

**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, COURT - V**

CP (IB)/357/MB/2020

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

In the matter of

Mr. Shyamsunder Biyani, Proprietor of M/s. Tirupati Dall Udyog, having its mill situated at: Ambajajoi Road, Gut No. 77, Arvi Post, Latur, Maharashtra-413531.

..... Applicant/ Operational Creditor

Versus

ETC Agro Processing (India) Private Limited, having its registered office at: - 805/806, 08th Floor, Neelkanth Corporate IT Park, Kirol Road, Vidyavihar (W), Mumbai- 400086.

.....Corporate Debtor

Order Delivered on :- 20.10.2023

Coram:

Mr. Anuradha Sanjay Bhatia
Member (Technical)

Mr. Kuldip Kumar Kareer
Member (Judicial)

Appearances:

For the Operational Creditor: Adv. Kunal Vaishnav a/w Adv. Kayyum
Shaikh

For the Corporate Debtor: Adv. Mayur Kadam.

ORDER

Per: - Shri. Kuldip Kumar Kareer (Hon'ble Judicial Member)

1. This Company petition is filed by Mr. Shyamsunder Biyani, Proprietor of M/s. Tirupati Dall Udyog, (hereinafter referred to as "Operational Creditor") seeking to initiate Corporate Insolvency Resolution Process (CIRP) against M/s. ETC Agro Processing (India) Private Limited (hereinafter referred to as "Corporate Debtor") by invoking the provisions of Section 9 of the Insolvency and Bankruptcy code, 2016 (hereinafter called "Code") read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.
2. The Company Petition was filed on 06.01.2020 claiming an outstanding amount of INR 2,30,56,253/- (Rupees Two Crores, Thirty Lakh, Fifty Six Thousand, Two Hundred and Fifty Three Only) comprising of 1) Loss of Processing Revenue -Rs.94,53,281/-2) Pre-Termination Compensation -Rs.70,35,000/-3) Storage Charges for Finished Goods -Rs.3,32,311/, GST- Rs.10,97,917/- and also claimed interest and penalties as per the running ledger account from 22nd March, 2019 to 30th November, 2019.

3. The details of the transactions leading to the filing of this Application as averred by the Operational Creditor in the application are as follows:
- a) The Operational Creditor is engaged in the business of processing/polishing and packaging of raw materials such as Tur Dal, Channa Dal, Moong, etc. and had supplied the processed/polished and packed materials to the Corporate Debtor as demanded by the Corporate Debtor as per the Third-Party Contract dated 25th December, 2018. As per the said contract, the Operational Creditor was required to process the raw material i.e. Tur Dal supplied by the Corporate Debtor into finished goods. In terms of the said Contract, the Operational Creditor processed/polished and packed the raw materials such as Tur Dal from time to time.
 - b) The Operational Creditor avers in his application that the polished material was satisfactorily used by the Corporate Debtor without any demur and that the Corporate Debtor never raised any dispute with regards to the quality of the material supplied. Therefore, the Operational Creditor raised invoices for the same from time to time. The two invoices in respect of which the payments have not been made by the Corporate Debtor are Invoice No.02 dated 26/04/2019 of INR 6,87,038/- and Invoice No.03 dated 09/05/2019 of INR 2,22,655/-. The Operational Creditor issued repeated reminders and requests to the Corporate Debtor to clear the debts, yet the Corporate Debtor has failed to make any payment.
 - c) As per Clause 19 of the aforementioned Third-Party Contract, the Operational Creditor cannot take any other order from other parties for processing and polishing goods. The said Contract was terminated by the Corporate Debtor vide notice dated 01st June, 2019. Since, the

Operational Creditor did not take any other work during the contractual period and that the Corporate Debtor failed to make payments in respect of the work done, the Operational Creditor sustained heavy losses. Also, since 22nd March, 2019 there has been no processing in the unit of the Operational Creditor and therefore, the Operational Creditor has sustained huge losses. Hence, the Operational Creditor has claimed the damages for loss of revenue from the Corporate Debtor of INR 94,53,281/-, the details of which have been given in the computation sheet annexed to the petition.

