



**THE NATIONAL COMPANY LAW TRIBUNAL
“CHANDIGARH BENCH, CHANDIGARH”
(Exercising powers of Adjudicating Authority under
the Insolvency and Bankruptcy Code, 2016)**

**CP (IB) No. 56/Chd/Chd/2020
Under Section 9 of Insolvency and
Bankruptcy Code, 2016.**

In the matter of:

Chawla Silica Sand Trading Co.
A-1, Ekanki Kunj, 24, Muir Road
Prayagraj - 211001
(Uttar Pradesh)

...Petitioner-Operational Creditor

Vs.

Indo Farm Equipments Limited
SCO 859NAC
Kalka Road, Manimajra,
Chandigarh- 160101, India.

...Respondent-Corporate Debtor

Judgement delivered on: 21.02.2023

**Coram: Hon'ble Mr. Harnam Singh Thakur, Member (Judicial)
Hon'ble Mr. Subrata Kumar Dash, Member (Technical)**

For the Petitioner-
Operational Creditor : Mr. Sarthak Gupta, Advocate

For the Respondent-
Corporate Debtor : Mr. Atul V. Sood, Advocate

Per: Harnam Singh Thakur, Member (Judicial)

JUDGMENT

The present petition is filed, under Section 9 of the Insolvency and Bankruptcy Code, 2016 (**for brevity 'IBC' / 'Code'**), by **Chawla Silica Sand Trading Co.** through its partner, Bharat Bhushan Chawla (**for brevity 'Operational Creditor' / 'Petitioner'**), with a prayer to initiate Corporate



Insolvency Resolution Process (**CIRP**) in case of **Indo Farm Equipments Limited (for brevity 'Corporate Debtor' / 'Respondent')**.

2. The Corporate Debtor, namely, Indo Farm Equipments Limited, is a Company incorporated on 05.10.1994 under the provisions of the Companies Act, 1956 with CIN No. U29219CH1994PLC015132 with its registered office at SCO 859 NAC, Kalka Road, Manimajra, Chandigarh-160101, India. Hence, the territorial jurisdiction lies with this Adjudicating Authority. A copy of the master data of the corporate debtor is attached with the main petition and marked as Annexure-O.

3. The facts of the case, briefly, as stated in the petition are that the principal amount of Rs. 68,49,848/- (Rupees Sixty Eight Lakhs Forth Nine Thousand Eight Hundred Forty Eight Only) was due and payable towards the supply of Silica sand by an operational creditor to the corporate debtor for which various invoices were raised. The payment was required to be made within 30 days of delivery and all products were delivered till 16.10.2019. The corporate debtor had acknowledged its liability to make payments vide e-mail dated 02.11.2019. Despite multiple requests, no payments were made by the corporate debtor. The corporate debtor assured that part-payment will be made in the month of October 2019. The orders had been placed by the corporate debtor on an operational creditor for the supply of products consistently till 16.10.2019. The operational creditor informed the corporate debtor that amounts are due through various e-mails. In response to e-mails, no dispute had ever been raised by the corporate debtor. Therefore, no payments were received from the corporate debtor.



The respondent-corporate debtor has filed suit for recovery in the Court of Ld. Civil Judge (Senior Division), Chandigarh bearing No. CS/2129/2019.

4. It is submitted by the petitioner in Form 5, Part IV that the amount claimed to be in default principle amount is Rs. 68,49,848/- (Rupees Sixty Eight Lakhs Forth Nine Thousand Eight Hundred Forty Eight Only). The default occurred on 16.10.2019 i.e. when the last invoice was raised upon the corporate debtor as interstate sales (GST). Copy of ledger Account (Annexure A), Plaint dated 14.11.2019 registered as CS/2129/2019 filed before District Court, Chandigarh by the corporate debtor (Annexure H), Ledger Account Statement along with plaint filed by the corporate debtor (Annexure I), Purchase Orders (Annexure L), Partnership Deed dated 01.04.2015 (Annexure N) are attached with the main petition.

5. A demand notice is stated to be issued by the operational creditor on 12.11.2019 through email (Annexure-E) and on 15.11.2019 through registered post, delivery report and tracking receipts are attached at Annexure-F of the petition. The corporate debtor gave a reply dated 18.11.2019 to demand notice wherein it was stated that the civil suit no CS/2129/2019 is pending in District Court, Chandigarh, notice had already been issued in it, sending demand notice is in violation of Section 8(2) of the IBC Code. If there is a pre-existing dispute between the parties then no demand notice can be raised. As per the books of accounts, an amount of Rs. 9,82,835/- is outstanding against the operational creditor for which a recovery suit along with 18% interest is pending before the District Court (Annexure-G).



