IN THE NATIONAL COMPANY LAW TRIBUNAL
CUTTACK BENCH
CUTTACK

CP (IB) No. 160/CTB/2019

INSOLVENCY AND BANKRUPTCY CODE, 2016;

and

In the Matter of:

Section 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules,2016.

and

In the Matter of:

Ganesh Ores Private Limited, having its office at – Manika Tower, LL-2, 3rd Floor, Civil Township, Rourkela, Dist. – Sundargarh, Odisha- 769 004;

... Applicant/Operational Creditor

versus

In the Matter of:

1. **Deepak Steel and Power Limited**, having its registered office at – C/o Hari Charan Gupta, Ispat Bhawan, Barbil, Dist. – Keonjhar, Odisha – 758 035;

2. **The Secretary**, Ministry of Corporate Affairs, 'A' Wing, Shastri Bhawan, Rajendra Prasad Road, New Delhi-110 001;

...Respondents/Corporate Debtor

Order reserved on: 29.11.2021

Order pronounced on: 03.12.2021

Coram:

Shri P. Mohan Raj	:	Member (Judicial)
Shri Satya Ranjan Prasad	:	Member (Technical)

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Appearances (through video conferencing)

For the Petitioner (s)	Mr. K. Kurmi, Adv.
	Mr. N. R. Pandit, Adv.
For the Respondent (s)	Mr. Anirudh Wadhwa, Adv.
	Mr. Bhargav Thali, Adv.
	Mr. Aditya Mittal, Adv.

ORDER

Per P. Mohan Raj, Member (Judicial)

1. This application has been filed by Ganesh Ores Private Limited as an Operational Creditor under Section 9 of the Insolvency and Bankruptcy Code, 2016 read with rule 6 of the Insolvency and bankruptcy Code, 2016 (Application to Adjudicating Authority) seeking to initiate Corporate Insolvency Resolution Process rules, 2016 (CIRP against Deepak Steel and Power Limited, a Company registered under the provision of Companies Act, 1956.

2. The brief contention of petition averments are as follows: -

i. The Operational Creditor was awarded contracts by the Corporate Debtor vide purchase Order No. Coal/26/13-14 dated 30.04.2013 for supply of 11000 MT of Coal (Grade F) during the year 2013 to the Sponge Iron Plant of the said Corporate Debtor.

ii. The Operational Creditor upon supply of material during 15.05.2013 to 18.06.2013 issued four number of invoices on the Corporate Debtor for supply of 11000 MT of Coal of the total value of Rs. 2,03,15,464/- against the total invoices of Rs. 2,03,15,464/- raised by the Operational Creditor on the Corporate Debtor, the Corporate Debtor made total

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payment of Rs. 1,39,90,000/- to the Operational Creditor, against total Bill value of Rs. 2,03,15,464/- raised by the Operational Creditor, the Corporate Debtor has made total payment of Rs. 1,39,90,000/- leaving outstanding balance of Rs. 63,25,464/-. The last payment of Rs. 3,00,000/- was received by the Operational Creditor from Corporate Debtor on 15.07.2015. Since no payment has been made by the Corporate Debtor, the Operational Creditor issued letters dated 13.06.2016, 10.09.2017 and 04.07.2018 and constantly followed-up the Corporate Debtor over phone demanding their payments which is due and payable by the Corporate Debtor and for release/payment of the aforesaid outstanding dues, however, no response was received from the Corporate Debtor.

iii. Therefore, the Operational Creditor having no other option, issued Demand Notice in Form-3 dated 24.07.2019 under covering Letter dated 09.08.2019 issued through their Authorized Representative Sri Rohit Sharma, Pr. CS in terms of Rule 5(1)(a) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 along with copies of invoices raised to the Corporate Debtor and statement of debt which are served on the Corporate Debtor on 02.09.2019 for claim of Rs. 1,72,52,986/- (i.e., Outstanding due of Rs. 63,25,464/- plus Interest of Rs. 1,09,27,522/-). However, after service of demand notice in Form -3 along with copies of the invoice etc., the Corporate Debtor for the first time raised dispute vaguely on the grounds of quality, delay in supply and adjustments etc. without any evidence, vide reply dated

