

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOCHI BENCH, KERALA**

CP(IBC)/20/KOB/2021

(Under Section 9 of the Insolvency and Bankruptcy Code, 2016)

Order delivered on: 21 .12.2021

Coram:

Hon'ble Mr. Ashok Kumar Borah, Member (Judicial)
Hon'ble Mr. Anil Kumar B, Member (Technical)

In the matter of:

ITC Ltd-Agri Business Division,
Grand Trunk Road,
Nagarampalem,
Guntur, 52 004
Andhra Pradesh.

.... Applicant/Operational Creditor

Versus.

Periyar Agro Food Industries Pvt. Ltd
Chundamala, West Vengola P O,
Perumbavur, Ernakulam District
Kerala-683 556.

...Corporate Debtor/Corporate Debtor

Appearance (through Video conferencing):

For Applicant/Operational Creditor : Shri. Anil D. Nair, Advocate

For Respondent/Corporate Debtor : Shri. Irfan Ziraj, Advocate

O R D E R

Per : Ashok Kumar Borah, Member (Judicial)

1. This application has been filed under Section 9 of IBC by M/s ITC Ltd. (hereinafter referred to as 'Operational Creditor') represented by Mr.Ashit Kumar, S/o Late Shri Sharavan Kumar against Periyar Agro Food Industries Pvt.Ltd (herein after referred to as 'Corporate Debtor') for recovery of the defaulted payment of operational debt of Rs. 80,16,526/- (Rupees Eighty Lakhs Sixteen Thousand Five Hundred and Twenty-Six only) on account of sale of goods and an amount of Rs. 58,94,662/- (Rupees Fifty Eight Lakhs Ninety-Four Thousand Six Hundred and Sixty-Two) on account of interest payable thereto, aggregating Rs. 1,39,11,188/- (Rupees One Crore Thirty-Nine Lakh Eleven Thousand One Hundred and Eighty-Eight Only) as on 18.01.2021.
2. The applicant stated that the Operational Creditor and Corporate Debtor entered into an agreement dated 19.01.2019 (along with amended agreement dated 30.01.2019) whereby the Operational creditor sold 2,650 MT (+/- 10%) of wheat to Corporate Debtor as per the terms set out therein (hereinafter referred to as 'Sale Contract').

3. As per the terms of Sale Contract, it was agreed by the Operational Creditor and Corporate Debtor that the original Railway Receipt (hereinafter referred to as 'RR') is to be handed-over to the Corporate Debtor once 50% payment is credited into Operational Creditor's account and balance 50% has to be paid within 25 days of the rake reaching destination. RR was to be handed over after receipt of first payment and Post Dated Cheques (dated 28 days from the Rake reaching destination date) for balance amount. Furthermore, it was agreed between the parties that interest@ 13.50% p.a. will be charged to the buyer, if there is any delay in receiving the payment.
4. The applicant further stated that pursuant to the Sale Contract, 2591 MTs of Wheat/goods as agreed to were supplied by Applicant/ Operational Creditor through invoice numbers F23AD19161001497 dated 11.02.2019 for Rs.89,28,705.40 (Rupees Eighty-Nine Lakhs Twenty-Eight Thousand Seven Hundred Five and Paise Forty Only) and Invoice bearing F23AD19161001498 for Rs.5,27,38,528.70 (Rupees Five Crore Twenty-Seven Lakhs Thirty-Eight Thousand Five Hundred Twenty-Eight and Paise Seventy Only) and RR bearing Number 19021012707 dated 11.02.2019 were duly received by the Corporate Debtor. RR was handed over to the Corporate Debtor

on 16.02.2019 when the goods reached the destination. Contrary to the terms of Contract, on 16.02.2019 the Corporate Debtor paid Rs. 1,60,00,000/- (Rupees One Crore Sixty Lakhs only) against receipt of RR, instead of releasing 50% agreed to. Till 20.02.2019 the Corporate Debtor paid a sum of Rs. 2,00,00,000/- (Rupees Two Crores only). The Corporate Debtor assured that they will pay full sale consideration within 25 days of the rake reaching destination, i.e. on or before 15.03.2019.

