



IN THE NATIONAL COMPANY LAW TRIBUNAL, NEW DELHI
COURT – VI

Item No. 703
IB-701(ND)/2020

IN THE MATTER OF:

M/s. Ashoka Creations Limited

...Applicant

V/s.

M/s. Trafigura India Private Limited

...Respondent

ORDER UNDER SECTION 9, IBC, 2016

ORDER DELIVERED ON: 14.09.2023

CORAM:

SHRI. P.S.N PRASAD, HON'BLE MEMBER (JUDICIAL)

SHRI. RAHUL BHATNAGAR, HON'BLE MEMBER (TECHNICAL)

ORDER

Order pronounced in open Court vide separate sheets.

IB-701(ND)/2020 stands dismissed.

SD/-

(RAHUL BHATNAGAR)
MEMBER (TECHNICAL)

SD/-

(P.S.N PRASAD)
MEMBER (JUDICIAL)



**IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI
BENCH-VI**

IB-701/(ND)/2020

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

In the matter of:

M/s. Ashoka Creations Limited

Registered Address at: 204 Eastern Building, 19 R N Mukherjee Road, Kolkata, West Bengal - 700001

...Applicant/Operational Creditor

Versus

M/s. Trafigura India Private Limited

Registered Address at: D-64, Defence Colony, New Delhi - 110024

...Respondent/Corporate Debtor

Coram:

SHRI. P.S.N. PRASAD, MEMBER (JUDICIAL)

SHRI. RAHUL BHATNAGAR, MEMBER (TECHNICAL)



Counsel for Applicant: Mr. Ankur Garg

Counsel for Respondent: Ms. Avni Sharma

ORDER

PER: P.S.N PRASAD, MEMBER (JUDICIAL) &

RAHUL BHATNAGAR, MEMBER (TECHNICAL)

Date: 14.09.2023

1. This is an application filed by the Applicant M/s. Ashoka Creation Ltd. seeking to initiate corporate insolvency resolution process (“CIRP”) under Section 9 of the Insolvency and Bankruptcy Code 2016 (“the Code”) of the Respondent M/s. Trafigura India Private Limited for the alleged default on the part of the Respondent in clearing the debt of Rs. 5,39,06,034/- (Rupees Five Crores Thirty-Nine Lakhs Six Thousand and Thirty-Four) comprising of principal amount of Rs. 4,57,50,000/- and interest at the rate of 27% p.a. of Rs. 81,56,034/-. The details of transactions leading to the filing of this application as averred by the Applicant/Operational Creditor are as follows:



- i. That the Applicant / Operational Creditor is a limited company incorporated under the provisions of the erstwhile Companies Act, 1956, which manufactures and supplies copper cathode and rods. The Applicant/ Operational Creditor and Respondent/ Corporate Debtor entered into a business relationship for purchase of Copper cathode, which was based on the assurances, guarantees and representations of the Corporate Debtor and in terms of the contract dated 03.06.2019.
- ii. In terms of the Contract No. 639184 dated 03.06.2019 entered into between Applicant / Operational Creditor and the Respondent/ Corporate Debtor, vide email dated 20.06.2019 Applicant/ Operational Creditor (Ashoka Creations Limited) placed order on Respondent/ Corporate Debtor (Trafigura India Private Limited) for purchase of 98.993 MT of copper cathode. In connection with the said Purchase Order vide email dated 20.06.2019, an advance payment of Rs. 4,57,50,000/- was made by Applicant/ Operational



Creditor (Ashoka Creations Limited) in three tranches on 20.06.2019.

iii. However, it is stated that the said purchase order was unilaterally cancelled by the Corporate Debtor and the goods were not delivered to Applicant/ Operational Creditor (Ashoka Creations Limited).

iv. In lieu of the same, amount of Rs. 5,39,06,034/- (Rupees Five Crores Thirty-Nine Lakhs Six Thousand and Thirty-Four Only) is still pending and due on the part of the Respondent/ Corporate Debtor which is yet to be recovered from the Respondent/ Corporate Debtor.

2. Consequent to the notice issued by this Adjudicating Authority, the Counsel for the Corporate Debtor filed its reply on behalf of the Corporate Debtor stating as below:

i. That the Applicant is a related entity of TDT Copper Limited ("TDT"), a company engaged in the manufacture and supply of a wide range of copper products using copper cathodes. Since 2016, TDT had been purchasing copper cathodes from



the Respondent under a Master Sales Agreement dated 27.01.2016 ("TDT MSA").