6. The notice of this petition has been issued to the corporate debtor to show cause as to why this petition be not admitted. The affidavit of service was filed vide Diary No 00244/1 dated 05.01.2022. The corporate debtor has filed a reply vide diary No.00244/2 dated 27.05.2022, wherein it is stated that there is a pre-existing dispute between the parties and sum of Rs. 9,82,835/- is due to the respondent from the petitioner. No amount is due which is to be paid to the petitioner. The petitioner having failed to make due payments, the respondent has filed suit for recovery in Court of Ld. Civil Judge (Senior Division), Chandigarh and the same is pending. The petitioner had not filed an affidavit stating that there is no pre-existing dispute. The Ledger Account submitted by the petitioner is fabricated. The petitioner has over invoiced its bills in contravention of purchase orders in breach of faith and trust. The purchase orders issued by the Respondents (Annexure-L to the petition) clearing included a binding clause which is reproduced as under "*This order is placed on your commitment that price given by you in no way would be more than Market/OEM price. Penalty clause would be applicable if price charged more than OEM Price*". It was one of the most critical commercial and binding clauses. The respondent came to know that the petitioner is billing the material by two times of market price in the purchase orders. The respondent sent a Legal Notice dated 19.10.2019 after adjusting the higher prices charged by the petitioner whereby a demand of the sum of Rs. 9,82,835/- was raised by the respondent. The petitioner after realising the same, vide e-mail dated 23.10.2019 stated that they have reduced the rates. In the meeting held on 12.11.2019, the invoices were shown to the petitioner and he was confronted with the huge difference between the market price



and the price built by the petitioner. In the meeting held on 12.11.2019, the petitioner refused to correct the overdoing. Resultantly, Civil Suit was filed before Civil Judge (Senior Division) Chandigarh by the respondent.

7. The rejoinder was filed vide Diary No.00244/3 dated 02.09.2022, wherein it is stated that the civil suit relied upon by the corporate debtor to claim pre-existing dispute between the parties was filed only after the receipt of the demand notice dated 12.11.2019. In relation to the price charged higher, each and every purchase order contained the price at which the corporate debtor was buying the silica sand from the operational creditor. The corporate debtor cannot at a later point in time after accepting the delivery of silica, claim that the price charged by the operational creditor was higher than the market price. The operational creditor is not an original equipment manufacturer (OEM) to which the said clause is applicable. Further, the clause does not lay down parameters for determining what the OEM price is and it cannot be a unilateral determination at the end of the corporate debtor. Also, it does not define 'penalty'. The alleged rates as offered by competitors do not provide certain issues:- whether it is inclusive of freight or not, source, state from which the silica sand will be procured and quality of the sand provided. Therefore, the quotations pertaining to the Year 2018-19 cannot be compared with the operational creditor's price stretching over five year period i.e. from 2014 to 2019. The rates mentioned by the corporate debtor are of stone dust and not silica. None of the amounts claimed by the petitioner are time-barred as there was a running account between the parties and the corporate debtor had acknowledged the debt multiple times. The invoices raised by the operational creditor included GST



and the corporate debtor claimed GST Input Credit on them. The ledger was prepared by the operational creditor on such invoices. In relation to the over-invoicing of the bills, the operational creditor in good faith and based on a long-lasting professional relationship agreed to reduce the rates. The operational creditor received no notice from the corporate debtor before sending the demand notice.

8. The short written submissions have been filed by petitioner-operational creditor vide Diary No. 00244/5 dated 02.11.2022 and by respondent corporate debtor vide diary No. 00244/4 dated 01.11.2022.

9. We have heard the learned counsel for the petitioner and corporate debtor and have perused the records.

10. The first issue for consideration is whether the demand notice was properly served. The demand notice dated 12.11.2019 was served through email (Annexure-E) and on 15.11.2019 through registered post, delivery report and tracking receipts are attached at Annexure-F of the petition. The corporate debtor gave a reply dated 18.11.2019 to demand notice. Therefore, the demand notice was duly served.

