

**IN THE NATIONAL COMPANY LAW TRIBUNAL**  
**NEW DELHI BENCH- (COURT-II)**

**(IB)-172/ND/2021**

**IN THE MATTER OF:**

**M/s K K Continental Trade Ltd.  
18, Chanderlok Enclave,  
Pitampura, Delhi - 110034**

**...Petitioner/ Operational Creditor**

**VERSUS**

**M/s. Diamond Traexim Pvt. Ltd.  
LG-10, Plot No. 31, Lower Ground Floor,  
Road No.- 44, Community Centre,  
Rani Bagh, Pitampura,  
North West Delhi - 110034**

**...Respondent / Corporate Debtor**

**Order Delivered on : 16.08.2021**

**Section : 9 of the Insolvency and Bankruptcy Code, 2016**

**CORAM:**

**MR. ABNI RANJAN KUMAR SINHA, MEMBER (JUDICIAL)**

**MR. L. N. GUPTA, MEMBER (TECHNICAL)**

**PRESENT:**

**For the Operational Creditor : CS Chauhan, Advocate**

**For the Corporate Debtor : Mr. Abhishek Kumar Dwivedi, Advocate**

(IB)-172/ND/2021

M/S. KK Continental Trade Limited Vs. M/S. Diamond Traexim Pvt. Ltd.

## ORDER

### PER SHRI L. N. GUPTA, MEMBER (T)

This Application is preferred under the Section 9 of the Insolvency and Bankruptcy Code, 2016 (**for brevity 'IBC, 2016'**) read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 by M/s K K Continental Trade Ltd. through its authorized Representative Sh. Hemant Jindal Director of the Operational Creditor (for brevity, **Applicant/Operational Creditor**), with a prayer to initiate the Corporate Insolvency Resolution Process against M/s Diamond Traexim Private Limited (for brevity, **'Corporate Debtor'**).

2. It is stated by the Applicant /Operational Creditor that it is one of the leading company in the business of import and trading of different types of edible oils since last more than two decades.

3. It is submitted by the Applicant/Operational Creditor that a High Seas Sale Agreement dated 10.04.2018 was executed between the Applicant and Corporate Debtor/Respondent for import of 2000 Metric Tons of Crude Palm Oil of (Edible Grade) in bulk. The Applicant has annexed the copy of the said Sale Agreement dated 10.04.2018 with the application.

4. That it is submitted by the Applicant that in pursuant to the aforesaid High Seas Sale Agreement dated 10.04.2018, the Corporate Debtor purchased 2000 metric tons of Crude Palm Oil of (Edible Grade)



in bulk from the applicant for which an Invoice being SI. No. 02/2018-19 dated 23.04.2018 for an amount of Rs. 9,06,00,000/- was raised @ Rs. 45,300/- PMT. It has been added that towards the aforesaid invoice, a part payment of Rs. 2,76,55,000/- only is received till date and the balance amount of Rs. 6,29,45,000/-remains due and unpaid.

5. It is averred by the Applicant that :

*“It is noteworthy to state that the goods were supplied as per agreed terms and were duly received by the Corporate Debtor. Further, the goods have been given to the entire satisfaction of the Corporate Debt and no dispute whatsoever was raised by the Corporate Debtor with regard to the said goods or towards the invoices raised as above.”*

6. It is stated by the Applicant that despite repeated oral requests, written reminders, personal visits and rigorous follow ups for settlement of dues, no initiative was taken by the Corporate Debtor to release the outstanding balance amount of Rs. 6,29,45,000/ as on date, which has caused great prejudice to the Applicant.

7. The Applicant has further averred that :

*“Since there was a dispute with regard to the payment between the Corporate debtor and the Operational Creditor applicant for which the Corporate debtor had asked the Operational Creditor to refer the dispute to the Arbitrator and appoint Arbitrator of its choice.”*



8. It is stated by the applicant that subsequently at the request of the Corporate Debtor it had appointed Mr. Sultan Singh Lamba, District and Session judge (Retd.) as the Sole Arbitrator to adjudicate upon the disputes between the parties. It has been added that the Ld. Sole Arbitrator after hearing both the parties and considering the documents placed on record had passed an Arbitral Award dated 23.08.2019, whereby the Ld. Sole Arbitrator had dismissed the claim of the applicant stating that the Claim is premature.

