

IN THE NATIONAL COMPANY LAW TRIBUNAL
CUTTACK BENCH
CUTTACK

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MA (IB) No. 1/CB/ 2024
In
IVN. No. 6/CB/2023
arising out of
CP (IB) No. 40/CB/2023

In the matter of:

An Application under Section 60 (5) read with Section 65 of Insolvency and Bankruptcy Code, 2016 and Rule 11 of the NCLT, Rules 2016; & Section 340 read with Section 195 (1) (b) of Code of Criminal Procedure, 1973 read with section 193 of the Indian Penal Code, 1860;

-And-

In the matter of:

TRL KROSAKI REFRACTORIES LTD, having its registered office at Belpahar, Jharsududa, Orissa- 768 218;

...Applicant/Intervenor

-Versus-

SARAT CHANDRA CHOWDHARY, having its registered office at- W-9, Civil Township, Rourkela, Odisha- 769 004;

... Respondent

In

IVN. No. 6/ CB/2023

In the matter of:

An Application under Section 60 (5) read with Section 65 of Insolvency and Bankruptcy Code, 2016 and Rule 11 of the NCLT, Rules 2016;

-And-

In the matter of:

TRL KROSAKI REFRACTORIES LIMITED, having its registered office at Belpahar, Jharsuguda, Orissa- 768 218;

...Applicant

Sd

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-Versus-

SMS Asia Private Limited, having its registered office at- W-9, CIVIL Township,
1st Floor, Rourkela, Odisha- 769 004;

...Respondent

- And-

CP (IB) No. 40/CB/2023

In the matter of:

Petition under Section 10 of the Insolvency and Bankruptcy Code, 2016 read with
7 of the Insolvency and Bankruptcy (Application to Adjudicating Authority)
Rules, 2016

-And-

In the matter of:

SMS Asia Private Limited, having its registered office at- W-9, CIVIL Township ,
1st Floor, Rourkela, Odisha- 769 004;

... Petitioner

-And-

Appearances (through hybrid mode)

For the applicant :

Mr. Gaurav Khanna, Adv.
Mr. Venugopal Mahapatra, Adv.
Mr. Gautam Burnwal, Adv.
Ms. Aishwarya Ray, Adv.
Mr. Sachin Sahoo, Adv.
Mr. Tushar Srivastava, Adv.

For the Respondents :

Mr. Saswat Kumar Acharya, Adv.
Mr. Jayabrata Mukherjee, Adv.
Mr. Abhijeet Agarwal, Adv.

Coram:

Shri P. Mohan Raj : Member (Judicial)
Shri Kaushalendra Kumar Singh : Member (Technical)

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Order Pronounced on:22.04.2024

ORDER

1. This is an application filed to conduct an enquiry under Section 340 of the Code of Criminal Procedure 1973.

2. The applicant is one of the operational creditor of M/s. SMS Asia Private Ltd. The respondent is the Managing director of the said SMS Asia Private Ltd engaged in business on refractories. The company filed petition C.P. (IB) No.40/CB/2023 under section 10 of IBC 2016 for an initiation of CIRP against the company itself. In the said proceeding this applicant filed intervening application Ivn No. No.6/CB/2023, in the said application the applicant alleged that the respondent and his family members incorporated new company Thyme India Pvt Ltd, in the same address of SMS Asia Pvt Limited and engaged in the same business. It is alleged that the respondent deliberately shifted the business of SMS Asia Pvt Ltd to new company Thyme India Pvt Ltd. In response to Inv No.6/CB/2023 the respondent filed reply on behalf of SMS Asia India Pvt Ltd and verified the affidavit dated 09.12.2023. In the said reply the respondent denied the said allegation and stated that Thyme India Ltd does not trade with refractory products manufactured by TRL or other refractory companies.

3. The applicant contended that the said reply statement is false statement given by the respondent in oath by affidavit and stated that thus the respondent committed an offence of giving false evidence punishable under section 193 IPC and filed this application. The applicant in support of his case relies upon the profile of Thyme India Pvt Ltd available in www.indiamart.com Annexure B1. The applicant relies upon the following passage found in profile of Thyme India Pvt Ltd.

