

**IN THE NATIONAL COMPANY LAW TRIBUNAL  
MUMBAI BENCH - IV**

**CP (IB) 467/MB/C-IV/2023**

Under section 9 of the Insolvency and Bankruptcy  
Code, 2016

**BST (SK) Limited**

**Identification No.: Business Registration Certificate  
BRC-22087101-000-10-21-0**

Address for Correspondence:

Flat No. 202, ORO Heights, Patrapada, Bhubaneswar,  
Odisha – 751019 IN.

...Operational Creditor/Petitioner

Versus

**Samruddha Resources Limited**

**[CIN: U51900MH1997PLC112284]**

Reg. Office- 6<sup>th</sup> Floor, 'A' Block, Dr. Annie Besant Road,  
Worli, Mumbai – 400018

... Corporate Debtor/Respondent

**Order Delivered on: 06.10.2023**

***Coram:***

Hon'ble Member (Judicial) : Mr. Kishore Vemulapalli

Hon'ble Member (Technical): Ms. Anu Jagmohan Singh

***Appearances:***

For the Operational Creditor : Mr. M. J. Sultan a/w Mr. Prithvi Raja,  
Advocate.

For the Corporate Debtor : Mr. Nausher Kohli a/w Mr. Chetan T  
Shah, Advocate.

**ORDER**

***Per: Anu Jagmohan Singh, Member (Technical)***

1. This Company Petition is filed under section 9 (“**the Petition**”) of the Insolvency and Bankruptcy Code, 2016 (**IBC**) by **BST (SK) Limited**, (“**the Operational Creditor**”), seeking to initiate Corporate Insolvency

Resolution Process (CIRP) against **Samruddha Resources Limited ("the Corporate Debtor")**).

2. The Corporate Debtor was incorporated 05.12.1997 under the Companies Act, 1956. It has its registered Office situated 6<sup>th</sup> Floor, 'A' Block, Dr. Annie Besant Road, Worli, Mumbai – 400018. Therefore, this Bench has jurisdiction to deal with this petition.

**Brief Facts of the case:**

3. The present petition was filed on 09.06.2023 before this Adjudicating Authority (AA) against the Corporate Debtor claiming USD 894,903.59 (\$530,823.59 + \$62,284.79 + \$301,795.21) i.e. Rs.7,40,98,017/- (INR Seven Crore Forty Lakh Ninety-Eight thousand and Seventeen only) as per agreed terms. The date of default is 30.09.2022.

**Submissions made by Operational Creditor:**

4. The Operational Creditor and the Corporate Debtor herein have entered into three contracts being Sales/Purchase Agreement dated 13-11-2017; 08-04-2022 and 21-04-2022 for the purpose of supply of goods. The First Contract being for the supply of "Iron Ore Lumps of Kenyan Origin" and second and third contract dated 08-04-2022 and 21-04-2022 being for supply of "Iron Ore Fines", by the Corporate Debtor to the Operational Creditor. As per the agreed terms and conditions of the Contract dated 13-11-2017, USD 30,00,000/- was given as advance to the Operational Creditor for supply of goods which was agreed to be returned back to the Operational Creditor in tranches i.e., USD 6,00,000/- in first 6 shipments, each shipment being 50,000 MTS of goods. The Specifications of the said Iron Ore Lumps including the chemical composition' and the 'physical size' are agreed under "Clause 3: Specifications". It is also submitted that base price for the said Iron Ore Lumps was agreed to be decided before

the nomination of vessel for each shipment and under "Clause 5: Price Adjustment" it was agreed that if the said Iron Ore Lumps do not meet the requirement as per Clause 3 the price would be adjusted based on the percentage of chemical composition and size. The intent behind the said price adjustment clause being cost of the extraction of the elements from the ore depending on said size and chemical compositions. It is also pertinent to mention herein that the terminology of "Penalty" and "Bonus" were used in reference to the Price adjustment, wherein of the chemical composition / size are less than the specifications, the price would be decreased proportionately ("Penalty") and wherein the chemical composition/size are more than the specifications, the price would be increased proportionately ("Bonus"). This clause is with intent to ensure that there is no unjust enrichment and the goods are priced properly. The said words Penalty and Bonus were used only for the purpose of fixation of the price of the goods which are mutually beneficial for the Operational Creditor and the Corporate Debtor.

