

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH (Court -I)
KOLKATA**

CP(IB) No. 617/KB/2020

*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:

Savitri Enterprises, a partnership firm having PAN: ACDFS6682B and having
address of correspondence- 18D, Sukeas Lane, Kolkata- 700001.

.....Operational Creditor

-Versus-

Bhagatpur Tea Company Limited, a company incorporated under the
Companies Act, 1956 and being a company within the meaning of Companies
Act, 2013 and having Corporate Identification No-
U51226WB1973PLC028810 and its registered office at 11, R.N. Mukherjee
Road, Nilhat House, Kolkata-700001, in the State of West Bengal.

.... Corporate Debtor

Date of Hearing : 4th August, 2022

Date of pronouncing the order: 5th September, 2022

Coram:

Shri Rohit Kapoor, Member (Judicial)

Shri Balraj Joshi, Member (Technical)

Appearances (via video conferencing/ physical):

For Operational Creditor	:	Mr. Shaunak Mitra, Advocate Mr. Satyaki Chaudhury, Advocate
For Corporate Debtor	:	Mr. Jishnu Chowdhury, Advocate Mr. Aritra Basu, Advocate

Mr. S.P. Tiwari, Advocate

Mr. H Tiwary, Advocate

Mr. Rajib Ghosh, Advocate

ORDER

Balraj Joshi, Member (Technical):

1. This Court convened through hybrid mode.
2. This is a Company Petition filed under section 9 of the Insolvency and Bankruptcy Code, 2016 (the Code) by **Savitri Enterprises** (Operational Creditor), seeking to initiate Corporate Insolvency Resolution Process (“CIRP”) against **Bhagatpur Tea Company Limited** (“Corporate Debtor”).
3. The Corporate Debtor is a public company incorporated on 22.05.1973. The authorized share- capital of the company is ₹92,00,000/- and the paid-up share- capital of the company is ₹45,46,800/-
4. The total amount claimed by the Operational Creditor is ₹9,34,114/- and the date of default is 11.06.2019. The Demand notice under section 8 of the Code was received by the Corporate Debtor on 14.08.2019. The reply to the same was sent by the Corporate Debtor.
5. **Submissions on behalf of the Operational Creditor:**
 - 5.1 The Operational Creditor is a partnership firm engaged in the business of selling and dealing in various grades of pesticides with different chemical compositions, in the states of West Bengal and Assam.
 - 5.2 The case of the Operational Creditor is that pursuant to several purchase orders placed by the Corporate Debtor in 2019, the Operational Creditors had supplied to the Corporate Debtor pesticides and chemicals.

- 5.3 The products so supplied were accepted by the Corporate Debtor and it acknowledged the fact that the goods supplied were in good condition and in accordance with the agreed specifications.
- 5.4 The unpaid operational debt presently due and payable by the Corporate Debtor pertains to supplies made by the Operational Creditor between 15.03.2019 and 04.05.2019. The invoices stipulated for interest @18% per annum to be payable if there was delay in payment.
- 5.5 However, when one of the partners of the Operational Creditor *i.e.* Mr. Rahul Saraf had visited the tea garden of the Corporate Debtor on May 28, 2019, he was told by officials of the Corporate Debtor that damage has been caused to tea bushes at the tea garden upon spraying Aster supplied by the Operational Creditor which in fact, had been occasioned due to improper spraying of chemicals on the tea bushes that were not in accordance with well-known industry practices or the normal quantity, time and manner of spraying the chemicals on tea bushes.
- 5.6 Thereafter, the Operational Creditor received a letter dated June 14, 2019 from the Corporate Debtor where it was alleged that spraying for the Aster supplied under invoices being Invoice No. WB/19-20/0009 dated 02.04.2019 and invoice No. WB/19-20/0036 dated 22.04.2019 had damaged tea bushes and allegedly caused loss to the Corporate Debtor. It was further alleged that Mr. Rahul Saraf of the Corporate Debtor had visited the tea garden on May 28, 2019 and that he had no clue of such occurrence. The allegations made in the letter dated June 14, 2019 false and incorrect. The said letter was promptly replied to by the Operational Creditor *vide* a letter dated June 24, 2019.
- 5.7 The Operational Creditor had duly clarified and addressed all the issues and allegations raised by the Corporate Debtor and believed that the matter stood closed as the purported damages caused to the tea bushes was clearly not attributable to any deficiencies in the product supplied by the Operational Creditor.

