

**IN THE NATIONAL COMPANY LAW TRIBUNAL
CUTTACK BENCH
CUTTACK**

CP (IB) No.45/CB/2021

INSOLVENCY AND BANKRUPTCY CODE, 2016;

-And-

In the Matter of:

An application 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:

Visa Coke Limited, having its registered address at: Visa House, 8/10, Alipore Road, Kolkata- 700027

...Operational Creditor

-Versus-

Mesco Kalinga Steel Limited, having its registered office at: 3915, Lewis Road, Mesco Tower, Kedar Gouri Square, Bhubaneswar, Odisha- 751002

...Corporate Debtor

Appearances (through video conferencing)

For the Petitioner : Mr. Satya Smruti Mohanty, Adv.

For the Respondent : Mr. Saswat K. Acharya, Adv.

Order reserved on:10.01.2023

Order Pronounced on: 24.01.2023

Coram:

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

ORDER

Per P. Mohan Raj, Member, (Judicial)

1. This application has been filed by **Visa Coke Limited**, as an Operational Creditor under Section 9 of the Insolvency and Bankruptcy Code, 2016 read with rule 6 of the Insolvency and bankruptcy Rules,2016 (Application to Adjudicating Authority) to initiate Corporate Insolvency Resolution Process (CIRP) against **Mesco Kalinga Steel Limited**, a Company registered under the provision of Companies Act, 1956.

2. The brief contention of Petition as follows: -

3. The instant application has been filed by the alleged Financial Creditor under Section 9 of IBC, 2016 for initiation of CIRP of the Respondent herein for the alleged default of operational debt to the tune of Rs. 4,19,77,245.17/- inclusive of 15 % per annum penal interest rate till 31.03.2021. it is stated that the operational creditor entered into a Contract with the corporate debtor, whereby the operational Creditor had sold Low Ash Metallurgical Coke to the Corporate Debtor for 12,000 MT=/-10% at Seller's Option and at the price of Rs, 18,800/- per Metric Ton+ GST with the delivery period being up to 10.11.2019. In terms of the Contract dated 11.10.2019, Mesco was to pay 100% payment in advance through RTGS/NEFT fund transfer or alternatively, by opening of Letter of Credit (LC) prior to dispatch. By way of its email dated 12.11.2019 and 16.11.2019, Corporate Debtor requested Operation Creditor to issue delivery order for 1700 MT of Coke and on 16.11.2019 assured that LC had been applied and would be opened by 18.1.2019 or 19.11.2019. Based on such assurance, between 12 November and 19th November, Visa Coke

Ltd. issued delivery orders for a total quantity of 1700 MT of Coke on credit-basis out of which about 1692,84 MT was lifted by Mesco. However, the payment for 1692.84 MT was not made by Mesco and the said amount is still due and payable. The corporate debtor admitted that an amount of Rs. 3,34,16,661.60/- was due and payable and issued two emails both dated 25.11.2019, seeking time to make payment of the outstanding dues. Thereafter, despite repeated requests of the operational creditor verbal and written also contain in several electronic mail as well as letter dated 14.02.20220, 26.06.2020 and Notice of Demand dated 23.09.2020, inter alia, wherein the corporate debtor had been called upon to make payment of the outstanding dues, it has failed and /or neglected to make payment till date. On 31.03.2021, a demand notice was issued by the operational creditor to the corporate debtor an unpaid amount of Rs. 41,977,245.17/- (inclusive of interest) is due and payable by the corporate debtor to operational creditor. Hence this petition.

4. The brief contention of Reply as follows: -

5. It is stated that the Respondent has been having business relation with petitioner since 2005. The Petitioner used to supply material (Coke) to MKSL pig iron plant, situated at Jajpur District, Duburi, which was utilised by the Respondents' parent company. Mid-East Integrated Steel Limited (MISL). On the other hand, different materials like Coke breeze and lime coke etc. has been bought from Visa Group Company which includes Visa Sun Coke and Visa Steel Limited. As per the Respondents lender account, it appears that Visa Group Company owes a sum of Rs. 75,44,461.52/- to MISL, parent company of the Respondent. Thus,

