

IN THE NATIONAL COMPANY LAW TRIBUNAL

MUMBAI BENCH

CP (IB) 126/MB/2019

Under Sections 8 & 9 of the Insolvency &
Bankruptcy Code, 2016

In the matter of

Mahakali Fuel Pvt Ltd.

303, Senat Wing, Aura Biplax Building,
Above Kalyan Jewellers,
S.V. Road, Borivali (West)
Mumbai-400092.

..... Operational Creditor

versus

ETCO Denim Pvt Ltd.

S/13, S-14, Pinnacle Business Park,
Shanti Nagar, MIDC, Mahakali Caves
Road, Andheri (East), Mumbai-400093.

.....Corporate Debtor

Order Pronounced on: 14.02.2020

Coram:

Hon'ble Shri Bhaskara Pantula Mohan (Member Judicial)

Hon'ble Shri Shyam Babu Gautam (Member Technical)

Appearance:

For the Operational Creditor: Mr. Tejas Sanghrajka, Advocate

For the Corporate Debtor: Ms. Sophia Pinto, Advocate

Per: Shri. Shyam Babu Gautam, Member

ORDER

1. This Company Petition is filed by Mahakali Fuel Pvt Ltd. (hereinafter called "Operational Creditor") seeking to initiate Corporate Insolvency Resolution Process (CIRP), against ETCO Denim Pvt Ltd. (hereinafter called "Corporate Debtor") on the ground that the

corporate debtor defaulted in payment of dues to the operational creditor, invoking the provisions of sections 8 & 9 of Insolvency and Bankruptcy Code (hereinafter called "Code") read with Rule 6 of Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

2. The operational creditor is a company bearing CIN U5150MH2013PTC246144 whereas the corporate debtor is a company incorporated on 21.04.2005 bearing CIN No. U18109MH2005PTC152771, having authorized Share Capital of Rs. 9,50,00,000/- and the paid-up Share Capital is Rs. 86,00,00,000/- .
3. The operational creditor is a supplier of Imported Coal and used to supply 'Imported Seam Coal' to the corporate debtor. The operational creditor in its Petition alleged that on 01.06.2017, the corporate debtor issued a Purchase Order bearing Reference No. EDD1617 and RSS 1205 to the operational creditor for the supply of 22.820 MT 'Imported Steam Coal'. Pursuant to this, the operational creditor supplied 'Imported seam Coal" through their Vaishnavi Transport Corporation on the same day as mentioned in their Tax Invoice which was issued for an amount of Rs. 1,80,449/-As per the terms of the Tax Invoice, dispute or discrepancy in the quality or quantity regarding the material supplied must be reported within a period of 2 days from the date of delivery or else it will be considered that the Tax Invoices have been accepted by the corporate debtor.
4. It was alleged by the operational creditor that as per general practice the Purchaser Company upon receipt of coal, conducts a Coal Test and prepares and gives to the seller a Coal Test Report, which was done in this case as well and a Report signed by 3 Representatives of the corporate debtor was sent to the operational creditor.
5. The operational creditor claims that as per the Purchase Order and the Tax Invoice, the payment of the Tax Invoices is to be made within 90 days from the date of the invoice; which was not made up till the day the petition was filed nor did the corporate debtor raise any dispute and/or discrepancy in quality or quantity regarding the

goods supplied by the operational creditor and therefore, it was assumed that the corporate debtor had accepted the goods supplied.

6. It was further mentioned by the learned counsel that pursuant to the above transaction and in the same manner, the operational creditor had, in the normal course of business, supplied 'Imported Steam Coal' in series of transactions to the corporate debtor. It was submitted that after receipt of each material by the corporate debtor, a Coal Test Report was sent to the operational creditor.
7. Also, on 27.09.2018, the corporate debtor by way of an e-mail, sent a final Ledger Account acknowledging outstanding Invoice Amounts of Rs.2,41,49,865/-, whereby all the transactions were confirmed, and the Final Accounts were reconciled. The learned counsel for the operational creditor further mentioned that as per the terms of the Tax Invoice, in the event the payment is not made within a period of 90 days, they are entitled to an interest of 24% p.a., which as on the date of the petition stands Rs.13,37,453/- over and above the outstanding principle amount. Therefore, the total amount due and payable comes to a tune of Rs.2,54,87,318/-Also, even upon several oral requests for repayment of the amount the corporate debtor did not pay the amount rather kept on insisting the operational creditor to supply further material.
8. A Demand Notice dated 03/12/2018 under Section 8 of the Code was duly served upon the corporate debtor and the same was acknowledged by them on 03.12.2018. The corporate debtor replied to this Demand Notice on 06.12.2018 wherein the existence of dispute between the parties has been brought to the notice of the operational creditor by the corporate debtor. Vide this letter, the corporate debtor for the first time denied the claim of the operational creditor and submitted that due to inferior quality of goods supplied to it, huge losses were suffered.
9. The claim of the corporate debtor was denied by the operational creditor and a further request was made to make the payment of the outstanding dues. The operational creditor submitted that on 30.10.2018 a joint meeting was held between both the parties and pursuant to the minutes of the meeting, the corporate debtor again

acknowledged the debt by agreeing that coal around INR 5.3 Crores was received by them but based on the test reports and specifications mentioned in the purchase orders, a debit of Rs.71,00,000/- has to be made due to quantity shortage and quality outside tolerance limits.

