

NATIONAL COMPANY LAW TRIBUNAL  
SPECIAL BENCH – II  
CHENNAI

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ATTENDANCE CUM ORDER SHEET OF THE HEARING OF CHENNAI BENCH, CHENNAI  
NATIONAL COMPANY LAW TRIBUNAL, HELD ON 06-06-2022 AT 10:30 A.M

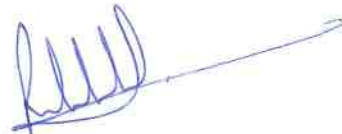
PRESENT: JUSTICE RAMALINGAM SUDHAKAR, HON'BLE PRESIDENT  
SHRI B. ANIL KUMAR, MEMBER (TECHNICAL)

APPLICATION NUMBER :  
PETITION NUMBER : CP/IB/12(CHE)/2022  
NAME OF THE PETITIONER : Samunnati Agro Solution Pvt Ltd  
NAME OF THE RESPONDENTS : SR Marine Foods Pvt Ltd  
UNDER SECTION : Sec 9 Rule 6 of IBC, 2016

Respondents. Mr. E. Omprakash, Senior Advocate  
assisted by Mr. Prakash



Petitioner. For M/S Nithyaesh & Vaibhav





(5)

CP/IB/12(CHE)/2022

ORDER

Ld. Counsel Mr. Nithyaesh Natraj for the Petitioner is present physically. Counsel on Record for the Respondents M/s. Aiyar & Dolia is led by Ld. Senior Counsel Mr. E. Om Prakash through physical mode.

1. The Petitioner is an Operational Creditor seeking to invoke Section 9 of IBC, 2016 and to initiate Corporate Insolvency Resolution Process (“CIRP”) against the Corporate Debtor. The Operational Creditor entered into Business contract with the Corporate Debtor viz., M/s. SR Marine Foods Pvt. Ltd under Sourcing and Distribution Agreement dated 17.10.2018. The Operational Creditor was engaged in the business of exports of marine products. In terms of this agreement, the transaction was made to the effect that the Petitioner/Operational Creditor would directly pay the supplier of Sea Foods/Shrimps etc. who would, in turn, deliver the goods to the Respondent/Corporate Debtor. Insofar as the supply of these goods are concerned, it is covered by Bill of Supply and Goods Delivery Receipt. For the purpose of this particular petition, we would refer to Bill of Supply dated 24.10.2018 at **Page 59** for which the Goods Receipt Invoice at **Page 60**. The Respondent/Corporate Debtor acknowledged the receipt of the goods in good condition signed and

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sealed by the Respondent/Corporate Debtor. There are other bills of supply which are also marked which is not in dispute.

2. A perusal of these documents which are in substantial numbers, clearly establish that the goods were sold and delivered at the behest of the Operational Creditor to the Corporate Debtor. In the course of the business transaction after paying substantial amounts towards goods which were delivered to the Respondent/Corporate Debtor, payments were not forthcoming which forced the Petitioner/Operational Creditor to seek various remedies for recovery of the amount including Section 138 of the Negotiable Instrument Act, 1881 proceedings against the Directors of the Respondent Company. In addition to that, on 03.11.2020, an arbitration petition was filed by the Petitioner/Operational Creditor in which an award came to be passed on 16.04.2021. The Respondent/Corporate Debtor Counsel also initiated arbitration proceedings on 07.12.2020 which was also taken up by the same Arbitrator. The arbitrator after considering the claim, counterclaim, crystallized the issue which is in **para 32, 33 & 34** at **page No.99** as follows:

32. *This will answer the points which Claim No.10 of 2020 directly takes. By no stretch of imagination can SR Marine Foods Pvt. Ltd. claim that its obligation as a contracting party will cease by withdrawal of the subsidy. The matter can further be examined by the fact that withdrawal of subsidy has nothing to do with products purchased by SR Marine Foods Pvt. Ltd. from the Claimant. It is nobody's case that the goods were not supplied. We have already examined*

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that the extension of credit by the Claimant takes the shape of goods made available by the Claimant for a client of SR Marine Foods Pvt. Ltd. The liability to make the payment by the buyer could never have been impacted by a policy change in the Government by withdrawal of the subsidy. It could at best only impact the profit margins of the company. Any failure of SR Marine Foods Pvt. Ltd. to collect the consideration for the supplies effected could not be deflected on the Claimants.

