

IN THE NATIONAL COMPANY LAW TRIBUNAL

NEW DELHI (COURT NO. IV)

Company Petition No. IB-1728/ND/2018

(Under Section 9 read with Rule 6 of the Insolvency and Bankruptcy Code, 2016
(Application to Adjudicating Authority) Rules, 2016)

IN THE MATTER OF:

CIL AUSTRALIA NORTH PTY LIMITED

...Applicant/Operational Creditor

VERSUS

M/s SHARP CORP LIMITED

...Respondent/ Corporate Debtor

Judgment Pronounced on:12.02.2019

CORAM:

DR. DEEPTI MUKESH

MEMBER (Judicial)

For the Applicant: Mr. Sudhanshu Batra, Sr. Adv. Mr. Arvind Kumar Gupta, Adv.
Ms. Damayanti, Adv. Mr. Aditya Mishra, Adv. Mr. Rishi
Bhardwaj, Adv. Mr. Parshant Bhardwaj, Advocate

For the Respondent: Mr. Arvind Gupta, Adv. Mr. Ishan Bisht, Adv. Mr. Parthiv K.
Goswami, Adv. Ms. Heena George, Adv. Ms. V.S. Lakshmi,
Advocate

MEMO OF PARTIES

CIL AUSTRALIA NORTH PTY LIMITED

Office at Level 1, Building 5,

658 Church Street

Richmond VIC 3121,

Australia

...Applicant/Operational Creditor

VERSUS

M/s SHARP CORP LIMITED

Registered office at: Sharp House, Plot No. 9

LSC, Gujranwala Town

Delhi-110009

...Respondent/ Corporate Debtor

JUDGEMENT

1. The present application is filed under section 9 of Insolvency and Bankruptcy Code, 2016 (for brevity 'IBC, 2016') read with Rule 6 of the Insolvency and Bankruptcy Code (Application to Adjudicating Authority) Rules, 2016 by CIL Australia North Pty Limited, (for brevity 'Applicant'), with a prayer to initiate the Corporate Insolvency Resolution Process against M/s Sharp Corp Limited (for brevity 'Corporate Debtor').
2. The Applicant company CIL Australia North Pty Limited, authorized Mr. Trilok Chand vide affidavit dated 26.11.2018 to initiate CIRP under I & B Code. The applicant is having its office at Level 1, Building 5, 658 Church Street, Richmond VIC 3121, Australia.
3. The Corporate Debtor is a private limited company, company limited by shares, incorporated under the provisions of Companies Act, 1956 on 22.08.1988 bearing CIN U74899DL1988PLC032881 as per master data.
4. The Authorised Share Capital of the Corporate Debtor is Rs. 64,00,00,000/- and Paid Up Share Capital is Rs. 5,92,085,000/- as per Master Data of the company, and having its registered office at 1st Floor Plot No. 9 Sagar Centre Gujrawalan Town Delhi-110009.

5. The Applicant has stated that during the course of business, since the Operational Creditor and/or its affiliated companies had a previous business relationship with and had dealt with the Corporate Debtor earlier, the Operational Creditor believed the representations made by the Corporate Debtor and accordingly, a series of contracts were entered into by and between the Corporate Debtor (as Buyer) and the Operational Creditor (as Seller) for sale of a total of 11,000MT (+/-10% at vessel's option) of Australian Desi Chickpeas in Bulk to be discharged at Mundra, India.
6. The Applicant has submitted that upon the cargo being discharged in India as per the terms of the Contracts, the Corporate Debtor defaulted in its payment obligations under the said Contracts, and notified the Operational Creditor that it would be unable to perform its obligations under the said Contracts. Accordingly, the Operational Creditor was constrained to invoke arbitration pursuant to the GAFTA (The Grain and Feed Trade Association) Arbitration Rules No. 125, which were incorporated into the said Contracts.
7. The Applicant has submitted that with regard to the said unpaid amount, invoices dated 31.10.2017 were raised by the applicant on corporate debtor. The applicant further submits that regular follow ups were made through emails, but no payment was ever received.

8. The Applicant served a demand notice, dated 30.10.2018 under section 8 of the Insolvency and Bankruptcy Code, 2016 under 1st settlement agreement, in which total amount of debt claimed is USD 2,304,035.63 and under 2nd settlement agreement, total amount of debt claimed is USD 608,615.08.
9. The Applicant further submitted that the Operational Creditor and the Corporate Debtor arrived at a settlement which was documented in a Settlement Agreement dated 14th May, 2018 ("1st Settlement Agreement"), the terms of which were binding upon both parties. As a consequence of and in terms of the 1st Settlement Agreement, the Operational Creditor withdrew the GAFTA arbitrations commenced by it against the Corporate Debtor, since, the Corporate Debtor was to pay the Operational Creditor, the settlement sum of USD 2,070,970 in 36 equal monthly installments of USD 57,526.94 each with the first installment becoming payable from 1st October 2018. Further, The Operational Creditor and the Corporate Debtor entered into a further sale contract for shipment of the 11,000MT of the cargo Australian Desi Chickpeas. However, the Corporate Debtor once again defaulted in its payment obligations under the said Contract, and notified the Operational Creditor that it would be unable to perform its obligations under the said Contracts. The Operational Creditor and the Corporate Debtor arrived at a settlement which was documented in a Settlement Agreement dated 5th June, 2018 ("2nd Settlement

Agreement"), the terms of which were binding upon both parties. Under the 2nd Settlement Agreement, the Corporate Debtor was to pay the Operational Creditor, the settlement sum of USD 605,000 in 36 equal monthly installments of USD 16,805.40 each, with the first installment becoming payable from 1st October 2018.