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06.09.2019 issued by one Sri Akash Sharma, Pr. CS claiming to be Authorized Representative of the Corporate Debtor. As per the Balance Sheet as at 31.03.2015, as at 31.03.2016, as at 31.03.2017 and as on 31.03.2018 and the Cash Flow Statement for the said period as available in the official website of the Register of Companies (MCA) uploaded by the Corporate Debtor, there is no reduction in the amount of debtor to the extent of Rs. 63,25,464/- which shows that the said amount was admitted as payable and outstanding by the Corporate Debtor in their Balance Sheet even as at 31.03.2018. Further, the Operational Creditor claims an interest @ 24% starting from the date of default occurred till 24.07.2019 of Rs. 1,09,27,522/- (Rupees One Crore Nine Lakhs Twenty-Seven Thousand Five Hundred and Twenty-Two Only). Hence, an aggregate amount of Rs. 1,72,52,986/- (Rupees Once Crore Seventy-Two Lakhs Fifty-Two Thousand Nine Hundred and Eighty-Six Only) is due and outstanding against the Corporate Debtor.

3. The brief contention of the reply submitted by the respondent/Corporate Debtor are as follows: -

i. The application preferred by the Petitioner/Operational Creditor is not maintainable in law by reason of the fact that a prior dispute has already been made at the time of the Demand Notice demanding payment of the alleged debt, served by the Applicant under the provisions of Section 8 of the Code. The Corporate Debtor has raised a prior dispute by replying to the Demand Notice wherein it is explicitly mentioned that on

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20.07.2018 the Corporate Debtor had written off the alleged amount after full and final settlement of dues between both the parties on 15.07.2015 after settling all the issues of quality, delay in supply, adjustments and various payments made. I further state and strongly press that the demand notice as sent by the Applicant to the Corporate Debtor on 09.08.2019 never mentioned anything regarding the legal notices been sent by the Applicant to the Respondent.

ii. That letters dated 13.06.2016, 10.09.2017 and 04.07.2018 sent by the Applications demanding a payment of Rs. 63,25,464.00/- showing the same as outstanding. I state that, no such letters were received by the Corporate Debtor at any given point of time. In reference to the name, the Applicant did not take into consideration that a mutual settlement towards the said amount was agreed upon between the parties that was already issued prior to the issuance of the letters and hence sent the said demand letter. I state that firstly, no dispute is raised against the mutual settlement held on 15.07.2015 and secondly the Applicant chose to serve the Respondent with a demand notice and file the said application. In light of the above, it can be clearly evidenced that the Applicant is desperate to extract money out of the Respondent, fraudulently and in a coercive manner, claiming a debt which does not even exist in the books of the Respondent.

iii. It is stated that a notice of dispute has been sent by the respondent/corporate debtor by virtue of the mutual settlement dated 15.07.2015, wherein it has been stated that an amount of Rs. 3,00,000/-

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is being paid as full and final settlement towards the outstanding debt. Furthermore, it was also highlighted by the respondent/corporate debtor that the materials that had been delivered by the operational creditor were of inferior quality and were not in a good condition. Moreover, the supply of goods by the Operational Creditor was also delayed because of which the Corporate Debtor suffered irreparable loss.

iv. Therefore, it is apparent that the Applicant chose to file the purported application only to misuse the provisions of the Code. I state that no amount remains to be paid to the Applicant by the Corporate Debtor. The purported calculations made in the annexures to the application are false and incorrect and contrary to records. It is denied and disputed that the applicant is entitled to any interest whatsoever or any alleged sum against the Corporate Debtor, as alleged or at all.

4. After gone through the averments made in the petition, reply and documents produced and other material available the following points are determined for consideration;

i) Whether the Application is barred by Limitation?

ii) Whether genuine Pre-existing dispute is there between the parties?

iii) Whether the application filed without authorisation of the applicant company is maintainable?

Point No.1

5. On the respondent side raised the plea of limitation and stated that the application is barred by limitation. The admitted fact is the last payment was made on 15.07.2015 and this application was filed on 04.12.2019 after

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the expiry of more than four years. In between there no payment was made and respondent had not made any correspondent with the petitioner. On this ground on the respondent side taken plea of limitation.

6. On the petitioner side solely relies upon the balance sheet of the respondent filed for the years 2015 to 2018 before the ROC in pursuance of mandatory requirement under the Companies Act, 2013.

