



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

Company Petition (IB) No. 114/KB/2022

*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:

Sri Jaiprakash Jaiswal, the Sole Proprietor of OM Traders

... Applicant/ Operational Creditor.

Verses

APL Metals Limited

(CIN: L24224WB1948PLC017455)

... Respondent/ Corporate Debtor.

Date of Pronouncement: January 08, 2024.

CORAM:

SMT. BIDISHA BANERJEE, MEMBER (JUDICIAL)

SHRI D. ARVIND, MEMBER (TECHNICAL)

APPEARANCES:

For the Operational Creditor:

Mr. Shaunak Mitra, Adv.,

Mr. Kanishk Kejriwal, Adv.,

Mr. Y. V. Deora, Adv.

For the Corporate Debtor:

Mr. Ratnanko Banerji, Sr. Adv.,

Mr. Pramit Bag, Adv.,

Mr. Rishav Banerjee, Adv.,

Mr. Patita Paban Bishwal, Adv.,

Ms. Suranjana Chatterjee, Adv.

ORDER

Per: Bidisha Banerjee, Member (Judicial):

1. This Court assembled through a blended mode.

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

Company Petition (IB) No. 114/KB/2022

2. Heard the Learned Counsels for Applicant and the Learned Senior Counsel for the Respondent.

Factual Backdrop:

3. The instant Application is filed under Section 9 of the Insolvency and Bankruptcy Code, 2016, for brevity "I&B Code" by one **Sri Jaiprakash Jaiswal**, the Sole Proprietor of OM Traders, hereinafter referred to as "Applicant"/ "Operational Creditor" against **APL Metals Limited**, hereinafter referred to as "Respondent"/ "Corporate Debtor" seeking the direction from this Adjudicating Authority to initiate the Corporate Insolvency Resolution Process, for brevity "CIR Process" in respect to the Corporate Debtor herein.
4. The Operational Creditor is engaged in the business of sale of lead ingots and the Corporate Debtor is a manufacturer and supplier of lead and lead oxides and requires lead ingots in its usual course of business.
5. The total amount of Debt claimed to be in default is of Rs. 2,14,99,995.73, which includes Rs. 2,08,62,129/- as the principal amount and interest calculated at the rate of 18% per annum, being an amount of Rs. 6,37,866.73/- as on 28.02.2022. the default occurred on 24.11.2021, 25.11.2021, 27.11.2021, 30.11.2021, 01.12.2021, 03.12.2021, 04.12.2021, 22.12.2021, 23.12.2021, 24.12.2021 that are the respective dates when the invoices were raised upon by the Corporate Debtor.
6. The Demand Notice in Form – 3 dated 01.03.2022, was duly served upon the Corporate Debtor on 02.03.2022 by the Applicant, annexed as Letter "I" to the Application. However, no reply to the said notice has been served upon the Operational Creditor.

Applicant's Contention:

7. The Learned Counsel, Mr. Shaunak Mitra appeared on behalf the Applicant submitted that in the month of November, 2021, the Corporate Debtor

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

Company Petition (IB) No. 114/KB/2022

approached the Operational Creditor for supply of lead ingots. It was inter alia agreed upon between the parties that the Corporate Debtor would place purchase orders upon the Operational Creditor from time to time as per its requirements. The Corporate Debtor placed the Truck for lifting the materials through its nominated transporter M/s A.K. Goods Carrier. The Operational Creditor would thereafter raise invoices upon the Corporate Debtor. Upon receipt of the invoice, the Corporate Debtor would be under an obligation to make payment as per the terms of the Purchase Order. Transactions have continued in the said manner.

8. The Learned Counsel, Mr. Mitra for the Applicant would further submit that the Corporate Debtor had placed six number of purchase orders upon the operational creditor and supply of materials was to be made at the rates duly mentioned in the respective purchase orders, annexed as Letter “B” to the Application, which are as follows:

- a)* BM-012/21-22 dated 23.11.2021.
- b)* PM-167/21-22 dated 23.11.2021.
- c)* PM-170/21-22 dated 24.11.2021.
- d)* PM 186/21-22 dated 25.11.2021.
- e)* PM-197/21-22 dated 28.11.2021.
- f)* PM 211/21-22 dated 03.12.2021.

9. Further, it is contended that upon the receipt of the Purchase Orders, the Applicant delivered the materials contained in the purchase order. The Copies of the Lorry Receipts evidencing the Delivery of materials as stipulated in the purchase orders are annexed at Letter “C” to the Application in substantiation thereof.

