IN THE NATIONAL COMPANY LAW TRIBUNAL
COURT NO. 5, MUMBAI BENCH

C.P. (IB) 3295/MB/2019

Under Section 8 &9 of the IBC, 2016

In the matter of

Transmec India Private Limited

... Petitioner

v/s.

Saflow Products Private Limited

… Corporate Debtor

Order Delivered on: 20.03.2020

Coram: Hon'ble Smt. Suchitra Kanuparthi, Member (Judicial)
Hon'ble Shri Chandra Bhan Singh, Member (Technical)

For the Petitioner: Adv. Sukanya Bhaumik, Adv. Sneha Jethwa, Adv. Payoja Gandhi

For the Corporate Debtor: Adv. Sarvesh Mishra, Adv. Shweta Tewari

Per: Suchitra Kanuparthi, Member (Judicial)

<u>ORDER</u>

1. This is a Company Petition filed by **Transmec India Private Limited**(hereinafter called "Petitioner") seeking to set in motion the Corporate Insolvency Resolution Process (CIRP) against **Saflow Products Private Limited** (hereinafter called "Corporate Debtor") alleging that Corporate Debtor committed default in making payment of ₹8,83,780/-along with an interest at the rate of 24% per annum on the delay in paymentby invoking the provisions of Section 8 and 9 of the Insolvency & Bankruptcy Code (hereinafter called "Code") read with Rule 5 and 6 of Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016.The Petition is filed on 11.09.2019 for initiating Corporate Insolvency Resolution Process (**CIRP**).
2. The Petition is filed by Mr. Leslie Rebello, Branch Manager- Mumbai Officeof the Petitioner, authorized vide letter dated 24.07.2019 which is annexed to the Petition.

Contentions made by the Petitioner:

3. The Petitioner contended that the Petitioner entered into an MOU dated 08.09.2017 with the Corporate Debtor through which the Corporate Debtor appointed the Petitioner in its capacity as a freight forwarder to facilitate the carriage of air freight cargo on behalf of the Corporate Debtor from Italy on free carrier basis to Mumbai Airport.On 11.09.2017, the Corporate Debtor confirmed the assignment with the Petitioner for airfreighting 5 wooden crates weighing about 8500 kgs from Italy to Mumbai. On 19.09.2017, Italy office of the Petitioner was informed by the office of the Corporate Debtor that the goods are ready for collection. The Petitioner was informed that 6 wooden crates aggregating to 12,042 kg were to be shipped. Based on this information, the Italy office of the Petitioner booked the shipment with Lufthansa for 26.09.2017 flight from Munich to Mumbai.

4. The Petitioner further contended that the 6 crates of goods of the Corporate Debtor arrived at the Petitioner's warehouse in Milan on 22.09.2017. The Italy office of the Petitioner, on inspection, observed that one of the wooden crates had length of 407 cm instead of 400 cm, and hence, the shipments had to be booked on a cargo flight instead of passenger flight booked earlier. The same was immediately informed to the Corporate Debtor and a cargo flight with Lufthansa was immediately booked. Thereafter, on 26.09.2017, the Petitioner received the revised flight schedule that the shipment was booked for 02.10.2017 cargo flight of Lufthansa which was scheduled for arrival in Mumbai on 03.10.2017 and the corporate Debtor was accordingly informed.

5. The Petitioner then submitted that on 03.10.2017, Lufthansa informed the Petitioner that only 5 out of 6 crates arrived at Mumbai and that they were still checking on the 6th crate. The Corporate Debtor was updated every time. Thereafter, the remaining crate was traced in Frankfurt and Lufthansa confirmed that the same was booked on the cargo flight of 08.10.2017. On 10.10.2017, the 6th crate also arrived at Mumbai and thus, all the crates were successfully

cleared and delivered to the Corporate Debtor on 11th and 12th Oct 2017. The Corporate Debtor accepted the delivery of the crates without any dispute and demur.

6. The Petitioner further submitted that on 27.10.2017, the Petitioner raised an invoice of an amount of ₹15,63,780/- on the Corporate Debtor, out of which an amount of ₹6,80,000/- was already paid in advance by the Corporate Debtor prior to the shipment and a sum of ₹8,83,780/- was due.

