Operational-Creditor under Section 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 6 of the Insolvency and Bankruptcy Rules, 2016 (herein after referred to as a "Code") seeking for initiation of Corporate Insolvency Resolution Process ("CIRP" in Short) in respect of the Corporate-Debtor-Company namely, M/s. Decore Exxoils Pvt. Ltd. It is stated that the Operational Creditor, M/s. Oriental Coal Corporation is a proprietorship firm of Mr. Animesh R. Agarwal being a Proprietor. The Operational Creditor is stated to be involved in 'Steam Coal' business. The office of Operational Creditor firm is situated at: 65, East High Court Road, Ramdaspeth, Nagpur – 440010, Maharashtra., India.

2. The brief particulars about the Respondent/Corporate Debtor Company, namely M/s. Decore Exxoils Pvt. Ltd. are that the company was incorporated on 25.11.1997 with the CIN: U15141MP1997PTC012474 and is said to be engaged in the business of food products.

3. It is informed that the Corporate-Debtor-Company is having nominal share capital of Rs.22,00,00,000/- (Rupees

Twenty-Two Crores) and the paid-up share capital of the company is Rs.21,57,20,000/- (Rupees Twenty-One Crore Fifty-Seven Lakh Twenty Thousand). The registered office of the Corporate Debtor Company is situated at: Office Block1 A, 5th Floor, DB City, Corporate Park, Area Hills, Opp. M.P. Nagar, Zone-1, Bhopal – 462016, Madhya Pradesh, India.

4. It is submitted that the Corporate-Debtor-Company, i.e. M/s. Decore Exxoils Pvt. Ltd. made request to the Petitioner, i.e. M/s. Oriental Coal Corporation for supply of **'Steam Coal,'** for which, the Corporate-Debtor also sent a Purchase-Order email dated 28.10.2013 for its **Mandideep** Unit and another order dated 24.09.2014 for supply the Steam Coal meant for its **Nagpur** Unit. The same was supplied by the Petitioner as per the terms and conditions of the purchase Orders/ Invoices.

5. It is submitted that the material – **'Steam Coal'** was being delivered by the Petitioner/Operational-Creditor to the Corporate-Debtor from time to time by generating corresponding invoices and form No. 27C of the Income Tax was also obtained from the Corporate Debtor against the invoices.

6. It is submitted that the Operational-Creditor supplied the goods, i.e. 'Steam Coal' to the Corporate Debtor in the

financial year 2011-12 and continued to supply till the month of November 2014.

7. It is alleged that the Corporate-Debtor delayed the payments of goods since the initial supply by the Operational-Creditor. The Corporate-Debtor made only some part payment of Rs.15,00,000/- (Rupees Fifteen Lakh) on **25.11.2014 that is too after a strict/rigorous regular follow-up of the Operational-Creditor and then after no other payment has been made by the Corporate-Debtor**.

8. It is contended that due to overwhelming delays in payments, the Operational-Creditor started to suffer the shortages of cash flow and working capital. The Operational-Creditor made many efforts for getting payments from the Corporate-Debtor by means of personal visits, verbal and by phone calls, but the Corporate-Debtor failed in making balance payments to the Operational-Creditor.

9. It is further stated that an email confirmation of the outstanding payable was received by the Petitioner/Operational Creditor on **31.05.2015**. **(The authenticity thereof is being disputed** by the Respondent/Corporate Debtor in the present matter).

10. Thereafter, the Operational-Creditor issued a demand notice to the Corporate-Debtor on 13.03.2018 in the prescribed Form 3, under Section 8 of the Insolvency and Bankruptcy Code, 2016, a copy of the same has been annexed with the present I.B. Petition.

11. It is submitted that the said demand notice was sent to the Corporate-Debtor through the speed post on 20.03.2018 but the same is stated to have been returned undelivered on 23.03.2018 with such remark **"concerned official not available."** The Petitioner has annexed a copy of speed post acknowledgement along with fast track report of the notice(s) returned undelivered with the present I.B. Petition. A copy of notice was further sent to the Corporate Office and Factory/Works address of the corporate debtor. The same is also reported to have been returned undelivered. The copies of speed post acknowledgement along with the track report of the notice returned undelivered have been annexed with the present petition.

12. The Petitioner submits that the total amount of debts which has been defaulted is to the tune of **Rs.19,93,848/- (Rupees Nineteen Lakhs Ninety-Three Thousand Eight Hundred Forty-Eight)** as on 12.03.2018. Out of which,

a. Rs.9,63,808/- (Rupees Nine Lakh Sixty-Three Thousand Eight Hundred Eight) is the principal amount receivable towards **the issued invoices**.

b. Rs.10,30,040/- (Rupees Ten Lakh Thirty Thousand Forty) is the amount **receivable towards the interest on delayed payments outstanding on issued invoices**.