10. The Learned Counsel would assert that the goods so delivered by the Applicant were duly accepted by the Respondent without raising any objection of dispute relating to quality or quantity. The Applicant had duly raised invoices upon the Respondent on 24.11.2021, 25.11.2021, 27.11.2021, 30.11.2021, 01.12.2021, 03.12.2021, 04.12.2021, 22.12.2021, 23.12.2021, 24.12.2021 and the invoices served upon the Corporate Debtor by the Operational Creditor were duly received

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

Company Petition (IB) No. 114/KB/2022

and accepted by the Operational Creditor without any demur. The Copies of the invoices are annexed as Letter “D” to the Application.

11. It is further claimed that the Corporate Debtor has made some part payment pursuant to the invoices served upon the Corporate Debtor. However, even after the expiry of the time stipulated for making payment, the Corporate Debtor failed and neglected to make payment of the amount due and payable. The Operational Creditor had requested the Corporate Debtor to pay the outstanding dues and amount payable but, the Corporate Debtor has failed or neglected to do so.
12. Hence, this Application has been preferred by the Operational Creditor.

Respondent’s submissions per contra:

13. Per contra, the Learned Senior Counsel, Mr. Ratnanko Banerji who appeared on behalf of the Respondent, would submit in the course of arguments that the Applicant along with its Group entities were supplying lead ingots for a long period of time to the Respondent. The Applicant has two group entities, i.e., A-One Enterprises and N.V. ALUMINIUM CAST PRIVATE LIMITED, and the Jaiswal Family are the Directors of the Applicant and also the proprietor/ partner of the related entities. It is claimed that one Mamta Jaiswal, a member of the Jaiswal Family is the proprietor of A-One Enterprises and one Niraj Jaiswal and one Shikha Jaiswal are the Directors of the N.V. ALUMINIUM CAST PRIVATE LIMITED.
14. The Learned Senior Counsel, Mr. Banerji would submit that the invoices dated November 24, 2021 till December 24, 2021 and are purportedly raised against the purchase orders placed in the months of November and December, 2021. It is alleged that on December 07, 2021 and on various subsequent dates, search and seizure operation was conducted by the Investigating Wing, Calcutta of the Income Tax Department, Ministry of Finance, Government of India, under Section 132 of the Income Tax Act, 1961 in the residence as well as the office premises of the corporate debtor.

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

Company Petition (IB) No. 114/KB/2022

- 15.** It is contended that in the course of the said search operation, an issue of bogus purchase was raised by the Income Tax authorities. A consequential survey was also conducted in the premises of the operational creditor in relation to the said issue. An assessment order was passed by the Assistant Commissioner of Income Tax, Circle-3 (3), Kolkata, on December 30, 2022, a copy whereof is annexed at page 4 of the supplementary affidavit filed by the corporate debtor dated February 9, 2023.
- 16.** Further, it is claimed that a perusal of the said assessment order would reveal that the issue of bogus purchase with regard to Jaiprakash Jaiswal in relation to the financial year 2020-21 is stated in paragraph 5 of the said order (page 5 of the supplementary affidavit) whereby bills to the tune of Rs. 30,64,70,741/- was in issue. The issue of evasion of GST was also raised in the said order at paragraph 12 (page 10 of the supplementary affidavit) and portions of the show cause notice dated December 26, 2022 and the corporate debtor was asked to show cause as to why the purchase amount mentioned therein should not be treated as bogus and that in case of failure to give satisfactory reply, the same would be treated to tax by adding the same to the total income of the assessee, as has been set out in paragraph 16 at pages 11 and 12 of the supplementary affidavit.
- 17.** Further, it is submitted that the name of the operational creditor finds mention in the second row of the tabular chart (page 14 of the supplementary affidavit) and specific case as made out against Jaiprakash Jaiswal, the operational creditor in the present proceeding is at paragraphs 7, 7.1 and 7.2 (at page 27 of the said supplementary affidavit).
- 18.** It is asserted that the Income Tax authorities have recorded that Jaiprakash Jaiswal, the operational creditor, was the owner of a very small shop at its declared address, and the volume of its business activities was negligible further, in the statement recorded under Section 131 of the Income Tax Act, he could not render a plausible explanation with regard to the absence of any physical stock nor could he provide any physical stock register. Further, his records were

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

Company Petition (IB) No. 114/KB/2022

doubted by the Income Tax authorities as he failed to comply with the summons issued by the said authorities seeking an explanation with regard to the transaction with the corporate debtor.