5. It is also submitted that the invoicing is done in two stages - one being provisional invoicing as per "Clause 6: Payment", wherein the Certificate of Quality and Certificate of quantity along with other documents as stated therein are provided by the Corporate Debtor to the Operational Creditor at the time of loading the shipment and accordingly based on the price adjustment and specifications clause, seller's provisional invoice is raised by the Corporate Debtor to the Operational Creditor for payment of invoice. It is pertinent to mention herein that the said advance which is to be returned to the Operational Creditor by the Corporate Debtor is adjusted in the said provisional invoice. Further, at the time of discharge or delivery of the Iron Ore Lumps, a survey is conducted by Entry Exit Inspection and Quarantine of the People's Republic of China (CIQ) which shall form final basis of determination of Final Price /Payment. It was

also agreed that the CIQ certificate shall be final as the same is done by the Government of China. As such, if the specifications/weightage/size of the Iron Ore Lumps as per the CIQ report is superior to the what was claimed in the Provisional Invoice, the Corporate Debtor would be entitled to Bonus i.e., increase in price which the Operational Creditor would have to pay to the Corporate Debtor and in case the same is inferior to the what was claimed in the Provisional Invoice, the price would be decreased proportionately on the defined limits as per Clause 5.

6. In the present case, since, the goods as per the CIQ report are inferior to what was claimed under the provisional invoice, the same resulted in excess payment by the Operational Creditor to the Corporate Debtor which the Corporate Debtor is liable to return. Hence, the Corporate Debtor owed an amount of USD 530,823.59/- to the Operational Creditor. Accordingly, at the request of the Corporate Debtor, a Settlement Agreement dated 08.04.2022 was entered between the Operational Creditor and the Corporate Debtor agreeing that the Corporate Debtor and /or associate company and/or shareholder and/or guarantor Mr. Vinay Patil would refund the said amount of USD \$30,823.59/- on or before 30.05.2022, which arose from the provision of goods and services.
7. It is also submitted that as per "Clause 19: Special Conditions", the Corporate Debtor has stated that the Corporate Debtor through its 100% owned subsidiary Samruddha Holdings Mauritius Limited owns 95% of equity in Samruddha Resources Kenya Limited and that transaction was mapped saying that Samruddha Resources Kenya Limited would sell the cargo to Samruddha Resources Limited and hence the Corporate Debtor would sell the same to the Operational Creditor herein. As such, for the said refund of USD 530,823.59/- at the request of the Corporate Debtor

debit note was raised on its subsidiary company Samruddha Resources Kenya Limited. However, the Corporate Debtor is the one which was agreed with the Operational Creditor for supply of goods, which has executed the Contract dated 13.11.2017, which has received the invoices and advance of USD 30,00,000/- and which has acknowledged its liability and executed a Settlement Agreement agreeing to refund the amount on or before 30.05.2022. **Hence the Corporate Debtor has admitted its liability of USD 530,823.59/- through the Settlement Agreement dated 08-04-2022.**

8. It is submitted that the Contract dated 08.04.2022 and 21.04.2022 were also executed between the Corporate Debtor and the Operational Creditor for supply of "Iron Ore Fines". Since the substantial terms and conditions of the said contracts are similar to the above stated contract dated 13.11.2017, the same are not being reproduced herein to avoid repetition. In a similar manner, under Contracts dated 08.04.2022 and 21.04.2022, the Corporate Debtor was liable to pay an amount of USD 62,284.79/- and USD 301,795.21/- respectively. Accordingly, there was a series of email communication between the Operational Creditor and the Corporate Debtor and the same is attached as annexure in the Petition. It is pertinent to point out one such email dated 12.08.2022 at Page no. 80 of the Petition which was from the Corporate Debtor to the Operational Creditor clearly admitting their liability of USD 62,284.79/- and USD 301,795.21/-. The said email is being reproduced herein:

*"Dear Ms. Kitty,*

*Re.: MV Desert Pioneer = USD 62,284.79 and MV Navigation  
OL = USD 301,795.21*

*We would appreciate it if you kindly understand our situation and  
allow us time for the delay in payment on MV Navigation OL  
until November 20, 2022.*

*We reassure you that we are trying hard to make this payment on MV Navigation OL by September 30, 2022. However, in case we are unable to pay by September end, we request you to allow us time until November 30, 2022.*

*We request you to bear with us for the payment delays on MC Desert Pioneer, we will remit the payment at the earliest.*

*Thank you so much for your co-operation and understanding during this time.*

*Thanks & Regards*

*Christine Samuel”*

**From the said email it is clear that the Corporate Debtor has accepted and acknowledged its liability without any dispute and has given a timeline too for the purpose of making such payment to the Operational Creditor.** Thereafter, the Corporate Debtor has evaded the communications of the Operational Creditor despite several reminders through email and the said reminders are also part of the record. It is pertinent to clarify that the said names MV Desert Pioneer and MV Navigation OL. are the names of the vessels which carried the goods.

