IN THE NATIONAL COMPANY LAW TRIBUNL
KOLKATA BENCH (Court-II)
KOKLKATA

Rst. A. (IB) No.3/KB/2023
C.P. (IB) No.1876/KB/2019

In the matter of:

An application under Section 60 (5) of the Code;

And

In the matter of:

Shark Mines & Minerals Private Limited (CIN No. U13209OR2006PTC008932), A/62, BDA Duplex Housing Colony, Palaspalli, Bhubaneswar – 751020, Odisha;

… … … Applicant/Operational Creditor

Versus

Maithan Ispat Limited (CIN No. U27109WB2003PLC096854), 16, Strand Road, Diamond Heritage, 14th Floor, Room No.1412, Kolkata – 700001, West Bengal;

… … … Corporate Debtor

Date of pronouncement of the Order: 5th March, 2024

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

Appearance (via video conferencing/physically)
Mr. Rohit Keshri, Adv.] For the Applicant
Mr. Udit Agrawal, Adv.]

Mr. Shaunak Mitra, Adv.] For the Corporate Debtor
Ms. Debdatta Ray Chaudhury, Adv.]

O R D E R

Per: Bidisha Banerjee, Member (Judicial)

1. This Court convened through video conferencing.

2. Heard the Ld. Counsel for the parties at length.

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3. <u>Facts in a nutshell:</u>

3.1. The applicant Shark Mines & Minerals Private Limited, the Operational Creditor (OC in short) has filed C.P. (IB) No.1876/KB/2019 against Maithan Ispat Limited, the Corporate Debtor (CD in short) for initiation of Corporate Insolvency Resolution Process (CIRP).

3.2. The C.P. (IB) No.1876/KB/2019 was filed by the OC, Shark Mines & Minerals Private Limited against the CD Maithan Ispat Limited for a total debt of Rs.9,53,02,840/- including of the principal debt amount of Rs.8,83,49,703/- and interest calculated at Rs.69,53,137/-, **as on 31.08.2019** (the **date of default**)

3.3. The C.P. (IB) No.1876/KB/2019 was first listed before this Tribunal on 08.11.2019 when OC was directed to serve the notice by speed [post and e-mail. The matter listed for further consideration on 02.01.2020.

3.4. The matter appeared on 02.01.2020, 18.02.2020, 23.04.2020, 25.11.2020 and 12.01.2021. The CD failed to filed its reply.

3.5. Hence, on 12.01.2021, the CD having further failed to file the reply a last opportunity of two weeks' time was given to the CD to file its reply subject to payment of cost of Rs.25,000/-.

3.6. The CD neither paid any cost to the Application nor filed its reply within the said two weeks. Hence, the opportunity to file its reply was closed on 26.01.2021.

3.7. The matter was fixed for hearing on 23.02.2021 and reposted for hearing on 15.07.2021, wherein the CD offered for settlement of the operational dues, to the Applicant.

3.8. After several rounds of negotiations and discussions between the parties, a settlement agreement was executed on 02.09.2021 for a total sum of Rs.9,53,02,840/- inclusive of the principal debt amount of Rs.8,83,49,703/- and interest of Rs.69,53,137/- with future date of payment of operational debt and supply of Raw materials to compensate.

3.9. Clause 3 of the Settlement Agreement provides as under:

"*That towards settlement of all claims and disputes, as well as, any past or present amounts which the First Party has or may claim to be due or payable from the Second Party, the Second Party has agreed to pay the sum of Rs.25,00,000/- on 02.09.2021 and Rs. 25,00,000/- on 03.09.2021. For the remaining sum of principal amount, the Seconds Party shall supply around 40000 tonnes of Iron Ore, lying in MV Crusher (Mesco Steel Ltd.) at Village Kolha Barpada, Badbil, Keonjhar District, at current market rate per ton depending upon the market rate fluctuation so as to adjust total outstanding sum. That any surplus material shall be returned by the First Party to the Second Party after the adjustment of due amount. The said goods should be supplied within a period of two months from the date of execution of this agreement.*"

Alternatively, Second Party shall pay the balance sum in five equal instalments within a period of two months from date of execution of this agreement.

