Sl. No. 4

NATIONAL COMPANY LAW TRIBUNAL
AMARAVATI BENCH
(Video Conference)
PRESENT: JUSTICE TELAPROLU RAJANI – MEMBER JUDICIAL
ATTENDANCE-CUM-ORDER SHEET OF THE HEARING HELD ON 01.09.2023 AT 02:25 P.M.

TC/CP. Nos.	CA/IA No.	Section/ Rule	Name of Parties
TCP(IB)/51/9/AMR/2019		9 of IBC	Posco Daewoo Corporation Vs Mohana Cotton Ginning Pvt Ltd
	IA(IBC)/323/2022	60(5) of IBC	Mohana Cotton Ginning Private Limited (CD) Vs. Posco Daewoo Corporation (OC)

ORDER

Mr. Eakansh Gupta & Ms.Senu Nizar, Ld. Counsels for the OC and Mr.Ch.Srinivasa Rao, Ld. Counsel for the CD present. Orders pronounced. Both TCP(IB)/51/9/AMR/2019 and IA(IBC)/323/2022 are dismissed vide separate orders.

Sd/- Dated 4/9/23
MEMBER JUDICIAL

RSN

NATIONAL COMPANY LAW TRIBUNAL
AMARAVATI BENCH AT MANGALAGIRI
*** *** ***

TP (IB)/51/9/AMR/2019 & IA(IBC)/323/2022

In the matter of a Petition 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

AND

In the matter of
M/s. MOHANA COTTON GINNING PRIVATE LIMITED

BETWEEN:

Posco Daewoo Corporation
Through Mr. Tae-Hoon Park
Posco Daewoo India Private Limited
703/12, Tower B, 7th Floor, Park Centra
NH-8, Sector-30, Gurgaon, UP– 122 001.

... Operational Creditor

AND

Mohana Cotton Ginning Private Limited
D.No.3-153, Garapadu (Post),
Vatticherukuru (Mandal), Guntur District
Andhra Pradesh – 522 017

... Corporate Debtor

AND

In the matter of
IA(IBC)/323/2022
IN
TP(IBC)/51/9/AMR/2019

In the matter of an Interlocutory Application filed under section 60 (5) of IBC, 2016 read with Rule 11 of NCLT Rules, 2016

BETWEEN:

Mohana Cotton Ginning Private Limited

.... Applicant/CD

AND

Posco Daewoo Corporation

.... Respondent/OC

Date of pronouncement of orders: 01.09.2023

CORAM:

Justice Telaprolu Rajani, Member Judicial.

Appearance:

For Operational Creditor :		Ms.Senu Nizar, Mr.Ekansh Gupta, & Mr,Arsheya Sardha, Advocates.
For Corporate Debtor	:	Mr. Chandrasen Reddy, Sr. Counsel along with Ms.Harshitha Datla, Advocate.

COMMON ORDER IN TP(IBC)/51/9/AMR/2019 AND IA(IBC)/323/2022 IN TP(IBC)/51/9/AMR/2019

(Per: Justice Telaprolu Rajani, Member Judicial)

1. This Petition is filed by the petitioner Posco Daewoo Corporation, i.e., the Operational Creditor ("in short OC") against the Respondent M/s. Mohana Cotton Ginning Private Limited i.e., the Corporate Debtor, ("in short CD") seeking to initiate Corporate Insolvency Resolution Process (CIRP) against the CD, for the default committed by the CD in discharging the debt of USD 30,000 (Approximately INR

19,51,200) (conversion rate applied is USD 1 = INR 65.04, being the Official Exchange Rate as on March, 28, 2018) that was due to the OC.

2. The facts, briefly, as per the Petitioner are as follows:

a) On 10.01.2017, the OC and the CD executed an International Shipment Contract and proforma invoice for the supply, to the OC, of 300 MT of Indian Raw Cotton by the CD.

b) Thereafter, the CD supplied the goods to the OC under the initial contract. However, on account of certain compensation due from the CD to the OC in relation to the initial contract, the parties agreed that the CD would pay an amount of USD 30,000 to the OC. Consequently, the OC raised a debit note for the said sum. The CD acknowledged the liability by executing the Debit Note which is transmitted to the OC by its email dated 07.09.2017. Despite repeated reminders from the OC, the CD failed to pay the said amount. Hence this Petition, seeking to initiate CIRP.