- ii. That the arrangement between the parties as documented in the TDT MSA was that the Respondent would raise provisional invoices, which were to be cleared within a period of 30 (thirty) days from the date of the relevant invoice. The final price was subsequently determined, and any difference was reconciled between the parties. There were persistent delays by TDT in making payments under the TDT MSA. Eventually, the Respondent discontinued the supply of copper cathodes to TDT on a credit-basis.
- iii. That following discussions between TDT and the Respondent, they entered into a Settlement Agreement dated 20.11.2018 ("Settlement Agreement"). TDT accepted its liability to pay an amount of INR 63,81,00,000 (Indian Rupees Sixty-Three Crores Eight One Lakhs) approximately and agreed to pay such amount (subject to certain adjustments) and interest thereon in tranches, to be completely paid by 30.04.2019. However, after making some initial payment of 1NR



12,30,00,000 (Indian Rupees Twelve Crores Thirty Lakhs), TDT did not pay any further amount.

- iv. That while discussions were ongoing between TDT and the Respondent regarding TDT's outstanding dues to the Respondent, TDT had commenced purchasing copper cathodes from the Respondent indirectly through its related entity i.e., the Applicant.
- v. That sometime in May 2019, the Applicant expressed its desire to purchase copper cathodes under a master sales agreement from the Respondent, Since the Respondent was aware that TDT was the ultimate recipient of the material supplied by it to the Applicant, to protect its interests, the Respondent required that the Applicant pay the purchase price upfront, i.e., before delivery of the material. Against this background, the Respondent and the Applicant entered into a Material Supply Agreement (“MSA”) dated 03.06.2019.
- vi. That under Clause 11.2 of the MSA, the Applicant assumed joint and several liabilities for the payment of all amounts that were due and payable by TDT as on the date of the MSA and for all amounts that would fall due and payable by TDT



in the future. The Applicant undertook to make prompt payment of such amounts due and payable by TDT, upon receiving a demand in writing for the payment from the Respondent.

- vii. That Clause 8.2 of the MSA further entitled the Respondent to withhold delivery of Materials until payment was made of all amounts due and payable by TDT to the Respondent.
- viii. That Clause 11.4 of the MSA also gave the right to the Respondent to retain and apply all monies paid by the Applicant to or for the credit of the Applicant or TDT, against the amounts due and payable by the Applicant or TDT, as on the date of the MSA or in the future. The rights of the Respondent under Clause 11.4 were without prejudice and notwithstanding whether a notice demanding payment under Clause 11.2 of the MSA had been issued.
- ix. That on 20.06.2019, the Respondent received from the Applicant a purchase order of the same date for the lifting of 98.993 MT of the Material and the Advance Amount of Rs. 4,57,50,000 (Indian Rupees Four Crores Fifty-Seven Lakhs Fifty Thousand) in three tranches. In the meantime, despite



multiple requests from the Respondent, TDT still had not paid the outstanding amounts due and payable to the Respondent as referenced under the Settlement Agreement. Around June 2019, an amount of INR 66,59,00,000 (Indian Rupees Sixty-Six Crores Fifty-Nine Lakhs) was due and payable by TDT to the Respondent under the Settlement Agreement. Since no payment was forthcoming from TDT, the Respondent, in accordance with Clause 11.4 read with Clause 8.6 of the MSA, retained the Advance Amount and applied the same towards the amounts due and payable by TDT.

x. That there are pre-existing disputes between the parties.

3. The Counsel for the Operational Creditor has further contended as follows:

i. That upon perusal of Recital C read with clauses 1, 3 and 4 of the MSA dated 03.06.2019, it is abundantly clear that the said agreement was an agreement for payment of consideration for delivery of goods, quantities of which was set-out in clause 3 of the said agreement. Further, clause 8.6 of the said



agreement particularly limits the liability of the OC with respect to the outstanding of the 'consignee', i.e., TDT Copper Ltd. only to the tune of transactions arising out of the said agreement.