33. The Senior Counsel for the Respondents was fair to admit the transaction was supported by consideration by the fact that the goods were actually availed by the Respondents for further sale; he exported them and had a right to expect consideration to be paid to him for the sale. The Senior Counsel therefore, argued that his own liability to the extent of Rs.1,99,28,000/- cannot be denied, but the issue will only be whether he has mis-conducted himself by committing a breach that would render him liable for damages in the manner claimed by the Claimant. The concession that the Senior Counsel was prepared to make is really a replication of how even the Respondent appraised his own liability. He stated in his evidence.

*"It is correct that the buyer's inability to pay does not impact the Claimant's entitlement to recover the money. However, the Claimant had been insisting for repayment of the amount availed in credit at the rate of 36% which I could ill-afford (to pay)".*

34. This argument clearly, therefore, makes a partial admission of the entitlement to the Claimant. The Counsel will not make such a clear admission that he made an attempt also to point out to me that the situation was such that the parties knew that the Respondent was actually availing of loan credit for sale of 'chilled shrimps' to foreign buyers and that was why the S&D Contract itself provided that the Claimant had a right to appropriation of the subsidy availed by the Respondent Company for the amount due to itself. The Counsel took me through R17 that showed a downward swing in the turnover and how the industry was fully dependent and the withdrawal of subsidy by the Central Government resulted in erosion of the turnover and consequently of their own financial stability from the total turnover of Rs.75.30 crores in 2015-16 to a hike of Rs.131.14 crores in 2016-17 and spiked to Rs.135.95 crores in 2017-18, it registered small decrees to Rs.112.44 crores in 2018-19, only to



plummet to just Rs. 12.12 crores in 2019-20. While the Claimant's Counsel would discount placing this document as self-serving, the Respondent's argument was driven to point out that any incident that affected the performance of obligation must be seen within the force majeure found in the SRT Agreement. We have already extracted the Clauses above. The Senior Counsel laid emphasis on the regulations of Government of India "due to which performance is affected or suspended or delayed". The Senior Counsel, therefore argued that the withdrawal of subsidy affected the chain of transaction that resulted in the ultimate default in payment of consideration by the buyer and therefore, the Clause must be applied.

The Arbitral Award concluded in **para 51 at Page 110** as follows.

#### **VIII. Issue no.8 in Case nos. 8 and 10 of 2020**

51. There are in the nature of residuary issues that require the Arbitrator to make the Award comprehensive. This will also include the consideration of the form and contents of the Arbitral Award, as spelt out in Section 31 of Arbitration & Conciliation Act.

- i. There shall be an award for Rs. 2,70,07,459/- (Rs. Two Crores seventy lakhs seven thousand four hundred and fifty-nine only) in favour of the Claimant against the Respondents with interest at 18% from the date of the institution of the Claim Statement till the date of payment.
- ii. The Claimant is entitled to proportionate costs for the amount awarded.
- iii. Claim no.8 of 2020 is allowed to the above extent.
- iv. Claim no.10 of 2020 filed by the Company is dismissed.
- v. The counterclaim (by the claimant in case no.8 of 2020) is allowed against the Company for Rs. 2,70,07,459/- (Rs. Two Crores seventy lakhs seven thousand four hundred and fifty-nine only) with interest at 18% from the date of the institution of the Claim Statement till the date of payment.
- vi. There shall be proportionate costs in favour of claimant.
- vii. Execution and satisfaction as regards the principal amount as determined including the component of penalty by way of reasonable sum towards damages in either one cases will constitute satisfaction to that extent in the other cases also.