- d) In view of the failure on the part of the Corporate Debtor to make the payments, the Operational Creditor issued a Demand Notice in Form 3 dated 11.12.2019 to the Corporate Debtor demanding Rs.2,30,56,253/- for the debts due from the period 22nd March, 2019 to 29th June, 2019. The copy of Demand Notice issued under Section 8 of the Code was attached as Exhibit 'G' to the application and the same was served on the Corporate Debtor as per the postal receipt submitted along with the application. The Corporate Debtor had responded to the Demand Notice on 18.12.2019. Despite receipt of the said Demand Notice, the Corporate Debtor did not make the payment under the invoices to the Operational Creditor, and hence the Operational Creditor has filed the present application for initiation of Corporate Insolvency Resolution Process against the Corporate Debtor.

4. Submissions of the Corporate Debtor:

- a. The Corporate Debtor has vehemently contested the insolvency petition filed against it by the Operational Creditor. The Corporate Debtor submits that the claim of the Operational Creditor with respect to the Loss of Processing Revenue of INR 94,53,281/-, Pre-Termination Compensation of INR 70,35,000/- and Penalty of INR 30,25,050/- does not fall within the definition of operational debt as defined u/s 5(21) of the Code as they are in the nature of consequential damages and the same cannot be relied upon in the absence of adjudication. It is settled position of law that, the claim regarding financial damages does not become operational debt until the liability is adjudicated upon and damages are assessed by a competent authority in law. In view of this, alleged claim of Operational Creditor would not fall under the definition of operational debt under section 5(21) of the IBC.
- b. During the period of 01/01/2019 to 31/12/2019, Operational Creditor had raised in all 10 invoices total amounting to Rs. 1,56, 14,096/-for the Processing of Tur and after deducting TDS amount of Rs. 1,64,959/-from all these invoices, Corporate Debtor had paid Rs.1,45,77,256/-(Rs. One Crore Forty-Five Lakh Seventy- Seven Thousand Two Hundred Fifty-Six Only) to the Operational Creditor and there are two invoices i.e. invoice No. 2 dated 26.04.2019 and invoice No. 3 dated 09 05 2019 total amounting to Rs.9,09,693/- which is outstanding, and also in dispute because of quality issue i.e., non-fulfilment of yield rate clause.

- c. In the month of March, 2019, when Corporate Debtor's accounts department audited transaction between Operational Creditor and Corporate Debtor, they found that Operational Creditor herein has not delivered the finished goods of Tur as per the yield rate mentioned in the Third-Party Processing Contract. It has also observed that Operational Creditor herein in collusion with Shri. Vinod Nair, an employee of the Corporate Debtor hatched a criminal conspiracy against Corporate Debtor and during the course of business, the Operational Creditor herein did not deliver the finished goods as per yield rate. It was also observed that the total deficiency of various processed pulses from Operational Creditor was amounting to Rs.1,62,20,135/- (Rs. One Crore, Sixty-Two Lakh, Twenty Thousand, One Hundred And Thirty-Five Only) which includes pulses of various kind viz Original Tur Dal 300 Metric Tons, tukada Tur Dal 267 MT, rejected tur dal 826 MT, Tukada Tur (powder) 28 MT, Tukada Tur (chuni) 60 MT and waste pulses 102 MT. Following to the above observation, the Corporate Debtor approached Shri. Vinod Nair. However, he simply neglected to look into the matter and therefore, Corporate Debtor had asked Shri. Vinod Nair to resign from the services of the Company till the pendency of investigation in this matter. During investigation Mr. Vinod Nair was found guilty and his services were terminated vide Termination Notice dated 08/05/2019, copy of which is annexed as Annexure 'C' to the Affidavit-in-Reply.
- d. On 25/05/2019, the Corporate Debtor through their advocate sent a notice to Operational Creditor for termination of Third-

Party Processing Contract dated 25/12/2018 and also requested to handover the material lying at the plant of Operational Creditor. The Operational Creditor herein relied upon said termination notice as "Exhibit-J" in the present petition.