10. In the submissions made by the corporate debtor all the statements, allegations, averments, submissions and contentions made by the operational creditor were denied because of which this petition deserves to be dismissed. It was alleged that this petition has been filed only to pressurize it for paying the amounts which are not due and payable by them
11. It was submitted that in 2014, one Sunder Enterprises approached them for supply of coal and represented that they can procure very good quality of coal from the operational creditor at reasonable rates. Later, in 2016, not being satisfied with the coal supplied by the operational creditor, the corporate debtor initiated talks with few more coal suppliers available in the market. It was around this time that M/s Mahakali Fuel Pvt Ltd. who is the petitioner in this matter approached the corporate debtor and promised to supply better quality of coal at reasonable rates, than that of Sunder Enterprises. Thus, the corporate debtor started taking supply of coal from the operational creditor.
12. However, the corporate debtor never really found much difference between the coal supplied by Sunder Enterprise and the operational creditor. It was only recently that they became aware that in fact the operational creditor and Sunder Enterprises were working in syndicate with each other. That the corporate debtor was never able to identify the cheating done to it by the operational creditor and Sunder Enterprises in collusion with each other, as they provided for 97% of the corporate debtor's coal requirement.
13. When the corporate debtor realized this, they initiated internal audit at its own factory and found that the coal supplied by the operational creditor did not meet the required parameters of the corporate debtor. They claim that the operational creditor started pressurizing the corporate debtor to release monies is also disputed by the it. It

informed the operational creditor that the amounts claimed by them are far less than the losses caused to the corporate debtor.

14. Since the corporate debtor felt cheated, it called for a personal meeting on 30/10/2018 where it concluded on a mutual agreement that the Respondent shall calculate the total loss caused to them and that the Petitioner shall meet again to discuss the way out of the same. Thereafter there was a meeting on 23/11/2018 where the Respondents explained how they had suffered losses due to the low-quality coal supplied by the operational creditor and that the loss in terms of money amounted to Rs. 3,00,00,000 and that it must be reimbursed, thus, making the operational creditor's claim Nil.
15. The corporate debtor alleged that the operational creditor is using the route of Section 9 of the Code only as a recovery tool, that the Petitioner sent a demand notice under Section 8 Code as threatened, leaving no choice to the corporate debtor but to dispatch the Debit Notes. The corporate debtor submitted that in lieu of the existing circumstances and the correspondence exchanged between the parties to the suit, the very notice issued by the Petitioner becomes faulty due to non-consideration of all the disputes.
16. In view of the arguments advanced as mentioned above, this Tribunal heard this matter at length and is hereby passing this following order:

FINDINGS

17. We have heard both the parties at length. We have also perused all the documents submitted by them. This matter has been posted for hearing before us on various dates of hearing. The corporate debtor was strongly opposing the admission of this petition claiming that there exists an ongoing dispute between both the parties. This Bench had thus, advised the parties to enter into settlement by an order dated 25.06.2019 but as informed by both the parties, the matter could not be settled and therefore we have proceeded with this matter on merits.

18. There were Tax Invoices raised by the operational creditor upon the corporate debtor, in pursuance of which the goods were duly received by it. This fact is also agreed by both the parties. The principal amount outstanding according to the operational creditor is Rs.2,41,49,865/- and along with an interest of Rs.13,37,453/- calculated at the rate of 24%, the total amount due and payable comes to the tune of Rs.2,54,87,318/-.
19. In this matter, there are strong averments made by the corporate debtor by stating that there is an ongoing dispute with the quality of goods received. To the Demand Notice sent by the operational creditor, there was a reply made by the corporate debtor wherein this dispute has been brought to the notice of the operational creditor.
20. While dealing with this matter, we would like to proceed chronologically. To begin with, we find it important to state that a company called Sundar Enterprises used to supply coal to corporate debtor as is stated by itself. Later a dispute arose between Sundar Enterprises and the corporate debtor. Therefore, Sundar Enterprises had made a representation to the corporate debtor regarding procuring very good quality of coal from the operational creditor. It is pertinent to note here that there is a similar Section 9 petition filed before us on similar lines by Sundar Enterprises which is Reserved for Orders after a detailed hearing of both the parties. This Sundar Enterprise is in collusion with the operational creditor. This is how the corporate debtor started to purchase coal from the operational creditor.
21. The operational creditor used to supply coal to the corporate debtor and raised invoices for the same. These invoices clearly indicated the terms and conditions that (a) Goods once sold will not be taken back, (b) 24% interest will be charged if payment is not made on due date as mentioned under each Tax Invoice, and (c) In case of any dispute or discrepancy in quality or quantity regarding the material supplied to be reported within 2 days to office by e-mail otherwise it is presumed that the details mentioned in the Tax Invoice are accepted to the Respondents. It becomes clear from the documents submitted that the corporate debtor never raised any disputes with regard to the quality/quantity of the goods supplied by the operational

