



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

CP (IB) No. 38/CB/2022

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;

And

In the matter of:

Srimanta Kumar Tripathy and Anusuya Tripathy, having address at Bhusugaon, PO: Bhradrasahi, Barbil, Keonjhar, Odisha- 758 035;

...Operational Creditor/Petitioners

And

In the matter of:

S.S Mining and Infra Private Limited having its registered office at/PO: Suakati, PS: Raisun, Dist: Keonjhar, Odisha- 758 018.

...Corporate Debtor

Coram:

Shri P. Mohan Raj : Member (Judicial)

Shri Satya Ranjan Prasad : Member (Technical)

Appearances:

For Petitioner(s) : Mr. Chittranjan Panda, Adv.

For Respondent(s) : Mr. Satya Smruti Mohanty, Adv.
Mr. Swayamjit Rout, Adv.
Mr. Goutam Rai, Adv.
Mr. Gyaninee Nayak, Adv.

**Order reserved on: 01.05.2023
Order pronounced on: 15.05.2023**



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ORDER

Per: Satya Ranjan Prasad, Member (Technical)

1. This application has been jointly filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as “**IBC, 2016**”) by the petitioners herein i.e., **Srimanta Kumar Tripathy** and **Ms. Anusuya Tripathy** (together referred to as “**OC**”) for initiation of Corporate Insolvency Resolution Process in short (**CIRP**) against respondent/Corporate Debtor i.e., **S.S Mining and Infra Private Limited (CD)** for alleged default in repayment of Financial Debt of ₹ 1,98,47,957/- (Rupees One Crore Ninety Eight Lakh Forty Seven Thousand Nine Hundred Fifty Seven only), due and payable by the Corporate Debtor to the Operational Creditors.
2. Petitioners (OC) submit that the CD was incorporated on 23.02.2011 and was engaged in providing mining services to Orissa Mining Corporation Limited. The company was in needs of funds and thereby approached the petitioners to inject funds as share capital and other unsecured loans and provision of other services for smooth running of business.
3. OC further submit that they had other business units in their own name such as Maa Tarini Filing Centre, Maa Tarini Spares and Maintenance Centre, S.K Tripathy and Anusuya Tripathy. They supplied materials to the respondent company and also deployed their machineries on the request letter of MD of the respondent Company and raised bills. The dues for the transactions in their individual business was not paid wholly and at the end there remained Rs. 1,98,47,957/- as outstanding dues from the respondent company. They filed an arbitration petition before the Hon’ble High Court of Orissa for the whole amount outstanding (Both financial debt and operational debt). The summary of Operational Transactions and dues outstanding in nutshell is presented by the petitioners are as below:



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Name	Particulars of Transactions	Bill raised by petitioners on S.S Mining	Received from S.S Mining	Outstanding dues
Maa Tarini Filing Centre (Prop: Srimanta Kumar Tripathy)	HSD	24706118.00	1207863.00	12627755.00
Maa Tarini Automobile Service Centre (Prop. Srimanta Kumar Tripathy)	Sale of Spare/ Parts & Repair Service	2675566.00	1275113.00	1400453.00
Srimanta Kumar Tripathy (Individual)	Shifting, Loading & Crushing Charges	6251536.00	1571570.00	4679966.00
Anusaya Tripathy (Individual)	Shifting Charge	1562813.00	428430.00	1139783.00
Total		35201433.00	15353476.00	19847957.00

4. It is submitted that Demand notice under Section 8 of the Code was sent on 27.02.2022 to the registered office of CD which was returned undelivered with reasons that the addressee was not present at home and office since the date of arrival of article. The petitioners claim that they also sent the demand notice through email on 27.07.2022 to ms.sksamal@gmail.com which was received by the CD. This Tribunal notes that receipt of demand notice herein is not in dispute in the instant matter.



