Sl. No. 2

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)/48/9/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)/48/9/AMR/2019 is dismissed, vide separate orders.

sd/- Dated 1/9/23

MEMBER JUDICIAL

RSN

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

TP (IBC)/48/9/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 20,792 (approximately INR 13,52,311.68) (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 executed an International Shipment Contract on 10.01.2017 with the CD to the effect that the CD shall supply to the OC 300 MT of Indian Raw Cotton, for a total invoiced amount of USD 521,630.40 with C.A. Textile Mills (Pvt.) Ltd. in Pakistan as the 'Notify Party'.

   b) Thereafter, the CD supplied the goods to the OC under the initial contract. However, on account of certain detention charges and demurrage 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 20,792 to the OC. In this regard, the CD's mail dated 11.10.2017, stating that they have no option except to pay the DEM/DET charges deducting only 5000 USD from the amount. That was stated to be final and that they have made similar payments after asking waiver from MSC & Before to Hyundai also and also indicated in the same email that it will make the payments after confirmation of re-sailing by the OC's logistics agent and the confirmation by an email dated 18.10.2017 was given by the OC's logistics agent, Logistics Services Pakistan. The detention charges and demurrage payable by the OC were USD 27,209, out of which an amount of USD 1,417 was to be borne by the OC, towards freight and handling charges. Consequently, the OC raised a debit note dated 29.11.2017 for the said sum. CD acknowledged the liability, by executing the Debit Note which is transmitted to the OC by its email dated 29.11.2017. 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 admitted 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 denied that on account of certain detention and demurrage charges payable by the CD, the parties agreed that the CD would pay the claim amount of USD 20,792 to the applicant, as such the OC raised a debit note dated 29.11.2017 for which the CD agreed. The CD never agreed to pay the above DET/DEM charges as stated.

With regard to the claim, it is contended that the OC directly made the CD liable for the said charges by suppressing the factual aspects. 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, shipped a consignment declared to contain "Indian Raw Cotton" to M/s. C.A. Textiles Mills Pvt. Ltd, Lahore,

vide bill of lading dated 15.04.2017. However, the consignee refused to accept the consignment 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 is dealt with in terms of Section 138 of Customs Act, 1969.

The OC, as per telephonic conversation, issued email dated 26.09.2017 requesting the CD to pay the DET/DEM charges 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 it 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 at between the parties, to claim the said amount. But keeping in view the business relations, the CD issued email dated 11.10.2017 agreeing to pay the DET/DEM charges subject to confirmation of re-sailing of cargo from their logistic agents. But the CD never received any such communication from the OC and the issue of shipping charges are to be dealt in Pakistan, as per contractual terms and this cannot be claimed by the OC against the CD. Even as per Clause 13 & 14 of the International Shipment Contract dated 10.01.2017, if there is any dispute it shall be resolved through arbitration and the OC cannot directly invoke the jurisdiction

of this Tribunal. It is only after receiving the demand notice, the CD came to know about the debit note and also logistic invoice regarding the re-sailing of the cargo. The CD immediately issued a reply dated 22.02.2018, denying the liability to pay the claim amount. Hence, the alleged claim amounts towards detention charges and storage plus shipping agent expenses are not liable to be paid by the CD. Hence, the Petition is liable to be dismissed.

4. The OC filed Rejoinder, contending that the Respondent/CD has stated that the Petition is prohibited as per the projected contract i.e., Annexure 8. It is unclear as to what the Respondent is referring to, hence, the same cannot be answered. The contention that the OC ought to have invoked the arbitration clause is misplaced, as, the unpaid operational debt arises out of the Debit Note which has been raised by the OC on account of certain detention charges and demurrage payable by the CD. The mere fact that there is an arbitration clause between the parties does not deprive the OC of the remedy provided under IBC. As regards, the certificate under Section 9 (3) (b) (c) of IBC, in view of 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,** the certificate need not be filed.

The OC further contended 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, the applicant sent a notice through its counsel, calling upon the CD to pay the amount. The Respondent did not raise any alleged disputes under the Debit Note. The CD did not raise any alleged disputes under the Debit Note and did not even raise a dispute in its reply. The CD, according to an email dated 11.10.2017 has to pay the unpaid operational debt after confirmation of re-sailing by the OC's logistics agent. This confirmation was given by the Applicant's logistics agents, by an email dated 18.10.2017, on which representatives of the Respondent were also marked. Therefore, the contention of the CD that it never received the confirmation of re-sailing is incorrect. Having acknowledged its liability, the CD is liable to pay the unpaid operational debt and hence the Petition needs to 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: "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. As regards the contention of the pre-existing dispute, a perusal of the mails between the parties would be beneficial. By the mail dated 11.10.2017, the CD asked the OC not to send so many emails and that they are getting confused and the words and meanings keep changing about the new mails again and again. By saying so, they clearly informed as follows: "Once the Shipment from your logistics agent is confirmed for resailing then we will approach Hyundai and ask for waiver and if first the resailing process is nearby then we have no option except to pay the DEM/DET charges deducting only 5000 USD from the amount. This is final and we have made the similar payments after asking waiver from MSC & Before to Hyundai also. We cannot make any payment prior to the confirmation from your agent". From the above mail it is clear that there was a condition laid down by the CD that until confirmation received from the agent of the OC, they would not pay the amount.

7. The proceedings of the Deputy Collector MCC-Appraisement (East) Karachi, shows that the letter of the OC was available with the subject "request to export of frustrated cargo without payment of customs duty and other taxes on import of Indian Raw Cotton." It also can be

seen that the OC shipped a consignment declared to contain Indian Raw Cotton, but the consignee refused to accept the consignment on the price and quality grounds. The refusal of consignee rendered the consignment as frustrated cargo, the request for reshipment of the consignment was made as per section 138 of the Customs Act. This proceeding would show that there was some quality issue with regard to the consignment. These proceedings are dated 18.08.2017. There is also another similar proceeding on 16.10.2017, wherein, further it was stated that a verification letter dated 14.09.2017 was sent to the Bank for confirmation of the contents and his shipmen signatures and that the bank has verified and confirmed that no remittance is affected against the documents therein. It is noted that the importer has fulfilled the requisite conditions as envisaged under Section 138 of the Customs Act and the consignment was decided to be sent back to the shipper.

8. A mail dated 29.11.2017 to the CD shows that total port charge of $5,000 was deducted by the OC. After the mail dated 11.10.2017 was issued by the CD, there seems to be no response from the OC. The mail dated 18.10.2017 sent to the CD by the OC does not mention about the issue raised in the mail dated 11.10.2017 by the CD. In the reply notice also, the CD mentioned about the dispute. In the reply it is stated that with regard to the claim of USD 20,792, it cannot be tagged to the CD as there was no understanding or agreement arrived between the parties to claim the said amount. It is also stated that the

shipping charges issue has to be dealt with in Pakistan. From the above correspondence, it can be understood that there was a pre-existing dispute between the parties.

9. 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.

10. In this case, it can be seen that the OC did not respond to the contention raised by the CD in the mail dated 11.10.2017. 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.

11. 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.

12. 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)/48/9/AMR/2019 is dismissed and disposed of.

Sd/- dated 01.09.2023
JUSTICE TELAPROLU RAJANI
MEMBER JUDICIAL

Swamy Naidu(PS)