- 5.8 However, the Corporate Debtor continued to make allegations regarding the quality of Aster supplied under the aforesaid two specific invoices and had called upon the Operational Creditor to supply the chemical analysis report and material safety data-sheet for the said products which were thereafter duly supplied and made over by the Operational Creditor on July 20, 2019 showing that the Aster of 400 Kgs met the agreed specifications and quality. At the same time, however, the repeated requests made by the Operational Creditor for being provided a copy of the analysis reports purportedly conducted by the Corporate Debtor went unheeded.
- 5.9 It is submitted that the Operational Creditor is not making any claim in the instant proceeding on account of the two invoices in respect of which the Corporate Debtor has made allegations of inferior quality of supplies. The claims forming subject-matter of the instant proceeding are restricted to the admitted supplies under the other nine invoices, in respect of which no allegation or notice of dispute has ever been issued by the Corporate Debtor.
- 5.10 In these circumstances, the Operational Creditor had issued notice under section 8 of the Code to the Corporate Debtor claiming an amount of ₹9,25,690/- along with ₹8424/- as interest on the unpaid principal amount, payable on account of the nine invoices mentioned above. The same was received by the Corporate Debtor on 14.08.2019. The Corporate Debtor, in response, issued a reply letter making false and baseless allegations.
- 5.11 As on August 9, 2019 an aggregate sum of ₹9,34,114/- is due and payable by the Corporate Debtor to the Operational Creditor, as per the following particulars:-
- i. ₹9,25,690/- on account of principal;
 - ii. ₹8,424/- on account of interest @18% p.a. calculated on the outstanding principal sum from June 11, 2019 to August 9, 2019.

The Operational Creditor is entitled to further interest on the unpaid operational debt till full realization

5.12 The Operational Creditor has relied on the following documents in support of its claims:

- a. purchase orders which are annexed to the petition and marked as “C”;
- b. acknowledgments by the Corporate Debtor; marked as annexure “D”;
- c. Copies of the invoices are collectively annexed to the petition and marked “F”.
- d. Letters dated June 14, 2019 and June 24, 2019, collectively annexed and marked as annexure “G”.
- e. Demand notice is annexed to the petition and marked “I”.
- f. A reply letter to the demand notice, annexed to the petition and marked “J”

6. **Submissions on behalf of the Corporate Debtor:**

6.1 It is submitted that since there are pre-existing disputes between the parties, the present petition could not have been filed at all. After receiving an undated demand notice, the Corporate Debtor made a reply indicating the existence of pre-existing disputes between parties. The said disputes between the parties are genuine and require adjudication in a civil suit.

6.2 The undated demand notice, being "Annexure I" to the petition is not in proper form. Hence, no demand notice can be said to have been issued by the Operational Creditor in terms of the Insolvency and Bankruptcy (Application to Adjudicating Authority), Rules, 2016. The petition, is thus, not maintainable and should be dismissed with costs.

6.3 The demand notice suppresses relevant facts. The purported Operational Creditor is not a creditor at all. In fact, the Corporate Debtor has claims against the Operational Creditor. For this purpose, there is a suit which has been filed by the Corporate Debtor.