- e. After the above stated series of incidence, it was realized by the Corporate Debtor that they are being cheated by the Operational Creditor in connivance with Shri.Vinod Nair and therefore on 19/06/2019 Corporate Debtor through their Legal Manager Smt. Seema Jagnani approached Ghatkopar Police station to register a Complaint against Operational Creditor and Shir.Vinod Nair, Ghatkpor Police acknowledge the written complaint of Corporate Debtor and informed that they will investigate into the matter and if they found any foul play then only they would take the cognizance of the Complaint. After the investigation, Ghatkopar Police station, registered FIR No.584 of 2019 against proprietor of M/s. Tirupati Dall Udyog, Mr. Shyamsunder Nandlalji Biyani i.e. Operational Creditor herein and Mr. Vinod Nair, for the offence punishable under section 420,406,408 and 34 of the Indian Penal Code, 1860 and also u/s 43(d) and 66 of Information Technology Act, 2000.
- f. Following to an FIR, on 02.11.2019 Ghatkopar Police, along with two panchas made seizure of material belongs to Corporate Debtor from the Operational creditor and seized total 4,74,730 kg material from Operational Creditor's godown No.1 to 4 located in his plant at Ambajogai Road, Gut No.77, Arvi Post, Tai/Dist. Latur-413531. Copy of Seizure Panchanama dated 02.11.2019 annexed as "Annexure-E" to the Affidavit in Reply.

g. After the above seizure, on 11.11.2019, the Corporate Debtor had filed an application bearing C. C. No.525/N/2019 under section 457 of Criminal Procedure code with Ld. Metropolitan Magistrate, 49th Court, Vikhroli, Mumbai for the return of seized property which were perishable in nature. In aforesaid application Operational Creditor herein had appeared and harped on claiming damages to the tune of Rs. 1,80,00,000/- approximately from Corporate Debtor. However, Corporate Debtor vehemently denied the same and fairly submitted that there are two invoices i.e. invoice No. 2 dated 26.04.2019 and 3 dated 09.05.2019 total amounting to Rs.9,09,693/-is in outstanding because of deficiency in service i.e. sub-standard quality of material provided by Operational Creditor and for illegally retaining Corporate Debtors material. After hearing both the side, Ld. Metropolitan Magistrate, 49th Court, vide its order dated 26.11.2019 below exhibit 01, allowed Corporate Debtors application and denied alleged claim of compensation of the Operational Creditor and Ld. Magistrate further directed Corporate Debtors to deposit bank guarantee of Rs.10 lakh with court for two invoices of operational creditor. In pursuance to the said order, Corporate Debtor complied with all the conditions imposed by Ld. Magistrate and got released the material from Operational Creditor's godown. However, the pulses released from Operational Creditor's godown lost the potentiality and purity due to Operational Creditor's illegal act of detention of materials. Copy of order dated 26.11.2019 below exhibit 01 passed by Ld. Metropolitan Magistrate, 49th Court,

Vikhroli, Mumbai is annexed "Annexure-F" to the Affidavit in Reply.

- h. Thereafter, within 10 days from the receipt of said demand notice, Corporate Debtor through its advocate replied to demand notice on 18/12/2019 pointed out the existence of dispute and also pointed out that claim regarding financial damages does not become operational debt until the liability is adjudicated upon and damages are assessed by a competent authority in law. Hence, the Corporate Debtor contends that the instant Petition filed by the Operational Creditor should be dismissed.

