

NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, COURT-II



CP (IB) 214 (MB)2018

Under section 9 of the Insolvency and
Bankruptcy Code, 2016

IN THE MATTER OF

LLOYDS METALS AND ENERGY LIMITED

Plot No. A 1-2, MIDC area, Ghugus
Chandrapur - 442505

... Operational Creditor

V/s.

SHAH COAL PRIVATE LIMITED

A Centre Point, 5th Floor, Junction of S.V.
Road and Juhu Road, Santacruz - W
Mumbai - 400054

... Corporate Debtor

Order delivered on :- 30.08.2023

Coram:

Hon'ble Shri Kuldip Kumar Kareer, Member (Judicial)

Hon'ble Shri Anil Raj Chellan, Member (Technical)

Appearances:

For the Petitioner : Adv. Zaid Ansari a/w Adv. Rekha Dogra

For the Corporate Debtor : Adv. Praghat G Tayshete i/b Adv. Tejas
R Balsava

ORDER

Per: - Kuldip Kumar Kareer, Member (Judicial)

1. This Company petition is filed by Lloyds Metals and Energy Limited (hereinafter called "**the Petitioner**") seeking to initiate Corporate



Insolvency Resolution Process (**CIRP**) against Shah Coal Private Limited (hereinafter called "**Corporate Debtor**") alleging that the Corporate debtor committed default in making payment to the Petitioner. This petition has been filed by invoking the provisions of Section 9 Insolvency and bankruptcy code, 2016 (hereinafter called "**Code**") on the ground that the Corporate Debtor had failed to make payment of a sum of Rs. 63,70,762/-.

The submissions by the Operational Creditor: -

2. The Operational Creditor is a public limited company incorporated under the provisions of the Companies Act, 1956 and is having its registered address at Plot No. A 1-2, MIDC area, Ghugus Chandrapur – 442505 and corporate address at Trade World, "C" Wing, 16th floor, Kamla City, Senapati Bapat Marg, Lower Parel (W), Mumbai – 400013. The Applicant Company is interalia engaged in the business of manufacturing of sponge iron and power generation.
3. The Corporate Debtor is a private limited company incorporated under the provisions of the Companies Act, 1956 and having its registered office at A Centre Point, 5th Floor, Junction of S.V. Road and Juhu Road, Santacruz – W Mumbai – 400054 which is within the local limits of the jurisdiction of this Hon'ble Court, (hereinafter referred to as "the Company" or "the Respondent")
4. The Applicant Company got supplied coking coal of 76,369 metric tonnes to the Respondent on commission at the rate of Rs. 61.34 (Rupees Sixty-One point Thirty-Four Only) per metric ton amounting to a total sum of Rs. 46,84,474/- (Rupees Forty-Six Lakhs Eighty-Four Thousand Four Hundred and Seventy-Four Only), plus service tax which was then applicable at the rate of 12.36 % (Twelve point Three Six Percent), amounting to Rs.5,79,001/- (Rupees Five Lakhs Seventy Nine Thousand and One Only), aggregating to total of Rs. 52,63,475/- (Rupees Fifty-Two Lakh Sixty-Three Thousand Four Hundred and Seventy-Five Only). For the said transaction, the Applicant Company raised invoice dated 25.12 2014.



5. In pursuance of the above-mentioned debt, the Respondent paid a partial amount of debt of Rs.5,00,000/- (Rupees Five Lakhs Only) to the Applicant Company on 27.12.2014
6. In the assessment year 2015-16, the Respondent admitted the full debt or outstanding amount payable to the Applicant Company without any dispute or disagreement by deducting tax at source at the rate of 10% (Ten Percent) on the total amount of Rs.46,84,474/- (Rupees Forty-Six Lakhs Eighty-Four Thousand Four Hundred and Seventy-Four Only) of the invoice i.e. an amount of Rs. 4,68,447/- (Rupees Four Lakh Sixty-Eight Thousand Four Hundred and Forty-Seven Only) and paid the same to the concerned authority.
7. However, the remaining due amount of Rs. 42,95,028/- along with interest at the rate of 18% per annum remained due and unpaid from 27.12.2014 onwards and the total amount (principal plus interest) of 63,70,762/- was due at the time of filing the Petition.
8. As the due amount was not paid, the Petitioner got issued a demand notice dated 05.09.2017 to the Respondent but the latter has failed to respond to the demand notice and also failed to pay the due amount to the Applicant. Hence the Application.