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Admittedly, after this award was passed, the Respondent/Corporate Debtor entered into a Memorandum of Compromise Settlement dated 30.06.2021 in **Annexure at Page 114** which would be relevant for the present case in **para 7, 8, 9 at page 116, 117, 118& 119** as follows:

- “7. *With a view to seamlessly implement the settlement terms, it is agreed between the Parties that the current Memorandum of Compromise Settlement signed by the Parties be recorded before the Hon'ble NCLT, Chennai after the payment of the first instalment. It is explicitly agreed between Parties that Samunnati shall have the right to reinstate their original application filed with the NCLT in case of any delay/default on the part of SR Marine and/or Guarantors in honouring the commitments under the current Memorandum of Compromise Settlement and that SR Marine/Guarantors shall not raise any objection of whatsoever nature before the NCLT.*
8. *Further, it is agreed between the Parties that Samunnati shall withdraw all the Sec.138 cases filed under NI Act against the guarantors with the Metropolitan Magistrate Court, Saidapet, Chennai, after payment of the first two instalments of the settlement amount aggregating to Rs.65,00,000/- to Samunnati. At the time of withdrawal of the Sec 138 cases by Samunnati, fresh dated cheque shall be issued by the Guarantors favouring Samunnati Agro Solutions Pvt. Ltd. for the balance settlement instalments. Mr K.V.Ramana shall issue a fresh cheque dated 30.09.2021 for Rs.60,00,000/-, Mrs. Shanthi Ramana shall issue fresh cheque dated 31.12.2021 for Rs.60,00,000/- and Mr. Sushil Kanugolu shall issue fresh cheque dated 31.03.2022 for Rs.80,00,000/- from their respective savings accounts maintained with their bankers, all favouring Samunnati Agro Solutions Pvt. Ltd.*
9. *It is agreed between the Parties that upon payment of the entire amount of Rs.2,65,00,000/- within the timelines specified above by SR Marine/Guarantors to Samunnati, SR Marine shall also not press / withdraw their appeal pending against the Arbitral Award but neither Samunnati nor SR Marine/Guarantors shall have any claim or counter claim against each other.”*

3. It is also worthwhile to mention that prior to the recording of settlement in the year 2019, the same Petitioner/Operational Creditor filed IBA/1368/2019 which was closed on 26.07.2021 by the following order

which is at **Page 122** as follows:

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*“Order in IBA/1368/2019 Ld. Counsel Mr. Nithyaesh Natraj for the Petitioner and Ld. Counsel Mr. Rohan Rajasekaran for the Respondent are present.*

*The parties have arrived at a compromise by a Settlement Deed dated 30.06.2021. Based on the terms and conditions of the Settlement Deed, the Petitioner seeks permission to withdraw this petition with liberty to file a fresh petition, if the Corporate Debtor violates the terms and conditions of the Settlement Deed.*

*Based on the compromise arrived between the parties, this IBA/1368/2019 stands dismissed as withdrawn with liberty.*

*The Registry is directed to accept photo copy of the duly signed Compromise Memo in IBA/1368/2019.”*

4. After the settlement was arrived, the Respondent/Corporate Debtor however failed to pay the amount. Despite the settlement arrived at between the parties, the Respondent/Corporate Debtor filed an application under Section 34 of Arbitration & Conciliation Act, 1996 before the Hon'ble High Court of Madras on 05.07.2021. The petition is not numbered till date but it is in the SR stage for almost one year. Since the settlement was not honoured by the Respondent/Corporate Debtor, the Petitioner/Operational Creditor was once again forced to file this petition on 15.12.2021. Prima facie, the debt and default has been established by the Petitioner/Operational Creditor by referring to the various marine goods supply bills which were duly acknowledged by the Respondent/Corporate Debtor and also by the award in **Para 32 & 33** mentioned above wherein the Respondent/Corporate Debtor clearly admitted the receipt of goods for export. It is another matter that the Respondent/Corporate Debtor was unable to make the payment as