3. The CD filed counter, contending that the Petition is not maintainable and further contended that the intention of the code is not to burden the Adjudicating Authority with the task of adjudicating each and every case pertaining to the OC's contract with third parties and to claim the due amounts by way of initiating Insolvency Resolution Process, inspite of there being an efficacious remedy of resolving the claims or any other dispute pertaining to the cotton business by

approaching the International Cotton Association Limited (ICS), which is at Liver Pool, United Kingdom, by invoking arbitration clause. The applicant has failed to comply the statutory provisions stipulated under Section 9 (3) (b) & (c) of IBC, which provides that adjudicating authority shall reject the application if notice of dispute has been received by the OC or if there is a record of dispute in the information utility. It is true that the OC entered into International Shipment Contract and proforma invoice dated 10.01.2017 for supply of 300 MT of Indian Raw Cotton by the CD for a total invoiced amount of USD 521,630.40 with CA Textile Mills (Pvt) Ltd in Pakistan as the notify party, but it is false to say that on account of certain compensation due payable by the CD, the parties agreed that the CD would pay the claim amount of USD 30,000 to the applicant, as such the OC raised a debit note dated 09.04.2017 for which the CD agreed. The CD never agreed to pay the above compensation due as stated.

After executing the projected contract dated 10.01.2017, the CD, as per agreed terms supplied the cotton material after SHG inspection who has conducted pre-shipment inspection only after verifying all the details, cargo loaded into container to the applicant under the initial contract as per stipulated time and shipment was also done. Thereafter, the OC, in turn, shipped a consignment declared to contain "Indian Raw Cotton" to M/s. C.A. Textiles Mills Pvt. Ltd, Lahore, which was refused as they raised a dispute with respect to the price and quality of goods with the applicant. As a result, it rendered the

consignment as Frustrated Cargo and are dealt with in terms of Section 138 of Customs Act, 1969.

The OC, as per telephonic conversation, issued email dated 06.09.2017 requesting the CD to pay the compensation dues for re-shipment of frustrated cargo/ consignment and other consequential charges which includes port charges and also to negotiate with Hyundai Line for waiver of shipping agents' expenses as already agreed to countersign on the debit note said to have been sent on 01.09.2017. Further, it undertook the liability of paying the port charges $ 5000 as previously agreed by the applicant in other emails correspondence. But the CD was unable to understand as to why the alleged compensation due amount is tagged down onto it, as there was no understanding or agreement arrived between the parties to claim the said amount. But keeping in view of the business relations, the CD issued email dated 07.09.2017 attaching the signed debit note and also informed the OC that the amount claimed can be settled only on release of the containers from the port and after sale of the same. However, the containers are kept under the applicant's custody illegally, as such the CD is not liable to pay any compensation amount. Even as per Clause 13 & 14 of the International Shipment Contract dated 10.01.2017, if they raise any dispute relating to the contract it shall be resolved through arbitration and the OC cannot directly invoke the jurisdiction of this Tribunal.

The CD was forced to counter sign the debit note, only on the assurance from the OC, that the cargo would be released. The OC has breached the terms of the purchase agreement dated 10.10.2016 and the claim amount is different from the agreed terms. The CD, after receiving the Form 3 demand notice issued reply, denying the liability. There exists a bonafide dispute between the parties, hence, this Petition is not maintainable.

