

**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)/47/9/AMR/2019		9 of IBC	Posco Daewoo Corporation Vs Mohana Cotton Ginning Pvt Ltd

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. TCP(IB)/47/9/AMR/2019 is dismissed, vide separate orders.

Self-dated 1/9/2023
MEMBER JUDICIAL

RSN

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

*** **

TP (IB)/47/9/AMR/2019

**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

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.

ORDER

(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 1,757.48 (Approximately INR 1,14,306.50) (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) The OC and the CD executed three (3) International Shipment Contract and proforma invoices on various dates, for the supply, to the OC, i.e., on 10.11.2016, for the supply of 200 MT of Indian Raw Cotton, Shankar 6 (Crop 2016-2017) for an invoiced amount of USD 321,600 with Phong Phu Corporation in Vietnam and on 16.12.2016, for the supply of 300 MT of Indian Raw Cotton, Grade SLM for an invoiced amount of USD 453,177.57 with M/s Ada Fios, S.A. in Portugal, and on 10.01.2017, for the supply, of 300 MT of Indian Raw Cotton MCU-5, Crop 2016/2017 for an invoiced amount of USD 521,630.40 with C.A. Textile Mills (Pvt.) Ltd. in Pakistan.

- b) Thereafter, the CD supplied the goods to the OC under the three initial contracts. However, on account of discrepancies in the weight of the cotton supplied by the CD to the OC, on account of LC amendment costs & on account of lawyers' fees in relation to the three initial contracts dated 10.11.2016, 16.12.2016 & 10.01.2017 respectively, the parties agreed that the CD would pay an amount of USD 176.88, USD 1080.60 & USD 500 respectively totalling to USD 1,757.48 to the OC. Consequently, the OC raised the debit notes for the said sum. The CD acknowledged the liability by executing the Debit Notes which are transmitted to the OC by its emails dated 28.07.2017, 07.09.2017 & 28.07.2017. By the mail dated 28.12.2017, the CD informed the OC that allegedly it remitted the amount of USD 2,630 against the two debit notes. But the said amount was never received by the OC. Despite repeated reminders from the OC, the CD failed to pay the said amount.
- c) On 12.02.2018, the OC issued three demand notices demanding payment of a total amount of USD 1,757.48 ("**Demand Notices**"). The CD, instead of paying the amounts due to the OC under the terms of the Debit Notes, replied separately to each of the Demand Notices by way of its letters dated 22.02.2018. In these replies, the CD denied its liability to pay the amount of USD 1080.60 for the first time, while admitting its liability to pay the amounts of USD 176.88 and USD 500. However, the

CD has not demonstrated any pre-existing dispute in relation to the amounts payable by it to the OC under the three Debit Notes. It is evident from the CD's replies to the Demand Notices dated 22.02.2018 that the CD never paid any of these amounts to the OC. 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 three International Shipment Contract and proforma invoices i.e., Invoice dated 10.11.2016 for supply of 200 MTs of Indian Raw Cotton by the CD for a total invoiced amount of USD 321,600 with Phong Phu Corporation in Vietnam, invoice dated 16.12.2016 for supply of 300 MTs of Indian Raw Cotton by the CD for a total invoiced amount of USD 453,177.57 with Ada Fios, S.A.in Portugal and invoice dated

10.01.2017 for the supply of 300 MTs 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 parties, but it is false to say that on account of discrepancies in the weight of the cotton supplied, LD amendment cost and lawyer's fees, which are payable by the CD, the parties agreed that the CD would pay the claim amount of USD 1,757.48 to the applicant, as such the OC raised the three debit notes dated 26.07.2017, 04.09.2017 & 21.06.2017 for which the CD agreed. The CD never agreed to pay the above dues as stated.

The CD initially agreed to pay the amount to the OC as stated in the Debit Note dated 26.07.2017 towards difference in weight, as per the talking terms and countersigned the Debit Note. However, the OC raised certain issues and hence the CD has decided to hold the claim amount for the time being and further informed orally that this agreed Debit Note amount would be cleared on or before 30.04.2018. Despite that the OC issued Section 8 Notice Demand Notice dated 12.02.2018 demanding to pay the respective Debit Note, for which the CD issued reply dated 22.02.2018 accepting the liability to pay. However, the OC meanwhile raised several issues in the business transactions and initiated the legal proceedings against the CD as such the OC is not entitled to claim amount.

With respect to the Debit Note dated 04.09.2017, towards LC amendment cost, the CD agreed to pay the amount mentioned in the respective Debit Note under the amendment of Letter of Credit

between applicant and buyer in Portugal and the same is already adjusted within the amount. Further under the same contract MCGPL/Exp – 003/2016-17 in point No. 5, the payment condition clearly stipulates that the applicant will only pay 95% of the Invoice value and balance will be paid only after adjusting, if any, short weight or agent commission. The CD under the three shipments has already processed as per shipment contracts and there is no short weight observed under this consignment.

