

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
CHENNAI BENCH

Company Appeal (AT) (CH) (Ins) No. 265 of 2022
(I.A. No. 563 of 2022)

[Arising out of Order dated 06.06.2022 passed by the Adjudicating Authority/National Company Law Tribunal, Special Bench-II, Chennai, in CP/IB/12(CHE)/2022]

IN THE MATTER OF:

Sushil Kanugolu
Ex-Director of Corporate Debtor
SR Marine Foods Pvt. Ltd.
No. 24, 3rd Cross Street, Ormes Road,
Kilpauk, Chennai-600010.

...Appellant

Versus

1. Samunnati Agro Solutions Pvt. Ltd.
No. 2A, Door No. ACS, 2nd Floor,
2nd Avenue, Anna Nagar,
Chennai-600040.

...Respondent No.1

2. SR Marine Foods Pvt. Ltd.
Through IRP: Mr. S. Anarendran
AVS Villa, HIG 428, TNHB Phase 3,
Sholinganallur, Chennai- 600119.

...Respondent No. 2

Present:

For Appellant : Mr. E Om Prakash, Sr. Advocate.
For Respondents : Mr. Nithyaesh Natraj & Mr. Kaushik N Sharma,
for IRP.

J U D G M E N T
(Virtual Mode)
(23.08.2022)

NARESH SALECHA, MEMBER (TECHNICAL)

Preamble:

The Present Appeal is filed by Shri Sushil Kanugolu Ex-Director of Corporate Debtor of SR Marine Foods Pvt. Ltd. (**in short CD**) against the Impugned Order

dated 06.06.2022 passed in CP/IB/12(CHE)/2022 by the National Company Law Tribunal, Special Bench-II, Chennai (**Adjudicating Authority**) whereby the Adjudicating Authority has accepted CIRP Proceedings in respect of Respondent No. 2 in terms of Section 9(5) of Insolvency & Bankruptcy Code, 2016 (**in short IBC**).

Brief Facts:

2. Appellant is the Suspended Director of CD which is undergoing CIRP Proceeding. CD is engaged in sale and export of sea foods such as squid, fish, prawns and crabs. Respondent No. 1 (in short **R-1**) is Samunnati Agro Solutions Pvt. Ltd. (Chennai) i.e Operational Creditor (in short **OC**). Operational Creditor is in the business of export of marine products, entered into an agreement with CD i.e. SR Marine Foods Pvt. Ltd. under 'Sourcing and Distribution Agreement' (in short **SDA**) on 17.10.2018. As per this agreement, OC was to pay directly to the supplier of sea food who will deliver goods to CD. The supply of such goods were covered by 'Bill of supply' and 'Goods Delivery Receipts' in short GDR. There are many such 'bill of supply' and 'GDR' and the CD acknowledged the receipt of goods in good condition and thereafter signed. These documents indicated that goods were sold and delivered on behalf of OC to CD. However, during period of agreement due to non-receipts of various payments, OC took recourse to various remedies for recovery including filing of a case under Section 138 of Negotiable Instrument Act, 1881. Apart from this, OC also filed an Arbitration Application as per SDA. Incidentally the Arbitration Award dated 16.04.2021 came in favour of

OC. After the award was passed, CD entered into 'Memorandum of Compromise Settlement' dated 30.06.2021. Despite such settlement CD could not make the payment of Rs. 2,11,46,122/- to OC except Rs. 10 Lakhs which was paid to OC. OC also filed Petition bearing CP/IB/12(CHE)/2022 before the Adjudicating Authority under Section 9 of IBC. Adjudicating Authority, vide Impugned Order dated 06.06.2022, accepted that debt existed which was due and not paid resulting into default allowed CIRP and appointed Mr. S. Amarendran as IRP. Aggrieved by this, the Appellant, as Suspended Director of CD, has filed this appeal.

Appellant's Submissions:

3. Learned Counsel for Appellant has challenged the Impugned Order dated 06.06.2020 and requested to set aside the same. He stated that CD is engaged in sale and export of sea foods. Learned Counsel stated that R-1 and R-2 entered into an agreement 'SDA' dated 17.10.2018. Learned Counsel claimed that OC offered to grant purchase credit to CD under SDA. Learned Counsel pleaded that the Business model of CD was heavily dependent on the export subsidy received from Government of India which was a subsidy under the Merchandise Exports from India Scheme (MEIS) formulated under Foreign Trade Policy. Learned Counsel brought out that notice dated 31.10.2018 was received from the Directorate of Revenue Intelligence of Government of India whereby CD came to know that he was not entitled for said export MEIS subsidy.