- ii. That clauses 11.2 and 11.4 of the contract were only intended to apply moneys owed by TDT in the capacity of a consignee and could not and did not entitle the CD to appropriate purchase price of goods paid in advance by the OC towards the alleged dues of TDT.
- iii. That the OC was not a party to the MSA entered into between the CD and TDT on 27.01.2016. The OC was also admittedly not a party to the settlement agreement entered into between CD and TDT on 20th November, 2018. Although according to the CD, TDT was given time to pay its dues under the settlement agreement by 15.05.2019, the contract dated 03.06.2019 that was subsequently entered into by the CD with the OC makes no mention of the settlement agreement or impose any liability on the OC for the alleged dues of the CD under the same.



4. The Counsel for the Corporate Debtor has further contended as follows:

- i. That it is clear from Recital C of the MSA dated 03.06.2019 that purchases under the MSA were being made by the Applicant on behalf of TDT Copper Limited ("TDT"), its group company and the ultimate recipient of the Material. Since the Respondent was aware of this fact, and since TDT had previously failed to make payments to the Respondent, the Respondent required that the Applicant pay the purchase price in advance of delivery of the Material. The parties also included certain provisions in the MSA to protect the Respondent's interest against both companies.
- ii. Under Clause 11.2 of the Ashoka MSA, the Applicant unequivocally agreed to assume joint and several liability for the payment of all amounts that were due and payable by TDT to the Respondent as on the date of the MSA and for present and future dues. This was expressly agreed to include amounts due under any agreement.
- iii. That since the Applicant owed the Respondent dues (i.e. TDT's dues which the Applicant has agreed to pay) under the MSA,



and the Respondent merely exercised its right under the MSA to retain and apply the Advance Amount towards those dues, there is no debt within the meaning of Section 3(11) of the Code. Instead of any debt on the part of the Respondent, it is the Applicant which continues to owe the Respondent the remainder of TDT's dues which it agreed to pay under the Ashoka MSA.

- 5.** We have heard the Ld. Counsels for the Operational Creditor and Corporate Debtor and perused the averments made in the application as well as the documents enclosed with the application. The Respondent has prayed for dismissal of the present Application on the ground that no debt exists as on date and that there exists pre-existing dispute between the parties.
- 6.** Clause C of the Agreement dated 03.06.2019 between the Applicant and the Respondent states as follows: “The Buyer wishes to purchase from the Seller, and the Seller desires to sell to the Buyer specified quantities of the Material as provided in this Agreement, with the Material ultimately to be delivered by the Buyer to TDT Copper Limited, a company registered under



the provisions of the Companies Act, 1956 and having its registered office at Tolstoy House 512-512A, Tolstoy Marg, Connaught Place, New Delhi 110001 (hereinafter called "Consignee", and together with the Buyer, "Parties)"). Therefore, it is evident that the Agreement was executed between the Applicant and the Respondent for supply of goods ultimately to TDT Copper Limited, i.e., Consignee in the Agreement.

- 7.** The Applicant has filed this Application in connection with the Purchase Order dated 20.06.2019 for which an advance payment of Rs. 4,57,50,000/- was made by Applicant/ Operational Creditor (Ashoka Creations Limited) in three tranches on 20.06.2019 to the Respondent and it is the case of the Applicant that the said purchase order was unilaterally cancelled by the Respondent. The Respondent has however, rebutted the claim of the Applicant and stated that the Respondent did not unilaterally cancel the agreement but rather adjusted the previous amounts due to the Respondent by TDT Copper Limited relying on clauses 11.2 and 11.4 of the MSA dated 03.06.2019. The said clauses are reproduced herein for easy reference:



11.2: *The Buyer will jointly and severally be liable to the Seller for the payment of all amounts due and payable by the Consignee to the Seller as on the date of this Agreement and for any amounts due and payable by the Consignee to the Seller from time to time, and the Buyer shall promptly make payment of such amounts upon a demand in writing from the Seller.*

11.4: *Notwithstanding anything contained in this Agreement, the Seller is hereby authorized at any time and from time to time, to retain and apply any and all amounts paid by Buyer to or for the credit or the account of either Party against any and all amounts due and payable by either Party to Seller as on the date of this Agreement or from time to time, irrespective of whether Seller has made any demand under sub-clause 11.2 above. The Seller agrees to promptly notify the relevant Parties after any such retention and application made by the Seller, provided that the failure to give such notice shall not affect the validity of such retention and application. The above does not in any way prejudice the rights or remedies that the Seller may have under this Agreement or any other agreement with or under applicable law against either of the Parties.*

- 8.** The Applicant has denied such interpretation of the above mentioned clauses by the Respondent and has stated that Clauses 11.2 and 11.4 of the contract were only intended to apply to money owed by TDT Copper Limited in the capacity of a



consignee and could not entitle the Respondent to appropriate purchase price of goods paid in advance by the Applicant towards the alleged dues of TDT Copper Limited.