Reply filed by the Corporate Debtor: -

9. The Corporate Debtor had filed their Affidavit in Reply (“**Reply**”) and denied each and every statement, contention and allegation made by the Petitioner.
10. The Respondent further submits that it is evident that the above-mentioned Application was filed by the Applicant for the recovery of outstanding as claimed by the Applicant under the single disputed invoice dated 25.12.2014.
11. The Respondent further submits that this Application is liable to be dismissed solely on the grounds of being barred by provisions of the Limitation Act, 1963, the disputed invoice no. LMEL/ CPP/2014-15/13 is dated 25.12.2014 and an Application under Section 9 of the IBC, 2016 for initiation of CIRP was filed in the Registry of NCLT,



Mumbai Bench in the year 2018. The abovementioned Application should have been filed within a period of 3 years from the date of invoice i.e. on or before 25.12.2017 which has not happened in this case. The Hon'ble Tribunal may consider the dismissal of this Application on this sole ground.

12. The Respondent further submits that there was no contract/agreement of commission between the parties under which this disputed invoice was raised and the applicant has failed to produce any documentary evidence regarding the validity of the disputed invoice.
13. The Respondent further submits that the invoice filed by the Applicant in this Application is under dispute from the very beginning and that was the primary reason due to which the Respondent has not paid the amount due under this disputed invoice.
14. The Respondent further submits that the Respondent already paid Rs. 5 lacs as full and final claim of the Applicant and requested the Applicant to send the revised invoice for Rs. 5 lacs which can be verified from emails exchanged between the parties. The Respondent never received any such revised invoice from the Applicant till date and hence the Respondent has treated this invoice under dispute.
15. The Respondent further submits that the Applicant has confirmed that under the Memorandum of Understanding, the role of the Applicant was restricted only as confirming party. Had the Applicant been entitled to get any commission from this transaction, it would have been specifically mentioned in the referred MOU. Hence the Applicant has failed to provide any basis of the disputed invoice.
16. The Respondent further submits that the calculation of default under part-IV of the Application form V is also defective as it includes interest on the disputed invoice for which the applicant has failed to produce any documentary evidence in the support of the claim of interest. The Applicant has not been able to show that there was an contractual obligation to any interest on the part of the Respondent.



17. The Respondent further submits that the said entire deal in respect of coal consignment was conducted through Mr. Sandeep Hisaria and there is ongoing dispute between parties for the alleged claim of commission. In fact, the contract of commission was absent since beginning and the Applicant is not entitled to demand the alleged commission. The Respondent has prayed for the dismissal for the dismissal of the Application.


Findings:

18. We have heard the Counsel for the parties.
19. During the course of the arguments, the Counsel for the Operational Creditor has argued that though there was no specific contract between the parties with regard to payment of commission but as per the memorandum of understanding (MoU) executed amongst the Operational Creditor, the Corporate Debtor and OAKY North Coking Coal Pvt. Ltd., who supplied goods to the Corporate Debtor it is clear that the Operational Creditor was to act as intermediary between the Corporate Debtor and the supplier i.e. OAKY North Coking Coal Pvt. Ltd. Counsel for the Operational Creditor has further argued that in addition to this the Corporate Debtor itself deducted and paid TDS of Rs. 46,844/- on due amount of Rs. 46,84,474/- which was payable to the Operational Creditor on account of commission. According to the Counsel for the Operational Creditor, this amounts to admission on the part of the Corporate Debtor that it was to pay commission to the tune of Rs. 46,84,474/-. Moreover, the Corporate Debtor paid a sum of Rs. 5,00,000/- to the Operational Creditor on 27.12.2014 as part payment out of the total payment of Rs. 46.84 Lakhs. Therefore, according to the Counsel for the Operational Creditor, the case stands established on record in as much as the existence of Operational Creditor debt and the default committed by the Corporate Debtor stands proved on record.
20. On the other hand, the Counsel for the Corporate Debtor has argued that the present Petition is palpably barred by time. According, to the Counsel for the Corporate Debtor, the invoice for the sum of Rs.



