

**IN THE NATIONAL COMPANY LAW TRIBUNAL,
MUMBAI BENCH, COURT – III**

C.P.(IB)-833(MB)/C-III/2022

(Under Section 9 of the IBC, 2016 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudication Authority) Rule 2016)

In the matter of

M/s. Kesar Tubes, Partnership Firm

Through Mr. Jevil Shah, Partner

Bldg. No 43/45, Office No. B6, 2nd Floor, Kika street, Gulalwadi, Mumbai, Maharashtra-400003.

.....Operational Creditor/Petitioner

Vs

M/s. South Sea Distilleries & Breweries Pvt. Ltd.

Aviskar Bldg. 103/A First Floor, Naushir Bharucha Marg, Ipp. Grant Road Stn (W) Mumbai- 400007.

.....Corporate Debtor/Respondent

Order Pronounced on: 07.02.2024

CORAM:

**SHRI CHARANJEET SINGH GULATI
HON'BLE MEMBER (T)**

**SMT LAKSHMI GURUNG
HON'BLE MEMBER (J)**

Appearances:

For the Operational Creditor: None

For the Corporate Debtor : Adv. Shyam Kapadia

ORDER

Per- Smt. Lakshmi Gurung, Member Judicial

1. The Present Application is filed under section 9 of Insolvency and Bankruptcy Code, 2016 (**"IBC"**) read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 by M/s. Kesar Tubes, through Mr. Jevil Shah (**"Petitioner/ Operational Creditor"**) for initiating Insolvency Resolution Process (CIRP) against M/s. South Seas Distilleries & Breweries Pvt. Ltd. (**"Corporate Debtor"**) for default in repaying an amount of ₹2,09,19,049/- as on 06.04.2020.

Brief Facts & Submission by Petitioner

2. As per the details mentioned in Part IV of the Petition, the Corporate Debtor placed purchase order dated 26.03.2022 on the Petitioner for supply of SS Steel Coil Grade, 304. Detailed descriptions are as below:

Sr. No.	Description	Quantity (KG)	Unit Rate (Rs./Kg.)	Total Value (Rs.)
1.	SS Steel Coil Grade, 304, Thickness 6 mm, Width 1500 mm, Surface Finish n 1, Edg Cond me	28,826	281	81,00,106/-
2.	SS Steel Coil Grade, 304, Thickness 5 mm, Width 1500 mm, Surface Finish n 1, Edg Cond me	46,800	281	1,31,50,800/-
3.	SS Steel Coil Grade, 304, Thickness 4 mm, Width 1500 mm, Surface Finish n 1, Edg Cond me	21,898	281	61,53,338/-
	Total Quantity	97,524		2,74,04,244/-
			GST@18%	49,32,763.92/-
			Total	3,23,37,007/-

3. The relevant terms and conditions for the supply and delivery of the said Goods, were stipulated in the said purchase order and read as under:

Payment Terms	Rs. 1,00,000 Advance with PO against PI. 1 st Lot payment to be made against vehicle loading LR copy. (50 Ton). 2 nd Lot payment (47,524 KG) Need Bank Guarantee of Rs. 25 Lacs for advance Payment. Balance Payment when material is loaded on truck and submission of LR copy.
Delivery on	<ul style="list-style-type: none">• 1st lot in 1st week of April.• 2nd lot on or before 25th April.
Delivery At	South Seas Distilleries & Breweries Pvt. Ltd., Dahanu

4. As mentioned in the petition the Petitioner raised invoice dated 26.03.2022 amounting to Rs. 3,23,37,007/-. It is noted that though the Petitioner has mentioned it as invoice but in reality it is a mere Purchase Order dated 26.03.2022 for Rs. 3,23,37,007/-.
5. The Petitioner submitted that an amount of Rs. 1,14,17,958/- against raised invoices no. 2114 and 2115 both dated 06.04.2022, was received. However, the remaining amount of Rs. 2,09,19,049/- plus applicable GST amount is outstanding resulting into filing of the present petition. The date of default has not been mentioned.
6. The Petitioner has annexed following documents: -
- a. Purchase Order dated 26.03.2022.
 - b. Tax invoice 2114 dated 06.04.2022 for Rs. 33,02,537.
 - c. Tax invoice 2115 dated 06.04.2022 for Rs. 81,15,421.
 - d. Demand Notice dated 10.05.2022.
 - e. Reply to the demand notice raising notice of dispute.

7. The case of the Petitioner is that though the purchase order was placed for Rs. 3,23,37,007/- but payment has been received only for Rs. 1,14,17,958/- and therefore there is outstanding of Rs. 2,09,19,049/-.

