

**In the National Company Law Tribunal,**  
**Kolkata Bench, Kolkata**

**Company Petition (IB) No.446/KB/2017**

**Section 9 of the Insolvency and Bankruptcy Code, 2016**

In the matter of:

SHREESHYAM METALIKS PRIVATE LIMITED  
Shyam Kutirmaswari Pada ,Jharsuguda,  
Orissa- 768201

.... Petitioner Company/Operational Creditor

Versus

CONCAST STEEL & POWER LTD.  
21, Hemant Basu Sarani,5<sup>th</sup> Floor, Room No.511 & 512  
Centre Point, Kolkata – 700 001, West Bengal.

.... Respondent Company/Corporate Debtor

Order Delivered on 7<sup>th</sup> November 2017

**Coram:**

**V. P. Singh, Member (J)**

**Jinan K.R., Member (J)**

For the Petitioner/Operational Creditor : Mr. Kanishk Khetan, Advocate

For the Corporate Debtor

- : 1. Mrs. Manju Bhutoria, Advocate  
2. Mr. S.K.Kasera, Advocate  
3. Mr. Ankur Singhi, Advocate  
4. Mr. D. Dey, Advocate  
5. Ms. Lili Bose, Advocate  
6. Mr. Subhadeep Basak, Advocate  
7. Mr. Noel Dey, Advocate  
8. Mr. A. Kedia, Advocate

**ORDER****Per Jinan K.R., Member (J)**

This is an application for initiation of Corporate Insolvency Resolution Process by the Financial Creditor Shreeshyam Metaliks Pvt. Ltd, as against the Corporate Debtor Concast Steel & Power Ltd, 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.

2. The petitioner, operational creditor namely, has filed this application Under Section 9 read with Rule 6 of the Insolvency and Bankruptcy Code 2016 for (hereinafter called as "I&B Code") initiating Insolvency Resolution Process against the respondent Company/ Corporate Debtor claiming that the respondent owes operational debt to the tune of Rs.2,58,44,678.00 (Two Crore fifty eight lakh forty four thousand six hundred seventy eighty) exclusive of interest @12% p.a from the date of default. It has also been claimed that the respondent failed to discharge the debt despite repeated demands and hence filed this petition for initiating corporate insolvency resolution process as against the respondent.

3. The Petitioner/Operational Creditor is engaged in the business of supplying coal. He has submitted that at the request of the respondent/Corporate Debtor, and on the basis of Purchase Orders dated 27.06.2015, 19.01.2015, 25.03.2015, 25.04.2015 and 11.02.2015 (Annexure B) the operational creditor supplied and delivered the goods as per the invoices issued by the petitioner dated 27.06.2015, 28.02.2015 ,16.02.2015 ,27.04.2015,23.05.2015, 28.02.2015 and 20.03.2015 (Annexure II, Exhibit B) to the corporate debtor for an aggregate quantity of 16,500 Mt of the said goods at the agreed rate of Rs.832 per unit.

4. It is further submitted that out of the total dues to the tune of Rs.3,48,44,678.00, (Three crore forty eight lakh forty four thousand six hundred seventy eight) part payment of Rs.90,00,000.00/- (Ninety crore) in respect of invoice No SSMPL/TI/2014-15/009 was paid and total amount in default comes to Rs.2,58,44,658.00.( Two crore fifty eight lakh forty four thousand six hundred fifty eight) with interest @ 12% p.a. Copy of Bank statements of operational creditor evidencing the receipt of part payment on various dates from the corporate debtor is annexed and marked as 'Annexure- II, Exhibit C. After just adjustment and appropriation balance amount to the tune of Rs.2,58,44,658/-, remained due and payable by corporate debtor to the operational creditor on or before 22<sup>nd</sup> June 2016 but the corporate debtor failed to do so, therefore, the operational creditor is entitled to and claim interest @ 12% per annum on the outstanding dues is annexed and marked as 'Annexure-II, Exhibit B.

5. The operational creditor sent a notice by speed post on 16th February 2016 under Section 8(1) of the Insolvency and Bankruptcy Code, 2016 to the corporate debtor at its registered office and demanded payment of a sum of Rs.2,58,44,658 (Two crore fifty-eight lakh forty-four thousand six hundred fifty eight) and interest thereon @12%per annum with effect from date of default till the date of payment vide 'Annexure-I, Exhibit - A. Despite service of Notice, the corporate debtor neither made payment of the outstanding sum but replied to the said notice contenting untenable contentions. It is further contended that the reply of the respondent does not constitute any pending dispute before service of demand notice as per S.9(3) (c) of the I&B Code.