5. The learned counsel for the applicant argued that even after completion of due date of second instalment, i.e., 15.03.2019, as payments were not forthcoming, on 24.04.2019 & 09.05.2019, Applicant/Operational Creditor sent reminder to the Corporate Debtor for the payment of Rs. 4,18,33,697.60 (Rupees Four Crores Eighteen Lakhs Thirty-Three Thousand Six Hundred Ninety-Seven and Paise Sixty Only) (excluding pre-existing outstanding amount under an earlier transaction of Rs. 1,89,558/- (Rupees One Lakh Eighty-Nine Thousand Five Hundred Fifty-Eight Only) along with agreed interest @ 13.50. It was made clear that there was clear breach of the contract by the Corporate Debtor. He further argued that after several reminders and continuous visits to the Office of

the Corporate Debtor, the Corporate Debtor effected payments to to the tune of Rs. 3,40,00,000/- (Rupees Three Crores Forty Lakh Only) in several installments and a balance of Rs. 80,16,526/- (Rupees Eighty Lakhs Sixteen Thousand Five Hundred and Twenty-Six only) on account of sale of goods and an amount of Rs. 58,94,662/- (Rupees Fifty-Eight Lakhs Ninety-Four Thousand Six Hundred and Sixty-Two) on account of interest payable thereto, aggregating to Rs. 1,39,11,188/- (Rupees One Crore Thirty-Nine Lakh Eleven Thousand One Hundred and Eighty-Eight Only) as on 18.01.2021.

6. The contention of the applicant/ Operational creditor is that the Corporate Debtor has acknowledged vide letter dated 08.08.2019 and letters dated 18.01.2021 its liability to pay under the Sales Contract at the time of furnishing cheques in favour of Applicant/Operational Creditor towards outstanding amount due in respect of goods supplied under the Sale Contract. The Corporate Debtor had further undertaken to pay the amounts due by 31.01.2021 and had also authorized Applicant/Operational Creditor to encash the cheques in order to recover the dues.

7. . The learned counsel for the applicant submitted that in view of non-compliance of the undertaking to pay the outstanding operational debt by 31.01.2021, Applicant/Operational Creditor deposited the cheques on 25.01.2021 but the same was returned unpaid by the bank stating the reason as 'Payment stopped by drawer'. Thereafter the Applicant sent a Demand Notice under Sec. 8 of IBC on 15.02.2021 demanding payment of the unpaid operational debt due from the Corporate Debtor, as on the date of the demand notice, totalling Rs. 1,39,11,188/- (Rupees One Crore Thirty-Nine Lakh Eleven Thousand One Hundred and Eighty-Eight Only). There is no prior dispute in respect of the amounts specified in the Demand Notice.
8. It is further stated that in response to the Demand Notice, Corporate Debtor has issued a communication dated 08.03.2021, wherein they have admitted the existence of debt, but they denied their liability to pay the interest. Therefore, the applicant has filed this application to initiate Corporate Insolvency Resolution Process against the Corporate Debtor, i.e., Periyar Agro Food Industries Pvt. Ltd.
9. The Corporate Debtor in their counter stated that in connection with the subject matter, the Operational Creditor already initiated

proceedings under Section 138 of the Negotiable Instruments Act and Section 420 of the Indian Penal Code. In connection with the said proceedings the Operational Creditor issued legal notice dated 08.02.2021. The Corporate Debtor also issued a reply dated 24.02.2021 to the said legal notice and thereby disputed the allegation.

10. It is further stated that the Corporate Debtor is ready and willing to clear off the entire principal amount of Rs.80,16,526/- by way of 10 monthly Installments to the Operational Creditor and that the Corporate Debtor is not in a position to pay any amount towards interest, since the entire business community in the world waived entire interest in connection with business transaction during the Covid- 19 pandemic and Operational Creditor also promised to waive the same.
11. The learned counsel for the Corporate Debtor submitted that it is true that there was some business transaction between Corporate Debtor and Operational Creditor and towards the security of the said transaction, Corporate Debtor usually issued post-dated cheques to Operational Creditor. He has further submitted that the usual practice was that after settling the amount Operational Creditor would return the said security cheques to Corporate

Debtor and Corporate Debtor will issue fresh security cheques. Operational creditor replaced said entire security cheques with covering letter bearing seal and signature of Operational Creditor. However, in connection with the transaction mentioned in the above application, there is a balance outstanding of Rs. 80,16,526/- . As the Corporate Debtor is not in a position to pay the interest, the matter is settled between Operational Creditor and Corporate Debtor and Corporate Debtor agreed to clear off the entire balance outstanding on 31.01.2021.

12. The Corporate Debtor stated that a written agreement also executed between the Corporate Debtor and Operational Creditor. In the said agreement it was made clear that the entire principal amount and interest will be paid by the Corporate Debtor since according to Operational Creditor, otherwise other clients and customers would also demand for waiver of Interest. But Operational Creditor assured to settle the entire transaction for payment of principal amount only without interest. On the basis of said agreement Corporate Debtor arranged money. But flouting all promises and assurances, Operational Creditor presented the cheques for encashment knowing fully well that there was no sufficient fund in the account of the Corporate Debtor.

13. The learned counsel for the Corporate Debtor during the argument submitted even though under Negotiable Instruments Act a notice was sent by the Operational Creditor to the Corporate Debtor and the Corporate Debtor replied to them, concealing this pre-existing dispute, the operational creditor approached this Tribunal, by filing this application. Therefore, the Corporate Debtor is not liable to pay the amount demanded in the above application and for that no Corporate Insolvency Resolutions Process be initiated against them.