Submission by the Corporate Debtor:

8. The Corporate Debtor has filed a detailed reply. In nutshell the reply is that the CD has made the entire payment for the goods supplied to it for which invoices were raised. The Petitioner cannot demand the payment merely on the basis of the Purchase Order for which no supplies were made and no invoice was raised.

9. Details of the quantity ordered and supplied are given below:-

Sr. No.	Description	Qty Ordered	Qty Sold
1.	SS Steel Coil Grade, 304, Thickness 6 mm, Width 1500 mm, Surface Finish n 1, Edg Cond me	28,826	5,290
2.	SS Steel Coil Grade, 304, Thickness 5 mm, Width 1500 mm, Surface Finish n 1, Edg Cond me	46,800	15,890
3.	SS Steel Coil Grade, 304, Thickness 4 mm, Width 1500 mm, Surface Finish n 1, Edg Cond me	21,898	13,255
	Total Quantity	97,524	34,435

10. In context of the delivery of the said 34,435 Kgs of SS steel, under the 1st lot to the Corporate Debtor, the Petitioner issued two Invoices bearing Nos. 2114 and 2115 dated 06.04.2022 for an aggregate sum of Rs. 1,14,17,958/- (Rupees One Crore Fourteen Lakh Seventeen Thousand Nine Hundred and Fifty-Eight Only) (inclusive of GST). Upon receipt of said invoices, the CD on the very next day i.e. 07.04.2022 made full payment of aforementioned amount of Rs. 1,14,17,958/-. The receipt of

the said amount has been admitted by the Corporate Debtor in petition itself.

11. The Corporate Debtor has submitted that all the key commercial terms as mentioned in the Purchase Order were breached by the Petitioner itself.
12. The Corporate Debtor further submitted that instead of delivering 50 tons (50,000 kgs) of the said Goods to the Respondent by the first week of April, 2022, being the 1st lot of the said Goods, the Petitioner supplied and delivered only 34.435 tons (34,435 Kgs.) of the said Goods to the Corporate Debtor, and furthermore the said 34.435 tons (34,435 Kgs.) of the said Goods were also belatedly delivered to the Respondent on 8th April, 2022, after the first week of April 2022.
13. Furthermore, as the Petitioner had completely abandoned all its obligations under the said purchase order, the Petitioner took no steps whatsoever towards delivering to the Respondent, the balance shortfall quantity of 15.565 Tons (15,565 Kgs) of the 1st lot, within the first week of April, 2022, as stipulated in the said Purchase Order.
14. The Corporate Debtor further submitted that the Petitioner was required and bound to furnish to the Respondent, a bank guarantee in the sum of Rs. 25,00,000/- (Rupees Twenty-Five Lakhs only), prior to seeking any advance payment from the Respondent for the 2nd lot of the said Goods. However, the Petitioner had failed to provide the same; and also failed to supply and deliver the said Goods to the Corporate Debtor as agreed and promised under the said Purchase Order.
15. The Corporate Debtor further submits that the Petitioner never supplied and delivered the balance quantity of the goods as per the purchase order therefore there is no debt due and payable to the Petitioner much less an Operational Debt.

Observations and Findings:

16. Vide order dated 11.08.2023, this Tribunal noted that “*pleadings are completed in this matter*”.
17. On 07.11.2023, though the Counsel for the Petitioner was present through Video Conference neither switched on the camera nor responded to the call of the bench. On 19.12.2023, none appeared for the Petitioner.
18. The matter is very old and enough opportunities are given to the Petitioner for making submission. However, the Petitioner has chosen not to appear and make submissions, hence we proceed in the matter on the basis of the documents on record.
19. We have heard the Counsel for Corporate Debtor and perused the petition and the documents on record.
20. It is undisputed fact that the Petitioner supplied goods vide following invoices:

S.N	Invoice No.	Invoice Date	Invoice Amount (Rs.)
1.	2114	06.04.2022	Rs. 33,02,537/-
2.	2115	06.04.2022	Rs. 81,15,421/-
		Total	Rs. 1,14,17,958/-

21. The Petitioner submitted that an amount of Rs. 1,14,17,958/- against raised invoices no. 2114 and 2115 both dated 06.04.2022, was received. However, the remaining amount of Rs. 2,09,19,049/- plus applicable GST amount is outstanding resulting into filing of the present petition. The date of default has not been mentioned.
22. The Corporate Debtor has made payment of above invoices on 07.04.2022 which factum has not been denied by the Petitioner. The case of the Petitioner seems to suggest that since the Purchase Order was for

Rs. 3,23,37,007/-, therefore Rs. 2,09,19,049/- is balance and outstanding without even supply of goods and raising any invoice. This contention of the Petitioner cannot be accepted.

