

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH

Company Appeal (AT) (Insolvency) No. 415 of 2023

[Arising out of Order dated 03.01.2023 passed by the Adjudicating Authority/National Company Law Tribunal, Kolkata Bench, in C.P. (IB) No. 1741/KB/2019.]

IN THE MATTER OF:

Matashree Mercantile Pvt. Ltd.

6, Dr. Meghnad Saha Sarani,
2nd Floor, Kolkata – 700026.

...Appellant

Versus

Sesa International Ltd.

Jasmine Tower
31 Shakespeare Sarani
6th Floor, Room No. 611,
Kolkata – 700017.

...Respondent

Present:

**For Appellant : Mr. Shreeyash U Lalit, Mr. Abhinav Aggarwal,
Mr. K. Abhay, Ms. Rimjhim Garg &
Mr. Himanshu Vats, Advocates.**

**For Respondent : Ms. Noelle Banerjee, Mr. Deepak Biswas &
Mr. Deepak Dey, Advocates.**

J U D G M E N T

(22.08.2023)

NARESH SALECHA, MEMBER (TECHNICAL)

1. The present appeal has been filed under Section 61 of the Insolvency & Bankruptcy Code, 2016 (in short '**Code**') against the Impugned Order dated 03.01.2023 in C.P. (IB) No. 1741/KB/2019 passed by the Adjudicating Authority (National Company Law Tribunal, Kolkata Bench),

whereby the Adjudicating Authority, rejected application of the Appellant filed under Section 9 of the Code.

2. Heard the Counsel for Parties and perused the records made available including cited judgments.

3. Learned Counsel for the Appellant gave the background of the case and stated that he deals in iron ore and ferro alloy material and approached the Respondent, who was a supplier of Iron Ore Fines, for procurement of material. Learned Counsel for the Appellant stated that after negotiation and mutual agreement, the Appellant agreed to purchase 1,00,000 MT of Iron Ore Fines from the Respondent and the Sales Contract was executed on 22.02.2019 between the Appellant and the Respondent.

4. Learned Counsel for the Appellant submitted that in pursuance to said Sales Contract, the Appellant paid advance of Rs. 15 Crores to the Respondent in two tranches of Rs. 10 Crores on 25.02.2019 and Rs. 5 Crores on 06.03.2019.

5. Learned Counsel for the Appellant highlighted that the significant clause of the Sales Contract is Clause 12 i.e., to supply material within three months of the advance payment and delivery to be completed within 6 months. Learned Counsel for the Appellant further submitted that in terms of Clause 16 of the Sales Contract, the risk of loss passed from Respondent to Appellant upon material being loaded on to container/ truck at the buyer's side and similarly in terms of Clause 10 and 11 of the Sales Contract, the Respondent has to indemnify the Appellant from any losses. Learned Counsel for the Appellant stated that in terms of Clause 21, it was

agreed that a cheque of Rs. 20 Crores would be issued by the Respondent to the Appellant and the said cheque could be encashed by the Appellant upon non-supply of material by the Respondent.

6. Learned Counsel for the Appellant stated that on failure of the Respondent to supply the material within three months of the advance payments, the Appellant has been enquiring from the Respondent about shipment, who indicated that due to shortage of supply, the Respondent was not in position to supply the same and verbally suggested to terminate the Sales Contract dated 22.09.2019. Learned Counsel for the Appellant further stated, the Respondent refunded a token amount of Rs. 1.5 Cores between 01.07.2019 to 10.07.2019 and subsequently, despite several requests, the Respondent did not refund the remaining amount of Rs. 13.5 Crores.

7. Learned Counsel for the Appellant assailed the conduct of the Respondent who tried to create artificial disputes in his letter dated 07.08.2019, stating that the Appellant could take the delivery of material after arranging transport for lifting of material, which was completely false and against the written agreement according to which it was responsibility of the Respondent to transport the material. Learned Counsel for the Appellant further stated that he replied the letter on 10.09.2019 clarifying the correct position of the Contract and the event subsequent to this and requested the Respondent to refund back outstanding advance of Rs. 13.5 Crores.