creditor within stipulated period of time (i.e. within 2 days of delivery) as mentioned in the Tax Invoice.

22. Also, the corporate debtor, vide its letter dated 10.01.2019 alleged that it was now constrained to release debit notes, dated 31.07.2018 & 31.10.2018 amounting to Rs. 61,32,343/- being the arrears for inferior coal supplied vis-à-vis specification mentioned in respective purchase order against invoices. To this, the operational creditor submitted that, all debit notes issued by the corporate debtor prior to filing the Company Petition were accepted by them and are reflected in the Balance Confirmation. The question of raising the Debit Note after filing of the present Company Petition does not arise as the operational creditor accepted all the Debit Notes which were already issued by the corporate debtor. The same were again reconfirmed by the corporate debtor vide e-mail dated 27.09.2018 to the operational creditor. Moreover, the corporate debtor by way of an email dated 27.09.2018 sent a final Ledger Account acknowledging outstanding Invoice Amounts of Rs.2,41,49,865/- in lieu of the coal supplied to it by the operational creditor.
23. It was the contention of the operational creditor that corporate debtor sent the letter dated 10.01.2019 along with fabricated Debit Notes to them with the clear intention to show that there exists a dispute about the debt of the operational creditor and/or with a clear intention to misguide this Tribunal. We are of the opinion that the dispute is merely an afterthought of the corporate debtor and hence, holds no water. Also, the question of the corporate debtor incurring loss does not arise in the present case as they had already raised the debit note for all tax invoices and the same were never disputed by the operational creditor. Therefore, even if it is assumed that alleged disputed amount is arrived at Rs. 61,32,343/-, then also the operational creditor is still entitled to receive the undisputed amount of Rs. 1,80,17,522/- towards principal outstanding along with an interest to be calculated @ 24% p.a., till date, as per the agreed terms and conditions of the Tax Invoices which is well above the minimum required amount of Rs.1,00,000/-
24. Demand Notice dated 03/12/2018 was also duly served on the corporate debtor which was received and acknowledged by them on

the same day. The Respondents vide their reply dated 06/12/2018 denied the claim of the Petitioners for the first time and submitted that due to inferior quality of goods supplied by the petitioners the Respondent suffered losses. We firmly believe that the contentions made by the corporate debtor to the effect that the entire claim is disputed is false and that the corporate debtor acknowledged the existence of the claimed outstanding amount, after reducing the disputed amount.

25. Also, the corporate debtor has mentioned about the ongoing dispute only in its reply to the demand notice. Here, it has become important to place reliance upon the judgment of the Hon'ble Supreme Court in the matter of **Mobilox Innovations Private Limited v. Kirusa Software Private Limited [(2018) 1 Supreme Court Cases 353]**, wherein it was held in paragraph 51 that:

51. It is clear, therefore, that once the operational creditor has filed an application, which is otherwise complete, the adjudicating authority must reject the application, under Section 9(5)(2)(d) if notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility. It is clear that such notice must bring to the notice of the operational creditor the "existence" of a dispute or the fact that a suit or arbitration proceeding relating to a dispute is pending between the parties. Therefore, all that the adjudicating authority is to see at this stage is whether there is a plausible contention which requires further investigation and that the "dispute" is not a patently feeble legal argument or an assertion of fact unsupported by evidence. It is important to separate the grain from the chaff and to reject a spurious defence which is mere bluster. However, in doing so, the Court does not need to be satisfied that the defence is likely to succeed. The Court does not at this stage examine the merits of the dispute except to the extent indicated above. So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application."

Also, the paragraphs 15 and 18 of the judgment of Hon'ble NCLAT in the matter of **Ahluwalia Contracts (India) Ltd. V. Raheja Developers Ltd. (NCLAT – Company Appeal (AT)(Insolvency) No. 703 of 2018**, need to be relied upon which runs as follows:

“15. In an application under Section 9, it is always open to the ‘Corporate Debtor’ to point out pre-existence of a dispute. It is to be shown that the dispute was raised prior to the issuance of the demand notice under Section 8(1).