9. It is submitted that it clear that the liability is acknowledged and till date, the Corporate Debtor has not raised any dispute. In total the liability of the Corporate Debtor is USD 894,903.59/- comprising of USD 530,823.59/- + USD 62,284.79/- + USD 301,795.21/-, as detailed above. Hence, the Operational Creditor has issued a demand notice under Form-3 through email and also through post and the same was received and acknowledged by the Corporate Debtor. The Corporate Debtor has replied to the said Notice on 11.11.2022 only stating that the Operational Creditor is not an operational creditor under the provisions of IBC. The said copy of the email dated 11.11.2022 and the Reply of the Corporate Debtor dated 11.11.2022 attached to Petition as **Annexure Nos. 1 & 2** respectively. **It is pertinent to mention that the Corporate Debtor has**

**only stated that the Operational Creditor is not operational creditor under the provisions of IBC but there was no denial of liability or dispute raised either prior to issuance of the said demand notice or through the said reply.**

10. It is submitted that the Corporate Debtor has filed its reply statement only stating that the amount of USD 530,823.59/- is from the Settlement Agreement and that the other two amounts of USD 62,284.79/- and USD 302,795.21/- are penalties claimed and that the same does not fall under the definition of "Operation Debt". With regard to the same, it is submitted that the amount of USD 530,823.59/- arose from the Contract dated 13.11.2017 and the Settlement Agreement is an ancillary agreement agreeing on the date of payment and it is not a standalone agreement. As such, the contention of the Corporate Debtor that the amount is from the Settlement Agreement alone is false as the same is pursuant to provision of goods and services. Further, with regard to the contentions of the Corporate Debtor that the other two amounts are in the nature of penalty, the same are false and are being made only to mislead this Tribunal. It is submitted that Penalty in legal sense would imply compensation for breach of law, rule or contract and involves an idea of punishment. However, the words 'penalty' and 'bonus' used in the Contracts are under the heading price adjustment only as a way to fix the price of the goods at the time of final payment and not something which arises from the breach of the contract. In fact, there are no clauses of breach or compensation in the said contract. The Contentions of the Corporate Debtor by projecting the said word to imply a legal sense than what was agreed under the contract is futile attempt to mislead this Tribunal.
11. Once the amount is **crystallized and undisputed**, the Corporate Debtor cannot deny that there is no liability. A mere reference to Section 3(6) read with Section 5(21) clearly shows that any right to payment whether or not

such rights is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured or unsecured, in respect of provision of goods and services is operation debt. Even assuming without conceding that the said amounts are in the nature of penalties, they squarely fall under the definition of Operation Debt. Further, since the amount is crystallized and undisputed which requires no adjudication especially in light of the above said admission by the Corporate Debtor with regard to their liability vide the Settlement Agreement and emails, the same cannot now be denied.

12. **It is again reiterated that the amount which was stated in the demand notice is crystallized, undisputed, admitted by the Corporate Debtor and same does not require any adjudication by any competent authority.**

**Submissions made by the Corporate Debtor:**

13. The Chief Financial Officer of the Respondent / Corporate Debtor is authorized and competent to file this Affidavit-in-Reply to the captioned Company Petition preferred by the Operational Creditor / Applicant u/s 9 of the Insolvency and Bankruptcy Code, 2016 by virtue of Board resolution dated 14th June, 2023 (copy enclosed as Annexure A to the Reply).
14. The respondent Corporate Debtor is engaged in the business of Mining and Sale/Exports of Iron-ore Fines/Lumps. The claim of the Applicant, as per the Petition filed u/s 9, a formal copy of which was served on us only on 10.07.2023, can be summarized as under:
  - a. Amount of US Dollars 5,30,823.59 arising out of a Settlement Agreement dated 08.04.2022 which was in settlement of certain disputes and alleged breach of contract terms in relation to supply of iron ore of Kenyan origin, said supplies having been made by an

entity incorporated in Kenya with which the Corporate Debtor has business relations;

- b. Amount of US Dollars 62,284.79 being payable as "Penalty" arising out of settlement of dispute relating to deviation in quality parameters in relation to supply of iron ore of Indian origin, shipped on vessel M. V. Desert Pioneer against contract dated 08.04.2022;
- c. Amount of US Dollars 3,01,795.21 being payable as "Penalty" arising out of settlement of dispute relating to deviation in quality parameters in relation to supply of iron ore of Indian origin, shipped on vessel M. V. Navigation OL against contract dated 21.04.2022

