

**BEFORE THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH**

CP (IB) NO. 625 OF 2019

**APPLICATION BY OPERATIONAL CREDITOR TO INITIATE
CORPORATE INSOLVENCY RESOLUTION PROCESS UNDER
THE INSOLVENCY AND BANKRUPTCY CODE, 2016.**

*(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)*

**Clariant Services India Private
Limited**

Reliable Tech Park,
Off. Thane, Belapur Road,
Airoli, Navi Mumbai, Thane 400708

....Petitioner/Operational
Creditor

versus

**Italtinto Equipment Private
Limited**

S5/2422, Vrundhavan Complex,
Opposite Satyam Petrol Pump,
Sonale Village, Mumbai Nashik
Highway, Bhiwandi, Thane 421302

....Respondent/Corporate
Debtor

Order delivered on: 09.02.2021

Coram: Hon'ble H.V. Subba Rao, Member (Judicial)

Hon'ble Shyam Babu Gautam, Member (Technical)

Appearance:

For the Petitioner: Adv. Aditya Udeshi and Adv. Sanjay Udeshi

For the Corporate Debtor: Not present

Per: H.V. Subba Rao, Member (Judicial)

ORDER

1. This Company Petition is filed by Clariant Services India Private Limited, (hereinafter called "Petitioner/Operational Creditor") seeking to set in motion the Corporate Insolvency Resolution Process (CIRP) against Italtinto Equipment Private Limited (hereinafter called "Respondent/Corporate Debtor") alleging that the Respondent

committed default in making payment to the Petitioner in view of the Business Transfer Agreement entered into between them, by invoking the provisions of Section 8 and 9 of Insolvency and Bankruptcy Code (hereinafter called the “Code”) read with Rule 6 of Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

2. The Petitioner is a company incorporated on 18.02.2002 and bearing Company Identification Number U74110MH2002PTC250930 whereas the Respondent is a company incorporated on 18/06/2012 and bearing CIN U72300MH2012PTC232352 and having Nominal Share Capital of Rs. 1,61,00,000/- and Paid Up Share Capital of Rs.1,60,94,800/-.
3. The counsel appearing on behalf of the Petitioner submitted that both the parties entered into a Business Transfer Agreement dated 04.11.2016 which was to be effective from close of 31.10.2016 for transfer of “Shade Equipment Business”. The counsel for the Petitioner submitted that as per the Clause 2 of the said Agreement, the Respondent agreed to pay INR 83,85,941 as consideration. Also, as per the Clause 5 of the said Agreement, the Respondent agreed that all payments to suppliers for order placed prior to the closing date, being 31.10.2016 would be discharged by the Respondent. However, the Petitioner had to discharge the said obligation and an amount of Rs.36,66,696 has been paid by the Respondent.
4. He stated further that as per Clause 7 of the said Agreement, the Respondent agreed that the employees relating to Shade Equipment Business as set out in Annexure 3.1 of the said Agreement will not be automatically transferred to the Respondent either by virtue of the said Agreement or by operation of law. He stated that it was further agreed that the Corporate Debtor shall make an offer for transferring their employment to the Corporate Debtor and in case any such employee opted not to have their service transferred to the Corporate Debtor, the Corporate Debtor will pay their retiral liabilities to the Operational Creditor. He stated that the Respondent is aware that 6 out of 9 employees opted not to have transferred their services to the Respondent and the Petitioner had to pay a total sum of undisputed Rs.17,29,976/- to them towards their retiral liability.