Findings:

14. On hearing the arguments advanced by both the sides and on perusal of the documents and evidences placed on record we find it necessary to determine whether there is any pre-existing dispute between the Operational Creditor and the Corporate Debtor.

15. In the present case, the only point which arises for consideration is whether the notice issued under the Negotiable Instruments Act dated 08.02.2021 amounts to 'pre-existing dispute'?

16. We have examined Sub-section 6 Section 5 of the Code to determine what 'dispute' is. The Section defines as follows:

“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.

From the above definitions, it is clear that the Corporate Debtor could not establish any of the three points mentioned under the definition in the Code, i.e., the existence of the amount of debt, the quality of goods or service, or the breach of a representation or warranty.

17. In “Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software (P) Limited– 2017 1 SCC OnLine SC 353”, the Hon’ble Supreme Court held as to what are the facts to be examined by the Adjudicating Authority while examining an application under Section 9, which is as follows:

“34. Therefore, the adjudicating authority, when examining an application under Section 9 of the Act will have to determine: (i) Whether there is an “operational debt” as defined exceeding Rs.1 lakh? (See Section 4 of the Act) (ii) Whether the documentary evidence furnished with the application shows that the aforesaid debt is due and payable and has not yet been paid? and (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.”

18. A reading of the aforesaid decision, makes it clear that the existence of ‘Dispute’ must be ‘pre-existing’ i.e. it must exist before the receipt of the demand notice or invoice. If it comes to the notice of the Adjudicating Authority that the ‘operational debt’ is exceeding Rs. 1 Crore and the Applicant shows that the aforesaid debt is due and payable and has not been paid, in such a case, in absence of any 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’, the Application under Section 9 cannot be rejected and is required to be admitted.

19. Since all the aforesaid conditions are fulfilled in the instant case, we find that the application submitted by Operational

Creditor is complete in all respects and it is also evident that the Corporate Debtor agreed for the due amount and disputed only the interests claimed by the Operational Creditor.

20. In view of the above, the instant application filed by the Operational creditor against M/s Periyar Agro Food Industries Pvt. Ltd.(Coprorate Debtor) deserves to be admitted.

21. The application, therefore, is admitted and moratorium is declared for prohibiting all of the following in terms of Section 14(1) of the Code as amended: -

- a) The institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;
- b) Transferring, encumbering, alienating or disposing off by the corporate debtor 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 corporate debtor in respect of its property including any action under the Securitisation 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 corporate debtor.

22.It is further directed that the services to the Corporate Debtor, if continuing, shall not be terminated or suspended or interrupted during moratorium period. The moratorium shall however not apply to such transactions as may be notified by the Central Government in consultation with any financial regulator and to a surety in a contract of guarantee to a corporate debtor.

- a) The order of moratorium shall have effect from the date of this order till the completion of the Corporate Insolvency Resolution Process or until this Bench approves the Resolution Plan under Sub-Section (1) of Section 31 or passes an order for liquidation of Corporate Debtor under Section 33, as the case may be.
- b) That the public pronouncement of the Corporate Insolvency Resolution Process shall be made immediately as specified under Section 13 of IBC.

23.The Operational Creditor has not suggested any name for appointment as the Interim Resolution Professional. Hence this Bench appoints Mr. George Varkey Registration No. IBBI/IPA-001/IP-P00433/2017-2018/10756 (Email: geovaktm@gmail.com) having office at Building No.110, Ground Floor, Surabhi Nagar,

Kakkanad, Kochi , Kerala, 682030 as the Interim Resolution Professional to carry out the functions as mentioned under the IBC. The fee payable to IRP/RP shall comply with the IBBI Regulations/Circulars/Directions issued in this regard. The Insolvency Resolution Professional is directed to submit the copy of AFA (Authorization for Assignment) issued by the Insolvency Professional Agency within 2 days from the date of receipt of this order.

24. We direct the Operational Creditor to deposit a sum of Rs. 2 lakhs (in proportion to their dues) with the Interim Resolution Professional namely Mr. George Varkey within three days from the date of receipt of this order by the Operational Creditor, in order to meet out the initial expense to perform the duties assigned to him in accordance with Regulation 6 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Person) Regulations, 2016.
25. The Registry is directed to immediately communicate this order to the Operational Creditor, the Corporate Debtor and the Interim Resolution Professional.
26. Registry is also directed to send a copy of this Order to the Registrar of Companies, Kerala, for updating the Master Data of the

Corporate Debtor. The Registrar of Companies shall send a compliance report in this regard to the Registry of this Tribunal within seven days from the date of receipt of the order.

Dated the 21st day of December, 2021.

Sd/-
(Anil Kumar B)
Member (Technical)

Sd/-
(Ashok Kumar Borah)
Member (Judicial)

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