- 19.** It is claimed that the purchases made by the operational creditor were also doubted by the Income Tax authorities in paragraph 7.3 of the order (page 27 of the said affidavit) and a co-joint reading of paragraphs 7.1 and 7.3 would reveal that the statements recorded under Section 131 of the Income Tax, 1961 was that of Jaiprakash Jaiswal and not of any other individual as has been contended by the operational creditor in the course of the proceeding. As such, the admission in paragraph 7.3 of the said order (at page 27 of the said supplementary affidavit) would underscore that Jaiprakash Jaiswal had admitted in his statement recorded under Section 131 of the Income Tax, 1961 that he was involved in the business of bogus billing and that he had supplied bogus bills without supply of any corresponding goods to entities, including M/s. Diach Chemicals & Pigments Pvt. Ltd. On being questioned by the authorities with regard to the fact of bogus purchase and as to why the purchase booked by his firm from parties, who could not have supplied such materials, should not be treated as bogus, he could not give any plausible explanation as is recorded in the said paragraph which is part of the assessment order.
- 20.** Further, it is submitted that in relation to the statements and details of Jaiprakash Jaiswal, as set out in paragraph 19 (at page 61 of the supplementary affidavit) and paragraph 19.2 thereof, the authorities have observed that Jaiprakash Jaiswal has been identified as an entity issuing bogus invoices without actual supply of goods, in the Incident Reports issued from the office of the Director General of GST (Intelligence), Kolkata from time to time. It has been recorded by the office of the DGGI that the said entity was non-existent and does not have any genuine business and was merely created for the purpose of issuing bogus bills in the name of the beneficiaries. It is claimed that although, the corporate debtor is entitled and in agreement with the said findings, however, the said observation

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

Company Petition (IB) No. 114/KB/2022

by the DGGI was relied on by the Income Tax authorities in arriving at the conclusion that Jaiprakash Jaiswal was engaged in the business of issuance of bogus bills. Attention is drawn to paragraphs 19.2 to 19.6, at pages 61 and 62 of the supplementary affidavit.

21. The Learned Senior Counsel for the Respondent would further submit that it is on the basis of such observations in the assessment order that the Income Tax authorities rendered a finding in the said assessment order in paragraph 34 thereof (at page 110 of the said supplementary affidavit) that it was clear that the entities against which Incident Reports had been generated by DGGI, Kolkata, were involved in the bogus billing and since M/s. APL Metals Ltd. was found to have recorded purchase from these entities, the same were also bogus. It is further submitted that the operational creditor herein was also one of such entities against whom Incident Reports were generated by DGGI, Kolkata.
22. Further, it is contended that the corporate debtor, being aggrieved by the said order had preferred an appeal before the Commissioner of Income Tax (Appeals) and the said proceeding is pending adjudication. There is no stay by the said authority on the order of the assessment dated December 30, 2022.

Counter submissions made by the Applicant:

23. The Learned Counsel for the Applicant claims that the issue of the IT Department Scrutiny of the Corporate Debtor is irrelevant for the consideration of the present Application filed under Section 9 of the I&B Code, 2016. Under the provisions of the Section 9 of the I&B Code, 2016, it has to only be seen that debt is due and there is default on part of the Corporate Debtor and there is no genuine dispute regarding the existence thereof. The issue of the IT penalty upon the Corporate Debtor does not in any manner affect the claim of the Operational Creditor under I&B Code.

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

Company Petition (IB) No. 114/KB/2022

24. We have duly considered the submissions made by the Learned Counsel and the Learned Senior Counsel for the parties, considered the written submissions and the documents placed before us.

Analysis and Findings:

25. It is evident from the order dated 30.12.2022 (DIN & Order No. ITBA/AST/S/143(3)/2022-23/1048376711(1), AY: 2021-22) passed by the Office of the Assistant Commissioner of Income Tax Central CIR 3(3), Kolkata under Section 132 of the Income Tax Act, 1961, that the Investigation Wing of IT Department, Kolkata conducted a Search and Seizure Operation at the residential and office premises of the APL Group of companies on 07.12.2021. The warrant of searching was executed in the name of the assessee, APL METALS LIMITED, the Corporate Debtor in this matter.

26. Para 7 of the said order, discloses that the IT Department in the said matter has observed as under:

“7. The Stock Register found during the course of search operation and seized vide identification mark APL-P/15. The assessee could not tally the stock register i.e., APL-P/15 with the above seven parties, namely, Soorajmull Mohanlal Private Limited, N.V. Aluminium Cast Pvt Ltd Cast Pvt Ltd, Utkarsh Lead, Jai Prakash Jaiswal (Proprietor of Om Traders), Onix Vyapaar LLP and Aurix Tradelink LLP. It is also pertinent to mention here that the assessee is a manufacturer and there is no corresponding sales against these purchase.”