7. Despite several requests made by the Petitioner, the Corporate Debtor failed to clear its dues. Thus, on account of non-payment of outstanding dues, the Petitioner issued Demand Notice dated 05.08.2019 in Form 3 under Section 8 of the I&B Code, 2016 to the Corporate Debtor demanding a sum of ₹8,83,780/- along with an interest calculated at the rate of 24% per annum on the delay in payment. The Corporate Debtor's Counsel vide its letter dated 20.08.2019 replied to the said demand notice.

8. The Petitioner has also annexed affidavit in terms of Section 9(3)(c) of the Code to show that a sum of ₹8,83,780/- is receivable from the Corporate Debtor.

<u>Contentions made by the Corporate Debtor:</u>

9. The Counsel for the Corporate Debtor replied to the said demand notice dated 05.08.2019 on 20.08.2019 and denied all allegations and contentions averred in the demand notice and stated that vide letter dated 01.11.2017 and 13.11.2017, the corporate debtor has raised a dispute regarding the delay of delivery of goods and the concomitant loss suffered by them.

10. The Corporate Debtor in its Reply to the Petition raised the following contentions:

    a. The Corporate Debtor evidently had been given the order in question by one their clients M/s. Sharp Designers and Engineers India Pvt. Ltd. ("the contractor") by and under their purchase order dated 12.06.2017. Annexed hereto and marked as "exhibit A" is a copy of the said purchase order which explicitly states that the cost of the delivery was to be borne and paid by the

Contractor. Such cost could have also paid by the Contractor on reimbursement basis. The Contractor was regular customer of the Corporate Debtor and the Corporate Debtor received regular work and references from the Contractor. To an extent that through the Contractor, the Corporate Debtor was to be empaneled with Reliance Industries Limited, which in the present matter was the end buyer. The Corporate Debtor was very keen on completing the transaction in question and to be associated with a brand like Reliance which would have entailed good revenue for the Corporate Debtor in future.

b. Relying on the representation of the Petitioner that they would be able to complete the mandate within the specified time, by and under an email of 08.09.2017, the Corporate Debtor had engaged the services of the Petitioner to carry 6 boxes of cargo ("cargo") from Milan to Mumbai on Ex-FOB basis. The obligation of customs clearance on behalf of the Corporate Debtor was also devolved upon the Petitioner.

c. The Cargo was to be supplied by an Italian supplier of the Corporate Debtor, i.e., Luxe Coat SRL Unipersonale ("supplier"). Further, the Cargo was to be delivered by the Supplier at the Petitioner's parent company's facility based in Italy. The primary reason for engaging the services of the Petitioner was the fact that their parent company was based in Italy and it would expediate the process of the delivery. The Petitioner was repeatedly informed the corporate debtor that the delivery of the Cargo was time bound and was assured that the entire process of airlifting and delivery of the Cargo to Mumbai would be completed within a bracket of 5 days, (this is a standard time for air delivery), from the date of delivery of the Cargo by the Supplier to the designated facility in Italy.

d. Pursuant to the acceptance of the proposal under the aforesaid email, the parties had signed the Memorandum of Understanding. The said MOU explicitly provides for the caveats under which the Petitioner was not to be held responsible for the delay. The said terms were specifically limited to delay arising out of "shortfall in documents/ customs permission or any strike or go slow by the authorities". There was never an agreed term between the parties, that the Petitioner will not be responsible for the delay in delivery due to its own default in booking the appropriate carrier and ensuring that the goods are delivered to the Corporate Debtor within the mandated time frame. Relying on these specific terms of the MOU, the Corporate Debtor engaged the services of the Petitioner. The Petitioner was solely responsible and liable for engaging the air carrier through which the delivery of the Cargo was to be completed. The Corporate Debtor had no engagement or association with the air carrier to the extent that all air bills were also issued in the name of the Petitioner. Annexed hereto and marked as "exhibit B" is a copy of the said air bill that records the name of the Petitioner's parent company based in Italy, i.e., Transport International Transmec S.P.A. as the entity in whose favor the air bill was issued.