13. The petitioner furnished the details of invoice-wise and date wise amount in respect of the Corporate-Debtor, which are described as under:-

Sr.	**Invoice No.**	**Amount (Rs.)**	**Invoice Date**
1	69(Invoice-1)	15,66,482/-	15.12.2013
2	47(Invoice-2)	6,79,993/-	19.12.2014

14. In response to the present I.B. Petition, the Respondent/Corporate Debtor, i.e. M/s. Decore Exxoils Pvt. Ltd. filed its reply in which, the Respondent contends that the Petitioner has submitted untrue facts and suppressed the correct facts. It is alleged that the instant petition suffers from ***Suggetio-falsi and Suppresso-Veri*** and deserves to be dismissed.

15. It is averred that the **present petition is primarily time-barred hence the petition is not maintainable** before this Court.

16. It is contended that that the Corporate Debtor made a last payment on 28.05.2014 and thereafter there was no transaction at all and hence, the said claim is clearly barred by limitation.

17. The Corporate-Debtor further contends about raising dispute on the quality of steam coal supplied. Earlier, it procured goods for its Mandideep and Nagpur unit but there were no issues with regard to its quality because whenever, the quality was found poor, the Corporate-Debtor used to verbally inform the Operational-Creditor and used to raise debit notes and thus the issues used to get resolve. However, during the month of November 2014, the Petitioner supplied coal of 234.28 MT, out of which, four lots totalling to 69.52 MT of steam coal was identified **of much deteriorated quality** and **contained non-inflammable particles**. It is contended that the total value of such rejected coal was **Rs.5,05,282/-.** It is submitted that earlier on 24.11.2014, the Corporate Debtor made an RTGS of Rs.15,00,000/-, while, the Corporate Debtor had an outstanding of only Rs.1,36,985/-, **thus such excess paid amount of Rs.13,63,015/- was re-credited to the account of Corporate Debtor.**

18. It is stated that the Corporate Debtor later on received coal worth 234.28 MT including the rejected quality which was billed to Rs.16,95,627/- leaving outstanding of Rs.3,32,612/- against rejected value of Rs.5,05,282/- as mentioned above. However, the request of Corporate Debtor replaced the coal of poor quality was ignored by the Petitioner, thus, compelling the Respondent to reject the coal and stop further payment.

19. It is submitted that the Corporate Debtor issued last Purchase Order for which the Petitioner had issued invoice No.69 dated 14.11.2013. As per the statement produced by operational creditor, the total outstanding as on 31.03.2014 is Rs.1631,152/-, thereafter, the Respondent has made payment of Rs.10=00 Lakh and the last payment of Rs.2,00,000/- was made by the Respondent on 28.05.2014 as such total outstanding remains of Mandideep Unit Rs.6,31,152/- against which, Rs.1,72,670/- was to be credited from Nagpur Unit which Operational Creditor has not given any credit. Further, Respondent has raised debit note of Rs.4,58,482/- as such if above two amounts credited into the account of Corporate Debtor then nothing can be found due and payable by the Respondent.

20. It is submitted that in order to substantiate Respondent's version of supply of goods of poor quality by the Petitioner, the Respondent got done coal analysis test from a certified lab. The report thereof has been enclosed and marked as Annexure WS-1.

21. The corporate debtor by filing an additional document has provided a copy of debit note dated 16.11.2015 raised by it, which has been made towards deduction of amount on account of inferior quality of 419.805 MT coal supplied. During the period of June 2014 to March 2014. Such debit note is supported by a copy of coal analysis report that reflects that the steam coal supplied in question, and the subject matter of present IB petition have been found of inferior quality. As per the report such lab tests were carried on 06.01.2014 which goes to show that there exists some pre-existing dispute between the petitioner the present operational creditor and the corporate debtor with regard to inferior quality of coal supplied.

22. It is also a matter of record that the Petitioner could not be able to produce acknowledgement of service of the **statutory demand notice of Section 8 of the I.B. Code**. The present petition and the petitioner has stated that although it sent to the registered office of the

company through a speed post. However, the same came back undelivered with a remark, **"concerned official not available."** Hence, the petitioners took ~~a~~ Such plea that ~~such~~ it tantamount to avoidance of accepting the service of demand notice. Hence, it is to be treated as deemed service. In addition to the above, the Corporate Debtor has submitted certain documents with its reply/objection which includes **debit note dated 24.03.2017** (WS-I) which is also much prior to the issuance of demand notice. The Learned Petitioner Counsel made an attempt to dispute the validity of such debit note because as per the petitioner, the same was never communicated to it and has been first time brought to its notice by way of raising objection to the present I.B. Petition. Hence, it should be treated as an after thought plea. However, it may be seen that the Corporate Debtor filed some additional documents in addition to its debit note, which includes the certificate of Coal Analysis dated 03.11.2014, 08.11.2014, 09.11.2014 and 07.11.2014 etc. which raise a doubt about standard and quality of the steam coal supplied to the Corporate Debtor. Hence, this Adjudicating Authority under the discipline of the I.B. Code is not expected to adjudicate such issue of disputed facts or to deal with such controversy while disposing of the present I.B. Petition.