8. Learned Counsel for the Appellant stated that since the Respondent did not pay back amount, therefore he deposited cheque of Rs. 20 Crores for

encashment on 23.08.2019 which was dishonoured on 26.08.2019 and the Appellant was constrained to issue notice to the Respondent under Section 138 of the Negotiable Instrument Act, 1881.

9. Learned Counsel for the Appellant submitted that he issued Demand Notice dated 16.09.2019 in Form 3 claiming principal amount of Rs. 13.5 Crores along with interest and penalty, which was replied by the Respondent on 26.09.2019 fabricating a story that Rs. 1.5 Crores was refunded on account of so-called discount. Learned Counsel for the Appellant further submitted that subsequently the Appellant filed an application under Section 9 of the Code before the Adjudicating Authority, which was rejected without going into details of the documents and the Adjudicating Authority merely considered the Respondent's submission regarding alleged pre-existing disputes.

10. Learned Counsel for the Appellant assailed the Impugned Order which is silent about any detailed finding regarding pre-existing dispute and only ground for rejection as recorded is that the Appellant has failed to provide documents establishing existence of default without substantiating the exact document which have not been produced by the Appellant before the Adjudicating Authority and this clearly reflects non-application of mind on the part of the Adjudicating Authority.

11. Learned Counsel for the Appellant, concluding his pleadings, requested to set-aside the Impugned Order dated 03.01.2023.

12. Per-contra, Learned Counsel for the Respondent denied all the averments made by the Appellant.

13. Learned Counsel for the Respondent submitted that the Sales Contract was indeed entered into between the Appellant and the Respondent on 22.02.2019 for supply of 1,00,000 MT of Iron Ore Fines and as per Clause 12 of the Sales Contract, the material was to be delivered by the Respondent to the Appellant at the mines of Orissa upon the Appellant placing trucks within 6 months from the date of advance payment.

14. Learned Counsel for the Respondent stated that the price was provisionally agreed at Rs. 2000/- per MT and discount of Rs. 50/- per MT was to be given for advance payment and the final price was to be negotiated at the time of delivery. Learned Counsel for the Respondent accepted that he had received Rs. 15 Crores as advance in two tranches of Rs. 10 Crores on 25.02.2019 and Rs. 5 Crores on 06.03.2019 and therefore time to complete delivery in terms of agreement could be completed upto 05.09.2019.

15. Learned Counsel for the Respondent submitted that in the letter of the respondent dated 07.08.2019, the respondent requested the appellant to make balance payment of the goods and lift the materials from Orissa mines and the Appellant was requested to provide details of transportation, payment program of the balance amount of Rs. 5.95 Crores and also lift the materials.

16. Learned Counsel for the Respondent stated that the Appellant failed to hand over the Respondent the lifting program or make the balance payment or inform particulars of lifting of the goods or placing of trucks for lifting of goods from the facilities of the respondent and on 10.09.2019, after

stipulated contractual period of six months i.e., 05.09.2022, the Appellant issued a letter dated 10.09.2019 refuting the content of the Respondent's letter. The Learned Counsel for the Respondent stated that the Appellant wrongfully tried encash to the security cheque of the Respondent on 23.08.2019.

17. Learned Counsel for the Respondent submitted that the Appellant also instituted criminal proceedings against the Respondent which is pending on the same subject matter alongwith case under Section 138 of the Negotiable Instrument Act, 1881, hence the Appeal could not have been preferred.

18. Learned Counsel for the Respondent submitted that the Appellant wrongfully issued a demand notice dated 16.09.2019 and the Respondent replied the same, denying and / or disputing the purported claims by the Appellant through his letter dated 26.09.2019 reiterating that the Appellant was in breach of the contract for :-

- (i) Failing to make balance outstanding payment of Rs. 5.95 Crores.
- (ii) Placing any truck for lifting material or even submitting any schedule for lifting material.
- (iii) Failing to take delivery from the Respondent's place.
- (iv) Completing the transaction in terms of the contract within the period of six months.

19. Learned Counsel for the Respondent submitted that the Adjudicating Authority has carefully gone into all the submission of both the parties and thereafter came to clear and valid conclusion about pre-existing dispute

between the parties and rightly rejected application filed under Section 9 of the Code.