4. OC, in the meanwhile, issued ten invoices to CD for payment between 24.10.2018 to 01.11.2018. Learned Counsel has alleged that in good faith SDA including booklet consisting of different document including personal guarantee deed to be provided by directors of CD were signed. He further alleged that in good faith, the erstwhile directors of CD, namely, Sushil Kanugolu (Appellant herein), K. Venkata Ramana and Shanthi Ramana gave their personal guarantees along with undated blank signed cheques presuming that these were being given for security only. According to Learned Counsel, representative of CD apprised OC in December 18/ January 19 that due to withdrawal of MEIS subsidy, CD was not able to sell the goods.

5. Despite all such good faith undertakings and request made by OC, the Appellant was shocked to know that OC had presented the signed cheques by quoting the amount which was not due at all on 24.06.2019. OC issued the demand notice in Form-3 on 24.06.2019 claiming that CD had committed a default of Rs. 2,11,46,122/- (inclusive of alleged default of Rs 1,99,28,000/- + 3% penal interest per month amounting of Rs. 12,18,122/-). Learned Counsel stated that there was no default committed by CD and non-payment was due to 'Force Majeure Clause'. Learned Counsel further stated that OC the at best could have referred the matter to Arbitration in accordance with Clause 13 of SDA, because according to Learned Counsel, the dispute was existing. On the other hand, OC had sought to invoke arbitration clause only in the guarantee agreement against alleged guarantor for the same claims which were being canvassed against CD in Application No. IBA/1368/2019.

On Application of OC, Hon'ble High Court of Madras at Chennai appointed Hon'ble Justice K. Kannan retired High Court Judge as sole the arbitrator against the alleged Guarantors. OC also filed an application under Section 9 of IBC against the 'Corporate Debtor' guarantors of CD. In the meantime, CD had also issued notice dated 12.10.2020 invoking arbitration clause 13 of SDA and Hon'ble High Court of Madras at Chennai appointed Justice K Kannan as sole arbitrator in dispute of SDA between OC and CD and both arbitration proceedings were taken up by the Sole Arbitrator in Arbitration Case No. 8 & 10 of 2020. Learned Counsel also admitted the fact that both arbitrations were decided in favour of OC by a common order.

6. Learned Counsel also brought to the notice of Appellate Tribunal that OC has filed the claim with insurance company also which was rejected holding that OC has undertaken financial services and SDA did not fall under scope and perview of scope of sale/service of goods and services.

7. Learned Counsel, however, accepted that after common arbitration award by sole arbitrator on 16.04.2021 against CD, Memorandum of Understanding (MoU) was entered into between OC and CD on 30.06.2020. Learned Counsel also stated that CD had filed two petitions under Section 34 of the Arbitration and Conciliation Act, 1996 for setting aside the said common order of sole arbitrator given by Justice K. Kannan against the CD and guarantors. He brought to the notice that these petitions against Arbitration cases are still pending and this tantamount to pendency of pre-

existing dispute between the parties in accordance with Hon'ble Supreme Court of India decision in **'(2018) 17 SCC 662- K. Kishan vs. Vijay Nirman Company Pvt. Ltd.'**. Learned Counsel maintained that in the MoU, the fact of pendency of Section 34 petition was acknowledged by OC.

8. OC issued fresh demand notice under Form 3 on 15.09.2021 which was replied by CD on 20.09.2021 bringing to the notice of pending dispute along with other irregularities in Form 3. As already discussed earlier, the Adjudicating Authority passed the Impugned Order admitting CIRP proceedings against CD.

9. Learned Counsel also alleged that OC has been misusing IBC process and indulged into forum shopping by filing his claims before different forums.

10. Concluding the pleadings, Learned Counsel reiterated that the transactions between OC and CD were not for supply of goods and services but merely were in nature of financial services and therefore, there is no operational debt within the ambit of definition of Section 5(20) of IBC. He also mentioned that even assuming it to be an operational debt in this case for argument's sake still due to pre-existing disputes, Impugned Order was not correct and required to be set aside.

Respondent's Submissions:

11. Learned Counsel for the Respondent has stated that the Appellant has failed to pay the operational debt and the Learned Adjudicating Authority has rightly accepted the petition and passed the order for CIRP Proceedings against Appellant. Learned Counsel has requested that the appeal be discussed being devoid of any merit.