15. As is evident from the pleadings of the Applicant itself, the entire claim is based on the following:

- a. The amounts payable in case of iron ore of Kenyan origin are arising out of a settlement of disputes covering different shipments and the Settlement Agreement dated 08.04.2022 has been executed by the Corporate Debtor solely in the capacity of a guarantor/ indemnifier and not as the provider of the goods in question;
- b. Amounts claimed in relation to the two shipments of iron ore of Indian origin are purely in the nature of "Penalty" to compensate for disputes that arose on account of deviation from agreed quality parameters of the goods supplied. The claim of the Applicant is thus in the nature of penalty or compensation for damages/deviation from quality parameters in the goods supplied.

16. The above submissions clearly bring out the following factual situation:

- i. the claims of the Applicant are entirely on account of amounts towards penalties/compensation and hence not in the nature of

Operational Debt as defined u/s 5(21) of the Insolvency and Bankruptcy Code, 2015;

- ii. the claims are based on "Settlement Agreement" and thus do not qualify to be treated as Operational Debt;
- iii. the Corporate Debtor, in the Settlement Agreement of 08.04.2022 (in relation to iron ore of Kenyan origin), is only a guarantor/indemnifier and thus an application u/s 9 of the Code cannot lie against the Corporate Debtor, as the said guarantee is not in the nature of a financial guarantee;
- iv. the sole objective of the Applicant is recovery of its dues and not the resolution of the Corporate Debtor;
- v. resorting to initiation of CIRP purely for recovery in personam squarely attracts the prohibition contained in sub-section (1) of section 65. The text of the said provision is reproduced hereinbelow:

*"65. Fraudulent or malicious initiation of proceedings-*

*(1) If any person initiates the insolvency resolution process or liquidation proceedings fraudulently or with malicious intent for any purpose other than for the resolution of insolvency, or liquidation, as the case may be, the Adjudicating Authority may impose upon such person a penalty which shall not be less than one lakh rupees but may extend to one crore rupees."*

17. In summary it is stated that:

- i. The application is based on claims which are not in the nature of Operational Debt
- ii. The application is purely for recovery and not resolution;

***Findings:***

18. We have heard the submissions of the Counsel appearing for the Operational Creditor and perused the records.
19. It is the contention of the Corporate Debtor that the claims of the Applicant are entirely on account of amounts towards penalties/compensation and hence not in the nature of Operational Debt as defined u/s 5(21) of the Insolvency and Bankruptcy Code, 2015.

Upon perusal of the records it is noted that as per clause 5 of the Agreement titled as Penalty and Bonus it was agreed that if the specifications/weightage/size of the Iron Ore Lumps as per the CIQ report is superior to the what was claimed in the Provisional Invoice, the Corporate Debtor would be entitled to Bonus i.e., increase in price which the Operational Creditor would have to pay to the Corporate Debtor and in case the same is inferior to the what was claimed in the Provisional Invoice, the price would be decreased proportionately on the defined limits and the Corporate Debtor would be liable to pay Penalty as difference of Price as per Clause 5. Therefore, it can be inferred from the records that the clause 5 of the agreement was mere mechanism of price adjustment and not to impose any Penalty or Bonus.

20. It is observed that the Notice under Section 8(1) of the Insolvency and Bankruptcy Code, 2016 dated 01.11.2022 issued to the Corporate Debtor. It is also noted that the Corporate Debtor replied to the said Demand Notice on 11.11.2022 and raised defence that the Operational Creditor is not an operational creditor under the provisions of IBC, 2016. That claims are based on amounts towards penalty/compensation "Settlement Agreement" and thus do not qualify to be treated as Operational Debt.