27. Further, Para 7.3. of the said order discloses that the concerned office of IT Department has observed that:

“Summons was also issued in the name of Shri jai Prakash Jaiswal seeking explanation regarding transactions with M/s APL Metals Limited, However, he did not comply. Also it was observed that the firm

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

Company Petition (IB) No. 114/KB/2022

is reporting purchases mainly from proprietorship firms which do not have capacity to supply such huge amount of goods. For instance, his firm M/s Om Traders has reported in its GST returns has reported in its GST returns to have purchases from M/s New Kumar battery Industries (Prop. Shri Jogendra Kumar Shah) Rs. 12 crores & Rs. 2.8 crores during the financial year 2020-21 & 2021-22 respectively and also M/s Enertec Enterprises (Prop. Abhisekh Shah) to the extent of Rs. 8 Crore during the financial year 2018-19. These two firms are controlled by Shri Jogendra Kumar Shah as Shri Abhisekh Shah is his son and has no knowledge of business of MS Enertec Enterprises. Shri Jogendra Kumar Shah has one shop in the same locality as of Shri Jogendra Kumar Shah and Abhisekh Shah has no capacity whatsoever to supply goods having such large value of 22.8 Crore to Shri Jai Prakash Jaiswal. Also, in his statement recorded u/s 131 at his shop on the same date, he has admitted the fact of his involvement in business of bogus billing and has supplied bogus bills with supply of any corresponding goods including M/s Diach Chemicals & Pigments private Limited. Shri Jai Prakash was confronted with this fact and asked to explain why purchases booked by his firm from these parties should not be treated bogus. However, he could not render any plausible explanation regarding this issue.”

- 28.** It is the submission of the Learned Senior Counsel for the Respondent that the corporate debtor, being aggrieved by the said order dated 30.12.2022 had preferred an appeal before the Commissioner of Income Tax (Appeals) and the said proceeding is pending consideration. However, no stay has been granted by the said authority on the order of the assessment dated December 30, 2022.
- 29.** Thus, in terms of the assessment order dated 30.12.2022 and the submissions made by the Learned Counsel and Learned Senior Counsel, we would infer that

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

Company Petition (IB) No. 114/KB/2022

the claim of the Operational Creditor filed in this application based on the bills are disputed by the Income Tax Authority itself and examination in regard to propriety and genuineness thereof is consequently pending before the Appellate Forum.

- 30.** The Income tax Assessment order dated 30.12.2022 for the AY 2021-2022 categorically reveals evasion of GST, in Para 12 at Page 7 of the order. In Para 12.2. of the Assessment order dated 30.12.2022, mentions as under:

“12.2. From the above incident reports, it was ample clear that the entities against which incident reports have been generated by the DGGI, Kolkata were in bogus billing and since M/s APL Metals Limited was found reporting purchases from these entities, the same are also bogus”

- 31.** In view of such findings, we are of the considered view that no reliance can be placed on the Invoices raised by the Operational Creditor for the purpose of ascertaining the disputed amount. Even the transporter documents are found to be fake and hence, the delivery order and transport documents too cannot be relied upon. When the Sale (Supply) of goods is itself in dispute, and there is a finding by a Government Authority (Income Tax Department) that such sales are bogus, we cannot shut our eyes to the facts recorded in the Assessment order. Neither can we conduct a roving and fishing enquiry to cull out the sanctity of transactions in a summary proceeding under the I&B Code, 2016. As such, we find no reason to treat the disputed debt as an operational debt for the purpose of initiating a CIR Process.
- 32.** Hence, sans further probe in the mechanics of the dispute raised by the Income Tax Department, we infer that the supply of goods by Operational Creditor has not been conclusively proved. This Adjudicating Authority is not meant for deciding the veracity and the genuineness of bills in issue as it is already pending consideration before the appropriate authority.

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

Company Petition (IB) No. 114/KB/2022

33. In terms of the foregoing discussion, we **dismiss** this company petition being **C.P. (IB) No. 114/KB/2022** accordingly.
34. No Costs.
35. **The Registry** is hereby directed to communicate this Order to the Parties by Speed Post and through email immediately, and in any case, not later than two days from the date of this Order.
36. Further, the **Registry** 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), West Bengal, Kolkata by all available means.
37. Urgent certified copy of this order, if applied for with the Registry of this Adjudicating Authority, 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 the 08th Day of January, 2024.

Bose, R. K. [LRA]