e. The Corporate Debtor's role in the entire transaction was to ensure that the supplier provides the cargo to the nominated facility of the Petitioner within the agreed time frame. It is an accepted position by the Petitioner that the cargo was ready for collection as of 19.09.2017 and was ready for immediate dispatch. Inspite of having the cargo ready for collection as of 19.09.2017, the Petitioner for some reason only booked the dispatch after 7 days i.e. for 26.09.2017. Further under various distorted and fake excuses, it kept further delaying the air lifting of the cargo. There is no communication from the air carrier that has been provided by the Petitioner to this Hon'ble Court or to the Corporate Debtor which states that there has been a delay from the air carrier's end, i.e., Lufthansa Airways and that they had informed the Petitioner of the same in advance, which is a requirement as per the applicable aviation policies. Despite repeated reminders, the Petitioner took almost 21 days from the date of the delivery of the cargo by the supplier to get the goods dispatched and delivered to the Corporate Debtor in Mumbai. After being ready for collection as of 19.09.2017, the cargo was eventually delivered to Mumbai and handed over to the Corporate Debtor after customs clearance only on 10.10.2017 and another box on 11.10.2017. it is also pertinent to note that not only was the cargo delayed but was also delivered at the Mumbai airport in two separate tranches. The final time of delivery, eventually owing to the default of the Petitioner, was the same which would have taken had the cargo been shipped via sea route at 1/10th of the cost. Had the Corporate Debtor chosen the sea route it would have saved the cost and the embarrassment however owing to false promises made by the Petitioner it chose air lifting of the cargo at its own cost and eventually suffered severe monetary losses.

f. Due to the delay in the delivery of the cargo, the Corporate Debtor was not reimbursed by the contractor for the cost towards the air freight. The reason Corporate Debtor had opted for the air lifting of the cargo was due to immediate requirement by the contractor to have the goods delivered from Milan. Due to the said delay, the Corporate Debtor not only incurred severe revenue losses but also lost prestigious clients to whom it used to provide goods and services on regular basis through the contractor. This led to severe embarrassment for the Corporate Debtor and loss of goodwill in the industry to an extent that contractor has blacklisted the Corporate Debtor and has refused to engage its services for any future project. This has caused severe business and revenue loss to the Corporate Debtor which is already struggling financially.

11. The Petitioner through its Rejoinder dated 10.12.2019 raised the following contentions:

a. That there was no time commitment made by the Petitioner with respect to the regarding the delivery of cargo by the Petitioner to the Corporate Debtor under the agreed terms of the MOU dated September 8, 2017. The said MOU provided that the Corporate Debtor was required to pay 50% of the agreed costs in advance (i.e. before transportation of the cargo) and the balance payment was to be made within 15 days from the date of the cargo arrival notice. Despite this arrangement, the Corporate Debtor has failed to pay the balance ₹8,83,780/- to the Petitioner. The Petitioner has fulfilled all its obligations under the MOU. The Petitioner has from time to time always updated and informed the Corporate Debtor of the change in the schedule of the flights of Lufthansa and the delay in the transportation of cargo caused by Lufthansa. The Petitioner say that the Corporate Debtor has admitted that the delay was caused by Lufthansa in its letter dated November 13, 2017. The Petitioner there fore cannot be faulted for the delay caused by Lufthansa as they were mere air freight forwarders and are as such dependent upon the airline for the timely transportation of cargo.

b. Without prejudice to any of the aforementioned submissions, the Corporate Debtor has in his letter dated November 13, 2017 to the Petitioner expressly admitted that the delay in transportation of cargo was caused by Lufthansa.

c. The Petitioner submit that the Corporate Debtor is making false and frivolous allegations against the Petitioner to not make the payment of the amount as agreed under MOU. It is reiterated that the Petitioner had always kept the Corporate Debtor informed about the change in schedule of flights which were carrying the cargo.

12. The Corporate Debtor through its Sur-Rejoinder dated 22.01.2020 raised the following contentions:

    a. The Petitioner has filed the present application and the Affidavit in rejoinder to merely extort money from the Corporate Debtor and arm twist the Corporate Debtor to make disputed payments where the services as performed by the Petitioner were clearly faulty and not in accordance with the mandate for which the Petitioner was appointed.