5. The counsel for the Petitioner stated that accordingly, the Respondent is liable to pay the Operational Creditor, under Clause 5 and 7 of the said Agreement a total sum of Rs.53,96,672/-. The counsel for the Petitioner stated that by letter dated 09.04.2018, the Petitioner called upon the Respondent to make the said payment of Rs.53,96,672 which was inclusive of an amount of Rs.36,66,696/- as per the Clause 5, and Rs.17,29,976/- as per the Clause 7 of the said Agreement within 10 days.
6. The counsel for the Petitioner further mentioned that the Respondent failed to reply to this aforesaid letter dated 09.04.2018 for almost 2 months and suddenly as an afterthought emailed the Petitioner on 15.06.2018 forwarding the alleged letter written by one Italtinto Group Holdings Corporation, Canada to Clariant International Limited. The counsel alleged that the Corporate Debtor is undoubtedly aware that the alleged proposal of said Italtinto Group Holdings Corporation as narrated in the letter dated 31.05.2017 has no nexus with the Agreement dated 04.11.2016 entered into both the parties or Respondent's liability towards the aforesaid amount of Rs.53,96,672/-. He further alleged that it is only to avoid liability that the Respondent has attempted to create false record.
7. The counsel for the Petitioner stated that the email and the alleged letter attached thereto clearly amounts to an admission on Respondent's part to pay Rs.17,29,976/- towards the Employee Retirral Liability and Rs.36,66,696/- towards supplier payables. He stated that even the Respondent will appreciate that the said Agreement dated 04.11.2016 is an independent transaction and contract which has no reference and/or nexus between the so-called arrangement/agreement/transaction and/or negotiations between the Italtinto Group Holdings Corporation and Clariant International Limited.
8. The counsel for the Petitioner stated that the Respondent has failed to make the payment and it is beyond doubt that the Respondent is unable to make the payment. He stated that sufficient time has been

given to the Respondent in the matter to discharge the liability/debt and can't wait any longer.

9. The counsel for the Petitioner stated that the Demand Notice dated 28.09.2018 was delivered to the Respondent by the Operational Creditor on 22.10.2018 to which the Respondent had replied vide their letter dated 29.10.2018 received by the Advocate for the Operational Creditor on 31.10.2018. Later, the Respondent also vide its letter dated 10.12.2018 raised false and frivolous allegations against the Petitioner and falsely accusing them for breach of contract. To this letter of the Respondent, the Petitioner replied vide an email dated 09.01.2019 denying all the allegations made by the Respondent.
10. The Petitioner has annexed the following documents with the petition:
 - i. Business Transfer Agreement dated 04.11.2016 annexed at Annexure II(b);
 - ii. Letter dated 09.04.2018 annexed at Annexure II(c);
 - iii. Email dated 15.06.2018 along with letter dated 31.05.2017 annexed at Annexure II(e);
 - iv. Respondent's reply dated 29.10.2018 to the Petitioner's Demand Notice annexed at Annexure II(f);
 - v. Respondent's reply dated 10.12.2018 annexed at Annexure II(g);
 - vi. Petitioner's reply dated 09.01.2019 to Respondent's letter dated 10.12.2018 annexed at Annexure II(h);
 - vii. Board Resolution dated 29.11.2018 annexed to Company Petition authorizing Mr. Jim Easow to file the petition is annexed and labelled as Annexure II(i).
11. The Respondent in its reply has denied all the contentions of the Petitioner. In fact, the Respondent has raised objections as to the very maintainability of the petition itself. It has been mentioned that the present Company Petition purports to have been filed under Section 9 of the Code by the applicant who purports to be an Operational Creditor of the Respondent Company whereas this present petition is filed upon a purported claim of Rs.53,96,672/- which is a combination of an amount paid by the Petitioner to the

suppliers and amount paid by the Petitioner to some of its erstwhile employees. The Respondent has further mentioned that it is the case of the Petitioner that the Respondent is liable to reimburse these amounts to it under the terms of a business transfer agreement where certain liabilities of the Petitioner were to be assumed by the Respondent. The Respondent has further mentioned that pertinently the Petitioner is not any supplier or an employee of the Respondent who has filed this Petition but one who purports to have paid these amounts has filed this Petition and therefore, is not an Operational Creditor as per the definition under Section 5(20) of the Code and the debt owed is not an Operational Debt as defined under Section 5(21) of the Code.