9. The scanned copy of the Arbitral Award as annexed by the Applicant with the Application is reproduced below :

27

BEFORE THE SOLE ARBITRATOR MR. SULTAN SINGH LAMBA,  
DISTRICT AND SESSION JUDGE (RETIRED)  
**IN THE MATTER OF**  
M/s K.K. Continental Trade Limited ... Claimant  
  
Versus  
  
Diamond Traexim Private Limited ... Respondent  
  
Present : Shri B.M. Sharma Advocate for Claimant  
          : Shri Vinod Kaushik Advocate for the Respondent  
  
Date : 23.08.2019  
Place : 18, Chanderlok Enclave, Pitampura, Delhi  
**AWARD**

I have been appointed vide letter dated 24.6.2019 from the Complainant as the Sole Arbitrator to adjudicate upon the disputes between K. K. Continental Trade Ltd. and M/s. Diamond Traexim Private Limited. I accepted the Appointment and accordingly entered upon reference and made negative declaration in terms of Schedule (v), (vi) and (vii) of Section 12 of the Arbitration and Conciliation Act, 1996. As agreed by both the parties the Arbitration was held at New Delhi and was completed within the time requested by the parties.


2. The brief facts of the case are that the Claimant and the Respondent executed High Seas Sales Agreement dated 10.04.2018 Ex.CW-1/5 and the subject matter of the dispute

TRUE COPY

is the said High Seas Sales Agreement dated 10.04.2018 (hereinafter referred to as Agreement).

3. That the Claimant filed a Statement of Claim of Rs.6,29,45,000/- against the Respondent & the Respondent filed Statement of Defense denying the Claim filed by the Claimant. The Respondent also filed Counter Claim of Rs.9,06,00,000/- on the Complainant and the Respondent sought directions for refund of the amount of Rs.2,76,55,000/- paid by the Respondent to the Claimant as part payment against the inferior and deteriorated quality of the Oil supplied by the Claimant to the Respondent. With the consent of the parties, the following issues were framed :-

1. Whether the Claimant is entitled to Claim an amount of Rs.6,29,45,000/- from the Respondent alongwith interest? OPC
2. Whether the Respondent is entitled to any Counter Claim of Rs.9,06,00,000/- from the Claimant and whether the Claim of Rs.6,29,45,000/- of the Claimant is liable to be adjusted against the Counter Claim of Rs.9,06,00,000/- of the Respondent ? OPR
3. Whether the Claimant is liable to refund of Rs.2,76,55,000/- already paid by the Respondent to the Claimant?
4. To prove its Claim, Shri Hemant Jindal, Authorised Representative of Claimant has tendered his Affidavit of Evidence Ex.CW1/A alongwith following documents:-

1. 

**Ex.CW-1/1** Board Resolution dated 30.03.2019 passed by the Board of Directors of the Claimant

**Ex.CW-1/2** Copy of the Contract No. S/SDL/1804/CPO0268 dated 02.04.2018

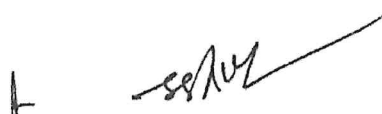
**Ex.CW-1/3** Copies of 8 Bill of Lading Nos. PKL/KDL-14 to PKL/KDL-21 for each all 250 MT, each all dated 07.04.2018 for total Quantity of 2000.00 MTs

**Ex.CW-1/4** Copy of the Invoice No. S/INV-180166 dated 23<sup>rd</sup> April 2018 on M/s K.K. Continental Trade Limited for Sale / Shipment of 3824.753MTs. of Crude Palm Oil (Edible Oil) in Bulk @ US\$672.50 per MT. for a total amount of US\$2572146.39.

**Ex.CW-1/5** Copy of the High Seas Sales Agreement dated 10.04.2018.

**Ex.CW-1/6** Copy of the Sale Letter dated 10.04.2018 to Assistant Commissioner of Custom, Custom House Deendayal Port, India that M/s K K Continental Trade Ltd have sold the above said material of 2000.00 MT. of Crude Palm Oil (Edible Oil) in Bulk to M/s Diamond Traexim Private Limited.

**Ex.CW-1/7** Copy of the Purchase Letter dated 10.04.2018 issued to Assistant Commissioner of Custom, Custom House Deendayal Port, India, that M/s Diamond Traexim Private Limited have purchased 2000.00 MT. of Crude Palm Oil (Edible Oil) in Bulk from M/s K.K. Continental Trade Limited.