Findings:

13. This Bench, after going through the averments made in the Petition and the arguments made during hearing, comes to the following findings:

    a. The MOU dated 28.09.2017 extracted below executed between the Petitioner and the Corporate Debtor expressly stipulates the standard timeline for delivery of goods:

Memorandum of Understanding

Between

TRANSMEC(INDIA) PVT. LTD.
207, WELLINGTON BUSINESS PARK, Marol, Andheri(East)
Mumbai – 400059

and

SAFLOW PRODUCTS PVT. LTD.
F-704, Remi Bizcourt, Shah Industrial Estate, Off.Veera Desai Road, Andheri West, Mumbai, Maharashtra 400053

This Memorandum of Understanding (MOU) sets for the terms and understanding between
SAFLOW PRODUCTS PVT. LTD. & TRANSMEC(INDIA) PVT. LTD.

It is agreed that Transmec(India)(herein referred to as 'The Freight Forwarder') has submitted the required airfreight offer/proposal to carry freight/cargo for Saflow Products(herein referred to as "The Consignee/Cnee").

That Transmec has submitted the freight offer on the 8th of September, 2017 and the same was accepted and nominated to Transmec on the same day vis office email. Vide acceptance of this contract, Saflow has permitted Transmec(India) to carry the airfreight cargo from the supplier in Italy(Luxe Coat) on Ex-FOB Milan airport basis to Mumbai airport. Further, Saflow has also permitted Transmec(India) to do the custom clearance on behalf of the them.

It is understood that the consignee shall provide all necessary documents to the Freight Forwarder in order to manage & custom clear this cargo and deliver it to the consignee's nominated address/ delivery point as per standard time lines. All related work shall be done in accordance of the Indian Custom's act upon arrival and Transmec(India) or its partner's shall not be responsible for any delay arising from shortfall in documents/customs permission or any strike or go slow by the authorities. By signing this agreement it is agreed that you have accepted the costs provided vide quote on the 8th September. The Consignee is also hereby required to pay 50% of the costs in advance as per attached proposal in order to facilitate the operations & clearance activity. Balance 50% to be paid 15days from the date of Cargo Arrival Notice.

Quotations in annex 1 & 2

    b. The tax invoice dated 27.10.2017 expressly defines the terms of delivery via ETD as 21.09.2017 and ETA as 21.09.2017 and accordingly, the delivery ought to have been completed before 27.09.2017.

c. The email dated 01.11.2017 sent by the Corporate Debtor to the Petitioner confirms that a dispute has been raised by the Corporate Debtor before issuing of the demand notice dated 05.08.2019. In view of the said email, it can be said that there is a clear dispute raised by the Corporate Debtor before the issuance of demand notice by the Petitioner. The said email is extracted below for ready reference:

On 1 November 2017 at 10:45, Shah Pravin <pravinsaflow@yahoo.com> wrote:

Dear Sir,

In the matter of Import Consignment by Air Freight

As we have been discussing the matter, The material was handed over to your Italy Transmec's office in Milan on 19th Sept,2017,It was informed that Material will arrive on 26th Sept,2017 than it was informed that Material will be arriving on 29th Sept,2017.

Fact that Material arrived on 3rd of Oct,2017 in pallet (Five pallet out of Six)and 6th pallet arrived on 10th of Oct,2017.Due to the above we have to face abnormal delay in delivering the material to our customer.

We air freighted the material because of the urgency of the material it was confirmed to us that material will take maximum 5 to 7 seven days to be cleared and delivered. Unfortunately it has taken 20 to 25 days for the material to be delivered to us. If we would shipped the material by SEA it has taken up the same period. The whole purpose of doing shipment by AIR has been lost.

As a result Our Customer has refuse to pay Airfreight charges. So as discuss with you please file the claim against Lufthansa and the agencies involved to compensate for the delay and inconvenience caused in this matter.