reconciliation of account is required between the parties. There are previous issued which are unsettled with Visa Coke. Around 2007-2008, MISL through its financier bought material (Coke) worth 21-22 crores. At that Visa Coke was named as Visa Steel Limited. The respondent has many unsettled issues with the Petitioner which requires to be addressed and settled and reconciliation of accounts to be done on the basis of above facts. There are no acknowledgments by the Respondent of the alleged dues at any point of time. It is specially denies that total amount of debt and payable as on 30.09.2020 is Rs. 41,977,245.17 (Rs. 3,34,16,661.60/- being the principal amount – 15 % p.a. penal interest rate inclusive till 31.03.2021. It is submitted that there is no documentary proof with regards to this contention. Moreover, Respondents intends to have reconciliation of accounts, since the Petitioner unanimously demanding such amount with any proof. It is stated that a sum of Rs. 75,44,461.52/- is due and payable by the petitioner to the Respondents parent company. On 01.01.2018, MISL mines and all its ancillary operations shut down. The respondent states that in order to establish the said purported claim the petitioner has to produce and prove requisite documents which can only be done in adjudicatory proceedings i.e., Civil suit and hence, the present application is not maintainable.

At the time of argument on the respondent side two pleas are raised of course they are not pleaded in the reply viz (I) The contract dated 11.10.2019 is novated by the action of parties and (ii) No statutory demand notice was issued under section 8 of IBC to the corporate debtor.

The points for consideration are:

1. Whether contract dated 11.10.2019 is novated?
2. Whether statutory demand notice has been served upon the corporate debtor?

Point No 1.

6. In this petition the petitioner mentioned the date of default is 19.11.2019, in terms of the contract dated 11.10.2019. As per the contract the respondent has to pay to the petitioner the sale amount in advance, only then the petitioner shall deliver the LAM Coke. In terms of contract, there is no possibility of occurring default because 100% payment shall be made prior to delivery of the coke. Further in terms of contract entire quantity of coal to be supplied before 10.11.2019 subject to respondent making advance payment. The delivery period was subsequently extended from 10.11.2019 to 20.11.2019, 30.11.2019, 20.12.2019 and 10.01.2020. Further in contra to the written contract at the request of the respondent by email dated 12.11.2019 and 16.11.2019 the petitioner permitted the respondent to lift the coals on 12.11.2019 and 19.11.2019 without payment in advance. On this basis it is argued that the contract dated 11.10.2019 is novated and default date mentioned in the petition is incorrect.

7. On the respondent side raised this plea at first time during the course of an argument and there is no pleading to that effect in the reply.

8. On the petitioner side oppose to entertain this plea in the absence of any pleadings. The issue of novation of contract is mixed question of fact and law.

In this regard petitioner side relies upon the Apex court Judgment **Purbanchal Cables & Conductors(p) Ltd Vs. Assam SEB (2012)7 SCC 462** as follows:

*Lastly, learned Senior Counsel for suppliers also contended that the extension of date of supply order, from time to time by Board, amounts to a novation of contract or supply order in terms of [Section 62](#) of the Indian Contracts Act and, therefore, the new contract or supply order would be governed by the Act. In our opinion, the ground or issue of novation of Contract is a mixed question of fact and law and it is being raised, for the first time, at the time of hearing of the case before us which cannot be permitted to be raised. The said fact of novation or alteration of contract is required to be urged evidentially and scrutinised by the courts below. In absence of such factual findings, it is not possible to decide such a mixed question of law and facts. In *Shakti Tubes Ltd. (supra)*, the issue of novation of contract was raised before this Court for the first time at the time of hearing. This Court declined to entertain such ground as being a mixed question of law and fact. This Court further observed that even on the merits of the case the escalation of price, reduction of the quantity of the supply order and extension of date of supply does not amount to novation or alteration in the supply order.*

In view of the supra citation the plea of novation raised without pleading is not entertainable. Thus, this point is answered.

Point No.2

9. On the respondent/corporate debtor side raised another plea that no demand notice under section 8(1) of IBC 2016 was served upon the corporate, hence the petition is not maintainable. In contra on the petitioner side argued that notice dated 31.03.2021 found in page 50 of the petition is valid statutory demand notice, which was duly served upon the key managerial personal, hence the petition is validly filed and maintainable. This is the pure question of law.