23. Moreover, in addition to the above, the Corporate Debtor has further disputed the authenticity and validity of a balance confirmation letter dated 05.08.2015 which is said to have been communicated to the Petitioner through an email by an officer Mr. Devkar Rage. It is contended that the Corporate Debtor Company neither directed nor authorised Mr. Devkar Rage sent such confirmation of balance. Further Mr. Devkar Rage at present is not working in the Corporate Debtor Company and is not available for confirmation of such facts that in what capacity and on and on whose instruction he has sent such email to the Petitioner.

24. In support of its contention, the Corporate Debtor has filed an affidavit of its Director Mr. Rajiv Chaturvedi who has deposed that Mr. Devkar Rage was appointed as a Chief Manager (Cost Analysis) only on 01.08.2015, while, he is said to have sent such balance confirmation email very promptly on 05.08.2015. Such attracts serious controversy being disputed question of facts on authenticity and validity of such email. Hence, such cannot be treated as conclusive document of confirming the balance nor such letter/email can be purported to be a valid acknowledgement of debt liability under the provision of Section 18 of the Indian Limitation Act.

25. The Hon'ble NCLAT in its decision in the matter of ***C. Shivakumar Reddy Vs. Vs. Dena Bank*** decided on 18.12.2019 has pleased to hold that even confirming of the loan in the annual balance sheet of the Corporate Debtor Company cannot be treated as acknowledgement of loan under Section 18 of the Limitation Act. For the convenience, the same Para is reproduced here in below:

"10. Similar issue fell for consideration before the Hon'ble Supreme Court in "Gaurav Hargovindbhai Dave Vs. Asset Reconstruction Company (India) Ltd. & Anr. In Civil Appeal No.4952 of 2019. The said case was disposed of on 18th September, 2019. In the said case, the Hon'ble Supreme Court noticed that the account of Respondent No.2 was declared NPA on 21st July, 2011 and subsequently, the State Bank of India filed two Original Applications before the Debts Recovery Tribunal in the year 2012 for recovery of the total debt of Rs.50 crores. In the meantime, when the State Bank of India assigned the debt to Asset Reconstruction Company (India) Limited on 28th March, 2014, the Debts Recovery Tribunal vide judgment dated 10th June, 2016 held that the waiver was not maintainable. In the said case, this Appellate Tribunal by its judgment held that the waiver was not maintainable. In the said case, this Appellate Tribunal by its judgment held that the limitation for application under Section 7 will be counted only from 1st December, 2016, which is the date on which the I&B Code brought into force. The Appellate Tribunal noted the NCLT Decision that the limitation period for suit was 12 years, their being a mortgage. However, Hon'ble Supreme Court taking into consideration the judgment in "B.K. Education Services Private Limited Vs.

Parag Gupta and Associates – MANU/SC/1160/2018" held that the limitation started from the date of default, i.e., 21st July, 2011 when the account was declared NPA.

11. Admittedly, the 'Corporate Debtor' the defaulted in making payments on 20th September, 2013 and the Dena Bank declared the account as NPA on 31st December, 2013. Therefore, we hold that the application filed under Section 7 of the I&B Code by the Bank is barred by limitation."

26. That apart, by following above stated preposition, we are of the view that the last payment received from the Corporate Debtor is 28.05.2014. Even assuming so, certain payment towards liability was made by the Corporate Debtor through RTGS on 24.11.2014 **(which is being seriously disputed by the Corporate Debtor being excess over payment made out of Rs.15 Lakhs and further Rs.13,63,015/- is said to have been reverted back in the account of the Corporate Debtor, However, the remaining balance of Rs.13,68,985/- is said to be still due and payable to the Petitioner by the Corporate Debtor).** Such being controversial facts would not serve the purpose of the present I.B. Petition to cover the limitation because the present petition is filed before, this Bench on 09.05.2018. The Legal position in this regard had been well settled by the Hon'ble Supreme Court in the matter of ***Vashdeo R. Bhojwani Vs. Abhyudaya Co-operative Bank Ltd. & Ors. Civil***

Appeal No. 11020 of 2018, Gaurav Hargovindbhai Dave Vs. Asset Reconstruction Company (India) Ltd.* and Ors. decided on 18.09.2019 and *Sagar Sharma Vs. Phoenix ARC (P.) Ltd*.** wherein, their Lordships have pleased to reiterate its stand as ruled earlier in its decision in ***B.K. Educational Services (P.) Ltd. Vs. Parag Gupta. Hence, it is held that the present I.B. Petition is hit by Limitation Act, thus, not maintainable.