7. The issue regarding the admissibility/considering the balance sheet filed by the company before ROC for the purpose of invoking Section 18 of Limitation Act, 1963 for an acknowledgement of debts is no more integra after the pronouncement of Apex court Judgment in Asset *Reconstruction Company (India) Ltd. v. Bishal Jaiswal & Another.* The Apex court, while recording its finding pertaining to the acknowledgement of liability through entries made in balance sheets has observed that there cannot be a strait jacket formula which can be applied in each and every case. In order to determine whether such entries would amount to acknowledgement, the Courts are required to check whether such entries are made unequivocal or entered with any caveat. The Apex court in para 22 states as follows:

> *22. A perusal of the aforesaid Sections would show that there is no doubt that the filing of a balance sheet in accordance with the provisions of the Companies Act is mandatory, any transgression of the same being punishable by law. However, what is of importance is that notes that are annexed to or forming part of such financial statements are expressly recognised by Section 134 (7). Equally, the auditor's report may also enter*

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caveats with regard to acknowledgements made in the books of accounts including the balance sheet. A perusal of the aforesaid would show that the statement of law contained in Bengal Silk Mills (supra), that there is a compulsion in law to prepare a balance sheet but no compulsion to make any particular admission, is correct in law as it would depend on the facts of each case as to whether an entry made in a balance sheet qua any particular creditor is unequivocal or has been entered into with caveats, which then has to be examined on a case by case basis to establish whether an acknowledgement of liability has, in fact, been made, thereby extending limitation under Section 18 of the Limitation Act.

In our case on the petitioner side relies upon Balance sheets of the Respondent company filed in annexure "k" page 234 for the years 2016 - 2018 there against the column 'Trade payable current' amount is mentioned as i) 5,88,35,916.33, ii) 5,87,07,485.33 and iii) 5,85,69,441.33 respectively. The amounts mentioned therein are almost statice except with minor variation, in the balance sheet there is no specific indication that amount of Rs.63,25,464/- is payable to the applicant company. On the petitioner side argued that the amount mentioned against the column 'Trade payable current' includes the debt amount of Rs.63,25,464/. As per the supra-Apex court judgment the entries found in the balance sheet must be certain and it must be unequivocal to take it as an acknowledgement of debt and it depends upon the facts and circumstances of each and every cases.

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8. Now we have to see whether the amounts entered against the column 'Trade Payable Current" is inclusive of debt amount of Rs.63,25,464/- payable to the applicant. In this case there is no difficulty to accept the plea of petitioner that it includes the amount of Rs.63,25,464/- because respondent himself unambiguously admitted in writing in its reply notice dated 06.09.2019 annexure "J "page 231 that due amount was written-off only on 20.07.2018, the same is also reiterated in its counter at page 6 para 3(m). When the respondent itself admitted the fact that the amount of Rs.63,25,464/ was shown in the balance sheets till 19.07.2018 and written-off on 20.07.2018. When the fact is admitted by the respondent there is no need to prove the said fact by the petitioner in view of section 58 of Indian Evidence Act, 1872. For the reasons discussed above it is concluded that the application is not barred by limitation.

Point No.2

9.Under section 9 of the IBC the operational creditor has to prove three ingredients to get through the application they are Debt, Due and Dispute free. In this case on the respondent side raised plea of discharge of debt about four years back from the date of filing this application and disputed his liability. As observed by the Apex court in Mobilox Innovations Private Limited vs Kirusa Software Private Limited (2018) 1 SCC 353 here the Tribunal need not put venture whether the respondent proved his contention, but it is enough to decide whether there is plausible contention which requires further investigation and ensure that the dispute is not based on patently unbelievable, vexatious and without any evidence.