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5. As alleged, the petitioners and respondent entered into an MOU which is a registered document. As per clause 9 of the MOU the applicant sold fuel for Rs. 2,47,06,118 and received payment of Rs. 1,20,78,363/-. The balance amount remaining is Rs. 1,26,27,755/-, which should have been converted into unsecured loan which the respondent did not do. It is alleged that the respondent did not act as per the MOU and never paid the dues and never prepared the statutory documents disclosing such fact. In the absence of statutory documents, it was not possible to ascertain the state of affairs of the respondent. From 01.04.2015 the company stopped all the activities and did not submit any return to any statutory authorities. Thus, applicant had nothing to ascertain that the respondent had made fraud by not complying with the MOU in the absence of relevant documents. The company remained active and non-complaint in ROC site. It did not file Income Tax Returns from the year 2014-15 onwards till date. The respondent did not appear before the Arbitration proceeding instituted by the applicant which remained active from 17.01.2017 to 04.01.2019. Thus, the fraud remained undiscovered by the Petitioners.
6. As alleged by the Petitioners, the respondent as per MOU, took Rs. 2,00,00,000.00 for issuance of share capital of the company in favour of the applicants on 22.02.2014 which it did not comply. It did not issue share capital, did not disclose as per Companies (Acceptance of Deposit) Rules, 2014. Being aggrieved, the applicants filed an application u/s 7 of IBC and during the course of proceedings, it was discovered that the respondent had committed fraud. Since, the grouping of the share application money was wrongly disclosed in the Balance Sheet, the application was dismissed on technical reason. Thus, Petitioners claim that from the above description it is proved that there existed fraud and during the course of hearing of Section 7 application, it was discovered through documentary evidence. Therefore, the applicant had fulfilled both the conditions of Section 17 of the



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Limitation Act, 1963 and limitation period and within one year from the date of discovery Section 9 application has been filed.

7. Petitioner claim that for computation of limitation period of three years from 04.01.2019 till date, the extension of limitation period from 15.03.2020 till 30.05.2022 *vide* order of the Hon'ble Supreme Court on outbreak of COVID-19 will be excluded. Excluding those periods, the petition is well within the limitation period of three years.
8. Petitioners have prayed that considering the threshold limit, limitation period, dues in default notice through speed post and email the application be admitted.
9. The CD has filed his reply dated 04.11.2022 and states *inter alia* that the petitioners have prayed for execution of operational debt amounting to Rs. 1,98,47,957/- purportedly for the services asked for by the respondents and to substantiate their stand, the petitioners have drawn chart at page 4 of the petition under Section 6 of the "The Code, 2016", which has been reproduced at para 3 hereinabove.
10. That, pursuant to this petition, a CP(IB) No. 24/CB/2022 was filed by the petitioner u/s 7 against the CD which was dismissed by this Tribunal dated 08.09.2022. Thereafter, the petitioners have given a demand notice stating the unpaid operational debt to the tune of Rs. 1,98,47,957/- from S.S Mining and Infra Pvt. Ltd. followed by a Section 9 petition.
11. It is observed by this Tribunal in the previous case, CP(IB) No. 24/CB/2022 that consequent upon execution of the MOU, the petitioner was given the express authority to deal with the finances of the company and to control the banking accounts of the company.



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12. According to the MOU signed between the parties, the immediate changes which took place was strictly as per the clauses of the MOU, therein: -
- i. The petitioners were inducted as Directors of the Company to look after the operation, administration and finances of the Company.
 - ii. As per the Clause No. 4, the administrative office of the Company was changed to “Maa Tarini Complex” (Complex owned by the Petitioners) situated at Bhadrasahi, Barbil, Keonjhar wherefrom day to financial activities would be controlled and monitored by the Petitioners.
 - iii. As per Clause No. 6, all the bank accounts in the name of the Company, henceforth, were operated by Sri Srimanta Kumar Tripathy alone, i.e., the petitioner herein.
13. Respondents claim that pursuant to above changes it was an easy task for the petitioners to forge the documents and issue letters, bills and requisition slips with the stamp and signature of “S.S Mining & Infra Pvt. Ltd.” as they were in charge of all the activities of the Respondent Company.
14. That, the petitioners after taking over the reins of the Company did not involve the Deponent and controlled the entire company. After, the sudden voluntary retirement of the Petitioners from the post of Directors in the year 2017, the present deponent learnt that the petitioner has siphoned off huge sum from the Company’s account and left the Company in huge debts which is now being repaid by the present deponent.
15. That, all bank statement obtained by the present deponent will prove beyond all reasonable doubt that it is actually the petitioners who mismanaged the Company and siphoned off huge amounts out of the company without any reasons above transfers of amount at the sole discretion of the Petitioner No. 1. Moreover, except for the Petitioner No.



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1 no other personnel was authorised by the Company to operate the bank accounts. The bank statement showing transfers made to the above entities at the sole discretion of the Petitioner No. 1 has been annexed with the reply as Annexure-2.