4. Rejoinder is filed by the Petitioner/OC contending that the petition is maintainable under Section 9 of IBC as the Petitioner falls under the category of Operational Creditor. The unpaid Operational Debt arises out of the Debit Note and mere fact that there is an arbitration clause between the parties under the initial contract, is irrelevant. Insolvency proceedings, being proceedings *in rem*, will not be barred by the existence of an arbitration clause, which proceedings are in *personam*. The Respondent did not demonstrate any pre-existing dispute. The dispute should exist prior to the issuance of the demand notice as per the judgment of the Supreme Court in ***Mobilox Innovations Private Limited*** case. In the present case, the Respondent never raised a dispute under the Debit Note or even under the Initial Contract. On the contrary, the Respondent acknowledged its liability to pay the unpaid operational debt. In fact, even after the exaction of the Debit Note, when the applicant sent reminders, the Respondent did not raise any alleged disputes under the Debit Note on receiving these reminders. They were first time raised in the reply to the demand notice. The

contentions of the Respondent are not supported by any documents and hence the Petition can be admitted.

5. Heard both the counsels and perused the written submissions filed by both sides.

6. As regards the objection raised by the CD that the applicant failed to comply Section 9 (3) (b) (c) of IBC, the counsel for the Applicant relies on the judgment of the ***Supreme Court in Civil Appeal No.15135 of 2017 between Macquarie Bank Limited vs. Shilpi Cables Technologies Ltd. (2018) 2 SCC 674***, wherein at paragraph 17, the Supreme Court observed that there may be situations of operational creditors who may have dealings with a financial institution as defined in Section 3(14) of the Code. There may also be situations where an operational creditor may have as his banker a non-scheduled bank, for example, in which case, it would be impossible for him to fulfil the aforesaid condition. A foreign supplier or assignee of such supplier may have a foreign banker who is not within Section 3(14) of the Code. The fact that such foreign supplier is an operational creditor is established from a reading of the definition of "person" contained in section 3(23), as including persons resident outside India, together with the definition of "operational creditor" contained in Section 5(20), which in turn is defined as "a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred". That such person may have a bank/financial institution with whom it deals and which is not

contained within the definition of Section 3(14) of the Code would show that Section 9(3)(c) in such a case would, being a condition precedent, amount to a threshold bar to proceeding further under the Code. The Code cannot be construed in a discriminatory fashion so as to include only those operational creditors who are residents outside India who happen to bank with financial institutions which may be included under Section 3(14) of the Code. It is no answer to state that such person can approach the Central Government to include its foreign banker under Section 3(14) of the Code, for the Central Government may never do so. In the light of the above, the failure of the Applicant to file the certificate under Section 9 (3) (c) does not become fatal in this application.

7. Coming to the merits of the case, there is no denial of the fact that the amount claimed in this Petition is the amount of compensation of USD 30,000. Keeping aside the issue of pre-existing dispute, it has to be initially seen whether a claim for compensation qualifies for an Operational Debt. The debit note clearly mentions that the amount is a compensation amount. The Petitioner relies on the email correspondence between the parties to contend that the Respondent has admitted the amount. An email dated 07.09.2017 issued by the Petitioner reminds the Respondent that they have already sent related debit notes and the Respondent has agreed for it. The petitioner also relies on an email dated 05.09.2017 issued by the Respondent stating that instead of issuing a similar cheque for the petitioner before negotiation, they would provide the cheque for amount of 30,000 USD

as agreed but before that they requested to negotiate and that then they would sign the agreement and issue the cheque. It is also mentioned that otherwise they have no objection as also agreed earlier that they are bound to pay 30,000 USD. This email from the CD is construed an admission of debt. As can be seen from the mail, no doubt the CD has agreed to pay the compensation of USD 30,000 but the email also reflects that there is a pre-condition for issuing the cheque. However, even if it can be held that the Respondent is liable to pay the compensation, whether it is within the purview of Section 9 of IBC or not is the moot question. For that, a reading of the definition of operational debt under section 5(210 would be beneficial. Section 5 (21): "Operational debt" means a claim in respect of the provision of goods or services including employment or debt in respect of the (payment) of dues arising under any other law for the time being in force and payable to the Central Government, any state Government or any local authority. So far as private persons or companies are concerned, the Operational debt should arise from provision of services or goods. A claim for mere compensation is not maintainable. As already observed, there was a pre-condition for payment of compensation by the CD. The NCLT Allahabad Bench in the case of BRS Refineries vs. Mr Supriyo Kumar Chaudhari, Liquidator of JVL Agro Industries Ltd., held that the purchaser is not entitled to claim compensation for breach of contract in liquidation sale. The said judgment was rendered with respect to a dispute pertaining to the compensation for not refunding the EMD amount by the Liquidator.