3.10. Clause 6 of the Settlement Agreement further provides as under:

"*That in case of **ANY DEFAULT IN PAYMENT AS ABOVE-MENTIONED, the settlement agreement shall become Null and Void and the Party of First Part shall be free to revive the CP (IB) No. 1876/KB/2019 from the same stage where it was settled** / pursue / start afresh appropriate legal proceedings against Party of Second Part before any appropriate Forum/Court/Tribunal to realize the settlement amount with any accrued interest thereof.*"

3.11. In compliance f the terms of settlement and the assurance given by the CD, the main petition was withdrawn by the OC on 02.09.2021. The order, however, does not mention of any liberty to the OC to revive the main petition in case of any failure to act in the terms of settlement Agreement.

3.12. The Applicant claims that the Ld. Counsel for the OC was not able to complete his submission on 02.09.2021 when he was appearing virtually. The matter was adjourned due to internet default in the NCLT Building Premises and no order

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was pronounced in the open Court on 02.09.2021. The Advocate of the Petitioner was surprised to notice that the instant application was dismissed as withdrawn. The Applicant in order to rectify the order dated 02.09.2021 and to restore the main company petition filed an application being M.A. (IB)/10/2021.

3.13. That after execution of the Settlement Agreement, the CD had defaulted in its payment to the OC and/or defaulted in supply of goods. The actual outstanding amount of Rs.1,59,94,396/- excluding interest @18% from 01.01.2022 till the actual rate of payment is still due and payable by the CD to the OC.

3.14. That the CD from time and again, since filing of the application has delayed the proceeding. It has not adhered to the order of the Court for payment of cost of Rs.25,000/-. The conduct of the CD makes it clear that it is unable to clear the debt in spite of acknowledging the debt by way of Settlement Agreement.

3.15. Thereafter, the matter was called and taken up on several occasion, such as 24.01.2022, 25.02.2022, 01.04.2022, 22.04.2022, 13.06.2022, 11.07.2022, 02.08.2022, 12.09.2022, 28.10.2022 and 15.12.2022 when the CD had time and again sought time, but had failed and neglected to complete the payment.

3.16. That when the matter was heard on 20.01.2023, the Adjudicating Authority was of the view that M.A. (IB)/10/KB/2021 was not maintainable and granted liberty to file he fresh application with appropriate relief. Emboldened thereby the instant application praying restoration of main company petition due to default in honouring the terms of the settlement agreement dated 02.09.2021 is preferred and revival/restoration of the main petition C.P. (IB) No.1876/KB/2019 at the stage it was left, to its original status is sought for.

4. **<u>Per contra, the Respondent CD has submitted as under:</u>**

4.1. That the settlement agreement stipulates only payment of the principal amount as per the books of the petitioner and there is no question of payment of interest.

4.2. The Respondent made payments and supplied goods in the following manner:

Sl. No.	Date	Particulars
1.	02.09.2021	Rs.25,00,000/- paid through RTGS

2.	30.11.2021	Rs.25,00,000/- paid through RTGS
3.	30.05.2022	30,752.720 MT Iron Ore Fines was supplied at the prevalent market rate of Rs.2,100 per MT [A copy of the tax invoice dated 30.05.2022 is at Annexure “C”, page 19 of the Reply Affidavit].

4.3. That the petitioner has suppressed the above payments and supply of goods in its application. However, after the Respondent place on record, the relevant details and document pertaining to payments and supply of goods in its reply affidavit, the same was not disputed by the Petitioner at its rejoinder.

4.4. That the OC till date has not paid GST of above Iron Ore material, which is more than 1.25 crore (approximately). As such, the restoration application is liable to be dismissed for the reasons set out.

5. It is vehemently denied by the respondents that the Restoration application is maintainable. It is argued that-

5.1. The main company petition came to be dismissed as withdrawn on the strength of submissions made by the petitioner that the matter was settled out of Court as evident from the order dated 2nd September, 2021 as in Annexure “B” at page 18 of the Reply Affidavit.