- 6.4 The true and correct facts of the present case are that the Corporate Debtor was supplied diverse chemicals by the Operational Creditor since 2014-2015.
- 6.5 In or around March-April, 2019, the Operational Creditor approached the Corporate Debtor and offered to supply Weedicide "ASTER" at contemporary market rates knowing that the Corporate Debtor required the same for use in its tea garden. 'Aster' is a weedicide with AS of Glyphosate 71%. Subsequent to agreement between the parties, the Operational Creditor supplied 400 kilograms of "ASTER" to the Corporate Debtor between April 2, 2019 and April 22, 2019.
- 6.6 Between April 22, 2019 and May 14, 2019, the Corporate Debtor used ASTER, purchased from the Operational Creditor, in its tea garden. Since the chemicals supplied by the Operational Creditor were deficient and defective, the tea bushes were severely affected with phytotoxicity. The Corporate Debtor, consequently incurred a loss of 1.5 lakh kilograms of tea and the total mortality of tea plants young and mature comes to 1,70,000 plants. Thus, the total loss and damage suffered by the Corporate Debtor has been of a sum of ₹4 crores.
- 6.7 The Corporate Debtor, thereafter, called upon the Operational Creditor to witness the situation and expected that the Operational Creditor would take appropriate measures.
- 6.8 On May 28, 2019, Rahul Saraf, one of the partners of the Operational Creditor visited the tea garden belonging to the Corporate Debtor. Mr. Rahul Saraf accepted the position after visiting the affected areas of the tea garden of the Corporate Debtor. This has been recorded by a letter dated June 14, 2019, The Operational Creditor made a reply to the same on June 24, 2019, raising false and/or incorrect pretext.
- 6.9 In the said circumstances, the Corporate Debtor requested the Operational Creditor to provide a chemical analysis report and a material safety data sheet of ASTER *vide* letter dated June 26, 2019.

- 6.10 The Operational Creditor, on July 20, 2019, made over a chemical analysis report purportedly of June, 2019. The original report prepared at the time of manufacture was, however, not provided to the Corporate Debtor. The purported report provided by the Operational Creditor is incorrect. The Corporate Debtor has also obtained reports from three accredited experts.
- 6.11 The reports would reveal that the chemicals supplied were deficient and defective. In the said circumstances, the Corporate Debtor suffered loss and damage and is thus, entitled to compensation consisting of a principal sum of ₹4 crores along with interest from 01.05.2019 @18% being ₹40,04,384/- as at 29.11.2019. To that end, the Corporate Debtor had filed a suit before the Hon'ble High Court at Calcutta being C.S. No. 266 of 2019. The same was admitted by the Hon'ble High Court on 05.01.2021.
- 6.12 In the suit, an application was filed by the Corporate Debtor being G. A. No. 1 of 2020. In the said application, on 11.01.2021, directions to file affidavits were given by the Hon'ble High Court at Calcutta. Thereafter, affidavits have been filed, from which it would be evident that the same disputes between the parties are the subject matter of the civil suit. The application was allowed by this Hon'ble Court by an order dated 02.02.2021.
- 6.13 The Corporate Debtor has mitigated its damages by disposing of the deficient and useless goods which had been supplied. It shall give necessary adjustments to its claims, at trial in the suit pending in the Hon'ble High Court at Calcutta.

7. **Analysis and Findings:**

- 7.1 We have heard the Ld. Counsel for the Operational Creditor and the Ld. Counsel for the Corporate Debtor and perused the record.

The Corporate Debtor has contended that since the debt in the instant petition is disputed and such disputes were raised prior to the sending of the demand notice under section 8 of the Code, the instant petition is not maintainable. The Corporate Debtor has further submitted in this regard that a civil suit for damages has been filed by the Corporate Debtor. the

Corporate Debtor in this regard, has relied on the decision of Hon'ble National Company Law Appellate Tribunal (NCLAT), New Delhi in the matter of ***M+R Logistics (India) Private Limited Vs. AGA Publications Limited***¹, Paragraphs 21, 22, 23, which stipulate that if there is a dispute between the parties which are prior to issuance of Demand Notice, the Adjudicating Authority, in summary jurisdiction, cannot go into those issues which otherwise require a regular trial.

The Corporate Debtor has also relied on the Hon'ble Supreme Court's decision in the matter of ***Mobilox Innovations Pvt. Ltd. vs. Kirusa Software Pvt. Ltd***², Paragraph 51, which is reproduced hereinbelow : -

“Therefore, all that the adjudicating authority is to see at this stage is whether there is a plausible contention which requires further investigation and that the "dispute" is not a patently feeble legal argument or an assertion of fact unsupported by evidence. It is important to separate the grain from the chaff and to reject a spurious defence which is mere bluster. However, in doing so, the Court does not need to be satisfied that the defence is likely to succeed.”