ANALYSIS AND FINDINGS

5. We have heard the learned Counsels for the Operational Creditor and the Corporate Debtor and have gone through the records.
6. A perusal of the record reveals that the Petition has been filed on 06th January, 2020. There are two invoices i.e. Invoice No.02 dated 26/04/2019 of INR 6,87,038/- and Invoice No.03 dated 09/05/2019 of INR 2,22,655/- total amounting to Rs.9,09,693/- are outstanding and remaining unpaid. The Corporate Debtor in its detailed reply to the Demand Notice dated 18.12.2019 as well as in its Affidavit-in-Reply has disputed the liability and asserted the existence of dispute between the Operational Creditor and the Corporate Debtor in respect of the claim made in the aforesaid demand notice. The Corporate Debtor through its Notice dated 25th May, 2019 to the Operational

Creditor for termination of Third-Party Processing Contract had stated in Para 5 as follows:

“My clients state that as per above stated contractual agreement dated 25.12.2018, your job requirements were conversion/processing of raw material i.e. Tur, Chana and Moong supplied by my clients into Finished Goods with agreed yield rate and also packing the said finished goods. However, my clients have observed that you have not fulfilled these responsibility satisfactorily on account of adverse differential in the yield rate/recovery stated in the contract and therefore, my clients do not wish to continue the aforesaid contract.”

In the said notice, the Corporate Debtor had also asked the Operational Creditor to compensate for the differential in yield rate for the conversion carried out till date and in case of failure to comply with the above, the Corporate Debtor had reserved its right to levy penalty on the Operational Creditor.

7. The Corporate Debtor had also terminated the services of its consultant Shri Vinod Nair not only for his failure to bring the adverse differential in the yield rate to the notice of the Corporate Debtor, but also for his alleged collusion with the Operational Creditor in allegedly defrauding the Corporate Debtor. In this regard, the Corporate Debtor had lodged an FIR No.584 of 2019 before the Ghatkopar Police Station under section 420,406,408 and 34 of the Indian Penal Code, 1860 and also u/s 43(d) and 66 of Information Technology Act, 2000. Copy of FIR No.584 of 2019 has been annexed at "Annexure-D" to the Affidavit in Reply. The said FIR recording the statement of the informant named Mrs. Seema Nathamal Jaganani, the legal manager of the Corporate Debtor, that the company (i.e. the Corporate Debtor) has been cheated by showing

the percentage less than the percentage shown in Annexure 1 so that the company does not receive information about the same. The FIR also states the fact of the termination/resignation of Mr. Vinod Ravi Nair, an employee of the company for allegedly colluding with the operational creditor to defraud the company.

8. In the light of aforesaid facts and **in our considered view, there is pre-existing dispute** between the Operational Creditor and the Corporate Debtor as the dispute with regard to the fulfilment of the yield rate while processing the raw materials such as Tur Dal into a finished good was not observed by the Operational Creditor. This was conveyed by the Corporate Debtor to the Operational Creditor vide Notice dated 25th May, 2019 and in the Notice dated 01st June, 2019 for Termination of Third-Party Notice, which are much prior to the issuance of demand notice and filing of this petition by the Operational Creditor. In this regard, the Corporate Debtor even lodged a report with the police alleging that the Operational Creditor in collusion with Mr. Vinod Nair, a consultant of the Corporate Debtor, manipulated the yield rate to defraud the Corporate Debtor. Therefore, on the ground of pre-existing dispute alone, the Petition deserves to be dismissed.
9. An operational debt must be crystallised and undisputed in order to send the Corporate Debtor to C.I.R.P. The claim of the Operational Creditor against the Corporate Debtor also includes Loss of Processing Revenue -Rs.94,53,281/-, 2) Pre-Termination Compensation -Rs.70,35,000/- and 3) Penalty of INR 30,25,050/-.

The aforesaid claims are in the nature of damages which require an adjudication by a competent court or authority to fix the quantum of damages, crystalize and fasten the liability on the corporate debtor. No such claim has been adjudicated by any court or authority and therefore, the Corporate Debtor cannot be subjected to the insolvency resolution process based on the disputed and uncrystallised claims.

10. In the light of the above brief discussion, the instant Company Petition filed u/s 9 of the Code, 2016 is hereby **dismissed** with no order as to costs. File be consigned to records.

Sd/-

ANURADHA SANJAY BHATIA
(MEMBER TECHNICAL)

Sd/-

KULDIP KUMAR KAREER
(MEMBER JUDICIAL)