12. Learned Counsel has stated that OC is engaged in the business of sea food items and by way of an arrangement between OC and CD it was agreed that OC will directly pay the suppliers of sea food/ shrimps etc. who would in turn deliver the goods to CD. There are several invoices and GDR to prove the same and CD had also acknowledged the receipt of goods in good condition. CD however, failed to make payment against invoices and therefore, OC was compelled to file the case under Section 138 of Negotiable Instrumental Act in order to realise the due debt.

13. To secure the financial position, OC also started Arbitration Proceedings in terms of SDA. Similarly, CD also filed one arbitration application and both were decided by a common order which came in favour of OC. According to Learned Counsel this itself proves that the claims made by OC were right and CIRP Proceeding was correctly ordered by the Learned Authority.

14. Learned Counsel has brought out that CD had entered into a Memorandum of Compromise settlement on 30.06.2021 for Rs. 2,70,07,459/- along with interest at the rate of 8 per cent from 20.07.2020. According to Learned Counsel the Appellant has paid only Rs. 10 Lakh out of the settlement and the balance amount was not paid which had was agreed upon between OC and CD as per 'Memorandum of Compromise Settlement'.

15. Learned Counsel has further submitted that in terms of the 'Memorandum of Compromise Settlement', OC withdrew Section 138 cases filed under Negotiable Instrumental Act 1881.

16. Learned Counsel has mentioned that withdrawal of MEIS subsidy had nothing to do with the SDA obligations and CD was duty bound to make all the payments against the invoices. He further submitted that Appellant has nowhere refuted the receipt of goods in good condition. In fact the Appellant has signed all such documents which prove that debt was due and payable as per SDA and due to default, the OC was compelled to approach the different forum including arbitration, NI Act and finally to the Adjudicating Authority under Section 9. Learned Counsel has repeated that on reaching the Memorandum of Compromise Settlement dated 30.06.2021, cases under NI Act were withdrawn and on the failure of receipt of money, as agreed under Memorandum of Compromise Settlement, OC was compelled to press upon his plea for CIRP Proceedings. Learned Counsel has denied the allegation of

forum shopping and stated the he has exercised his rights to realise his dues as per settled law.

17. Learned Counsel has vehemently opposed the claims of the Appellant that there was no supply of goods and services and the transactions between OC and CD were merely financial arrangements. He has referred to various 'Bill of Supplies' as well as GDR which according to him clearly proves that the transactions were indeed in the nature of supply of marine goods and services.

18. He countered the argument of the Appellant that the insurance company has rejected the claim of Respondent on the plea that the said transactions were of financial nature and not of supply of goods and services. Learned Counsel has mentioned that he has already filed an appeal before State Consumer Forum and the case is still pending. He further submitted that the claim of insurance has nothing to do with this case and it is not connected at all with Section 9 Application admitted by the Adjudicating Authority.

19. Learned Counsel has also referred to a decision of the Hon'ble Supreme Court passed in '**2022 SCC OnLine SC 142 in Consolidated Construction Consortium Limited vs. Hitro Energy Solutions Pvt. Ltd.**' . By this Judgment the Hon'ble Supreme Court has held that the claim must bear some nexus with the provision of goods and services without specifying as to who

is the supplier or receiver. It is also stated that the Hon'ble Supreme Court has enlarged the scope of operational debts and held that a debt which arises out of advance payment made to Corporate Debtor for supply of goods or services would be considered as an operational debt.

20. Learned Counsel has reiterated that ten invoices, available on the record along with goods receipt notes, clearly demonstrate that SDA was purely a supply contract.

21. On the issue of non-levy of GST which has been raised by Appellant, Learned Counsel has brought out that GST was exempted for marine products.

22. Learned Counsel has also emphasised that the citations of *K. Kishan vs. Vijay Nirman Company Pvt. Ltd.* is not relevant for the present case as both the parties acknowledge the debt and dues in the present case.

22. Learned Counsel also refuted any pre-existing disputes prior to issue of demand notice. He assailed the logic of the Appellant that since appeals against arbitration cases are pending the pendency may be treated as pre-existing disputes. This cannot be in any way be treated as acknowledgement of pre-existing dispute by Respondents by any stretch of imagination.

23. Concluding his arguments, the Learned Counsel has again requested for dismissal of the Appeal.

Analysis

24. We have heard Learned Counsel for the parties and perused the record made available. We have also gone through the relevant provisions of IBC and decision of Hon'ble Supreme Court. The following issues are required to be addressed in to order to come to the final conclusions about the case.