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undertaken. The question is that in subsequent event viz., filing of the counter claim, both parties entered into an arbitration award and that award crystallized the amount due and payable under the supply of goods and Memorandum of Compromise settlement has been arrived by the Respondent/Corporate Debtor in favour of the Operational Creditor herein. It is the nature of goods sold and delivered for which the amount due and payable has not been paid by the Respondent/Corporate Debtor, despite several proceedings taken by the Petitioner/Operational Creditor in different forums. Therefore, it is a clear case of inability to pay the debt by the Respondent/Corporate Debtor. The amount of Rs.10,00,000/- paid consequent to the Memorandum of Compromise Settlement only justifies that the Respondent/Corporate Debtor has already admitted the liability by way of debt and subsequent default. In any event, one Clause i.e. "GUARANTEE" in the Memorandum of Compromise Settlement makes it clear that the default is continuing which is at **Page 116**. Further, the proof of default is established in **2<sup>nd</sup> para** at **Page 116** of the Memorandum of Compromise Settlement. Insofar as the Respondent/Corporate Debtor company is concerned, the default is also recorded in the Memorandum of Compromise Settlement which is extracted as follows:

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*“Thereafter, SR Marine has defaulted in making payment on the respective due date(s). Despite several mail communications/notices issued by Samunnati to SR Marine. SR Marine defaulted in making the payment to Samunnati. Consequently, Samunnati has filed an application under Insolvency & Bankruptcy Code (IBC) with National Company Law Tribunal (NCLT,) Chennai. The application is still pending with NCLT, Chennai.”*

5. The Senior Counsel Mr. E. Om Prakash for the Respondent referred to the decision of the Hon’ble Supreme Court of India in the case of ***K. Kishan vs. Vijay Nirman Co. (P) Ltd.***, more particularly in Para 27, the same reads as follows:

*“27. We repeat with emphasis that under our Code, insofar as an operational debt is concerned, all that has to be seen is whether the said debt can be said to be disputed, and we have no doubt in stating that the filing of a Section 34 petition against an arbitral award shows that a pre-existing dispute which culminates at the first stage of the proceedings in an award, continues even after the award, at least till the final adjudicating process under Sections 34 and 37 has taken place.”*

6. This decision will have bearing on the facts of the present case. The facts in the present case is different from the facts of ***“K. Kishan vs. Vijay Nirman Company (P) Ltd.”*** particularly in **Para 27**. The reason being after the award, the parties have agreed to certain terms by way of Memorandum of Compromise Settlement. In it, the debt has been acknowledged as due and payable. Therefore mere filing of the petition under Section 34 over and above the compromise is a sham. It does not amount to the continuation of arbitration proceedings because the



settlement concludes the award. The disputes ends then and there. **Para 9** of the Memorandum of Compromise Settlement records the withdrawal of the arbitration proceedings. It is an undertaking which has to be given by the Respondent/Corporate Debtor and not by the Petitioner/Operational Creditor. Therefore the case of “*K. Kishan vs. Vijay Nirman Company (P) Ltd.*” will have no relevance in view of the Memorandum of Compromise Settlement entered into between the parties. The Senior Counsel Mr. E. Om Prakash for the Respondent pleaded that the NCLT proceedings is not a proceedings for recovery of the amount. Is it no doubt true but admittedly, Section 9 application has been filed by the Petitioner/Operational Creditor for initiating CIRP proceedings against the Respondent/Corporate Debtor to declare the Respondent/Corporate Debtor as insolvent in view of continuing debt and default. Insofar as the recovery of the amount, other proceedings are available under law and are ~~very~~ pursued. Therefore, none of the plea of the Respondent/Corporate Debtor is tenable. The Petitioner/Operational Creditor is not seeking for recovery of amount. It is for initiating CIRP against the Respondent/Corporate Debtor.

7. Thus, taking into consideration the facts and circumstances of the case as well as the position of Law, we are of the view that the Petition, as filed by the Operational Creditor in a clear case of debt and default coupled

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with inability to pay justifies initiation of proceedings. Hence, the petition is required to be admitted under Section 9(5) of the IBC, 2016.