7.2 However, on perusal of the Corporate Debtor's letter dated 14.06.2019, it becomes evident that the Corporate Debtor's contention of pre-existing disputes pertains to two specific invoices being Invoices WB/19-20/0036 dated 22.04.2019 and WB/19-20/009 dated 02.04.2019. The weedicide 'Aster' was supplied under these two invoices only.

7.3 The amount claimed by the Operational Creditor being ₹9,34,114/- is on account of nine invoices not including the above-mentioned disputed invoices. In the instant petition, the Operational Creditor has made no claim with respect to the said disputed invoices. As such, the defence of the Corporate Debtor regarding pre-existing disputes does not extend to the

¹ Company Appeal (AT) (Insolvency) No. 667/2020

² reported at (2018) 1 SCC 353

other nine invoices *i.e* subject matter of the instant petition and therefore is untenable.

7.4 The Corporate Debtor has contended that it has incurred losses worth over ₹4 Crore due to defective weedicide supplied by the Operational Creditor and therefore has filed a civil suit for claim of damages before the Hon'ble High Court at Calcutta to recover the same.

7.5 In this regard, we would rely on the decision of Hon'ble Supreme Court of India, in the matter of ***Union of India (UOI) vs. Raman Iron Foundry and Ors.***³ Paragraph 11, the relevant passages of which are reproduced hereinafter:

"... Now the law is well settled that a claim for unliquidated damages does not give rise to a debt until the liability is adjudicated and damages assessed by the decree or order of a Court or other adjudicatory authority. When there is a breach of contract, the party who commits the breach does not eo instanti incur any pecuniary obligation, nor does the party complaining of the breach become entitled to a debt due from the other party. The only right which the party aggrieved by the breach of the contract has is the right to sue for damages ..."

"... A claim for damages for breach of contract is, therefore, not a claim for a sum presently due and payable and the purchaser is not entitled ... to recover the amount of such claim by appropriating other sums due to the contractor ..."

7.6 The Hon'ble High Court at Calcutta, in the matter of ***Organon (India) Private Limited vs. Martin and Harris Private Limited***⁴, has also decided that:

"It goes without saying that a claim in damages cannot be elevated to the status of an immediately enforceable claim to be adjusted or set off against

³ MANU/SC/0005/1974 : 12.03.1974 - SC

⁴ MANU/WB/0723/2017 : 12.09.2017 - CALHC

an admitted debt. There is no doubt that if x amount is due from A to B and y amount is due from B to A, the amounts may be adjusted and the person with a positive net amount due may be paid only such balance. Equally, if there is a claim by way of legal proceedings by A against B for amount x and B has also a claim for amount y, B can seek adjustment by setting off the lesser amount of y against amount x or counter-claiming for the balance amount of y after adjusting it against the lesser amount of x. But such form adjustment would arise when rival debts are due, where a debt is not an inchoate claim but a specified liquidated amount immediately recoverable in law.” (Paragraph 37)

“A claim in damages, on the other hand, is subject to two sets of adjudication albeit in the same proceedings: the entitlement thereof and the assessment of the quantum of damages. Merely because a person has a claim in damages against another would not imply that the undisputed debt of the other may be withheld till the unadjudicated unliquidated claim in damages is pronounced upon by an appropriate forum. Equally, a stark breach of a contract by a party and its denial of the consequent claim in damages by the other may not, in certain circumstances, be completely ignored even if the party in breach has an undisputed amount due from the other.” (Paragraph 38)

7.7 In light of the abovementioned judgments, it is clear that while the Corporate Debtor has right to claim damages against Invoices WB/19-20/0036 and WB/19-20/009, the same cannot be used to set off its existing debt to the Operational Creditor under the other nine invoices. The debt due under the said nine invoices have not been disputed by the Corporate Debtor, thereby acquiescing the same.

7.8 The Corporate Debtor has also contended that since the demand notice sent by the Operational Creditor is undated, no demand notice can said to have been issued by it.