- 9.** It is clear from the above that the parties are at variance with respect to the interpretation of the clauses of the MSA dated 03.06.2019. We would like to refer to letter dated 26.06.2019 sent by the Respondent to the Applicant wherein the Respondent informed the Applicant of the retention and application of the advance amount towards the amounts due and payable by TDT Copper Limited. The Respondent also requested the Applicant to pay the remaining outstanding amount of Rs. 62,01,50,000 (Indian Rupees Sixty-Two Crores One Lakh Fifty Thousand) at the earliest. The Applicant however, has contended that the letter dated 26.06.2019 will not qualify as pre-existing dispute and such letter reflects the malafide intention of the Respondent not to deliver the goods. Be that as it may be, the dispute with respect to the terms of the Agreement dated 03.06.2019 is evident from the above mentioned letter.



10. Thus, it can be said that the existence of dispute with respect to the terms of the Agreement between the parties was prior to issuance of notice dated 18.10.2019 u/s 8 IBC, 2016.

11. The Hon'ble Supreme Court in "**Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software (P) Limited- 2017 1 SCC On Line SC 353**", analyzed the meaning of dispute with respect to Operational Creditors and observed:

"33. The scheme under Sections 8 and 9 of the Code, appears to be that an operational creditor, as defined, may, on the occurrence of a default (i.e., on non-payment of a debt, any part whereof has become due and payable and has not been repaid), deliver a demand notice of such unpaid operational debt or deliver the copy of an invoice demanding payment of such amount to the corporate debtor in the form set out in Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 read with Form 3 or 4, as the case may be (Section 8(1)). Within a period of 10 days of the receipt of such demand notice or copy of invoice, the corporate debtor must bring to the notice of the operational creditor the existence of a dispute and/or the record of the pendency of a suit or arbitration proceeding filed before the receipt of such notice or invoice in relation to such dispute (Section 8(2)(a)). What is important is that the existence of the dispute and/or the suit or arbitration proceeding must be pre-existing – i.e. it must exist before the receipt of the demand notice or invoice, as the case may be."

"34. Therefore, the adjudicating authority, when examining an application under Section 9 of the Act will have to determine:



(iii) Whether there is 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 in relation to such dispute?”

If any one of the aforesaid conditions is lacking, the application would have to be rejected. Apart from the above, the adjudicating authority must follow the mandate of Section 9, as outlined above, and in particular the mandate of Section 9(5) of the Act, and admit or reject the application, as the case may be, depending upon the factors mentioned in Section 9(5) of the Act.”

12. At this juncture, reliance is placed on the judgement of Hon'ble Supreme Court in the matter of *M/s. S.S. Engineers V/s Hindustan Petroleum Corporation Ltd. & Ors. Civil Appeal No. 4583 of 2022* wherein the Hon'ble Supreme Court has held as follows:

"On a reading of Sections 8 and 9 of the IBC, it is patently clear that an Operational Creditor can only trigger the CIRP process, when there is an undisputed debt and a default in payment thereof. If the claim of an operational creditor is undisputed and the operational debt remains unpaid, CIRP must commence, for IBC does not countenance dishonestly or deliberate failure to repay the dues of an Operational Creditor. However, if the debt is disputed, the application of the Operational Creditor for initiation of CIRP must be dismissed.”

13. From the aforesaid decisions, it is clear that an Application filed under Section 9, IBC, 2016 cannot be admitted if there are



disputes existing between the parties before the issuance of notice u/s 8, IBC, 2016 and also that the amount of debt is disputed. Further, based on the arguments advanced by the Ld. Counsels and the documents produced before this Adjudicating Authority, it clearly establishes that there were disputes existing prior to the issuance of the Demand Notice u/s 8(1) of the IB Code, 2016.

14. The present application filed under Section 9, IBC, 2016, therefore, stands dismissed.

SD/-

(RAHUL BHATNAGAR)
MEMBER (TECHNICAL)

SD/-

(P.S.N. PRASAD)
MEMBER (JUDICIAL)