

IN THE NATIONAL COMPANY LAW TRIBUNAL AT
ALLAHABAD BENCH

CP (IB) 297/ALD/2018

*(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 :

METCO TRACOM PVT. LTD.

(Having office at 11, Crooked Lane 1st Floor Kolkata WB 700069, Phone No.-
9831559111, email-address-happyhomes@live.in)

..... Petitioner
(Operational Creditor)

VERSUS

M/S ASSOCIATED MACHINERY CORPORATION LIMITED,

(A company incorporated under the Companies Act, 1956 and having its registered
office at F-64, Bulandshahar Road, Industrial Area, Ghaziabad, Uttar Pradesh-
201001)

..... RESPONDENT
(Corporate Debtor)

JUDGMENT/ORDER DELIVERED ON 04.12.2018

CORAM : Hon'ble SH. BIKKI RAVEENDRA BABU MEMBER (J)
Hon'ble MS. SAROJ RAJWARE, MEMBER (T)

For the Petitioner: Sh. Babita Jain (PCS)

**For the Respondents: Sh. Abhinav Mehrotra, Adv. Srijan Mehrotra, Adv.
Bhavana Mehrotra, Adv & Anuj Kumar, Adv.**

PER SE : Hon'ble SH. BIKKI RAVEENDRA BABU MEMBER (J)

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ORDER/JUDGMENT

1. Metco Tracom Pvt Ltd styling itself as Operational Creditor filed this petition under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as 'IBC') read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (hereinafter referred to as the 'AA Rules') in respect of **M/s Associated Machinery Corporation Limited** styling it as Corporate Debtor with a request to commence Corporate Insolvency Resolution Process.

2. It is stated in the petition that petitioner placed an order for supply of Machine of the value of Rs.2,36,50,000/- (Rs.Two Crore Thirty Six Lakh and Fifty Thousand) with the respondent. It is further stated that petitioner paid 15% advance amount i.e. 35,47,500/- (Thirty Five Lakhs Forty Seven Thousand and Five Hundred) out of the total amount of Rs. 2,36,50,000/-(Two Crore Thirty Six Lakh Fifty Thousand) on 6th May, 2017. Respondent accepted the order and agreed to deliver the machine within three months i.e. on 31st July, 2017 at the address of the petitioner. It is also stated in the petition that respondent failed to deliver the Machine to the petitioner on 31st July, 2018. Pursuant to the demands made by the petitioner respondent agreed to pay the amount in instalments from 10th April, 2018 to 30th June, 2018 via mail dated 21st March, 2018. Respondent against revised the instalment amount and finally agreed to pay 10,00,000/-(Ten Lakh) up to 25th April, 2018, 10,00,000/-(Ten Lakh) in May, 2018 and 15,48,000/-(Fifteen Lakh Forty-Eight Thousand) before 30th June through mail dated 23rd, March 2018. Respondent gave a cheque bearing No. 065288 dated 21.5.2018 drawn on Bank of India, Navyug Market Branch U.P. to an amount of Rs.8,00,000/- (Eight Lakhs) and handover to petitioner. The said cheque returned unpaid with the remark "funds insufficient". Respondent also gave another cheque for an amount of Rs.5,50,000/-(Five Lakh Fifty Thousand) on 21st June, 2018 for the same was also dishonoured. Petitioner through its advocate has sent letter to the respondent on 6th June, 2018 regarding dishonoured of cheque on 4th June, 2018. Petitioner issued Demand Notice in Form-3 on 28th June, 2018 to the respondent by speed post in accordance with section 8 of the Insolvency

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and Bankruptcy Code, 2016 and Rule 5 of the Insolvency Bankruptcy Rules, 2016. The said demand notice was duly served to the respondent. Respondent neither choose to make payment nor to give reply to the demand notice dated 28th June, 2018. It is further stated in the petition that respondent committed default in payment of the operational debt owned by it to the petitioner in access of Rs.1,00,000/- (One Lakh). It is also stated that the registered office of the respondent is located in Ghaziabad, Uttar Pradesh State.