(i) Whether the debt in the Appeal is in nature of operational debt within the ambit of Section 5(21) of IBC.

(ii) Existence of any pre-existing dispute.

25. We shall deal within these two issues accordingly:-

Issue No. (i) :- Whether the debt in the Appeal is in nature of operational debt within the definition of Section 5(21) of IBC.

To understand whether in the present appeal any debt existed at all and if so then what is the nature of the debt we need to see the exact definitions of these in the IBC.

The debt has been defined in Section 3 (11) of IBC which is as under:-

*“3(11). “**debt**” means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt;”*

Since, the term claim is mentioned in above definition of debt, we need to refer to definition of claim under Section 3(6) of IBC which as under:-

*“3(6). **“claim”** means-*

- (a) A right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured or unsecured;*
- (b) Right to remedy for breach of contract under any law for the time being in force, if such breach gives rise to a right to payment, whether or not such right is reduced to judgment, fixed, matured, unmatured, disputed, undisputed, secured or unsecured;”*

The other relevant definition of IBC with reference to this Appeal are ‘Operational Debt’ and ‘Operational Creditor’ which are 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 [payment] 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;*

*“5(20). **“operational creditors”** means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred;”*

Similarly, default is also defined under Section 3(12) of IBC which as under:-

*“3(12). **“default”** means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not [paid] by the debtor or the corporate debtor, as the case may be;*

The Financial Creditor and Financial Debtor is also defined under Section 5(7)

& Section 5(8) of the IBC which as under:-

*“(7) **“financial creditor”** means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to;*

*(8) **“financial debt”** means a debt alongwith interest, if any, which is disbursed against the consideration for the time value of money and includes—*

(a) money borrowed against the payment of interest;

(b) any amount raised by acceptance under any acceptance credit facility or its de-materialised equivalent;

(c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;

(d) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;

(e) receivables sold or discounted other than any receivables sold on nonrecourse basis;

(f) any amount raised under any other transaction, including any forward sale or purchase agreement, having

the commercial effect of a borrowing; [Explanation. -For the purposes of this sub-clause,-

(i) any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and

(ii) the expressions, “allottee” and “real estate project” shall have the meanings respectively assigned to them in clauses (d) and (zn) of section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016);]

(g) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;

(h) any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;

(i) the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h) of this clause;

These definitions makes the distinction between Operational Debt and Financial Debt. As seen from above, ‘financial debt’ is an inclusive and non-

exhaustive definition given under Section 5(8) of the IBC to mean “*a debt alongwith interest, if any, which is disbursed against the consideration for time value of money.*” Financial creditors have relationship with the entity as financial contract, like loan or security etc. Whereas, an operational debt as defined under section 5(21) of IBC signifies a claim in respect of the provisions of goods or services.

To further understand we tried to peruse the available records especially the SDA between OC & CD dated 17.11.2018 and Memorandum of Compromise Settlement dated 30.06.2021 along with bill of supply and goods receipt notes.

The caption of agreement itself is ‘Sourcing in Distribution Agreement’ between CD & OC. While perusing the agreement it is evidently clear that the relationship between OC & CD is with reference to procurement of marine products. For illustration purpose only following few clauses observed from the SDA (only indicative not exhaustive clauses). The Company is engaged

in the business of procuring Agricultural commodities on wholesale basis:-

The Company is engaged in the business of procuring Agricultural Commodities on wholesale basis.

M/s. SR MARINE FOODS PRIVATE LIMITED is engaged in the business of FISH & DRAWNS AND PROCESSED FOODS

is desirous of undertaking the procurement of Agricultural Commodities mentioned in Annexure I from the Company and/or Persons identified by _____ for procurement of Agricultural Commodities and in turn undertaking the Trading of same to Clients (as defined under) and the Company has agreed to engage the services of M/s. SR MARINE FOODS PRIVATE LIMITED, in the Territory.

The Parties wish to record their understanding in writing, the terms and conditions of concerning

PROCUREMENT AND SALE OF AGRICULTURAL COMMODITIES *Client*

4.1. The Company shall procure the Agricultural Commodities directly from farmers, Traders, Wholesalers, Distributors and/or Manufacturers and sell the same to SR MARINE FOODS PRIVATE LIMITED who in turn undertakes Trading of the same to its Clients throughout the Term of this Agreement.