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10.The petitioner claims due amount of Rs.63,25,464/- towards principal and a sum of Rs.1,09,27,522/- towards interest. The interest amount is almost nearing double the principal amount. According to the petitioner the respondent placed the purchase order dated 30.04.2013 found in page 180 for supply of 11,000 MT of coal (Grade F) at the rate of Rs.1358/- for 5000 MT, at the rate of Rs.1198/- for 3,000 MT and at the rate of Rs.1298 for 3000 MT. The petitioner supplied the coal through five invoices at the rates of Rs.1,606, Rs.1,728 and Rs.1868/ and raised the bills for Rs.2,03,15,464/-inclusive of 5% VAT Tax. Admittedly the coals were supplied to the higher rates than rates quoted in the purchase order. The difference in amount in this regard according to respondent is Rs.50,70,060/- On the petitioner side not stated anything in the pleadings about the difference in rate between the purchase order and invoices, but during arguments it is argued that the rates mentioned in the invoices are inclusive of royalty. Further stated that at the time of delivery the respondent accepted the coal without raising any query and defects hence now he cannot raise this plea. On the respondent side stated in the reply, dispute was already raised and after negotiation settlement was arrived and finally Rs.3,00,000/- was paid on 15.07.2017 and the issue was settled. Even though on the petitioner side denies this but not satisfactorily explained why there are difference in the amount between the purchase order and invoices, the variance in the rate also substantial in nature. Thus, there exist genuine dispute regarding the rate on which the coals were supplied.

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11. The one another fact is the petitioner claims a sum of Rs.1,09,27,522/-towards interest at the rate of 24%. On the respondent side denies their liability in entirety, including the liability to pay interest. It is settled position of law that the seller is entitled for interest for the delayed payment as per terms of contracts agreed or in the absence of any contract as fixed by the court under section 61 of Sale of Goods Act 1930.On the petitioner side claims at 24% interest without any agreement between the parties. In all the invoices, there is no reference regarding rate of interest leviable for the delayed payments and also there is no reference what is the time fixed for payment. The rate of interest levied and claimed also appears exorbitant. Even according to petitioner in his ledgers for the period 2015-16 to 2019-20 annexure 'G' the due amount is mentioned is Rs.63,25,464/- further the petitioner remains silent for about four years and all of sudden awake from slumber and issued the demand notice and at first time claims interest.

12. On the petitioner side stated that even before the demand notice dated 09.08.2019 they sent three letters demanding the payments by courier's annexure 'H' only courier bills are produced but no delivery proof has been filed. On the respondent side denies the receipt of any of such letters and plead that the letters were created for the purpose of the case. On the respondent side filed annexure 'A' the blank tract report of the consignment. It is not known how long the track report available on the public domine, further it is stated that the letters were sent by private courier so the presumption available under section 27 of The General clauses Act

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1897 cannot be invoked. In this situation petitioner side not proved that the said letters were sent as averred in the petition. Thus, on the respondent side raised the acceptable dispute regarding the entitlement of petitioner for the amount claimed in the petition and the interest.

13. The respondent in its reply notice dated 06.09.2019 denies its liability, the dispute raised by the respondent is substantial in nature it needs further investigation. Thus, this point is answered.

Point No.3

14. The primary objection made on the respondent side is that since the application is filed without any authorisation of the applicant company authorising any one to file the application on behalf of the company the application is liable to be dismissed. The operation creditor is a company registered under companies Act 1956.In the application there is no averments how the person who filed this application is competent to file the application on behalf of Company. Even though he is designated as managing Director would have no authority to file the application on behalf of company. There is no board resolution passed authorising the person who filed this application on behalf of the company. In form 5-chapter II serial No.6 specifically requires to enclose authorisation. The non-filing of Board resolution goes to the root of the case. In this situation it is answered that the application filed on behalf of operational creditor without the authorisation is not maintainable.

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15. On the petitioner side made a request to return the petition in the event the Tribunal comes to the conclusion that application filed without authorisation is invalid, for rectification.

16. As per Section 9(5)(ii)(a) if the petition is incomplete same shall be rejected, provided seven days' time shall be granted to rectify the defect.

17.In this matter we already answered to the point No.2 that there exists genuine dispute in respect of debt in such a situation the prayer made in this application is liable to be negatived, so even if the application is returned to rectify defects it will not serve any purpose. Further this case travelled long distance and reached the pole for ultimate conclusion and for termination, so we declined to return the application at this length of time and particularly because of the reason that for the point No.2 we have arrived conclusion that genuine dispute exists in respect of debt.

18. In fine in view of answer arrived to point No.2 this petition is **DISMISSED**.

19. Registry is directed to send e-mail copies of the order forthwith to all the parties and their counsel for limitation.

20. Certified copy of this order my be issued, if applied for, upon compliance of all requisite formalities.

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Satya Ranjan Prasad
Member (Technical)

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P. Mohan Raj
Member (Judicial)

Signed on this 3rd day of December, 2021.

Kaushal