23. Further, we rely on the judgement of **Neeraj Jain Vs. Cloudwalker Streaming Technologies Private Limited (Company Appeal (AT) (Insolvency) No. 1354 of 2019** wherein, the Hon'ble NCLAT has held that the operational creditor has to file its claim along with an invoice demanding payment for the goods and services supplied to the Corporate Debtor. The relevant paragraphs are as below:

“41. Annexure I of the said Form 5 contains the phrase, —Copy of the invoice/demand notice as in Form 3 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 served on the corporate debtor. Thus, it is clear that copy of invoice/demand notice as noted in Form 3, is to be attached along with the application under Section 9 of the Code. Here the expression, —copy of invoice/demand notice” means that invoice raising the demand or demand notice is to be submitted as per the nature of the operational debt. For example, in cases where the operational debt is like salary dues, there can be no invoice. In such a scenario, the demand notice delivered in Form 3 can be submitted along with the application.

42. However, if the operational debt is of nature where the invoice is generated as part of the transaction, then in such cases the invoice becomes an essential document to prove the existence of the debt, and thus it has to be submitted. In case of operational debt where the transaction does not involve the generation of the invoice, then as per column 7 of Form 3, documents to prove the existence of operational debt and the amount in default are to be submitted along with the notice in Form 3.

....

46. On perusal of the language of Section 8, it is clear that an Operational Creditor on the occurrence of default has been provided with the option of delivering a demand notice of the unpaid operational debt or raising an invoice demanding payment of the amount involved. The two options available for initiation of Corporate Insolvency Process are provided to deal with all the eventualities that may occur. For example, if an operational debt is in the nature of salary dues, then in that situation, the question of submitting an invoice does not arise. To deal with such a situation, Section 8 contains the provision for issuance of demand notice of the unpaid operational debt. Form 3 of the Adjudicating Authority Rules has only laid down the condition that the applicant has to give the details of the amount of debt, details of the transaction on account of which such debt fell due and the date from which such debt fell due, and as per Column 7 of the said Form 3, applicant has to attach the documents to prove the existence of operational debt and the amount in default. Likewise, where the operational debt involves the generation of the invoice, then in that case, invoice raising the demand may be sent to the Corporate Debtor demanding the invoice amount. In such a situation, the Operational Creditor has to issue the demand notice in Form 4 along with the invoice.

47. Thus, it is clear that the choice of issuance of demand notice u/s 8(1) of the Insolvency and Bankruptcy Code 2016, either in Form 3 or Form 4, under the Insolvency and Bankruptcy Code Application to Adjudicating Authority Rules 2016, depends on the nature of Operational Debt. Section 8(1) does not provide the Operational Creditor, with the discretion to send the demand notice either Form 3 or Form 4, as per its convenience. The applicability of Form 3 or Form 4 depends on whether the invoices were generated during the course of transaction or not. It is also made clear that the copy of the invoice is not mandatory if the demand notice is issued in Form 3 of the Insolvency and Bankruptcy Code Application to Adjudicating

Authority Rules 2016 provided the documents to prove the existence of operational debt and the amount in default is attached with the application.”

24. In present case, the Petitioner issued two Invoices bearing Nos. 2114 and 2115 dated 06.04.2022 for an aggregate sum of Rs. 1,14,17,958/- and the same was paid by the Corporate Debtor on 07.04.2022. No further invoices were issued by the Petitioner to the Corporate Debtor. Therefore, no claim was asserted by the Petitioner, prior to the Demand Notice.

25. We refer to Section 5(20) and 5(21) of IBC as below:

5(20) “operational creditor” means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred;

5(21) “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;

26. In other words, an operational debt can only arise against the provision of goods or services. However, in the present case, the Petitioner has failed to demonstrate any claim in respect of goods supplied to the Corporate Debtor for which payment has remained outstanding. In fact, there was no supply of goods and no invoice for which amount this petition has been filed.

27. In view of above, we are of the considered opinion that the Corporate Debtor have successfully, demonstrated that there was not even a debt due and payable to the Petitioner.

28. In the absence of any supply or sale and any document to substantiate the same, the present petition is not maintainable.

29. In view of above, the present Company Petition is ***dismissed as non-maintainable.***

Sd/-

**CHARANJEET SINGH GULATI
(MEMBER TECHNICAL)**

Sd/-

**LAKSHMI GURUNG
(MEMBER JUDICIAL)**

Arpan, LRA