8. Since the Operational Creditor has not named the Insolvency Resolution Professional, this Tribunal based on the latest list furnished by Insolvency and Bankruptcy Board of India applicable for the period between January 2022 - June 2022 at S. No.52 hereby appoints **Mr. S Amarendran** with **Registration Number [IBBI/IPA-002/IP-N00634/2018-2019/11962]** (*e-mail id:- sivakumar.amarendran@gmail.com*) as the “Interim Resolution Professional” subject to the condition that no disciplinary proceedings are pending against such an Interim Resolution Professional named and disclosures as required under IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 are made within a period of one week from the date of this order. The IRP appointed shall take in this regard such other and further steps as are required under the Statute, more specifically in terms of Section 15,17,18 of the Code and file his report within 20 days before this Bench.
9. The powers of the Board of Directors of the Corporate Debtor shall stand superseded as a consequence of the initiation of the CIRP in relation to the Corporate Debtor in terms of the provisions of IBC, 2016.
10. As a consequence of the Application being admitted in terms of Section 9 (5) of the Code, the moratorium as envisaged under the provisions of



Section 14(1) and as extracted hereunder shall follow in relation to the Corporate Debtor:

- a. The institution of suits or continuation of pending suits or proceedings against the respondent including the execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;
- b. Transferring, encumbering, alienating or disposing of by the respondent any of its assets or any legal right or beneficial interest therein;
- c. Any action to foreclose, recover or enforce any security interest created by the respondent in respect of its property including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;
- d. The recovery of any property by an owner or lessor where such property is occupied by or in the possession of the respondent.

*Explanation.*-For the purposes of this sub-section, it is hereby clarified that notwithstanding anything contained in any other law for the time being in force, a licence, permit, registration, quota, concession, clearance or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license or a similar grant or right during moratorium period;

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11. However, during the pendency of the moratorium period in terms of Section 14(2) (2A) and 14(3) as extracted hereunder:

(2) The supply of essential goods or services to the Corporate Debtor as may be specified shall not be terminated or suspended or interrupted during the moratorium period.

(2A) Where the interim resolution professional or resolution professional, as the case may be, considers the supply of goods or services critical to protect and preserve the value of the Corporate Debtor and manage the operations of such Corporate Debtor as a going concern, then the supply of such goods or services shall not be terminated, suspended or interrupted during the period of moratorium, except where such Corporate Debtor has not paid dues arising from such supply during the moratorium period or in such circumstances as may be specified.

- (3) The provisions of sub-section (1) shall not apply to
- (a) such transactions, agreements or other arrangements as may be notified by the Central Government in consultation with any financial sector regulator or any other authority;
  - (b) a surety in a contract of guarantee to a corporate debtor.

12. The duration of the period of moratorium shall be as provided in Section 14(4) of the Code and for ready reference reproduced as follows:

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(4) The order of moratorium shall have effect from the date of such order till the completion of the Corporate Insolvency Resolution Process:

Provided that where at any time during the Corporate Insolvency Resolution Process period, if the Adjudicating Authority approves the Resolution Plan under sub-Section (1) of Section 31 or passes an order for liquidation of Corporate Debtor under Section 33, the moratorium shall cease to have effect from the date of such approval or Liquidation Order, as the case may be.

13. The Operational Creditor is directed to pay a sum of **Rs.1,00,000/-** (*Rupees One Lakh Only*) to the Interim Resolution Professional upon the Interim Resolution Professional filing the necessary declaration form as required under the provisions of the Code to meet out the expenses to perform the functions assigned to her in accordance with Regulation 6 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

14. Based on the above terms, the Application stands **admitted** in terms of Section 9(5) of IBC, 2016 and the moratorium shall come in to effect as of this date. A copy of the Order shall be communicated to the Operational Creditor as well as to the Corporate Debtor above named by the Registry. In addition, a copy of the Order shall also be forwarded to IBBI for its records. Further, the Interim Resolution Professional above named who is figuring in the list of Resolution Professionals forwarded

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by IBBI is also furnished with a copy of this Order forthwith by the Registry, who will also communicate the initiation of the CIRP in relation to the Corporate Debtor to the Registrar of Companies concerned.

15. Accordingly, this CP/IB/12(CHE)/2022 stands **admitted**.

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**[JUSTICE RAMALINGAM SUDHAKAR]**  
**PRESIDENT**

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**[B. ANIL KUMAR]**  
**MEMBER (TECHNICAL)**

VS