

NATIONAL COMPANY LAW TRIBUNAL
INDORE BENCH
COURT NO. 1

ITEM No.5
(MP) CP(IB) 68 of 2020

Proceedings under Section 9 IBC

IN THE MATTER OF:

Indian Potash Ltd
V/s
Summan Phosphates & Chemicals Ltd

.....Applicant

.....Respondent

Order delivered on 05/04/2024

Coram:

P. Mohan Raj, Hon'ble Member(J)
Kaushalendra Kumar Singh, Hon'ble Member(T)

PRESENT:

For the Applicant :
For the Respondent :

ORDER

The case is fixed for pronouncement of the order.

The order is pronounced in open Court *vide* separate sheet.

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KAUSHALENDRA KUMAR SINGH
MEMBER (TECHNICAL)

A. Bhadauria

-sd-

P. MOHAN RAJ
MEMBER (JUDICIAL)

THE ADJUDICATING AUTHORITY
NATIONAL COMPANY LAW TRIBUNAL
INDORE BENCH

CP(IB)/68/MP/2020

(An application under section 9 of the Insolvency and Bankruptcy Code, 2016)

In the matter of:

Indian Potash Limited

CIN No.: U14219TN1955PLC000961

Having its registered address at:

Seethakathi Business Center,
1st Floor, 684-690, Anna Salai,
Chennai, 600006

.....Petitioner/Operational Creditor

Versus

Suman Phosphates and Chemicals Limited

CIN No.: U24120MP2008PLC021383

Having its registered address at:

304, Block A, Silver Mall,
R.N.T. Marg, Indore,
Madhya Pradesh- 452001

.....Respondent/Corporate Debtor

Order pronounced on: 05.04.2024

Coram: P. Mohan Raj, Member (J)

Kaushalendra Kumar Singh, Member (T)

Appearance:

For petitioner: Ld. Adv. Mr. Ajit Singh Joher, Ld. Adv. Mr. Manish Kaushik

For respondent: Ld. Adv. Mr. Vijay Assudani

ORDER

1. This petition was filed on 02.09.2020, by Mr. Manish Kaushik, authorised representative of M/s Indian Potash Limited (Operational Creditor) under section 9 of the Insolvency and Bankruptcy Code, 2016 (the Code) for initiating Corporate Insolvency Resolution Process (CIRP) against M/s Suman Phosphates and Chemicals Limited (Corporate Debtor). The default amount stated by the operational creditor is Rs 10,86,82,581/-. The date of default stated by the operational creditor is 17.08.2016 (with respect to the agreement dated 17.08.2016) and 19.03.2017 (due date as per the agreement dated 07.10.2016).

2. The averments made by the operational creditor in its petition and presented/argued by the learned counsel for the operational creditor are summarized hereunder:

(i) The corporate debtor entered into two agreements with the operational creditor. The first agreement was executed on 17.08.2016, by this agreement the corporate debtor became liable to pay a sum of Rs 1,33,34,200/- (as principal outstanding amount) to the operational creditor. The second agreement for High Seas Sales agreement was executed on 07.10.2016, by this agreement the corporate debtor became liable to pay a sum of Rs 6,52,78,088/- (as principal outstanding amount) to the operational creditor.

(ii) By the first agreement dated 17.08.2016, the operational creditor agreed to import Egyptian/Jordanian Rock Phosphates and sell it to the corporate debtor on High Sea Sale basis. The corporate debtor requested for urgent shipment of imported rock for their urgent requirement. However, the operational creditor required more time to finalize the terms of supply of rock phosphate and as a stop gap arrangement the operational creditor released a sum of Rs 1,33,34,200/- to the corporate debtor for purchasing Indigenous Rock Phosphate from M/s Rajasthan State Mines and Minerals Limited as a loan. Hence, the corporate debtor became liable for the said amount on same date as of agreement.

(iii) In pursuance of understanding between the operational creditor and the corporate debtor another agreement dated 07.10.2016 was entered. By this agreement the operational creditor supplied 12000 Metric Tons of bulk Rock Phosphate to the corporate debtor for a sum of USD 998,400/-. Under the terms of agreement the payment of this amount had to be made in equivalent Indian Rupees based on Rupees-Dollar Exchange parity as per RBI reference rate prevailing on due date. The operational debt amount became due on 19.03.2017 and on that date Indian Rupees equivalent to USD 998,400/- was Rs 6,52,78,088/-

(iv) The corporate debtor communicated its problem and requested to extend the deadline for payment of the liability to the operational creditor via email dated 21.07.2017 and 30.08.2017 and gave assurance that the payment would be made within a period of 40 days. The request was accepted by the operational creditor and extended the deadline.

(v) To discharge the liability of the aforesaid amounts, the corporate debtor issued cheque dated 19.12.2017 bearing no. 00513 for an amount of Rs 1,33,34,200/- and another cheque dated 19.12.2017 bearing no. 000428 for an amount of Rs 6,52,18,088/-. Both the cheques were dishonored by the bank upon presentation with the remark "Funds Insufficient".