10. Section 8(1) of IBC 2016 is required the operational creditor may send demand notice to the corporate debtor. The form and manner how the notice to be served are set out in Rule 5 of the Adjudicating Authority Rules 2016.

11. The petition filed under section 9 of IBC 2016 without serving notice under section 8 of IBC 2016 is not maintainable. Indeed, failure to serve the demand notice is not curable defect. A notice under section 8 of IBC 2016 set in motion, the entire process of Insolvency. After ten days from the service of notice only the operational creditor gets right to file the petition.

12. Thus, there is no pale of controversy that the demand notice to the corporate debtor under section 8 of IBC 2016 is mandatory, preceding to file a petition under section of 9 of IBC 2016.

13. In this case petitioner sent notice dated 31.03.2021 addressed to three managerial persons M/s.Sameer Singh, Bibhuti Bhushan Rath and S.Subudhi but no notice was sent/addressed to the corporate debtor.

14. The statutory Form No.3 of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules 2016 mention “To Name and address of the registered office of the corporate debtor”, further in the Form No.5 under the heading Instructions Annexure VII it is mentioned that the proof of serving copy of the application(a) to the corporate debtor(b).....It is crystal clear that Section 9 of IBC petition can be filed only against the corporate debtor after giving prior notice under section 8 of IBC to the corporate debtor. In this case no notice was sent to the corporate debtor against whom this present petition is filed.

15. On the petitioner side relies upon Rule 5(2) of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules 2016. For ready reference the section 8(1) of IBC 2016 and Rule 5 of Adjudicating Authority Rules 2016 are extracted:

*8. Insolvency resolution by operational creditor. (1) An operational creditor may, on the occurrence of a default, deliver a demand notice of unpaid operational debt or copy of an invoice demanding payment of the amount involved in the default to the **corporate debtor** in such form and manner as may be prescribed.*

Demand notice by operational creditor. — (1) An operational creditor shall deliver to the corporate debtor, the following documents, namely. -

(a) a demand notice in Form 3; or

(b) a copy of an invoice attached with a notice in Form 4.

(2) The demand notice or the copy of the invoice demanding payment referred to in sub-section (2) of section 8 of the Code, may be delivered to the corporate debtor,

(a) at the registered office by hand, registered post or speed post with acknowledgement due; or

(b) by electronic mail service to a whole-time director or designated partner or key managerial personnel, if any, of the corporate debtor.

(3) A copy of demand notice or invoice demanding payment served under this rule by an operational creditor shall also be filed with an information utility, if any.

16. On the petitioner side submitted that the delivery to the corporate debtor is sufficient if notice served by registered post on the director or key managerial personnel of the corporate debtor. On the petitioner side read the Rule 5 (2)(a)(b) in disjunction manner picking up under lined sentences as above. The interpretation of the petitioner side is not acceptable.

17. The section 8(1) of IBC 2016 and Rule 5(1) & (2) of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules 2016. shall read conjointly and to arrive plain meaning. In section 8 (1) it is mentioned that operational creditor may on occurrence of a default deliver a demand notice of unpaid operational debt demanding payment of the amount involved in the default **to the corporate debtor.**

Rule 5(1) begins with “An operational creditor **shall deliver to the corporate debtor** the following documents namely-

Rule 5(2) describes the mode of service of demand notice on corporate debtor. It is stated that notice of/to the corporate debtor can deliver at the registered office of the corporate debtor by hand, Registered post or Speed post etc.

18. In short if the notice is addressed to the corporate debtor a non-living juristic person, then such a notice addressed to the corporate debtor can be delivered upon the key managerial person. But in our case no notice is addressed to the corporate debtor. The three key managerial persons of corporate debtor M/s. Sameer Singh, Bibhuti Bhushan Rath and S. Subudhi, received the notices sent to them by registered post. In our case when no notice is addressed/sent to corporate debtor the question of whether service is valid or not does not arise at all. For the reasons discussed above it is concluded that no statutory demand notice has been served upon the corporate debtor, in consequence the petition is liable to be dismissed.

In view of answer arrived to the point No.2, the petition is **DISMISSED.**

19. 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,

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

Satya Ranjan Prasad
Member (Technical)

P. Mohan Raj
Member (Judicial)

Signed on this 24th day of January, 2023.

Supriya-P. s