12. The main contention of the Respondent in its reply is that the relationship between the parties was not one where the Petitioner has supplied any goods or provided any services to the Respondent. The Business Transfer Agreement dated 04.11.2016 is for the purpose of purchase by the Respondent of the tinting equipment business carried on by the Petitioner as a going concern on a lumpsum consideration without values being assigned to individual assets and liabilities. Also, the entire consideration under the Business Transfer Agreement i.e. an amount of Rs.83,85,941/- has been paid by the Respondent to the Petitioner.
13. The Respondent in its reply has denied that the Petitioner has paid an amount of Rs.36,66,696/- towards payments to suppliers and as is evident from the Business Transfer Agreement, it did not contain any quantification of the amount to be paid by the Respondent company to suppliers of the Petitioner prior to the closing date being 31.10.2016 and thus the claim of the Petitioner in as much as it relates to the payments allegedly made by the Petitioner itself to the suppliers is not only unsubstantiated but also does not flow from any provision of or schedule or annexure to the Agreement. Further, such suppliers had not raised any claim upon the Respondent company.
14. Also, the Business Transfer Agreement, its annexures or schedules (which constitute the entire contract between the parties) does not contain any quantification-whether of Rs.17,29,976/- or otherwise

of liability towards employees. Therefore, the claim of this aforesaid amount is not traceable at all to the Agreement between the parties. The same is unsubstantiated and arbitrary. Furthermore, the reliance on Clause 7 of the Business Transfer Agreement is a clear attempt to misguide the Tribunal, because Annexure 1.2 (e) specifically excludes claims by or obligations to employees who do not opt to transfer their services to the Respondent.

15. The respondent in its reply has stated that it has, vide its email dated 15.06.2018 addressed to the Petitioner, denied any and all liabilities. Also, the respondent has denied that it, vide a letter dated 31.05.2017 forwarded via email on 15.06.2018 amounts to an admission of liability. It is only a *mala fide* attempt on the part of the Petitioner to twist the meaning, import and intent of the letter dated 31.05.2017. It is only a “without prejudice” offer made by the Respondent to settle the disagreements and differences that had arisen within the context of the global transfer of business from the Petitioner’s worldwide affiliates to the Respondent’s worldwide affiliates.
16. The Respondent has further stated that there are various triable issues of fact and law that arise in this dispute and that the Respondent has made out a case of existence of dispute under Section 5(6) of the Code. And for these reasons along with others, the present Petition cannot and does not deserve to be admitted and therefore, must be dismissed.
17. This matter was last listed on board on 16.03.2020 and could not be listed thereafter due to the lockdown and taking up only urgent matters by NCLTs. The matter was listed on 16.12.2020 after lockdown and adjourned to 08.01.2021 and from 08.01.2021 to 13.01.2021. The Respondent remained absent even after service of notice by the Petitioner about listing of the matter on board after lockdown. Therefore, this Tribunal has no option except to dispose of the matter considering the reply filed by the Respondent.

FINDINGS

18. We have heard both the counsel appearing for the Petitioner and perused all the documents submitted by both the parties and there

remains no doubt that there was a Business Transfer Agreement entered into between the parties to which even the Respondent has agreed in its reply.

19. Under the provisions of this Agreement, it was the obligation of the Respondent to make payment of all liabilities towards the retiral benefits of the employees and the Respondent has failed to perform this liability. Therefore, the Petitioner was compelled to discharge its liability on behalf of the Respondent and therefore, payment was made by the Petitioner to these parties on behalf of the Respondent. After making these payments, the Petitioner demanded these amounts from the Respondent and the Respondent even failed to make payment of these amounts. Also, when demanded by the petitioner, the Respondent has admitted its liability and still failed to make any payment to the Petitioner. Therefore, it is crystal clear that there is debt and default on the part of the Respondent.