46.84 Lakhs was raised on 25.12.2014. The claim in respect of the said invoice could have been filed within a period of 3 years. The Counsel for the Corporate Debtor has further argued that even if the part payment of Rs. 5 Lakhs, which was made on 27.12.2014, is taken into consideration, even then the instant Petition is barred by time as it was filed on 08.02.2018 and is liable to be dismissed on this ground alone.

21. Counsel for the Corporate Debtor has further argued that the MoU dated 29.05.2014 does not speak of any commission payable to the Operational Creditor. Therefore, it is evident that there was no contractual obligation on the part of the Corporate Debtor to pay any Commission and the instant Petition is liable to be dismissed on this ground also.
22. In response to the argument put forward by the Corporate Debtor, Counsel for the Operational Creditor has argued that the instant Petition cannot be said to be barred by time by any stretch of imagination as the Corporate Debtor itself has been acknowledging the debt in its account books throughout. In support of his Contentions, Counsel for the Operational Creditor has relied upon "*Asset Reconstruction Company V/s Bishal Jaiswal & Anr.* an order passed in *Civil Appeal No. 323 of 2021* on 15.04.2021, whereby it has been held by the Hon'ble Supreme Court that if in the balance sheets of the Corporate Debtor the amount due is reflected as outstanding, this amount to acknowledgment. Therefore, the application u/s 9 cannot be said to be time barred.
23. Having heard Counsel for the parties and after going through the records, we are of the considered view that the present **Petition is barred by time**. Admittedly, the invoice was issued by the Operational Creditor on 25.12.2014. No doubt the TDS was deducted by the Corporate Debtor as reflected in form 26 AS, but the Corporate Debtor made only a part payment of Rs. 5 lakhs on 27.12.2014, as stated by the Operational Creditor in the Petition itself. There is no due date mentioned in the invoice dated 25.12.2014. Therefore, the time began to run on 25.12.2014 itself. The part payment of the Rs. 5



lakhs were made on 27.12.2014 which amounts to an acknowledgment of debt on the part of the Corporate Debtor. Since no payment was made after 27.12.2014, the time again began to run on that date itself. It is well settled that the period of limitation to file a Petition u/s 9 is three years from the date when the default was committed by the Corporate Debtor. That being so, the Operational Creditor could have filed the instant Petition only till 26.12.2017, whereas the instant Petition was filed on 08.02.2018.

24. The Counsel for the Operational Creditor has claimed that since the Corporate Debtor has been acknowledging its liability in its balance sheet/books of accounts, and therefore, the Application is within time. However, no such balance sheets have been placed on record. There is no dispute with regard to the proposition of laws that reflection of the outstanding dues in the balance sheet amounts to an acknowledgment. However, in the instant case, the Operation Creditor has not placed on record any audited balance sheets of the Corporate Debtor, whereby the latter might have acknowledged the debt or shown the same to be outstanding. In the absence of the balance sheets, we cannot say that the debt was acknowledged by the Corporate Debtor any time after 27.12.2014. That being so, it has to be held that the Application u/s 9 of the Code is clearly barred by time having been filed after a lapse of more than three years from the date of default. Therefore, on this ground alone, the instant Petition is liable to be dismissed.
25. Hence, **CP(IB) 214 (MB)2018** is **dismissed** in terms of the above order. File be consigned to records. All pending IAs/MAs, if any, connected with the present Company Petition shall also stand disposed of having rendered infructuous.

Sd/-

ANIL RAJ CHELLAN
Member (Technical)

ANKIT

Sd/-

KULDIP KUMAR KAREER
Member (Judicial)