3. Respondent filed reply stating that petitioner suppressed material facts and with a mala fide intention mislead this tribunal.
4. It is the plea of the respondent that no debt is due to the petitioner from the respondent.
5. It is stated the demand notice dated 27.6.2018 was never served on the respondent. The demand notice is addressed to the Board of Directors of A.M.C Limited but not to M/s Associated Machinery Corporation Limited. The answering respondent stated that it could not give any reply to the demand notice because he has not received any demand notice. It is the specific case of the respondent that it has not received any money from the petitioner. It is also pleaded that the advance amount received from 3rd Party would not qualify as operational debt due to the petitioner within the meaning of Section 5 (21) of the Code.
6. It is also pleaded that petitioner will not fall under the category of Operational Creditor. It is stated that the disputed purchase order dated 5.5.2017 clearly state that M/s Sanjay Associate Pvt Ltd has made payment on 6.5.2017 to the respondent. It appears that there was some arrangement between M/s Sanjay Associate Pvt Ltd. and M/s Metco Tracom Pvt. Ltd. (Petitioner) behind the back of the respondent. It is also stated that the application is in complete. It is stated that the commercial transactions under purchase order dated 5th May, 2017 was a simpliciter agreement of supplying of Goods against money and the same was done with M/s Sanjay Associates Pvt. Ltd under the franchise of M/s Metco Pvt. Ltd (Petitioner). The order was placed through the petitioner to enable the ease of finance for M/s Sanjay Associates Pvt. ltd.

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7. There is no relationship of Debtor and Creditor between the Petitioner and Respondent. Petitioner annexed the bank account detail of Ms. Sanjay Associates Pvt. Ltd as Annexure-7 alongwith the I&B petition.
8. It is stated that the Cheque No. 065288 dated 21.5.2018 for Rs.8,00,000/- (Eight Lakhs) and Cheque No. 065289 dated 21.6.2018 for 5,50,000/- (Five Lakh Fifty Thousand) were issued in favour of M/s Sanjay Associates Pvt. Ltd. and not to the petitioner. It is also stated that M/s Sanjay Associates Pvt. Ltd issued a notice under Section 138 of the N.I Act for the dishonour of the aforesaid cheques. It is not the petitioner that issued the said notices. Respondents state that on one hand Ms. Sanjay Associates Pvt. Ltd is trying to recover its money by initiating legal proceedings dated 5th may, 2018 in the Shape of Notice under Section 138 of the N.I Act and on other hand for the same debt petitioner is trying to trigger Corporate Insolvency Resolution Process by filing this petition styling as Operational Creditor.
9. It is further stated that respondent company is in a sound financial state and having enough assets to make payment to whomsoever they are due. It is also the case of the respondent that in pursuance of the understanding with M/s Sanjay Associates Pvt. Ltd, respondent on multiple occasions offered to supply the disputed Machineries. However Sanjay Associates Pvt. Ltd neglected to take delivery of Machine. Sanjay Associates Pvt. Ltd also did not pay the balance consideration of 60% amounting to Rs. 2,36,50,000/- (Two Crore Thirty Six Lakh Fifty Thousand).
10. In the rejoinder it is stated that petitioner has given order to the respondent for the purchase of Machinery which is goods and therefore petitioner is an operational creditor. It is further stated that advance payment was made from the bank account of the sister concern of the petitioner. Petitioner stated that the demand notice was served on the corporate debtor and its director. It is stated by the petitioner that Form-3 has been sent to the address available in the official website of the Ministry of Corporate Affairs, and it was duly acknowledged by the Corporate Debtor. It is stated that respondent has not raised any objection for receiving advance amount from the Ms. Sanjay Associates Pvt. Ltd which is sister concern of the petitioner.