  
**TRUE COPY**

**Ex.CW-1/8** Copy of the High seas Sale Invoice Sr. No.02/2018-2019 dated 23.04.2018 for Rs.9,06,00,000.00.

**Ex.CW-1/9** Copy of the Letter Dated 26.12.2018.

**Ex.CW-1/10** Copy of the Letter Dated 11.01.2019.

**Ex.CW-1/11** Copy of the Notice Dated 31.01.2019.

**Ex.CW-1/12** Copy of the Notice dated 31.03.2019

**Ex.CW-1/13** Copy of the Letter dated 20.04.2019

**Ex.CW-1/14** Copy of the Letter dated 27.04.2019

**Ex.CW-1/15** Copy of the Letter dated 22.05.2019

**Ex.CW-1/16** Copy of the Letter dated 24.05.2019.

8. In its defense, Shri Pankaj Kumar Jha Authorised Representative of Respondent has tendered his Affidavit of Evidence Ex.RW1/A alongwith following documents:-

**Ex.RW-1/1** Copy of the Board Resolution

**Ex.RW-1/2** Copy of the High Seas Sales Agreement dated 10.04.2018.

**Ex.RW-1/3** Copy of the Letter Dated 11.01.2019.

**Ex.RW-1/4** Copy of the Notice Dated 31.01.2019.

**Ex.RW-1/5** Copy of the Notice Dated 31.03.2019.

**Ex.RW-1/6** Copy of the Letter dated 20.04.2019.

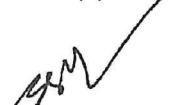
The witness of the Respondent (RW-1) was duly cross examined by the Counsel of the Claimant, and subsequently the Evidence of Respondent was closed vide Order dated 19.08.2019, and the case was listed on 23.08.2019 for arguments.

  
**TRUE COPY**

9. Arguments were advanced by Ld. Counsel for the parties. The Ld. Counsel for the Claimant vehemently argued that as per High Seas Sales Agreement dated 10.04.2018 M/s. Diamond Traexim Private Limited, House No. 302, Plot-12, Block B-1 Sector-9, Varun Apartment, Rohini, Delhi - 110085 has purchased from M/s K.K. Continental Trade Limited 9<sup>th</sup> KM Stone, Chandigarh Road, Talwandi, Rana, Hissar-125001, Haryana, India Per Vessel MT. SUPER FORTE V.137 Port of Discharge DEEN DAYAL PORT, INDIA, the said 2000.00 MT. of CRUDE PALM OIL (EDIBLE GRADE) in Bulk INR 45,300.00 per MT. for a total amount of Rs.9,06,00,000.00. That for the said supply the Claimant raised Invoice Sr. No.02/2018-19 dated 23.04.2018 for a Total Invoice Value of Rs.9,06,00,000/- and against the said Invoice of Rs.9,06,00,000/- M/s. Diamond Traexim Private Limited Released a payment of Rs.2,76,55,000/-. Hence a balance amount of Rs.6,29,45,000/- (i.e. Rs.9,06,00,000/-- Rs.2,76,55,000/-) is still pending to be paid by M/s. Diamond Traexim Private Limited to M/s K.K. Continental Trade Limited. The Claimant vide letter dated 26.12.2018 (Ex.CW-1/9), 31.01.2019 (Ex.CW-1/11) and 30.03.2019 (Ex.CW-1/12) requested the Respondent to release the outstanding payment of Rs.6,29,45,000/-. The Ld. Counsel for the Claimant argued that its a transparent case of admitted supply of Oil to the Respondent and default on the part of the Respondent and hence the Claim of the Claimant be allowed and the Counter Claim of the Respondent be dismissed with cost. The Ld. Counsel have further argued that

the Palm Oil was supplied by the Claimant to the Respondent on High Seas Sales basis and on "As is Where is Basis" as per the High Seas Sales Agreement dated 10.04.2018 **Ex.RW-1/2**. On the contrary the Respondent relied upon the Letter dated 31.01.2019 **Ex.RW-1/4**, 30.03.2019 **Ex.RW-1/5** and letter dated 20.4.2018 **Ex.RW-1/6** of the Claimant whereby by the Claimant admitted that the Crude Palm Oil of Edible Grades was sold by the Claimant to the Respondent on "As is where is basis". The Claimant also admitted that the Claimant are in the process of forwarding the complaint/ claim of Rs.9,06,00,000/- of the Respondent to the Supplier and once the Complaint is addressed and any claim is received by the Claimant, the Claimant will forward the same to the Respondent. The Respondent also argued that vide Letter dated 27.04.2019 (**Ex.CW-1/14**), the Respondent informed the Claimant that as per Clause 10 (c) of the High Seas Sales Agreement dated 10.04.2018, it is the duty of the Claimant to file the Complaint / the claim of Rs.9,06,00,000/- of the Respondent with the overseas supplier for supply of deteriorated and inferior quality of Oil. The Claimant and the Respondent admitted that in the past there has never been any dispute with regard to the supplies made by the Claimant to the Respondent and the payments made by the Respondent to the Claimant. It is only in respect of the supplies which is subject matter of this arbitration that the Respondent informed the Claimant to lodge the Complaint of the Respondent with the supplier as per