Thanks & Regards Fri, Oct 6, 2017 at 10:53 AM, Khan, Sajida <csv1.bom@transmec.co.in>

d. Also, the letter dated 13.11.2017 sent by the Corporate Debtor to the Petitioner again confirms the existence of dispute before issuance of the demand notice. The said letter is extracted below:

13[TH] November 2017

To,
Transmec India Pvt. Limited.,
207, Wellington Business Park,
Marol Andheri Kurla Road,
Mumbai

This is with reference to your regular follow up on the payments of freight for the **AWB No: 020/76497680 & your house AWB No.: MIL/00059008 dated 21[st] September 2017**. We would like to apprise you that the said shipment was nominated to you under the promise made by you that the same will be delivered within 6 days and hence we agreed for a freight dictated by you.

We have been regularly informing you that the freight is declined by the end user stating the facts that the shipments came only after 21 -23 days owing the failure of your services and hence deficiency of services proved, You have been threatening us that you will sue us for no fault of ours and let us inform you that we have been importing materials since ages, but because you came to our office represented the high end services , we nominated your company to pick up the Air shipment.

Still as a upright customer we have done our inquiry with the Carrier " Lufthansa - Mr Hiren Joshi and he has accepted that the shipment was delayed and hence it was the duty of Your company Namely Transmec India Pvt Limited to put up a reverse claim on the airlines website which is online. We are shocked to know that this provision is there for you to recover the same, but you have been writing to us to pay the same. Hence if you are looking for a other means we too inform you that under Montreal Convention, we are also protected equally due to the huge losses we have suffered in our production and sales and if need be we shall contest at the appropriate authorities.

Extract of international Laws

Responsibility

-For the air transport, or airport-to-airport part, the contracting carrier (= the carrier who's (master) air waybill is used) as being the prime contractor is responsible towards shipper and consignee for the acts and omissions in the execution of the contract performed by its own employees and/or its agents. It is basically the task of the forwarder (as the agent for the shipper and/or consignee or end-customer), to file a claim at the airline in case something goes wrong.

Service. Safety. Style

for the forwarding, or the door-to-airport or airport-to-door part, the contracting forwarder (= the forwarder or NVOCC who's (house) air waybill is used) as being the prime contractor is responsible towards shipper and consignee for the acts and omissions in the execution of the contract performed by its own employees and/or its agents or subcontractors. In case something goes wrong in the whole contracted door-to-door transport, the party who contracted the forwarder (e.g. the shipper or the consignee) should claim a file at the forwarder for this.

Please also note that all additional charges (demurrages / terminal charges etc) due to the delay and shipment arriving in 2 parts will not be borne by us.

We request you to kindly take up the issues with the Airline and the concerned parties' involved in the above delays. We have already paid you a amount of RS.6,80,000/- in good faith .

Thanks and regards,
For SAFLOW PRODUCTS PVT.LTD

AUTHORISED SIGNATORY

e. It is beneficial to refer the judgement of the Hon'ble Supreme Court in the case of ***Mobilox Innovations Pvt. Ltd. v/s. Kirusa Software (P) Limited- 2017*** **(SCC Online SC 1154)** wherein in para no. 40, it was held as follows:

> *"40. It is clear, therefore, that once the Petitioner has filed an application, which is otherwise complete, the adjudicating authority must reject the application under Section 9(5)(2)(d) if notice of dispute has been received by the Petitioner or there is a record of dispute in the information utility. It is clear that such notice must bring to the notice of the Petitioner the "existence" of a dispute or the fact that a suit or arbitration proceeding relating to a dispute is pending between the parties. 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. The Court does not at this stage examine the merits of the dispute except to the extent indicated above. So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application."*

14. When the ratio laid down in the judgement cited supra is applied to the facts of the present case on hand wherein the Corporate Debtor vide email dated 01.11.2017 and 13.11.2017 clearly raised dispute regarding delay in delivery of goods which is prior to the issuance of demand notice dated 05.08.2018, thus tantamount to a pre-existing dispute between parties and the Petition deserves to be dismissed.

SD/-	SD/-
Chandra Bhan Singh	Suchitra Kanuparthi
Member (Technical)	Member (Judicial)