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11. Learned counsel appearing for the petitioner contended the purchase order dated 5th May, 2017 is between the petitioner and respondent. The advance amount of Rs. 35,47,500/- (Thirty Five Lakhs Forty Seven Thousand and Five Hundred) was paid from M/s Sanjay Associate Pvt Ltd which is a sister concern of the petitioner and, therefore petitioner is an Operational Creditor and operational debt is due to the petitioner from the respondent.
12. It is the contention of the learned counsel for the respondent that admittedly the advance amount of Rs. 35,47,500/- (Thirty Five Lakhs Forty Seven Thousand and Five Hundred) was not paid by the petitioner and it is only paid by the M/s Sanjay Associate Pvt Ltd. He further contended that respondent issued two Cheques dated 21.5.2018 for Rs. 8,00,000/- (Rs. Eight Lakhs) and 21.6.2018 for 5,50,000/- (Rs. Five Lakhs Fifty Thousand) in the name of M/s Sanjay Associate Pvt Ltd and those cheques were presented by M/s Sanjay Associate Pvt Ltd and they were dishonoured. He further contended that the M/s Sanjay Associate Pvt Ltd also issued notice dated 6th June, 2018 under Section 138 of the N.I. Act for the dishonour of the cheque dated 21.5.2018 for Rs. 8,00,000/- (Rs. Eight Lakhs) under Section 138 of the N.I. Act. He also contended that petitioner filed the bank account copy of the M/s Sanjay Associate Pvt Ltd but not the bank accounts' copy of the petitioner company. Placing reliance on the aforesaid material, the argument of the learned counsel appearing for the respondent is that no debt is due from the respondent to the petitioner and if there is any debt due it is due to M/s Sanjay Associate Pvt Ltd. He contended that when there is no debt due from the respondent to the petitioner, petitioner cannot claim as Operational Creditor basing on the work order dated 5th May, 2017.
13. In order to appreciate the rival contentions it is necessary to refer to the definition of Operational Creditor in Section 5(20) and operational debt in Section 5 (21).

Section 5(20) reads as follows: -

“operational creditor means a person to whom an operational debt is owed and includes any persons to whom such debt has been legally assigned or transferred”

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Section 5 (21) reads as follows: -

“operational debt means a claim in respect of the provision of goods or services including employment or a debt in respect of the (Payment) of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority”

14. In the case on hand, work order is placed by the petitioner to supply the Machinery by the respondent. Towards 15% value of the Machinery an amount of Rs. 35,47,500/- (Thirty Five Lakhs Forty Seven Thousand and Five Hundred) was paid as advance to the respondent. The material on record clearly goes to show that the said payment was made by M/s Sanjay Associate Pvt Ltd but not by the petitioner. The work order itself reads that the payment was made by M/s Sanjay Associate Pvt Ltd which is a sister concern of the petitioner. The statement of account of M/s Sanjay Associate Pvt Ltd goes to show that an amount of Rs. 35,47,500/- (Thirty Five Lakhs Forty Seven Thousand and Five Hundred) was paid to the respondent on 6.5.2017 from the account of M/s Sanjay Associate Pvt Ltd but not from the petitioner. Therefore, it is clear that no amount was paid by the petitioner to the respondent towards advance amount for the supply of machinery covered by the work order dated 5.5.2017.

15. It is contended by the learned counsel for the petitioner that M/s Sanjay Associate Pvt Ltd is only the sister concern of the petitioner and such payment was accepted by the respondent and therefore respondent cannot plead that no amount is due to the petitioner and the amount if any, due is to M/s Sanjay Associate Pvt Ltd. No doubt, respondent accepted the payment from M/s Sanjay Associate Pvt Ltd. It is not stated in the work order the payment M/s Sanjay Associate Pvt Ltd is on behalf of the petitioner. It is not a case where the amount of Rs. 35,47,500/- (Thirty Five Lakhs Forty Seven Thousand and Five Hundred) paid to the respondent by the M/s Sanjay Associate Pvt Ltd was assigned as a debt to the petitioner. Therefore, there is no assignment of debt from M/s Sanjay Associate Pvt Ltd to the petitioner.