Even in this case, the compensation is claimed for breach of certain terms of the contract which does not fall within the purview of section 9 of IBC and qualify for an Operational Debt. Amaravathi bench, in the above cited judgment, observed that the relationship between the parties emanates from the purchase agreement and the rights, liabilities and subsequent conduct have to be worked out basing on the said contract and therefore the rights arising there from are rights in personam and not rights in rem. It also observed that as contended, the application is not moved for the benefit of all the creditors and no material was placed that the respondent owes payments to other creditors and even if it had, the petitioner cannot be a representative of all the creditors. It also noted that the agreement stipulated for dispute resolution by an arbitration.

8. The counsel for the CD relies on a judgment rendered by the **NCLAT principal bench, New Delhi in *Company appeal (AT) (Insolvency) No. 1032 of 2023 and other IAs*** **between *Chandrasekhar Exports Pvt. Ltd v. Babanraoji Singh Sugar & Allied Industries Ltd*,** which held that crystallisation of the compensation has to be done by competent court. Here though compensation was an agreed amount, it was subjected to a condition. As to how the compensation amount was arrived at is not stated. Hence the petition fails on that count.

9. A judgment rendered by the ***NCLT Amaravati Bench in TCP(IB)/50/9/AMR/2019***, in a dispute between the same parties by order dated 11.09.2019, has dealt with similar set of facts in relation to

the maintainability of the petition when there is an arbitration clause between the parties. In this case, it can be seen from the mail dated 07.09.2017 that the Respondent agreed to pay the compensation, but there was a pre-condition that there should be negotiations before signing the agreement. In the reply notice, the CD reiterated that it has inform the OC that the amount under the Debit Note can be settled only on release of containers from the port and after sale of the same and that the containers are kept under custody of the OC illegally and hence no compensation needs to be paid by the CD. It is also stated that the OC has forced them to sign the debit note though they are not liable to pay any amount and that they have breached the terms of purchase agreement dated 10.10.2016. It is also stated that the claim amount is different from the agreed terms. The law is well settled that the dispute should be raised by the Respondent prior to the issuance of the demand notice. It can be seen that the email dated 14.09.2017 is prior to the issuance of the demand notice which is dated 12.02.2018. The acceptance to pay the compensation vide said email is not unconditional. There is no dispute that there is an arbitration clause in the contract and it is clear that there was a dispute with regard to the delivery of containers. The OC does not contend that they have dispatched the containers or that they need not.

10. The NCLT Amaravati Bench has referred to the judgment of the Hon'ble Supreme Court in ***Booz Allen and Hamilton Inc. vs SBI Home Finance Ltd. & Ors. (2011) 5SCC 532*** wherein it was held that despite arbitration clause, an arbitrator, notwithstanding any

agreement between the parties, has jurisdiction to order winding up of the company. Another judgment in ***Haryana Telecom Ltd vs. Sterlite Industries (India) Ltd, (1999) 5SCC 688*** was also referred to, wherein it was held that the proceedings which are in *rem* are for the benefit of all the creditors and not for an individual creditor. Therefore, the only effective remedy is under the Code and not elsewhere. Reference was made to ***Mobilox Innovations Private Limited vs. Kirusa Software Private Limited (2018) 1 SCC 353.*** In ***Booz Allen*** case, the Supreme Court held that the Arbitral Tribunals are private fora chosen voluntarily by the parties to the dispute, to adjudicate their disputes in place of courts and tribunals which are public fora constituted under the laws of the country. Every civil or commercial dispute, either contractual or non-contractual, which can be decided by a court, it in principle capable of being adjudicated and resolved by arbitration unless the jurisdiction of the Arbitral Tribunals is excluded either expressly or by necessary implication. Adjudication of certain categories of proceedings are reserved by the legislature exclusively for public fora as a matter of public policy. Certain other categories of cases, though not expressly reserved for adjudication by public fora, may by necessary implication stand excluded from the purview of private fora. Consequently, where the dispute is inarbitrable, the court where a suit is pending will refuse to refer the parties to arbitration, under Section 8 of the Act, even if the parties might have agreed upon arbitration as the forum for settlement of such disputes.