20. Learned Counsel for the Respondent concluding the arguments, requested to dismiss the Appeal with heavy cost.

21. This Appellate Tribunal notes that Sales Contract date 22.02.2019 is admitted fact. Similarly, the Respondent has accepted receiving advance payment of Rs. 15 Crores from the Appellant as per the Sales Contract.

22. Both the parties have referred to various clauses of the Sales Contract in support of their case and one of the issue between the parties seems to be clauses regarding as to who is responsible for giving delivering/ taking delivery of material.

23. It is therefore desirable to refer to the clauses No. 10, 11, 12, 16, and 21 of the Sales Contract dated 22.02.2019 which read as under :-

“10. *The Seller shall keep the Buyer well sufficiently saved, defended, harmless and indemnified of, from and against all former and other charges, encumbrances and liabilities, whatsoever made upon, done, executed or occasioned by the Seller or any person-or-persons claiming under or in trust for the Seller and free and clear from and against all manner of encumbrances, trust, liens, encumbrances, charges and liabilities of any nature whatsoever made upon done executed or occasioned by the Seller.*

11. *The Buyer shall remain free and clear and freely and clearly and absolutely acquitted, exonerated, discharged and released by the Seller and well and sufficiently saved, defended, kept harmless and indemnified from and against all manner of charges,*

hypothecations, claims, demands, liens, lispendens, attachments, encumbrances and liabilities whatsoever made, executed, occurred, occasioned or knowingly suffered to the contrary by the Seller.

12. The said goods shall be delivered by the Seller to the Buyer within six months from the date of advance payment of Rs. 15,00,000,00 (Rupees Fifteen Crores Only).

SPECIFICATIONS OF THE SAID GOODS

- i. Material : IRON ORE Fines
- ii. Quantity : 100,000 Metric Tons
- iii. Special Specifications : Fe 58% Typical
SiO₂ 7% Max
Al₂O₃ 34% Max
P/S 0.07% Max
Size: 0-1 mm (90% Min) or as mutually agreed at the time of delivery.
- iv. Price : Provisional Price of Rs. 2000/MT.
A Discount of Rs. 50/mt would be given for advance payment.
Final price to be negotiated at the time of delivery.
- v. Packaging : Loose in Bulk
- vi. Delivery : By Trucks or as mutually agreed
- vii. Shipment / Delivery : Seller to aim supply of material within 3 months of the advance payment date but in any case, delivery must be completed within 6 months of receipt of full advance of Rs. 15,00,00,000 from the Buyer.

vii. Country of : India
origin

16. Title & Risk

The title and/ or ownership pass from the Seller to the Buyer upon making payment of the consideration value of the said goods. Risk of loss shall pass from Seller to Buyer upon material loaded into container/trucks at the Buyer's site in Orissa.

(Emphasis Supplied)

24. From the averments, as well as on the basis of the Sales Contract it is very clear that it was the responsibility of the Respondent to supply material within three months of the advance payment i.e., 05.06.2022 and in any case to complete the same within 6 months of the receipt of full advance of Rs. 15 Crores i.e., by 05.09.2022. The delivery was to be made by trucks or as mutually agreed which means any other modes of transport as mutually agreed like containers, trains, etc.

25. It is the case of the Respondent that in terms of the Clause 12 of the Sales Contract “*goods were to be delivered by the Corporate Debtor to Operational Creditor at the ex-mines Odisha CD's mines where the Operational Creditor would place trucks*”. We have already noted that Clause 12 (vi) which states that “*Delivery : By Trucks or as mutually agreed*”. It is nowhere mentioned that Operational Creditor/ Appellant would place truck as claimed by the Respondent during proceedings, as well in the Written Submission. Therefore, we find contention of the Respondent to be misplaced and far from truth as per written Sales Contract.

26. We also note that it is clearly stipulated that the title and ownership of the material shall stand transferred from the Respondent to the Appellant upon material loaded into container/ truck at Appellant side in Orissa. Thus, clearly it was responsibility of the Respondent to deliver material to the Appellant at site of the Appellant.