With reference to Debit Note dated 21.06.2017, towards the Lawyer's Fee, the CD in its reply notice, agreed to pay the legal charges towards the advocate fees. However, the OC started to involve in the issue. As a result, the CD has upheld this payment and is unable to process the same. In view of the long-lasting business relations, the CD has countersigned on all the Debit Notes issued by the OC and basing on the same the CD cannot be made liable to pay the Debit Note claims.

After executing the three contracts, 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. But the CD was unable to understand as to why the alleged Debit Note amount is tagged down onto it, as there was no understanding or agreement arrived at between the parties to claim the said amount. But keeping in view of the

business relations the CD issued email dated 28.07.2017, attaching the signed Debit Notes, the CD, initially agreed to pay the respective Debit Notes and further clearly stated the amounts that are already adjusted, in spite of which the OC filed this petition. The alleged claim is untenable and against the contractual terms. Even as per clause 13 & 14 of the International Shipment contracts, 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 OC without invoking the said clauses directly issued demand notice under form 3. 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 three Debit Notes 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 Notes or even under the Initial

Contracts. On the contrary, the Respondent acknowledged its liability to pay the unpaid operational debt. In fact, even after the exaction of the Debit Notes, when the applicant sent reminders, the Respondent did not raise any alleged disputes under the Debit Notes 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. 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.

6. The case of the Respondent is that the debit notes were raised for the discrepancies in the weight of cotton supplied by the CD and it is towards the LC amendment costs and lawyers’ fees. It is admitted that the CD initially agreed to pay the amount towards difference in the weight and as per the talking terms and the CD has countersigned the debit notes. However, they raised a dispute and hence the CD has decided to hold the claim amount for the time being and orally informed that the agreed Debit Note amount would be cleared on or before 30.04.2018. The OC, in the meanwhile raised several issues in the business transactions and initiated legal proceedings against the CD. With respect to the debit note for USD \$1080.60, the contention

is that it is towards LC amendment cost and the same is already adjusted against the amount payable to the CD. It is also stated that under Point No. 5 of the contract, the payment condition clearly stipulates that the applicant will only pay 95% of the invoice value and balance will be paid only after adjusting, if any, short weight or agent commission. It is also contended that the CD has already processed three shipments as per shipment contracts and the CD is holding USD \$ 22,005.85, as such there is no short weight observed under the consignment. As regards the Lawyer's fee, the CD agreed to pay the same, but due to issues raised by the OC, the same was withheld. In the email dated 28.07.2017, it is stated that the signed debits notes were attached keeping view of the business relations. It is contended that this Tribunal does not have the jurisdiction to quantify the amount that is due and payable to the Applicant and to determine the extent liability of the CD. It is also contended that in view of the Arbitration clause in the contract, this Petition cannot be maintained here.

7. A perusal of the reply notice issued to the demand notice would show that there was a pre-existing dispute between the parties, it is mentioned that they have earlier agreed to make the payment, but however, as the disputes and other issues along with this issue have popped up they are holding the said amount. But however, it is undertaken to clear the amount by 31.04.2018 and request to withdraw the notices was made in the reply notice dated 22.02.2018. From the

debit notes can be understood that the claim amount pertains to the Weight Loss, LC amendment costs by ADA and Lawyers Fees.

8. There is no dispute that there is an arbitration clause in the contract between the parties. But whether the amounts under the debit notes constituted is an Operational Debt or not is the question. Operational Debt under Section 5(21) of IBC as defined as under:

5(21) "operational debt" means a claim in respect of the provision of goods or services including employment or a debt in respect of the repayment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority."

9. The above claimed amounts are not towards the supply of any goods or services, but are related to the violation of the terms of contract. However, if there is nexus between the contract and the claim amount the same falls under the category of 'operational debt'. But the reply notice shows that there were certain issues between the parties earlier, which is not categorically disputed by the OC.
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. 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 relied on the judgment 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.
13. What this tribunal opines, on the entire conspectus of the precedents on arbitration, is that when the dispute mentioned in the reply notice is arbitrable, the same would have to be referred for arbitration. But when the liability is acknowledged, the dispute regarding the realisation of the said amount need not be referred to arbitration, as a parallel remedy is available under IBC. Section 9 comes into play on the acknowledgment of debt and default. However, as already observed there seems to be a pre-existing dispute between the parties.

Hence, in view of the same, the Company Petition will not survive and is consequently dismissed.

Accordingly, TP(IBC)/47/9/AMR/2019 is dismissed and disposed of.

**Sd/- dated 01.09.2023
JUSTICE TELAPROLU RAJANI
MEMBER JUDICIAL**

Swamy Naidu(PS)