11. In this case, it can be seen that the OC did not respond to the contention raised by the CD in the mail dated 05.09.2017. The NCLT Amaravati Bench held that when the Respondent disputes the payment and also questions the conduct of the Petitioner in the reply notice, it indicates that there were issues between the parties.

12. The counsel for the petitioner also relied on the judgments of ***NCLAT in Company Appeal (AT) (Insolvency) No.802/2020*** between ***Hasan Shafiq vs. CT Technologies Aps & Anr***, wherein it was held that despite there being a clause of arbitration in the agreement, Petition under Section 9 was fully maintainable and could be proceeded with by the Adjudicating Authority. Another judgment rendered by the Supreme Court between ***Indus Biotech Private Limited vs Kotak India Venture (Offshore) Fund (2021) 6 SCC 436,*** was also relied upon, wherein it was held that the IB Code shall override all other laws as provided under Section 238 of the IB Code. In that view, notwithstanding the fact that the alleged Corporate Debtor filed an application under Section 8 of the Act, 1996, the independent consideration of the same dehors the application filed under Section 7 of IB Code and materials produced therewith will not arise. However, as already observed there seems to be a pre-existing dispute between the parties. From the precedential law, what can be understood is that if the dispute is not arbitrable, then arbitration clause in the contract does not cast an obligation on the court to refer the matter to arbitration. If the dispute is only with regard to the course of action for realising the amount that is admitted, then the parties can move a

petition under IBC, since the jurisdiction is independent of the arbitration. Hence, in view of the same, the Company Petition is not maintainable and is hence, dismissed.

13. An Interlocutory Application in IA(IBC)/323/2022 IN TCP(IB)/51/9AMR/2019 was filed by the Applicant/CD to receive certain documents on record, which is an email correspondence between the parties. The reasons for not filing the said documents along with the reply are stated to be due to inadvertence and non-availability of the authorized representative of the CD in India, due to Covid pandemic.

The Respondent/OC opposed the Application contending that the said email is not received by him and that the said email was never referred to in the pleadings and it is filed with an inordinate delay and hence it cannot be received at this stage. The Respondent's counsel relied on the judgment of the Supreme Court in ***Dena Bank v. Shivakumar Reddy, (2021) 10 SCC 330*** in support of his contention that the Adjudicating Authority has the discretion to decline the request to file additional documents depending on the facts and circumstances of the case. But in the same judgment, it is observed that there is no bar in law to the amendment of pleadings in an application under Section 7 of IBC or to the filing of additional documents, apart from those initially filed along with the application. In the absence of any express provision which either prohibits or sets a time limit for filing of additional documents, it cannot be said that the

Adjudicating Authority committed any illegality or error in permitting the appellant bank to file additional documents. Hence from the above judgment, it can be understood that when there are circumstances explaining the delay in filing the documents, the same can be accepted.

In this case, the counsel for the OC wanted physical examination of the computer of the sender of the email, which was permitted. But the sender could not be present as, according to the counsel's representation, he is abroad and is not likely to return within reasonable time. The counsel for the respondent contends that even if the said email is ignored, it can be seen that there was a dispute raised by the Applicant/CD in the email dated 05.09.2017. The said contention is cogent. Hence, this application is dismissed and accordingly, IA(IBC)/323/2023 is disposed of.

14. Accordingly, IA(IBC)/323/2023 in TP(IBC)/51/9/AMR/2019 and TP(IBC)/51/9/AMR/2019 are dismissed and disposed of.

Sd/- dated 01.09.2023
JUSTICE TELAPROLU RAJANI
MEMBER JUDICIAL

Swamy Naidu (PS)