20. Now the question remains that whether the Petitioner comes within the definition of the term 'Operational Creditor' or not. According to Section 5(20) of the Code, the definition of 'Operational Creditor' runs as follows:

"Operational Creditor means a person to whom an 'Operational Debt' is owed and includes any person to whom such debt has been legally assigned and/or transferred."

The term 'Operational Debt' as defined under Section 5(21) of the Code is as follows:

"Operational Debt means a claim in respect of the provisions of the goods and services including employment or a debt in respect of the repayment 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."

Here, in this matter, the claims pertain to supply of goods and services by third parties and also pertains to the employees' dues. Therefore, the same fall within the meaning of the term "Operational Debt" as defined under the Code. As per the terms of the Business Transfer Agreement, the Respondent was legally under a duty to pay various employees and suppliers of goods and services of which the payment was made by the Petitioner. Therefore, the debt is now

transferred and is due and payable to the Petitioner by the Respondent.

Further, this fact is evident from the Respondent's letter dated 17.03.2017 which runs as follows:

“2. Assumption of Trade Payables of Italtinto India

At Clariant's insistence, trade payables of Italtinto India (“Indian Trade Payables”) were to be paid by Clariant and my client was to reimburse Clariant to the extent they constitute Assumes Shade Liabilities...”

Therefore, there remains no doubt that the debt is due and payable and also that the same is admitted by the Respondent itself. It is only now that the Respondent has come with certain defenses and an attempt to show that there is a dispute between the parties. We observe that this attempt is nothing but an afterthought and thus, we find no merit in the case of the Respondent. For these reasons, we believe it is a fit case for admission.

21. Also, the documents submitted by the Petitioner are enough to establish the debt upon the Respondent and hence the defenses made by it cannot be relied. Also, they defaulted in repaying the debt which they themselves have admitted. Also, the amount of debt is much above the minimum required amount of Rs.1,00,000/-. The debt is also within limitation. The Petitioner has also filed the consent of the proposed Interim Resolution Professional by way of Form-2. Hence, the petition is complete in all respects and fulfills the requisite conditions for admission of a petition under Section 9. Therefore, this petition deserves to be admitted by passing the following:

ORDER

- (a) The above Company Petition No. (IB) -625(MB)/2019 is hereby allowed and initiation of Corporate Insolvency Resolution Process (CIRP) is ordered against Italtinto Equipment Private Limited.
- (b) This Bench hereby appoints **Mr. Bhaskar Gopal Shetty**, Insolvency Professional, Registration No: IBBI/IPA-001/IP-P-01285/2018-19/12003 having office at C-77, Shanti

Shopping Centre, Mira Road East, Maharashtra-401107, as the Interim Resolution Professional to carry out the functions as mentioned under the Insolvency & Bankruptcy Code, 2016.

- (c) The Operational Creditor shall deposit an amount of Rs.1 lakh towards the initial CIRP cost by way of Demand Draft drawn in favor of the Interim Resolution Professional appointed herein, immediately upon communication of this Order.
- (d) 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.
- (e) 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.
- (f) 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.
- (g) That the order of moratorium shall have effect from the date of pronouncement of this order till the completion of the corporate insolvency resolution process or until this Bench 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.

- (h) That the public announcement of the corporate insolvency resolution process shall be made immediately as specified under section 13 of the Code.
- (i) During the CIRP period, the management of the corporate debtor will vest in the IRP/RP. The suspended directors and employees of the corporate debtor shall provide all documents in their possession and furnish every information in their knowledge to the IRP/RP.
- (j) Registry shall send a copy of this order to the Registrar of Companies, Mumbai, for updating the Master Data of the Corporate Debtor.

Accordingly, this Petition is allowed.

The Registry is hereby directed to communicate this order to both the parties and to IRP immediately.

Sd/-
SHYAM BABU GAUTAM
Member (Technical)

Sd/-
H V SUBBA RAO
Member (Judicial)