TRUE COPY



Clause No.10 (c) of the High Seas Sales Agreement dated 10.04.2018 **Ex.RW-1/2** which is reproduced as under:-

**"10. General Conditions**

*c). For any damage and deficiencies of goods in process of transit unloading due to accidents or should establish beyond reasonable doubt any or all damages and deficiencies of goods duly supported by documents after test/survey and batch survey and proof of their having loaded initial report and claim with the port trust and steam ship company. Claim as made settlement that may be arrived at between the sellers and their foreign suppliers."*

The counsel for the Respondent submitted that the Claimant admitted vide letter dated 31.01.2019 **Ex.RW-1/4** and 30.03.2019 **Ex.RW-1/5**, and 20.04.2019 **Ex.RW-1/6** that the supplies to the Respondent was on "As is Where is Basis" and the Claimant is in the process of forwarding the Complaint/ Claim of Rs.9,06,00,000/- of the Respondent to the supplier and once the complaint is addressed and any claim is received the same will be forwarded to the Respondent and this is admitted by the Claimant in its Affidavit of Evidence as well as during cross examination and also admitted in the Statement of Claim.


12. After going through the records of the case, documents exhibited and admissions during the cross examination and in

^ / ✓ -rw

the statement of claim I am of the considered opinion that admittedly the material supplied to the Respondent by the Claimant was on "As is Where is Basis" whereas there is no clause in the High Seas Sales Agreement which states that the material is to be supplied on "As is Where is Basis". Besides above the Claimant has also admitted in their correspondences with the Respondent that the Claimant is in the process of forwarding the Complaint/ Claim of Rs.9,06,00,000/- of the Respondent to the supplier and once the complaint is addressed and any claim is received the same will be forwarded to the Respondent. In view of the above facts and findings, the Claim of the Claimant is premature and can be filed only after the complaint / claim of Rs.9,06,00,000/- of the Respondent is addressed to by the supplier of the Oil to the Claimant. Accordingly the Claim of the Claimant is dismissed. The Counter Claim of the Respondent also deserve to be dismissed. The parties are at liberty to file fresh claims/ counter claims after the supplier have addressed the complaint / claim of the Respondent once it is lodge by the Claimant with the supplier. No Order has to costs.

The Award has been typed on the E-Stamp Papers of Rs.500/- provided by the Claimant who will retain the Original. Attested copy of the same is provided to the Respondent.



  
Mr. Sultan Singh Lamba,  
District and Session Judge (Retired)

 23.08.2019

10. It is contended by the Applicant that the default of Rs.6,29,45,000/- is continuing and subsisting as on date and the Operational Creditor is legally entitled to receive the aforesaid amount of Rs. 6,29,45,000/- from the Corporate Debtor along with interest @ 12% per annum which is due and payable by the Corporate Debtor to the Operational Creditor.

11. That the Applicant has stated that under the circumstances, it was constrained to issue a Demand Notice dated 28.01.2021 under Section 8 of the Insolvency and Bankruptcy Code, 2016 to the Corporate Debtor through speed post which was received by the Corporate Debtor at its registered office on 29.01.2021.

12. That the Applicant has further stated that the Corporate Debtor through its Counsel responded to the Demand Notice vide its reply dated 18.02.2021, whereby the Corporate Debtor denied the debt due and further disputed the amount claimed by stating that the goods (Crude palm oil of edible grade in bulk) supplied were of the deteriorated quality. The Corporate Debtor has also referred to the Arbitral Award dated 24.09.2019, whereby the claim applicant/ Operational Creditor and counter claim of Corporate Debtor were dismissed as pre-mature. The parties were, however, given liberty to file fresh claims/ counter claims after the (original) supplier have addressed the complaint / claim of the Respondent once it is lodged by the Applicant/Claimant with that supplier.

13. It is submitted by the applicant that the payments have not been made by the Corporate Debtor but instead the Corporate Debtor vide its reply dated 18.02.2021 has raised frivolous quality issues in order to evade the due payments. The applicant has reiterated that an amount of Rs. 6,29,45,000/- is due and payable by the Corporate Debtor as on date along with interest @ 12% p.a.