16. That, the MOU was signed between the parties on 29.01.2014 and immediately after execution of it, the petitioners started issuing letters, cheque and requisition slips. All of the transactions referred to in the petition has occurred during the period of 2014-15 during which the petitioner was in charge of all activities of the company.

17. Respondent alleges that the resignation of the petitioners was done hastily without any knowledge or consultation of the respondent, the Managing Director on 20.10.2017 and from the said instances it is clear that the petitioners' intention was *mala fide*. Respondent further alleges that the entire tenure of the petitioners as the directors of the company is tainted with unaccounted transactions, financial loss, gross mismanagement, and fraud.

18. Heard the Ld. Counsel/Authorized Representative appearing for the parties. Case records perused. This petition has been filed for alleged default in payment of operational Debt to the tune of Rs.1,98,47,957. Details of such alleged operational debt as mentioned in the petition have been tabulated at Para 3 above. Such debt pertains to the year 2014-15 and this petition has been filed on 14.11.2022. On the aspect of limitation, the petitioner claims that the petition is not time barred as the amount became due from the date on which an arbitration petition was dismissed for default by the Hon'ble High Court of Orissa, i.e., 19.01.2019 and subsequent extension of limitation period from 15.03.2020 till 30.05.2022 *vide* order of the Hon'ble Supreme Court on outbreak of COVID-19. Petitioner has in its further submissions stated that during the hearing of the Sec. 7 petition filed



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against the CD they came to know that the Respondent has committed fraud. Within 1 year of discovery of such alleged fraud they have filed this Section 9 petition thereby fulfilling the conditions of Section 17 of the Limitation Act, 1963 and thus their petition is not time barred. **Therefore, the first question that needs to be answered is that whether this Petition is barred by limitation?**

19. On the issue of limitation Respondent has claimed that the relied demand notices annexed as Annexure A to D of the Petition are of the year 2014 whereas the present Petition has been filed in the year 2022 i.e., after a delay of more than 8 years without explaining the delay. Hence, the Petition is time barred according to Art-137 of the Limitation Act. Further, that in absence of any written communication from the respondent accepting the debt there is no way the period of Limitation can be extended beyond 3 years from the cause of action.
20. OC has claimed in the petition that the amount became due and payable from the date of on which the Arbitration petition was dismissed for default. Respondent has submitted that although, the OC has not relied on Section 14 of Limitation Act specifically but the fact that the OC has initially stated that the amount became due and payable from the date of Arbitration petition being dismissed shows that the Petitioner wants to take benefit of section 14. However, Section 14 of Limitation Act shall not come to the aid of the OC as the Arbitration Petition was dismissed for default of the OC and not due to want of Jurisdiction of the Hon'ble High Court.
21. In this regard, respondent has relied on the following judgements. It was held in *A.L.A.R. Arunachellum Chettiar and Three Others v. Lakshmana Ayyar and Another (1915 SCC OnLine Mad 142)* that-

"The question then arises whether Section 14 preserves his rights in a case where his suit has not been dismissed by the



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tribunal, but has been voluntarily abandoned by himself on discovery of a technical defect which would involve a failure. The matter is not free from difficulty and it has been decided in *Varajlal v Shomeshwar*- that the Section in question of the Limitation Act has no application to a case of withdrawal of the suit and can apply only to cases where the failure of the suit was due to action of the Court. "

22. *In Sadayatan Pande v. Ram Chandra Gopal (1934 SCC OnLine All 96)* it was held- "Whereas Section 14 of the Limitation Act would apply to a case where the court by its own order has terminated the suit of proceeding and has struck off the case from its file on the ground that either it has no jurisdiction to entertain it or that there is some cause of a like nature which makes it impossible for the court to entertain it."
23. It is also relevant to state here that in absence of the copy of Arbitration Petition being filed before this Tribunal it cannot be assumed that the subject matter of the present petition is similar to that of the Arbitration petition.
24. In view of the forgoing, we are not inclined to give any relief to the petitioner on the issue of limitation on the plea that amount became due and payable from the date the Arbitration Petition was dismissed for default i.e., from 04.01.2019.
25. Respondent has subsequently in its rejoinder application, has relied on Section 17 of the Limitation Act, 1963, which was earlier not pleaded in the main petition, to justify its claim that the petition is not barred by limitation. Section 17 of the Limitation Act deals with the effect of fraud on the limitation period for instituting a suit. It says that when the suit is based on the fraud of the defendant, the period of limitation shall not



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begin to run until the plaintiff or applicant has discovered the fraud. Petitioner has stated that the Company has not filed its statutory returns with ROC, also not filed its Income Tax Returns and did not appear in the Arbitration Proceedings, which ended on 04.01.2019. Therefore, the alleged fraud remained undiscovered by them.