(vi) Subsequently, the operational creditor served a legal notice dated 10.01.2018 under section 138 of the Negotiable Instruments Act, 1881 upon the corporate debtor to discharge their liability. In response to the said legal notice the corporate debtor issued a letter dated 12.02.2018 and assured the operational creditor for the payment of outstanding principal amount by 15.04.2018.

(vii) Even after assurance the corporate debtor failed to discharge its liabilities and hence, the corporate debtor and its directors are being criminally prosecuted for offence committed under section 138.

(viii) The default on part of the corporate debtor occurred on 12.02.2018 and the default is continuing even as on date.

(ix) The operational creditor also served demand notice dated 20.04.2020 twice to the corporate debtor for payment of the outstanding amount liable as per agreement. However, both the times demand notice issued to the corporate debtor returned as unserved without any instructions. The amount payable as on 28.05.2019 is Rs 10,86,82,581/- (Rs 1,33,34,200 and Rs 6,52,78,088/-) with simple interest at 12% per annum.

3. In this context, defense placed by the corporate debtor in its affidavit in reply and submissions made thereon and as presented/argued by the learned counsel for the corporate debtor are summarized as under:

(i) The demand notice under section 8 of the Code has not been served upon the corporate debtor. Issuance and subsequent receipt of the demand notice under section 8 of the Code is essential for initiation of the proceedings under section 9 of the Code.

(ii) The entire foundation of the present petition is based in the premise that there is a default in relation to an operational debt. The amount of Rs 1,33,34,200/- was released to the corporate debtor as a loan, which would not classify as an operational debt because there is no supply of goods or services by the operational creditor. Further, there is no time value of money, and therefore in view of the fact there is no remedy under section 7 of the Code is available for the operational creditor.

(iii) The claim of interest is not permissible while it is pertaining to operational debt, and therefore the calculation of interest cannot be claimed by way of the remedy under section 9.

(iv) Security interest is created on the assets/machinery belonging to/leased to the company, and for the enforcement of which, concerned financial institution have already invoked the provisions of the

SARFAESI Act. The corporate debtor has already challenged it before the concerned DRT Bench of Jabalpur.

(v) There is no crystallization of the claim of Rs 10,86,82,581/-. Till the claim is not crystallized in any case, there no applicability of section 9.

(vi) Proceeding initiated under section 138 of NI Act is pending, and in view of pendency of such case, application under section 9 of the Code is not maintainable as per the Doctrine of Election.

4. In this context, rejoinder placed by the operational creditor and submissions made thereon and as presented/argued by the learned counsel for the operational creditor are summarized as under:

(i) The corporate debtor has deliberately avoided the service of the demand notice in order to create a false narrative/illusion of the demand notice being unserved.

(ii) The debt arose under the agreements entered between the parties and as such, the claim of the operational creditor in respect of goods and services falls under the definition of operational debt.

(iii) The corporate debtor has not mentioned the operational debt owed to the operational creditor under the agreement dated 07.10.2016 in order to mislead the Adjudicating Authority.

(iv) The agreements dated 17.08.2016 and 07.10.2016 clearly envisaged for interest at 12% per annum in case of delayed payments/default (payment beyond 180 days from the date of the bill of lading) on the end of the corporate debtor.

(v) Section 238 of the Code provides that the provisions of the Code shall have an overriding effect and therefore the proceedings under the SARFAESI Act or any other proceedings are no bar to initiate proceedings under the Code.

(vi) The claims of the operational creditor are completely quantified and crystallized under the agreements dated 17.08.2016 and

07.10.2016, wherein the operational creditor was to supply rock phosphates to the corporate debtor.

5. We have heard the learned counsel appearing for the operational creditor as well as the learned counsel for the corporate debtor on the issue of admission of petition filed under section 9 of the Code and have perused the relevant records and documents. It is noted that there was a business relationship between the operational creditor and the corporate debtor. Two agreements dated 17.08.2016 and 07.10.2016 were executed between the parties, whereby the operational creditor was to import and sell Rock Phosphate to the corporate debtor. In the agreement dated 17.08.2016, the operational creditor has provided some amount as loan to the corporate debtor for the time gap in providing the required goods on urgent basis, and in the agreement dated 07.10.2016 the operational creditor has provided the corporate debtor 12000 Metric Tons of Rock Phosphate amounting to USD 998,400/- (Rs 6,52,78,088/-). The corporate debtor in return has provided two cheques of Rs 1,33,34,200/- and Rs 6,52,78,088/- for the repayment under the said agreements. Both cheques were dishonored on 21.12.2017. Subsequently, the operational creditor sent two legal notices on 10.01.2018, demanding the amounts of Rs 1,33,34,200 and Rs 6,52,78,088. A notice under section 8 of the Code dated 20.04.2020 was also sent to the corporate debtor which was returned with remark "Addressee Left without instructions".