14. It is pertinent to mention here that Ld. Counsel for the Corporate Debtor on the last date of hearing held on 02.08.2021, submitted that the Corporate Debtor does not want to file reply and therefore, the right Corporate Debtor to file reply was closed. Ld. Counsel for the Corporate Debtor argued that there has been existence of a dispute prior to the service of demand notice, for which the application is not maintainable. He further added that the Corporate Debtor, in its reply to the Section 8 Demand Notice, has stated that the dispute was referred to the Sole Arbitrator, who has rejected the claims/counter claims of both the parties in the Award. Arguments of both the parties were heard and the order in the matter was reserved.

15. After hearing submissions of both the parties and perusing the application and documents placed on record, we observe that the present claim of Rs. 6,29,45,000/- of the Applicant primarily arose out of the High Seas Sales Agreement, the dispute relating to which was referred by the Applicant to the Arbitrator by invoking Arbitration clause of the Agreement.



16. We further find that the Ld. Sole Arbitrator in para 12 of the Arbitral Award dated 23.08.2019 has opined and concluded as reproduced below :

*"12. After going through the records of the case, documents exhibited and admissions during the cross examination and in the statement of claim I am of the considered opinion that admittedly the material supplied to the Respondent by the Claimant was on "As is Where is Basis" whereas there is no clause in the High Seas Sales Agreement which states that the material is to be supplied on "As is Where is Basis". Besides above the Claimant has also admitted in their correspondences with the Respondent that the Claimant is in the process of forwarding the Complaint/Claim of Rs.9,06,00,000/- of the Respondent to the supplier and once the complaint is addressed and any claim is received the same will be forwarded to the Respondent. **In view of the above facts and findings, the Claim of the Claimant is premature and can be filed only after the complaint/ claim of Rs. 9,06,00,000/- of the Respondent is addressed to by the supplier of the Oil to the Claimant. Accordingly the Claim of the Claimant is dismissed. The Counter Claim of the Respondent also deserve to be dismissed.** The parties are at liberty to file fresh claims/ counter claims after the supplier have addressed the complaint / claim of the Respondent once it is lodge by the Claimant with the supplier. No Order has to costs.*

17. We observe that the Operational Creditor has claimed the same (balance) amount of Rs. 6,29,45,000/- in Part IV of the present Petition filed under Section 9 of the IBC 2016, which was the subject matter of the Arbitration (reference: paragraph 9 of the Award) and which has already been rejected by the Ld. Sole Arbitrator. That further, there is no averment made by the Applicant/Operational Creditor in its Petition with regard to the steps it had taken for lodging its claim with the original Supplier on the basis of the complaint of the Corporate Debtor/Respondent, in terms of the Arbitration Award dated 23.08.2019.

18. Admittedly, the Corporate Debtor has raised dispute over the claim of the applicant within 10 days, as prescribed under Section 8 of the Code, vide its reply to the Demand Notice dated 28.01.2021. The Corporate Debtor in paragraphs 10,11,12 and 13 of the reply to the demand notice, has referred to the Arbitration Proceedings and claimed pre-existing dispute. Further, we notice that the applicant itself had initiated the Arbitration Proceeding to resolve the dispute relating to its claim, which resulted in dismissal of the claim being pre-mature.

19. Here it is worthwhile to refer to the Para-40 of the Judgement dated 21.09.2017 in the matter of **Mobilox Innovations Private Limited V/s. Kirusa Software Private Limited in Civil Appeal No. 9405 of 2017**, wherein the Hon'ble Supreme Court has observed that:

*"40. 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.”*

20. Further, in the case of **Transmission Corporation of Andhra Pradesh Limited V/s. Equipment Conductors and Cables Limited - Civil Appeal No. 9597 of 2018**, the Hon’ble Supreme Court has observed that:

*“15. In a recent judgment of this Court in Mobilox Innovations Private Limited vs. Kirusa Software Private Limited<sup>1</sup>, this Court has categorically laid down **that IBC is not intended to be substitute to a recovery forum. It is also laid down that whenever there is existence of real dispute, the IBC provisions cannot be invoked.....**”*

21. We observe that the material on record sufficiently indicates that there has been a pre-existing dispute between the parties prior to issuance of demand notice. Therefore, there being a pre-existing dispute and a situation in which the Applicant itself has referred the dispute to the Arbitration proceeding, which resulted in dismissal of the claim of the Applicant being pre-mature, the applicant has failed to prove that its operational debt is undisputed. In terms of Section 9 (5)(ii)(d) of the IBC, the moment it is established that there is a pre-existing dispute, the Corporate Debtor gets out of the clutches of the IBC.

22. In sequel to the above, **the Application is DISMISSED.**

—Sd—

(L. N. Gupta)  
Member (T)

—Sd—

(Abni Ranjan Kumar Sinha)  
Member (J)