4.2. The SR MARINE FOODS PRIVATE LIMITED also undertakes to procure the Agricultural Commodities directly from farmers, Traders, Wholesalers, Distributors and/or Manufacturers as listed in Annexure II and in accordance with the instructions of the Company and shall in turn Trade the same to its Clients throughout the Term of this Agreement.

SCOPE OF THIS AGREEMENT

4.1. Subject to the terms and conditions contained in this Agreement, the Company is desirous of engaging SR MARINE FOODS PRIVATE LIMITED SR MARINE FOODS PRIVATE LIMITED agreed to procure the Agricultural Commodities from the Company and/or Persons identified by the Company and undertakes Trading of the same to its Clients.

TERM

6.1.1. As per the payment schedule agreed upon in written during the purchase of Agricultural Commodities from the Company or the documentation generated during the transaction such as Invoice, Purchase Order, Goods Receipt Note.

The wording used in the above clauses shows that these transactions were of the nature of trading / procurement and supply of goods and services and not of financing

26. We have noted the argument of Learned Counsel for the Appellant that insurance company has rejected the claims of Respondents treating this as Financial Arrangements and not procurement of goods and services. We have also noted from Learned Counsel for the Respondent that the said order of insurance company has already been challenged in the State Consumer Forum as such this has not reached the stage of finality. In any case, the outcome of insurance will not impact IBC Proceedings and at the best can only be one of the factors to be considered in final decision as claimed by Appellant.

Looking to all above, we are of view that the Adjudicating Authority has correctly treated debt due as operational debt and therefore allowed to petition under Section 9 of IBC.

27. **Issue No. (ii) Existence of any pre-existing dispute.**

Before going into detail, we have perused the definition of dispute as given in IBC

*“5(6) "**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;”

We have also perused the decision of Hon’ble Supreme Court in ***Mobilox Innovation Pvt. Ltd. vs. Kirusa Software Pvt. Ltd. (2018 1 SCC 253)*** which says that the dispute need to exist prior to the issuance of demand notice.

The main plea of the Appellant is invocation of arbitration by OC against the guarantors of the CD for the same debt. Similarly, CD has also invoked arbitration in terms of SDA. As already discussed earlier these arbitration cases were decided in favour of the Respondent. The Appellant has claimed that the same common order has already been challenged under Section 34 of the Arbitration and Conciliation Act, 1996 and is pending in the High Court of Judicature at Madras). According to Learned Counsel the pendency of Section 34 of Arbitration Act makes Section 9 of IBC application unsustainable.

As per section 9(5)(ii)(d) of the IBC, application under Section 8 must be rejected with notice of dispute has been received by the Operational Creditor, however, the existence of dispute and/or a suit of arbitration

proceeding must be pre-existing i.e. before receipt of demand notice as settled by Hon'ble Hon'ble Supreme Court of India in ***Mobilox Innovation Pvt. Ltd. vs. Kirusa Software Pvt. Ltd. (Supra)***.

28. It is therefore, important to understand as to whether there were pre-existing dispute prior to issue of demand notice or otherwise. The demand notice was issued on 24.06.2019 in Form 3. Whereas, the arbitration petition was filed by OC on 03.11.2020. CD also initiated arbitration proceeding on 07.12.2020. Thus, it is clear that both the arbitration petition filed by OC (R-1) and CD (Appellant) were later then the demand notice issued. The intervening period between issue of demand notice and arbitration petition is of more than one year and four months. Incidentally, the common arbitration award was passed on 16.04.2021.

29. Another contention of Appellant to establish pre-existing dispute is the fact that the pendency of Section 34 of Arbitration Act was acknowledged by Respondent in the 'Memorandum of Compromise Settlement' entered into CD and OC on 30.06.2021. This is also found to be an event subsequent to issue of Demand Notice.

30. From the series of events, it is clear that the arbitration petition as well as settlement memo were subsequent to issue of demand notice. As we have already discussed earlier in terms of legal provision of the IBC as well as the relevant decision of the Hon'ble Supreme Court, pre-existing dispute can be considered only if it is pre dated then the date of demand notice which is not

the case here. As such the Learned Adjudicating Authority was right, we do not find any pre-existing dispute and therefore, Section 9 application was maintainable.

31. Based on above discussions, we are of considered view that there is no ground for interference with the Impugned Order dated 06.06.2020 passed by the Adjudicating Authority and therefore dismiss the appeal. No costs.

[Justice Rakesh Kumar Jain]
Member (Judicial)

[Mr. Naresh Salecha]
Member (Technical)

Sim