27. We also note that the Appellant complied with various clauses of the Sales Contract especially regarding advance payment which the Appellant performed by making two tranches of payment of Rs. 10 Crores on 25.02.2019 and Rs. 5 Crores on 06.03.2019. Upon his making advance payment, the responsibility was on the Respondent as Seller of the material to arrange for the trucks, load the materials on to trucks and deliver the same at the site of the Appellant and then only the liability and risk would have transferred to the Appellant as Buyers of the goods.

28. From the various documents made available including the Sales Contract, we have no doubt that while the Appellant had paid the advance of Rs. 15 Crores but the Respondent has not been able to supply the material.

29. The averments of the Respondent that it was for the Appellant to arrange for the trucks and send the delivery programme along with the balance payment to the Respondent, is not convincing and looks like after thought to make out for non-delivering of material as well as not to refund back advance kept by the Respondent to the Appellant.

30. It is also case of the Respondent that he called upon the Appellant to make balance payment of Rs. 5.95 Crores. We observe that the Respondent had advance amount of Rs. 15 Crores given by the Appellant, since last six

months. In this background, we are not able to appreciate how the Respondent is claiming balance payment of Rs. 5.95 Crores without supplying even one MT out of agreed supply of 1,00,000 MT. The defence seems to be moon-shine defence to create alleged disputes, which we are unable to digest.

31. The Respondent stated that the Appellant gave further discount of Rs. 50 per MT in addition to the discount of Rs. Per MT for advance payment and “parties finally negotiated and agreed on final price of Rs. 1,900 per MT”. We have examined this statement of Respondent w.r.t. written Sales Contract. As per Clause 12 (iv) of Sales Contract “the final price to be negotiated at the time of delivery”.

We have already seen that no delivery was made during first three months as per Sales Contract and not even till almost fag end of six months period. In this backdrop, we are not able to appreciate how this “negotiated price” was arrived by the Respondent.

32. Incidentally, we also note that the contract was to supply 1,00,000 MT of Iron Ore Fines “on truck or as mutually agreed”, by the Respondent. Assuming, a truck can load 20 MT, around 5,000 trucks would be required to complete delivery for loading. Similarly, if it was to be loaded in train, about 25 Rakes (having 58 wagons in one Rakes/train) would be required. As per the Sales Contract, the delivery was to be completed preferably within three months and maximum six months from the date of receipt of Rs. 15 Crores advance. It is the case of the Respondent that he asked the Appellant vide his letter dated 07.08.2019, inter-alia, about delivery

schedule. We note that the Sales Contract was signed on 22.02.2019 between the Appellant and the Respondent and the Appellant had paid of Rs. 10 Crores on 25.02.2019 and balance of Rs. 5 Crores on 06.03.2019. The three months normal period for delivery of material by the Respondent would have been over by 05.06.2019, much before alleged letter of the Respondent dated 07.08.2019. All these events indicates that perhaps the Respondent was not in a position to supply material and no attempt was made by him in this regard.

33. We also refer to the Impugned Order dated 03.01.2023 especially Para 16 which reads as under :-

***“16.** With respect to the default, there are not enough documents on record which shows that the Corporate Debtor failed to supply the material, rather as per the letter dated 07th August, 2019 of the Corporate Debtor it reflects a failure on the part of the Operational Creditor. Hence, CP (IB) No. 1741/KB/2019 is **rejected**. Needless to say that the Operational Creditor is at liberty to resort to other remedies that may be available to it under any other law.”*

(Emphasis Supplied)

We are unable to appreciate as what ‘documents’ are being referred to in the Impugned Order to show that the Corporate Debtor/ Respondent failed to supply materials. Similarly no application of mind on the part of the Adjudicating Authority is found in the order which states that :-

“rather as per the letter dated 07th August, 2019 of the Corporate Debtor it reflects a failure on the part of the Operational Creditor.”

We do not find any cogent reason for rejecting the application under Section 9 of the Code and we are not in position to agree with the Impugned Order passed by the Adjudicating Authority.

34. Therefore, the Appeal succeeds. The Impugned Order is set-aside and the case is remanded back to the Adjudicating Authority who shall pass suitable order in accordance with the law at an early date. No Costs.

35. The Parties are directed to appear before the Adjudicating Authority on 31st August, 2023.

[Justice Rakesh Kumar Jain]
Member (Judicial)

[Naresh Salecha]
Member (Technical)

Simran