- 7.9 In this regard, we would like to rely on Rule 5 of the Insolvency and Bankruptcy (Application to the Adjudicating Authority) Rules, 2016 along with section 8 of the Code, which provide that a demand notice may be delivered to the corporate debtor, either at the registered office by hand, registered post or speed post with acknowledgement due or by electronic mail service to a whole-time director or designated partner or key managerial personnel, if any, of the corporate debtor.
- 7.10 In the instant petition, the Demand Notice under section 8 has been accompanied by a postal receipt and acknowledgment. The Corporate Debtor has received the Demand Notice. Further, the Corporate Debtor has replied to the said demand notice. The purpose of the said demand notice has been fulfilled in this case and therefore, the same stands admitted.
- 7.11 Section 9 (3)(b) affidavit has been filed by the Operational Creditor which is at page 23-24 of the instant application.
- 7.12 In view of the above facts, the present petition made by the Operational Creditor is complete in all respect as required by law. The petition establishes that the Corporate Debtor is in default of a debt due and payable and that the default is more than the minimum amount stipulated under section 4(1) of the Code at the relevant time, *i.e.*, Rupees one lakh.
- 7.13 It is, accordingly, hereby ordered as follows:-
- a) The application bearing **CP (IB) No. 617/KB/2020** filed by Savitri Enterprises (Operational Creditor), under section 9 of the Code read with rule 6 of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating CIRP against **Bhagatpur Tea Company Ltd.**, CIN:U51226WB1973PLC028810, the Corporate Debtor, is **admitted**.
 - b) There shall be a moratorium under section 14 of the IBC.
 - c) The moratorium shall have effect from the date of this order till the completion of the CIRP or until this Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 of the IBC or passes

an order for liquidation of Corporate Debtor under section 33 of the IBC, as the case may be.

- d) Public announcement of the CIRP shall be made immediately as specified under section 13 of the Code read with regulation 6 of the Insolvency & Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.
- e) **Mr. Abhisekh Khemka** registration number **IBBI/IPA-001/IP-P02038/2020-21/13151** email: **Khemka.abhisekh@gmail.com** is hereby appointed as Interim Resolution Professional (IRP) of the Corporate Debtor to carry out the functions as per the Code subject to submission of a valid Authorisation of Assignment in terms of regulation 7A of the Insolvency and Bankruptcy Board of India (Insolvency Professional) Regulations, 2016. The fee payable to IRP or, as the case may be, the RP shall be compliant with such Regulations, Circulars and Directions as may be issued by the Insolvency & Bankruptcy Board of India (IBBI). The IRP shall carry out his functions as contemplated by sections 15, 17, 18, 19, 20 and 21 of the Code.
- f) During the CIRP period, the management of the Corporate Debtor shall vest in the IRP or, as the case may be, the RP in terms of section 17 of the IBC. The officers and managers of the Corporate Debtor shall provide all documents in their possession and furnish every information in their knowledge to the IRP within one week from the date of receipt of this Order, in default of which coercive steps will follow.
- g) The IRP/RP shall submit to this Adjudicating Authority periodical reports with regard to the progress of the CIRP in respect of the Corporate Debtor.
- h) The Operational Creditor shall initially deposit a sum of ₹2,00,000/- (Rupees two lakh only) with the IRP to meet the expenses arising out of issuing public notice and inviting claims and for his remuneration. These expenses are subject to approval by the Committee of Creditors (CoC).

- i) In terms of section 7(5)(a) of the Code, Court Officer of this Court is hereby directed to communicate this Order to the Operational Creditor, the Corporate Debtor and the IRP by Speed Post, email and WhatsApp immediately, and in any case, not later than two days from the date of this Order.
- j) Additionally, the Operational Creditor shall serve a copy of this Order on the IRP and on the Registrar of Companies, West Bengal, Kolkata by all available means for updating the Master Data of the Corporate Debtor. The said Registrar of Companies shall send a compliance report in this regard to the Registry of this Court within seven days from the date of receipt of a copy of this order.
- k) **CP (IB) No. 617/KB/2020** to come up on **18.10.2022** for filing the periodical report.
- l) A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

Balraj Joshi
Member (Technical)

Rohit Kapoor
Member (Judicial)

Signed this on the 5th day of September, 2022

SM[LRA]