IN THE NATIONAL COMPANY LAW TRIBUNAL
CUTTACK BENCH
CUTTACK

CP (IB) No. 39/CB/2021

In the Matter of:

An application under section 7 of Insolvency and Bankruptcy Code 2016 read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules 2016.

-And-

In the Matter of:

Vanit Inder Kumar Gupta, (Carrying on business under the name and style of Sri Enterprises as the sole proprietor), having address at: 142, B-Wing, Mittal Tower Nariman Point, Mumbai- 40002, Maharashtra

…Financial Creditor

-Versus-

Balasore Alloys Limited, having registered office at: Balgopalpur, Balasore, Orissa- 756020 and Corporate Office at: Park Plaza, 71 Park Street, 1st Floor, Kolkata- 700016

…Corporate Debtor

Appearances (through video conferencing)

For the Applicant : Mr. Vaibhav Mahajan, &
Mr. Karnain Sattar Advocates

For the Respondent : M/s.Debabrata Ganguly &
Sandeep S Ladda Advocates.

Order Pronounced on: 06.12.2022

Coram:

Shri P. Mohan Raj : Member (Judicial)
Shri Satya Ranjan Prasad : Member (Technical)

O R D E R

Per: P. Mohan Raj, Member (Judicial)

The brief contents of the petition are as follows:

1. The Petitioner/Financial creditor is a proprietary concern entered into an understanding with the corporate debtor as set out in a letter dated 21.03.2017. As per the arrangements the Petitioner used to advance the monies to the respondent/corporate debtor against 1.5% profit for manufacture of High Carbon Ferro Chrome and allied products. The corporate debtor in turn to repay the advance amount, shall supply the manufactured products to the petitioner at lower price than the market price, he in turn sells the products to higher price to the buyers. For the financial year 2019-2020 the petitioners advanced to the tune of Rs.25 crores to the corporate debtor with the above said understanding. Further two triparty agreements were executed on 27 & 28 February 2020 among the corporate debtor as manufacturer, financial creditor as seller and METCOSPA as buyer for supply 300 each metric tonnes of High Carbon Ferro Chrome by the end of April 2020. Another contract dated 01.06.2020 was executed among corporate debtor, financial creditor and CRONIMET BRASIL LTDA for supply of 82 tonnes of High Carbon Ferro Chrome by the end of June 2020. In pursuance the said agreements the financial creditor raised purchase orders and paid advance amounts to the corporate debtor. The corporate debtor received the advances but defaulted to supply the products as agreed in the said three agreements. In this regard a sum of Rs.5,06,86,784.62/-was payable by corporate debtor to financial creditor. On negotiation an agreement was entered between the financial creditor

and corporate debtor on 30.12.2020 treating the outstanding amount as financial debt and corporate debtor agreed to repay the amount with 24% simple interest per annum on or before 31.03.2021. For repayment of amount ten postdated cheques were also given by the corporate debtor drawn in favour of financial creditor. When the cheques were presented for collection, they were returned with an endorsement 'insufficient funds". The financial creditor already initiated proceedings against the corporate debtor under section 138 of Negotiable Instruments Act. The financial creditor filed this petition stating that the corporate debtor committed default of RS.6,33,47,945/-as on 31.03.2021 and prayed for initiation CIRP against the corporate debtor.

The brief contents of reply are as follows:

2. On the Respondent side filed reply primarily questioning the nature of debt. According to the respondent the debt involves in this petition is not a financial debt as defined under IBC 2016 and petitioner is not a financial creditor. No forward sale contract entered between the parties, the petitioner at best be an operational creditor. No loan was advanced, in pursuance of triparty agreements the financial creditor submitted purchase orders. There is no lender and borrower relationship. The agreement dated 30.12.2020 may at best be described as settlement between the parties. The present case is completely outside the purview of IBC, 2016.

The points for consideration are:

i. Whether the debt alleged in the petition is a financial debt?

ii. Whether the agreement dated 30.12.2020 entered between Petitioner and respondent is enforceable?

Points No.1 & 2:

3. The petitioner advances the amount and raised purchase orders for the production of High Carbon Ferro Chrome and allied products. This is obviously purchase and sales transactions. The Petitioner termed the transaction as a Forward Sale Contracts, but one of the elements of Forward Sale Contract is fixing specified price and fixing future date, but here price of product is not specifically fixed but the respondent has to return the advance amount with 1.5% profit by supply of the manufactured products to the petitioner for lesser price then the market price. No document regarding forward contract entered between the parties has been produced. The petitioner relies upon the agreement dated 30.12.2020, there it is recited that the amounts paid to the respondent in pursuance of various sale and purchase contracts to be treated as financial debt. In the said agreements the parties agreed themselves to treat the amount advanced by the petitioner and defaulted by the respondent as financial debt but actually no amount was disbursed in pursuance of the agreement dated 30.12.2020. The amount was paid by the petitioner for purchase of goods but the respondent failed to supply the goods as agreed, this is the actual case of the petitioner, this fact is admitted by the petitioner in his legal notice dated 26.04.2021. The question is whether the parties by consent change the nature of operational debt into as financial debt.

4. The "financial debt" is defined in section 5(8) of IBC 2016 is a debt together with interest if any which is disbursed against the consideration for time

value of money. No amount was disbursed in pursuance of the agreement dated 30.12.2020, the money was already paid by the petitioner for purchase of goods. At no point of time money was advanced for time value of money. It is abundantly clear that the amount advanced by the petitioner to the respondent is not a financial debt, the ingredients to constitute a financial debt are missing. At best the amount due from the respondent amounts to operational debt, but the petitioner wants to treat the debt as financial debt, because the respondent agreed to treat the debt as financial debt in the agreement dated 30.12.2020. By consent of parties the nature/character of debt cannot be altered/changed. In the rejoinder the petitioner stated that after filed this petition the respondent entered into an agreement and accepted the contention of petitioner and made part payment towards the debt hence the contention of the respondent that the debt is not a financial debt should not be accepted. Only because the respondent agreed to treat the debt as financial debt the character of the debt will not change, further there is no estoppel against the statue, hence in spite of agreement dated 30.12.2020 the character of debt remains as operational debt and the petitioner remains as operational creditor, as such the petition filed by the petitioner terming himself as financial creditor is not maintainable.

5. The one another point is the petitioner is a proprietary concern not a factor, the exemption provided under section 8D of Indian Stamp Act 1899 not applicable to him. The loan agreement dated 30.12.2020 is engrossed on plain unstamped paper the same is hit by the stamp Act. The agreement is chargeable instrument as per Article 5 of Indian Stamp Act 1899. As per section 35 of Indian

Stamp Act 1899 if the chargeable instrument written on unstamped paper, it is not admissible in evidence for any purpose.

6. For the reasons state above it is answered to the points that the debt narrated in the petition is not a financial debt and agreement dated 30/12/2020 is unenforceable document and in consequence the petition is liable to be dismissed.

In the result petition is **DISMISSED.**

7. 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,

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

SATYARANJAN PRASAD Digitally signed by SATYARANJAN PRASAD Date: 2022.12.06 16:59:41 +05'30'

Satya Ranjan Prasad
Member (Technical)

PANDIAN MOHAN RAJ Digitally signed by PANDIAN MOHAN RAJ Date: 2022.12.06 15:40:20 +05'30'

P. Mohan Raj
Member (Judicial)

Signed on this 6th day of December, 2022.

Supriya-P. s_