6. On perusal of the records it reflects that the applicant/operational creditor has delivered demand notice of unpaid operational debt/copy of Invoices dated 27.6.2015, 28.02.2015, 16.2.2015, 27.04.2015, 23.05.2015 ,28.02.2015 and 20.03.2015, to Corporate Debtor under Section 8(1) of the Insolvency and Bankruptcy Code, 2016 which is Annexure - I, Exhibit A. The demand notice was

duly served upon Corporate Debtor and corporate debtor send a reply to the demand notice on 06.03.2017 which is annexed to the petition as Annexure II, Exhibit K. The respondent / corporate debtor is required to reply within 10 days of the receipt of copy of notice but he neither raised any dispute nor he discharged his obligation to repay the operational debt.

7. The operational creditor has filed this application by complying Section 9 (3) (b) and 9 (3) (c). Affidavit under section 9(3) (b) is produced and marked as Annexure II, Exhibit E, and certificate from bank as specified in Section 9 (3) (c) of the I&B code also produced and marked as Annexure II, Exhibit I.

8. Shri. Anil Kumar Kedia, director of the Sreeshyam Metaliks Private Limited, who was specifically authorized to file this petition produced copy of resolution dated 11.07.2017 along with supplementary affidavit as per the direction of this Tribunal. Therefore, petitioner is found having authority to file this petition for initiating corporate insolvency resolution process as against the respondent.

9. Upon the above said facts and circumstances as aforesaid, it is evident that corporate debtor committed default by not making payment of outstanding dues amounting to Rs. 2,58,44,658.00 along with interest @12% p.a to operational creditor, despite receipt of demand notice by the respondent.

10. The respondent entered appearance and filed reply in the form of affidavit in opposition contending in brief is the following: -

11. The respondent admitted the purchase of coal from the petitioner. The respondent contended that there is no debt due and payable by the company to the petitioner and that since the coal supplied to the respondent did not comply with the specifications of the purchase orders, the respondent requested the petitioner to take back the goods or provide appropriate reduction in the supply rate for such deficiency. According to the respondent as per mutual understanding

adjustments were made against the invoices for low fixed carbon content and since the petitioner agreed to improve the quality of the goods respondent continues purchase but despite the understanding the petitioner continued to supply poor quality of coal. Accordingly, the respondent company began to suffer loss while selling its products. The respondent further alleged that by sending letter dated 04.08.2015 petitioner was informed that respondent will not be in position to procure any further material from the petitioner and produced copy of the letter allegedly send to the petitioner as Annexure C along with the reply. Upon the said contention respondent further alleged that no money is due and payable by the respondent to the petitioner and that a sum more than Rs.90.00 lakhs have been paid by the respondent and therefore this petition is liable to be dismissed.

12. Heard both side. Upon hearing the argument and considering the contentions and on perusal of the records the point that arise for consideration is whether the respondent succeeded in proving existence of a dispute as alleged in the reply?

13. Here in this case the ingredients as provided under section 9(5) (a to c) are satisfied by the petitioner for admission of this petition under section 9 of I&B Code. The petitioner did not suggest any insolvency resolution professional and hence requirement under section 9(5)(e) of I & B Code doesn't arise. Thus, the only question arises is whether the allegations raised by the respondent in the reply qualify 'dispute' as provided under section 5(6) of I & B Code?

14. According to the Learned counsel for the respondent the allegation raised by the respondent in the reply was raised prior to issuance of the notice and that no amount is due and payable by the respondent and highlighted Annexure C produced along with the reply to show that respondent disputed the quality of

goods supplied to the respondent and would come under the purview of section 5(6) of I & B Code.

15. Learned counsel for the petitioner strongly opposed the above said contention and submits that Annexure C in the reply is not a copy of the letter allegedly given to the petitioner and that the signature in the said letter as if the petitioner acknowledged the receipt of the said letter is not the signature of the petitioner.

16. Other than Annexure C there is nothing in this case to support the contention of the respondent that respondent raised dispute regarding the quality of the goods supplied by the petitioner before receiving the demand notice from the petitioner. It is significant to note here that in the reply notice send to the petitioner the respondent not at all mentioned about any letters or notice send to the petitioner prior to receipt of the demand notice from the petitioner. On the other hand, in the reply it is alleged that respondent refused to place any further purchase order since June 2015. Annexure C allegedly delivered by hand to the petitioner in person allegedly prepared on 04.08.2015 alleging that the quality of coal supplied not fulfill the required specification and hence respondent requested the petitioner not to continue supply of goods. Thus, there is inconsistency in regards raising of dispute, regarding the quality of the goods as alleged in Annexure C. Allegation that Annexure C was delivered by hand and got signature of the petitioner acknowledging receipt of that letter by him in person is unbelievable without supporting evidence on the side of the respondent. Since authenticity of the signature in Annexure C is disputed we are not inclined to accept this letter as a proof proving existence of dispute without corroborating evidence on the side of the respondent.