“Founded in the year 1990, at Rourkela (Odisha, India), we “SMS Asia Private Limited” are known as the reputed Trader, Supplier, and Importer of Ores Refractories, Chemical Compound, Refractory Bricks,

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Ceramic Products, Zircon Nozzles, Special Chemicals, High Aluminate Cement, High Alumina Mortars, Ramming Mass, Gunning Mass and Spraying Mass. Our Company is Private Limited based Company. In addition to this, we also provide Refractory Lining Services to our clients. Under the supervision of Directors, "Sarat Chandra Chowdhary", we have been able to manage our leading position in the market. We are importing 20-25% of our products from China."

4. The above passage described about SMS Asia Pvt Ltd. Further in display of material under the caption Products & services refractory items are displayed.
5. One of the conditions required to be fulfilled for initiation of proceedings under section 340 Cr.P.C of 1973 is it must be expedient in the interest of justice that an enquiry should be made into the alleged offence. The mere fact that a person has made a contradictory statement or inconsistent statement is not enough to proceed under section 340 Cr.P.C. It must be shown that the person intentionally given the false statement at any stage of Judicial proceeding. Further, still the court form an opinion that it is expedient in the interest of justice and if the offence is against public interest, then only the court can initiate inquiry under section 340 Cr.P.C. It is established rule that standard of proof requires in criminal cases are more stringent then the civil cases.
6. The respondent taken a stand that SMS Asia Pvt Ltd and Thyme India Pvt Ltd have different product lines of the major activities/products of the two companies. It is described as follows: -

SMS ASIA	THYME INDIA
Finished refractories, including castable, mortar, gunning mass, and bricks	Refractory raw materials, including fused and sintered alumina, fused and burnt magnesia, fused and sintered silica, and calcined clays
Ceramic fibre products	Chemicals for steel and aluminum

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Anchors	Alloys
Turnkey installation projects of refractories and heat up of refractories	Machinery for steel and cement

7. From the chart it shows that there are certain differences between the products dealt by the two companies. It is not necessary to go in depth of roving enquiry. The alleged act of respondent is not against the interest of public. Further in C.P. (IB) No.40/CB/2023 we concluded that after the incorporation of Thyme India Pvt Ltd the respondent and his family members managing both the companies deliberately shifted the business to new company Thyme India Pvt Ltd and making it a profit earning concern. Further we found that SMS Asia India Pvt Ltd not filed the petition for resolution and as provided under section 65 of IBC imposed penalty of Rs.1,00,000/- hence we think it is not necessary and it is not in the interest of justice again on the same point proceed individually against the respondent.

8. The initiation of proceeding under section 340 Cr.P.C is not routine; it can be used sparingly. In this regard Apex Court held as follows in case of **Chajoo Ram Vs. Radhey Shyam**, (1971) 1 SCC 774: 1971 SCC (cri) 331, at Para 7 of the judgment has held that:

“7. The prosecution for perjury should be sanctioned by courts only in those cases where the perjury appears to be deliberate and conscious and the conviction is reasonably probable or likely. No doubt giving of false evidence and filing false affidavits is an evil which must be effectively curbed with a strong hand but to start prosecution for perjury too readily and too frequently without due care and caution and on inconclusive and doubtful material defeats its very purpose. Prosecution should be ordered when it is considered expedient in the interests of justice to punish the delinquent and not merely because there is some inaccuracy in the statement which may be innocent or immaterial. There must be prima facie case of deliberate falsehood on a matter of substance

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and the court should be satisfied that there is reasonable foundation for the charge.”

9. In the case of **Santokh Singh Vs. Izhar Hussain**, (1973) 2 SCC 406: 1973 SCC (Cri) 828, at Para 19 of the judgment has held that:

19. In Santokh Singh V. Izhar Hussain, this Court has held that every incorrect or false statement does not make it incumbent on the court to order prosecution. The court has to exercise judicial discretion in the light of all the relevant circumstances when it determines the question of expediency. The court orders prosecution in the larger interest of the administration of justice and not to gratify the feelings or personal revenge or vindictiveness or to serve the ends of a private party. Too frequent prosecutions for such offences tend to defeat its very object. It is only in glaring cases of deliberate falsehood where conviction is highly likely that the court should direct prosecution.

10. In the circumstances, we opined that it is not expedient in the interest of justice to proceed. In consequence, this application is **Dismissed**.

11. The Registry is directed to send e-mail copies of the order forthwith to all the parties and their Ld. Counsel for information and for taking necessary steps.

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


Kaushalendra Kumar Singh
Member (Technical)


P. Mohan Raj
Member (Judicial)

Signed on this, the 22 day of April, 2024.

Supriya P.S.