5.2. The settlement agreement was never brought on record by the petitioner and the settlement terms were never incorporated in the order dated 2nd September, 2021, whereby the company petition was dismissed as withdrawn.

5.3. The petitioner was not granted liberty to approach this Tribunal in the case of default, if at all. Reliance is placed on judgments of the Hon’ble National Company Law Appellate Tribunal in C.A. (AT) Ins. No.92 of 2021, *Krishna Garg & Anr. V. Pioneer Fabricators Pvt. Ltd.* (attached wherewith at page 6 and 7); *C.A. (AT) Ins. No.294 of 2021 SRLK Enterprise LLP v. Jalan Transolutions (India) Ltd.* (attached herewith at page8 to 11); *C.A. (AT) Ins. No.36 of 2023Permali Wallace Pvt. Ltd. V. Narbada Forest Industries Pvt. Ltd.* (attached herewith at pages 12 to 14) *and also C/P/ (IB) No.1013 (PB) of 2020*

M/s. Finsbury Global FZE v. Uttam Sucrotech International Pvt. Ltd in this regard.

5.4. That the instant application does not lie since any outstanding amount arising out of the settlement agreement cannot and does not fall under the purview of "Operational Debt", and, therefore, the application must necessarily fail.

5.5. The default, if any, gives rise to a fresh cause of action and the petitioner filed the instant application only to circumvent the threshold amount of Rs.1 crore. The petitioner cannot be permitted to convert proceedings under the IBC to recovery proceedings.

5.6. That there is no "default" and the company petition should not and/or cannot be restored. The petitioner has deliberately suppressed the payments and supply of goods made by the respondent in the application.

5.7. A joint reading of Recital C and Clause 3 would show that the settlement agreement stipulates payment of Rs.7,28,73,519.81/- (principal amount) by payment of Rs.50,00,000/- and thereafter, by supply of around 40,000 MT Iron Ore depending on market fluctuation in prices. By making payments and supplying goods as above, the Respondent has squarely discharged its obligations under the settlement agreement. The instant application for restoration be dismissed.

6. We have considered the rival contentions and perused records.

7. **<u>Our revelation:</u>**

7.1. The order dated 02.09.2021 does not record any liberty granted to the OC to revive the CP on failure of the CD to discharge its obligation in terms of the settlement agreement entered into on 02.09.2021 i.e., payment in terms of Clause 3 thereof:

- **(a)** Rs. 25,00,000/- on 02.09.2021
- **(b)** Rs. 25,00,000/- on 03.09.2021
- **(c)** Supply of 40000 Tonnes of Iron Ore etc.

7.2. Inarguably and irrefutably the CD has made payments/supply against (a), (b) and (c) above, in the following manner:

Sl. No.	Date	Particulars
1.	02.09.2021	Rs.25,00,000/- paid through RTGS
2.	30.11.2021	Rs.25,00,000/- paid through RTGS
3.	30.05.2022	30,752.720 MT Iron Ore Fines was supplied at the prevalent market rate of Rs.2,100 per MT [A copy of the tax invoice dated 30.05.2022 is at Annexure "C", page 19 of the Reply Affidavit].

7.3. The above payments have not been denied or disputed by the OC. The amount due and payable now may not be above Rs. 1 crore if the value of Iron ore Fines has come down considerately.

8. **Our inference:**

8.1. The payments and supply, in terms of the settlement, already stands appropriated by OC.

8.2. The alleged default amount, if any, is not yet ascertained, hence it cannot be asserted with conviction that threshold to maintain this application, is met.

8.3. The threshold even if met the application for restoration, without the liberty being there in the dismissal order, is not maintainable.

8.4. The CP even if restored, would not be entertainable as this is not a forum for adjudicating on the quantum of recovery, as the amount which is purportedly recoverable, is not yet ascertained.

9. **Conclusion:**

9.1. In the aforesaid backdrop, the Restoration Application stands rejected.

10. Urgent Certified copy of this order, if applied for, be supplied to the parties, upon compliance of all requisite formalities.

D. Arvind
Member (Technical)

Bidisha Banerjee
Member (Judicial)

This Order signed on this, the 5th day of March, 2024.

Sayon [Steno]