17. The Hon'ble Supreme court in Mobilox Innovations (P) Ltd. V. Kirusa Software (P) Ltd. [2017]140 CLA123 (SC) has held that *"So long as a dispute truly exist in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application for initiation of corporate insolvency resolution process."* To understand the principle laid down in the citation above referred it is good to read para 40 of the judgment. It read as follows: -

*"40. It is clear, therefore, that once the operational creditor has filed an application, which is otherwise complete, the adjudicating authority must reject the application under Section 9(5)(2)(d) if notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility. Such notice must bring to the notice of the operational creditor the "existence" of a dispute or the fact that a suit or arbitration proceeding relating to a dispute is pending between the parties. Therefore, all that the adjudicating authority is to see at this stage is whether there is a plausible contention which requires further investigation and that the "dispute" is not a patently feeble legal argument or an assertion of fact unsupported by evidence. It is important to separate the grain from the chaff and to reject a spurious defense which is mere bluster. However, in doing so, the Court does not need to be satisfied that the defense is likely to succeed. The Court does not at this stage examine the merits of the dispute except to the extent indicated above. So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application".*

18. Here in this case respondent not at all succeeded in proving the existence of a dispute regarding the quality of coal received by him as substandard prior to the receipt of the demand admittedly received by him. More over in the reply the dispute highlighted is vague. There is no reference of letter Annexure C in the reply notice produced along with the reply. If such a letter had been given to the petitioner as alleged, it would have been mentioned in the reply notice. Nothing

prevent the respondent in not mentioning the said letter in the reply notice. No valid explanation in this regard offered by the learned counsel for the respondent at the time of hearing. No authentic acknowledgment of receipt of the said letter by the petitioner in person produced for the perusal of this Tribunal. More over there is inconsistency regarding date of refusal of receipt of goods from the petitioner due to poor quality of supply of goods to the respondent. Law is settled that mere mentioning in the notice that dispute is in existence, in relation of impugned debt is not sufficient. Dispute shall be preexisting prior to receipt of the demand notice by the respondent. Such a fact not at all established in this case on the side of the respondent. In view of the above said factors and bear in mind the principle laid down in the above cited case the contentions of the respondent that there was pre-existing dispute regarding quality of the coal supplied by the petitioner to the respondent is found devoid of any merit.

19. One another contention raised by the respondent is that there is no debt due and payable by the respondent. To substantiate the said contention also here in this case no evidence. Respondent produced copy of petitioner's ledger account as Annexure B. A copy of Subsidiary ledger account of the respondent was produced by the petitioner and marked as Annexure II, Exhibit H along with the copy of ledger produced by the respondent. The petitioner also produced a statement of computation of amounts in default in tabular form and marked as Annexure II, Exhibit B. There is no express challenge against Exhibit B in the reply filed by the respondent. Herein this case no supporting evidence to show that other than Rs.90 lakhs admittedly paid by the respondent any amount has been paid by the respondent to the petitioner. The bank statement produced by the petitioner strengthen the contention of the petitioner that the other than Rs. 90 lakhs paid by the respondent no other amount has been paid by the



respondent. So, the contention on the side of the respondent that no amount is due to the petitioner is also found devoid of any merit.

20. In view of the above said discussion we have no hesitation to hold that this petition deserve admission under section 9 of I & B Code. Here in this case the petitioner did not utilize his option in proposing name of an insolvency professional of his own choice. Therefore, we hereby make a reference to the IBBI for the recommendation of an Insolvency professional who may act as an interim resolution professional as per section 16(3) (a) of I & B code.

21. In view of the above we hereby admit this petition for initiating insolvency resolution process and declaring moratorium for the purposes referred to in section 14 of the I&B Code with following directions:

(i) That this Bench, subject to provisions of sub sections (1) of section 14 of the Code, hereby prohibits the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgement, decree or order in any court of law, Tribunal arbitration panel or other authority; transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein; 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 Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

(ii) That the supply of essential goods or services to the corporate debtor, if continuing, shall not be terminated or suspended or interrupted during moratorium period.

(iii) That the provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

(iv) That the order of moratorium shall have effect from the date of admission of this petition till the completion of the corporate insolvency resolution process as prescribed under section 12 of the Code.

(v) That his Bench hereby directs to cause public announcement of the corporate insolvency resolution process upon appointment of insolvency professional by IBBI immediately as specified under section 15 of the Code.

(vi) That, moratorium is declared for the purposes referred to under 14 of the IBC Code.

The registry is directed to make a reference to the IBBI for the appointment of an interim resolution professional as per section 16(4) of I&B, Code.

This order be communicated to the Operational Creditor as well as Corporate Debtor.

Urgent Photostat certified copies of this Order, if applied for, be supplied to parties upon compliance of all requisite formalities.

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**Vijai Pratap Singh,  
Member (J)**

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**Jinan K.R.  
Member (J)**

Signed on 7<sup>th</sup> November 2017