6. In defence, the corporate debtor has taken plea that the demand notice was never served, and the amount in default is not an operational debt. Further, it has taken a plea that interest should not be added into the amount and the present petition is not maintainable as there is a section 138 proceedings is still pending.

7. Having considered the facts of the case, we are of the view that the corporate debtor has defaulted in repayment of its debt, letter dated 21.07.2017, 30.08.2017 and 12.02.2018 confirms the same. The corporate debtor's argument against the inclusion of interest is invalid, as the agreements dated 17.08.2016 and 07.10.2016 explicitly stipulate a 12% interest charge for delayed payments. The claim that the demand notice was

not served is also misplaced, as the tracking report clearly indicates that the corporate debtor was unavailable to receive the section 8 notice. Even if, we do not consider the amount of the agreement dated 17.08.2016, the default amount of Rs 6,52,78,088/- as per agreement dated 07.10.2016 meets the threshold limit as prescribed under section 4 of the Code. The default date mentioned by the operational creditor is 17.08.2016 and 19.03.2017, and the present petition was filed on 02.09.2020. The acknowledgement by the corporate debtor by letter dated 21.07.2017, 30.08.2017 and 12.02.2018 extends the limitation period. Accordingly, the present petition is well within the limitation period. As such the petition deserved to be admitted. Accordingly, we allow this petition and order as under:

(i) Corporate Debtor M/s Suman Phosphates and Chemicals Limited is admitted in the Corporate Insolvency Resolution Process under Section 9 of the Insolvency and Bankruptcy Code, 2016.

(ii) The moratorium under section 14 of the Insolvency and Bankruptcy Code, 2016 is declared for prohibiting all of the following in terms of section 14(1) of the Code.

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 of 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.

(iii) 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 Adjudicating Authority approves the Resolution Plan under sub-section (1) of section 31 or passes an order for liquidation of Corporate Debtor under section 33 of the Insolvency & Bankruptcy Code, 2016, as the case may be.

(iv) We appoint Mr. Bishwa Ranjan Chatterjee, having IBBI registration no. IBBI/IPA-002/IP-N00877/2019-2020/12806, Email: brcind@gmail.com, to act as an Interim Resolution Professional under section 13(1)(c) of the Code. He shall conduct the Corporate Insolvency Resolution Process as per the provisions of the Insolvency and Bankruptcy Code, 2016 r.w. Regulations made thereunder.

(v) The IRP so appointed shall make a public announcement of initiation of the Corporate Insolvency Resolution Process (CIRP) and call for submission of claims under Section 15 as required by section 13(1)(b) of the Code.

(vi) The supply of essential goods or services to the corporate debtor, if continuing, shall not be terminated or suspended, or interrupted during the moratorium period. The corporate debtor to provide effective assistance to the IRP as and when he takes charge of the assets and management of the corporate debtor.

(vii) The IRP shall perform all his functions as contemplated, *inter alia*, by sections 17, 18, 20 & 21 of the Code. It is further made clear that all personnel connected with Corporate Debtor, its Promoter or any other person associated with management of the Corporate Debtor are under legal obligation under section 19 of the Code extending every assistance and co-operation to the Interim Resolution Professional. Where any personnel of the Corporate Debtor, its Promoter or any other person required to assist or co-operate with IRP, do not assist or co-operate the IRP is at liberty to make appropriate application to this Adjudicating Authority with a prayer for passing an appropriate order.

(viii) The IRP shall be under duty to protect and preserve the value of the property of the 'Corporate Debtor' and manage the operations of the Corporate Debtor as a going concern as a part of obligation imposed by section 20 of the Insolvency & Bankruptcy Code, 2016.

(ix) The Operational creditor is directed to pay an advance of Rs.2,00,000/- (Rupees One Lakh Only) to the IRP within two weeks from the date of receipt of this order for the purpose of smooth conduct of the Corporate Insolvency Resolution Process (CIRP) and IRP to file proof of receipt of such amount to this Adjudicating Authority along with First Progress Report. Subsequently, IRP may raise further demands for Interim funds, which shall be provided as per Rules.

(x) The Registry is directed to communicate a copy of this order to the Operational creditor, Corporate Debtor and the Interim Resolution Professional, and the concerned Registrar of Companies, after completion of necessary formalities, within seven working days and upload the same on website immediately after pronouncement of the order.

(xi) The IRP shall also serve a copy of this order to the various departments such as Income Tax, GST, and Provident Fund etc. who are likely to have their claim against the Corporate Debtor as well as to the trade unions/employee's associations so that they are informed of the initiating of CIRP against the Corporate Debtor timely.

(xii) The commencement of the Corporate Insolvency Resolution Process shall be effective from the date of this order.

7. Accordingly, the petition CP(IB)/68/MP/2020 stands allowed.

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KAUSHALENDRA KUMAR SINGH
MEMBER (TECHNICAL)

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P. MOHAN RAJ
MEMBER (JUDICIAL)

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