27. We further examined the issue of the Pre-Existing Dispute in the present matter. It is evident that the Corporate Debtor has raised Debit Note on 16.11.2015 and also got tested the quality of steam coal supplied. Further, the Petitioner in its petition in Colum part4 (1)(b) Bullet Point No.(7) has stated that it made quite delayed payment on **25.11.2014**. **Such payment was received after rigorous follow up by the Operational Creditor. Thereafter, the Corporate Debtor did not even make a single payment to the Operational Creditor**. Therefore, such raise *prima-facie* doubt about some pending dispute with regard to the quality of goods and or on existing dispute on terms and condition payment thereof, which are undisputedly of prior to issuance of the demand notice and filing of the present petition.

28. The Hon'ble Supreme Court came to examine in its landmark decision in the matter of ***Mobilox Innovations Vs. Kirusha Software Limited*** and held that the I.B. Code is not meant for enforcement of recovery of debts. Its main aim and object is to bring resolution for the Corporate Debtor and not otherwise. Therefore, if there is some dispute on payments or dues of the debts and **defence taken by the Corporate Debtor seems to be bonafide. Thus, it is for the competent court of law to decide the same and this Adjudicating Authority is neither expected to adjudicate the same nor the CIRP under the I.B. Code can be triggered**. The CIRP can be triggered in respect of Corporate Debtor only in situation where defence taken by the Corporate Debtor is found ***spurious and feeble***. Which, in our view is not the case here as the Corporate Debtor has furnished the debit note and as well as copy of Coal Analysis Report based on lab test of coal supplied and the same was found of poor and inferior quality which are *prima-facie* evidence of dispute and such disputed question of facts are required to be agitated before a proper forum of Law, as it is out of purview of the I.B. Code to be adjudicated by this Adjudicating Authority.

29. For the sake of convenience, the relevant Para(s) of the Hon'ble Supreme Court's decision in the matter of

Mobilox Innovations Pvt. Ltd. Vs. Kirusha software are being reproduced herein below:

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34. Therefore, the adjudicating authority, when examining an application under Section 9 of the Act will have to determine:

(i) Whether there is an "operational debt" as defined exceeding Rs.1 Lakh? (See Section of the Act)

(ii) Whether the documentary evidence furnished with the application shows that the aforesaid debt is due and payable and has not yet been paid? and

(iii) Whether there is existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceedings filed before the receipt of the demand notice of the unpaid operational debt in relation to such dispute?

If any of the aforesaid conditions is lacking, the application would have to be rejected Apart from the above, the adjudicating authority must follow the mandate of Section 9, as outlined above, and in particular the mandate of Section 9(5) of the Act.

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51. 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)(2X) ***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 being 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 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 not spurious, hypothetical or illusory, the adjudicating authority has to reject the application."***

30. By following the above stated decision and other rulings of the Hon'ble Supreme Court and Hon'ble NCLAT, it is found that the present case that the Corporate Debtor has also furnished a copy of coal analysis report which reflects that the goods in question and subject matter of the present I.B. Petition were found of inferior quality. Such lab test to examine the quality of the coal supplied was carried out on 06.01.2014. Thus, it is evident that there is some "Pre-Existing-Dispute" between the Petitioner/ Operational-Creditor and Respondent/ Corporate-Debtor with regard to inferior quality of coal supplied. Hence, by following the above stated decision(s) of the Hon'ble Supreme Court, the present I.B. Petition is not maintainable.

31. Further, the present appeal is found to be filed beyond three (03) years from the date of default or the last payment received because, the Petitioner, itself in 'Part-4,' Column 1(b) of the present petition has pleaded that the Corporate Debtor made the last payment of Rs.15=00 Lakhs to the petitioner on 25.11.2014, that is too after a rigorous follow up by the Operational Creditor with the Respondent/ Corporate Debtor that means that there was some pre-existing dispute as well as the present petition is filed on 09.05.2018, which is beyond the prescribed limitation of three (03) years.

32. For the aforesaid reason, the present I.B. Petition is not maintainable on the ground of pre-existing dispute as well as being hit by limitation. Hence, is liable to be rejected and accordingly it is rejected.

No order as to costs.

(Prasanta Kumar Mohanty) **Adjudicating Authority &** **Member (Technical)**	**(Harihar Prakash Chaturvedi)** **Adjudicating Authority &** **Member (Judicial)**

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