16. On the other hand, when respondent was asked to repay the amount respondent issued two cheques in the name of M/s Sanjay Associate Pvt Ltd

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one cheque is for Rs.8,00,000/- (Rs. Eight Lakhs) dated 21.5.2018 and another cheque is for Rs. 5,50,000/- (Five Lakh Fifty Thousand) dated 21.6.2018. From the material available on record both the aforesaid cheques issued by the respondent in favour of M/s Sanjay Associates Pvt Ltd were presented in the bank and they were dishonoured. In fact, M/s Sanjay Associate Pvt Ltd also issued notice in Section 138 of the N.I. Act for the dishonour of the cheque dated 21.5.2018 for Rs. 8,00,000/- (Rs. Eight Lakhs). Therefore, the understanding between the parties that respondent has to refund the advance amount of Rs. 35,47,500/- (Thirty Five Lakhs Forty Seven Thousand and Five Hundred) to M/s Sanjay Associate Pvt Ltd since the amount was transferred from the account of M/s Sanjay Associate Pvt Ltd. Unless and until there is an assignment of debt by M/s Sanjay Associate Pvt Ltd in favour of the petitioners the payment, even if, made to the petitioner by the respondent is not a valid discharge of the amount. Therefore, respondent with a view to refund the advance amount of Rs. 35,47,500/- (Thirty Five Lakhs Forty Seven Thousand and Five Hundred) issued cheques in favour of the M/s Sanjay Associate Pvt Ltd. But those cheques were dishonoured. Basing on the dishonoured cheque M/s Sanjay Associate Pvt Ltd already initiated action by issuing notice under Section 138 of the N.I. Act. Therefore, the material on record clearly show no amount is due from the respondent to the petitioner and the amount, if any, due from the respondent is to M/s Sanjay Associate Pvt Ltd and in discharge, certain cheques were also issued by the respondent in favour of the M/s Sanjay Associate Pvt Ltd. It is also pertinent to mention here that M/s Sanjay Associate Pvt Ltd in order to recover the amount issued notice under Section 138 of the N.I. Act. Simply because the purchase order is placed by the petitioner it cannot be said that advance amount is also paid by the petitioner. Unless there is an amount due from the respondent to the petitioner on account of transaction covered by the work order dated 5.5.2017 it cannot be said that there is operational debt due from the respondent to the petitioner.

17. In the absence of operational debt due from the respondent to the petitioner, petitioner cannot be called as an Operational Creditor. It appears that basing on the work order petitioner wants to claim as an Operational Creditor. At the same time, M/s Sanjay Associate Pvt Ltd basing on the dishonoured cheques claims that it is entitled to receive the repayment of the advance amount. So

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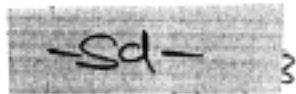
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far as the respondent is concerned it becomes a valid discharge of refund of advance amount only if the amount is paid to M/s Sanjay Associate Pvt Ltd in the absence of assignment of debt made by the M/s Sanjay Associate Pvt Ltd to the petitioner. In view of the above discussion it cannot be said that there is operational debt due to the petitioner from the respondent. petitioner cannot be called as an Operational Creditor.

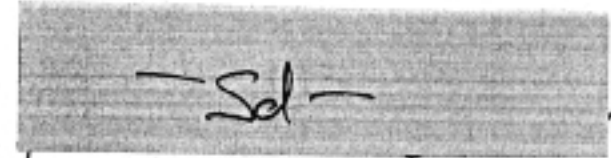
18. Respondent also raised the plea that demand notice has not been served. The material on record clearly shows that demand notices were served on the directors of the Corporate Debtor. In view of the above discussion, petitioner is not entitled to trigger Corporate Insolvency Process in respect of the respondent.

19. In the result CP No. (IB) 297/ALD/2018 is rejected. No order as to costs.

Dated: 04.12.2018



**SAROJ RAJWARE,
MEMBER (T)**



**BIKKI RAVEENDRA BABU,
MEMBER (J)**

Typed by:

Shubham Kr. Singh
(Private Secretary)