26. We note that Petitioners have alleged fraud and forgery against the Respondent in Para 5 Page 11 of the Rejoinder. It is well settled that this Tribunal is not a forum for adjudication of fraud. It was held in *Shelendra Kumar Sharma v DSC Ltd (2019 SCC OnLine NCLAT 1274)* that-

"5..... Sofar as the question as to *whether the documents are forged or not is concerned, it cannot be determined by the Adjudicating Authority (National Company Law Tribunal) or this Appellate Tribunal* and therefore, the Act Adjudicating Authority rightly not deliberated on such issue. "

27. The limitation period shall start from the date on which the fraud is discovered proof. There is nothing on records that fraud has been established. Petitioner has not provided any specific date on which fraud has been discovered. In view of the same, this Tribunal is not inclined to allow any relief to the Petitioner under Section 17 of Limitation Act, 1963 and thereby agree with the contentions of the Respondent that the petition is hopelessly barred by Limitation.

28. Apart from the issue of limitation, on the maintainability aspect respondent has stated that it is a joint petition pursuant to a single demand notice when the law is clear that demand notice under Section 8 can only be sent individually/independently. In the present case, the total amount of debt as stated in serial I, Part-IV at Page 8 of the Petition is allegedly due from 4 different entities, two of which are proprietorship and the



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other two are individuals. The same is also reflected from the summary of debt provided in the Synopsis.

29. However, contrary to the above, the Petitioners in Para 3, Page 9 of their Rejoinder have stated that both of them (Partitioners) have a family business and Mrs. Anusuya Tripathy has assigned her debt in favour of her husband (1st Petitioner), but there is no documentary evidence filed about such assignment of Debt. Further, a perusal of the demand notice shows that a common demand notice has been issued for alleged dues of 4 entities pursuant to which the present common petition has been filed.

30. In the present case there are four entities including two proprietors. Mr. Srimanta Kumar Tripathy, being an individual can file on behalf of one of his proprietorship firms vide one Demand Notice i.e., M/s Maa Traini Filling Centre and he can again file another Demand Notice for M/s Maa Tarini Automobile Service Centre and that Mr. Anusuya Tripathy being another individual has to file separately as held in the case of Uttam Galva Steels Limited vs. DF Deutsche Forfait AG & Anr. 2017 (SCC OnLine NCLAT 212) .

‘From the aforesaid provisions of Section 8 and 9 of I&B Code, it is clear that unlike Section 7, ***a notice under Section 8 is to be issued by an "Operational Creditor" individually and petition under Section 9 has to be filed by Operational Creditor individually and not jointly.***

Otherwise also it is not practical for more than one 'operational creditor' to file a joint petition. Individual 'Operational Creditors' will have to issue their individual claim notice under Section 8 of the I&B Code. The claim will vary which will be different. Date of notice under Section 8 of the I &B Code in different cases will be different. It will have to be issued in



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format(s). Separate Form-3 or Form-4 will have to be filled Petition under Section 9 in the format will contain, separate individual data.

.....For the reasons aforesaid, *we hold that a joint application under Section 9 by one or more 'operational creditor' is not maintainable."*

31. In light of the above facts, this Tribunal takes a conscious view that This petition is not maintainable and is hopelessly barred by limitation.
32. Accordingly, this petition **CP (IB) No. 38/CB/2022** shall stand **DISMISSED**.
33. The Registry is hereby directed to send e-mail copies of the order forthwith to all the parties and their counsel for information and for taking necessary steps.
34. Let the certified copy of the order be issued upon compliance with requisite formalities.
35. File be consigned to records.

SATYARANJAN PRASAD Digitally signed by SATYARANJAN PRASAD
Date: 2023.05.15 16:23:13 +05'30'

Satya Ranjan Prasad
Member (Technical)

PANDIAN MOHAN RAJ Digitally signed by PANDIAN
MOHAN RAJ
Date: 2023.05.15 16:00:57
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P. Mohan Raj
Member (Judicial)

Signed on this, the 15th day of May, 2023

Nishi