18. From the aforesaid decision, it is clear that the existence of dispute must be pre-existing i.e. it must exist before the receipt of the demand notice or invoice. If it comes to the notice of the Adjudicating Authority that the ‘operational debt’ is exceeding Rs.1 Lakh and the application shows that the aforesaid debt is due and payable and has not been paid, in such case, in absence of any existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before the receipt of the demand notice of the unpaid ‘operational debt’, the application under Section 9 cannot be rejected and is required to be admitted.”

The first and foremost thing we need to look into while dealing with this matter is that whether the dispute raised is a ‘bona fide’ dispute. It was only after the demand notice was sent that the existence of the said dispute was brought to the notice of the operational creditor by the corporate debtor. If the dispute existed prior to sending the demand notice, the corporate debtor should have taken some steps to initiate a proper proceeding against the operational creditor. A plain reading of Section 5(6) of the Code explains the term dispute:

Section 5(6) “dispute” includes a suit or arbitration proceedings relating to –

- (a) the existence of the amount of debt;*
- (b) the quality of goods or service; or*
- (c) the breach of a representation or warranty.*

Further, it is also important to go through the provision of Section 8 of the Code which runs as follows:

Section 8 – Insolvency Resolution by Operational Creditor:

“(1) an operational creditor may, on the occurrence of a default, deliver a demand notice of unpaid operational debtor 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.

(2) the corporate debtor shall within a period of 10 days of the receipt of the demand notice a copy of the invoice mentioned in sub section (1) bring to the notice of the operational creditor-

(a) existence of a dispute [if any, or] record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoice in relation to such dispute;

(b) the [payment] of unpaid operational debt-

(i) by sending an attested copy of the record of electronic transfer of the unpaid amount from the bank account of the corporate debtor; or

(ii) by sending an attested copy of record that the operational creditor has encashed a cheque issued by the corporate debtor.

Also, it was only after the Demand Notice sent on 03.12.2018 that the Debit Notes for the bad quality of products was made by the corporate debtor. Therefore, we are of the opinion that it is the fault of the corporate debtor that if the quality of the materials was not good, they did not take cognizance of it even when in the Tax Invoices it was mentioned that in case of any complaint regarding the quality and quantity of the materials supplied, is to be reported within 2 days.

Moreover, the debit notes raised by the corporate debtor are accepted by the operational creditor and still the outstanding amount comes above the minimum required of Rs.1 Lakh. Also, vide its e-mail dated 27.09.2018, the liability has been admitted by the corporate debtor. Again, the minutes of the meeting dated 30.10.2018 make it crystal clear that the corporate debtor had again admitted its liability by stating that some on-account payment may be done after withholding disputed amount.

26. In view of the above observations, it can be concluded that it is an admitted liability and that the documents submitted by the operational creditor are enough to establish the debt upon the corporate debtor and hence the contentions made by the corporate debtor cannot be relied upon. Also, they defaulted in repaying the debt the amount of which is more than Rs.1,00,000/- Hence, all the requisite conditions for admission of a petition under Section 9 have been found to be fulfilled and therefore, this petition deserves to be admitted.

27. Therefore, this Tribunal having been satisfied with the Petition filed by the operational creditor which is in compliance with the provisions of section 8 & 9 of the Insolvency and Bankruptcy Code, 2016, admits this petition declaring moratorium with the directions as mentioned below:

- (a) That this Bench hereby prohibits the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority; transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein; any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002; the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.
- (b) That the supply of essential goods or services to the corporate debtor, if continuing, shall not be terminated or suspended or interrupted during moratorium period.
- (c) That the provisions of sub-section (1) of Section 14 shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.
- (d) That the order of moratorium shall have effect from 14.02.2020 till the completion of the corporate insolvency resolution process or until this Tribunal approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, as the case may be.
- (e) That the public announcement of the corporate insolvency resolution process shall be made immediately as specified under section 13 of the Code.
- (f) That this Bench hereby appoints Mr. Swapnil Mukund Agrawal, having his registered office at F. No. 102, Krushna Kunj, Plot No. 10-C, Near Tilak Nagar Ground, Nagpur- 400010 and having Registration No: IBBI/IPA-001/IP-P00845/2017-18/11429 as an interim resolution professional to carry out

the functions as mentioned under the Insolvency & Bankruptcy Code, 2016.

28. Accordingly, this Petition is allowed.
29. The Registry is hereby directed to communicate this order to both the parties and to IRP immediately.

Sd/-

SHYAM BABU GAUTAM
Member (Technical)

Sd/-

BHASKARA PANTULA MOHAN
Member (Judicial)

/sneha/