10. The Applicant further submitted that under the terms of both the Settlement Agreements, the Corporate Debtor was to make payment in accordance with the schedule agreed between the parties, with the first installment payments under both Settlement Agreements falling due on 1st October 2018.

However, the Corporate Debtor has failed to pay the first installment amount of USD 57,526.94 under the 1st Settlement Agreement and the first installment amount of USD 16,805.40 under 2nd Settlement Agreement which payments became due and payable on 1st October, 2018 ("Date of Default"). The Corporate Debtor has till date failed to make any payment whatsoever under the Settlement Agreements.

11. As a consequence of the failure of the Corporate Debtor to make any payment against the outstanding debt under the Settlement Agreements the principal amount of USD 2,290,350.00 i.e. Rs. 16,21,56,780/- under the 1st Settlement Agreement and USD 605,000.00 i.e. Rs. 4,28,34,000/- under the 2nd Settlement Agreement, the total debt amounting to Rs. 204,990,780/- has become due and

payable under the Settlement Agreements along with Interest @ LIBOR (as USD 25,985.27 i.e. Rs. 18,39,757/- under the 1st Settlement Agreement and USD 6,864.06 i.e. Rs. 485975.45/- under the 2nd Settlement Agreement from Date of Default till the date of filing the present application) + 5% per annum till date.

12. The Respondent has filed a reply stating that on 05.10.2018 two letters were issued by the Applicant to the Respondent for seeking enforcement of the aforesaid alleged two Settlement Agreements. The respondent, was shocked to receive such letters, inter alia, disputed the execution of the aforesaid two Settlement Agreements as well as the existence of any debt whatsoever.
13. The Respondent has submitted that immediately a Civil Suit was filed by the Respondent against the applicant, before the Ld. Additional District Judge, Gurugram bearing Civil Suit No. 77 of 2018 seeking, inter alia, a decree that the said two Settlement Agreements be declared null and void and not binding on the instant Respondent (being plaintiff in said suit). Further, the execution, validity and legality of the said alleged Settlement Agreements have been assailed before the appropriate civil court, namely, Ld. Additional District Judge cum Presiding Judge, Special Commercial Court at Gurugram and the same was filed on 16.10.2018 much prior to the demand notice sent by the Applicant under Section 8 of the IBC, 2016.

14. It is stated by the Respondent that the notice was issued in the said suit by the Ld. ADJ, Gurugram vide order dated 02.11.2018. Thereafter, two Defendants including the Applicant herein have entered appearance on 29.11.2018 and are actively contending the matter, by filing various applications.
15. It is relevant to mention that the Applicant herein in their Application under Order 7 Rule 11 read with Section 151 of the Code of Civil Procedure, 1908 in Civil Suit No. 77 of 2018 in paragraph 2 thereof has stated as follows:

"The Applicant/ Original Defendant No. 2 i.e. CIL Australia North Pty Ltd. is entering appearance before this Hon'ble Court under protest and for the limited purpose of contesting the jurisdiction of this Hon'ble Court. All rights of the Applicant/ Original Defendant No. 2 including but not limited to taking out an appropriate application for reference of any purported disputes to arbitration under the prescribed arbitration clause in the Settlement Agreement dated 14th May, 2018 and the Settlement Agreement dated 5th June, 2018 (together referred to as "Settlement Agreements") are expressly reserved."

16. That, it is stated and submitted by the Respondent that the issue regarding the execution, validity and legality of the said alleged Settlement Agreements is pending adjudication before the appropriate civil court and are contested by

both parties. The contentions raised by the Respondent in the said civil suit require detailed examination by the competent civil court.

The learned counsel for the Respondent relied on the order of the Hon'ble Supreme Court in the case of **Mobilox Innovations Private Limited Kirusa Software Private Limited**, in civil appeal number 9405 of 2017 vide order dated 21.09.2017 and has held that:

“ Therefore, all 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 exist in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application. In the present case the respondent has raised dispute with sufficient particulars. Besides the case records reveal that there was existence of dispute much prior to the issuance of notice under section 8 of the code. The claim of the dispute suggest the need of elaborate

investigation. The moment there is existence of such a pre-existence dispute, the corporate debtor gets out of the clutches of the code.

17. On hearing the Ld. Counsels of both the sides and on perusal of the record, it can be concluded as under:

- i. “Dispute’ has been defined under the code in section 5 (6) which envisages that:

‘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.”

The definition of ‘dispute’ is inclusive and not exhaustive.

The same has to be given wide meaning provided it is relatable to the existence of the amount of the debt, quality of goods or service or breach of a representation or warranty.

- ii. Once the term ‘dispute’ is given its natural and ordinary meaning, upon reading of the code as a whole, the width of “dispute” should cover all disputes on debt, default etc. and not be limited to only two ways of disputing a demand made by the operational creditor, i.e. either by showing a record of pending suit or by showing a record of a pending arbitration.”

- iii. A dispute does truly exist between the parties in the present case, which may or may not ultimately succeed but requires trial/investigation.
18. In view of the aforesaid facts, a conclusion can be drawn that there is 'Pre-existence dispute' and was raised by corporate debtor time and again much prior to the notice served under section 8 of I & B Code. It is a fit case to reject the application under section 9 of the Insolvency & Bankruptcy Code, 2016.
19. In view of the above discussion the present application is hereby dismissed. No order as to costs. A copy of the order shall be forwarded to IBBI for its records.

Sd/-

(DR. DEEPTI MUKESH)
MEMBER (JUDICIAL)