21. However as observed in para 19 above, that clause 5 of the Agreement is in the nature of price adjustment mechanism and settlement agreement was arrived among the Operational Creditor and the Corporate Debtor to crystallize the amount as per clause 5 of the agreement. Therefore, this bench is of the view that the amount claimed by way of this Petition falls under the definition of the operational debt. Further, the said amount was accepted vide email dated 12.08.2022 at Page no. 80 of the Petition which was from the Corporate Debtor to the Operational Creditor.
22. As relied by the Operational Creditor on the judgement of Mobilox Innovation (P) Ltd. v. Kirusa Software Pvt. Ltd. (2018) 1 SCC 353 the law is settled on point of dispute that the Corporate Debtor shall bring to the notice of the Operational Creditor the pre-existence of dispute. In the matter in hand the Pre-existing dispute brought by the Corporate Debtor was already settled by way of supplementary settlement agreement. Hence it is concluded that the amount is due and payable by the Corporate Debtor.
23. The amount outstanding is above Rs. 1 lakh and since the present petition was filed before the amendment increasing threshold limit, the present petition is in compliance with section 4(1).
24. The application made by the Operational Creditor is complete in all respects as required by law. It clearly shows that the Corporate Debtor is in default of a debt due and payable, and the default is in excess of minimum amount stipulated under section 4(1) of the IBC. Therefore, the default stands established and there is no reason to deny the admission of the Petition. In view of this, this Adjudicating Authority admits this Petition and orders initiation of CIRP against the Corporate Debtor.

25. The petition bearing **CP (IB) 467/MB/C-IV/2023** filed by **BST (SK) Limited**, the Operational Creditor, under section 9 of the IBC read with rule 6(1) of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating Corporate Insolvency Resolution Process (CIRP) against **Samruddha Resources Limited [CIN: U51900MH1997PLC112284]**, the Corporate Debtor, is **admitted**.
26. There shall be a moratorium under Section 14 of the IBC, in regard to the following:
- a. The institution of suits or continuation of pending suits or proceedings against the Corporate Debtor including execution of any judgment, decree or order in any court of law, Tribunal, arbitration panel or other authority;
  - b. Transferring, encumbering, alienating or disposing of by the Corporate Debtor any of its assets or any legal right or beneficial interest therein;
  - c. Any action to foreclose, recover or enforce any security interest created by the Corporate Debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest (SARFAESI) Act, 2002;
  - d. The recovery of any property by an owner or lessor where such property is occupied by or in possession of the Corporate Debtor.
27. Notwithstanding the above, during the period of moratorium: -

- e. The supply of essential goods or services to the corporate debtor, if continuing, shall not be terminated or suspended or interrupted during the moratorium period;
  - f. The provisions of sub-section (1) of section 14 of the IBC shall not apply to such transactions as may be notified by the Central Government in consultation with any sectoral regulator;
28. The moratorium shall have effect from the date of this order till the completion of the CIRP or until this Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 of the IBC or passes an order for liquidation of Corporate Debtor under section 33 of the IBC, as the case may be.
29. Public announcement of the CIRP shall be made immediately as specified under section 13 of the IBC read with regulation 6 of the Insolvency & Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.
30. The Tribunal hereby appoints **Mr. Sushanta Kumar Choudhary**, Registration No. IBBI/IPA-003/IP-N00292/2020-2021/13238, Email: [sk.choudhary123@gamil.com](mailto:sk.choudhary123@gamil.com) Contact No:9007016008 as Interim Resolution Professional (IRP) of the Corporate Debtor to carry out the functions as mentioned under IBC. The IRP shall carry out functions as contemplated by sections 15, 17, 18, 19, 20 and 21 of the IBC. The fee payable to IRP/RP shall be compliant with Regulations, Circulars and Directions issued by the Insolvency & Bankruptcy Board of India (IBBI) as may be applicable.

31. During the CIRP Period, the management of the Corporate Debtor shall vest in the IRP or, as the case may be, the RP in terms of section 17 of the IBC. The officers and managers of the Corporate Debtor shall provide all documents in their possession and furnish every information in their knowledge to the IRP within a period of one week from the date of receipt of this Order, in default of which coercive steps will follow.
32. The Operational Creditor shall deposit a sum of Rs.3,00,000/- (Rupees Three Lakh only) with the IRP to meet the expenses arising out of issuing public notice and inviting claims. These expenses are subject to approval by the Committee of Creditors (CoC).
33. The Registry is directed to communicate this Order to the Operational Creditor, the Corporate Debtor and the IRP by Speed Post and email immediately, and in any case, not later than two days from the date of this Order.
34. A copy of this Order be sent to the Registrar of Companies, Maharashtra, Mumbai, for updating the Master Data of the Corporate Debtor. The said Registrar of Companies shall send a compliance report in this regard to the Registry of this Court **within seven days** from the date of receipt of a copy of this order.
35. Ordered accordingly.

Sd/-

**ANU JAGMOHAN SINGH**  
**Member (Technical)**  
06.10.2022  
SAM

Sd/-

**KISHORE VEMULAPALLI**  
**Member (Judicial)**