11. The other issue for consideration is whether this application is filed within limitation. A demand notice issued dated 12.11.2019 served through email (Annexure-E) and dated 15.11.2019 served through registered post, delivery report and tracking receipts are attached at Annexure-F of the petition. Therefore, the period of limitation would begin from the date of default i.e. 16.10.2019 i.e. when the last invoice was raised upon the corporate debtor as interstate sales (GST). This application was filed vide Diary No. 7271 on 18.12.2019 and was re-filed on 15.11.2020 vide Diary



No.361. Therefore, this Adjudicating Authority finds that this application is filed within limitation.

12. The next issue for consideration is whether the operational debt was disputed by the corporate debtor. With respect to the contention raised by the corporate debtor in his reply regarding the pre-existing dispute between the parties and no affidavit under Section 9(3)(b) is filed by the operational creditor. However, it is seen from the records that the affidavit under section 9(3)(b) was filed vide Dairy No. 991 dated 05.02.2020 by the operational creditor deposing that no notice was given by the corporate debtor in terms of Section 8(2)(a) of the Insolvency and Bankruptcy Code, 2016 nor any payment of the unpaid operational debt was made to the operational creditor. It is further deposed that no issues or concerns with respect to the delivery/quality of goods have ever been raised by the corporate debtor. Another contention raised by the corporate debtor is with respect to the sum of Rs. 9,82,835/- which was due to the respondent from the petitioner and a civil suit for recovery was filed and is pending before Ld. Civil Judge (Senior Division), Chandigarh bearing No. CS/2129/2019. It is contended by Ld. counsel for petitioner that the civil suit (dated 14.11.2019) relied upon by the corporate debtor to claim pre-existing dispute between the parties was filed after the receipt of the demand notice dated 12.11.2019. However, contention of Ld. counsel for petitioner is not much convincing because the operational creditor through Mr. Bharat Chawla attended the meeting dated 12.11.2019. A civil suit for recovery of Rs.9,82,835/- due to higher prices charged by petitioner was filed before Ld. Civil Judge (Senior Division), Chandigarh bearing No. CS/2129/2019 dated 14.11.2019 which is still



pending. The demand notice was sent after the meeting through email on 12.11.2019 and through registered post on 15.11.2019 after filing of Civil Suit on 14.11.2019. The petitioner after realising the higher prices, vide e-mail dated 23.10.2019 stated that they have reduced the rates. In the meeting held on 12.11.2019, the invoices were shown to the petitioner and he was confronted with the huge difference between the market price and the price charged by the petitioner.

13. It is admitted fact that the petitioner-operational creditor reduced the rate of Silica Sand. Although, in its rejoinder, the explanation given by the operational creditor is that the rates were reduced in good faith keeping in view the long-lasting professional relationship between the parties. The petitioner has also denied receipt of legal notice dated 19.10.2019 when a demand of Rs.9,82,835/- was raised by the respondent corporate debtor after adjusting the higher rates/prices of Silica Sand charged by the petitioner-operational creditor. If at all petitioner has not received such legal notice, then there was no reason to reduce the rates vide email dated 23.10.2019 sent by the petitioner-operational creditor. It is further admitted fact that the meeting held between the parties on 12.11.2019 in which Mr. Bharat Chawla a Representative of the petitioner-operational creditor attended the meeting. Since the parties failed to arrive at some amicable settlement/resolution of disputes. Therefore, in tearing hurry petitioner sent the demand notice on 12.11.2019 itself through email whereas the demand notice through the registered post was sent on 15.11.2019. Before that respondent-corporate debtor after taking legal advice had filed Civil Suit No. CS/2129/2019 on 14.11.2019 in the Court of Ld. Civil Judge (Senior



Division), Chandigarh. This chronological development of the facts shows that there was pre-existing dispute between the parties about the rates of the Silica Sand supplied by the petitioner-operational creditor. Whether particular terms and conditions in the agreement were applicable to the parties would be decided by the Civil Court, Chandigarh. Be that as it may, but before this Bench, the application under Section 9 of the Code is not maintainable in presence of pre-existing dispute. Reliance has been placed upon by learned counsel for the respondent-corporate debtor in the matters of ***Mobilox Innovations Private Limited Vs. Kirusa Software Private Limited, Civil Appeal No.9405 of 2017 dated 21.09.2017 and Rajratan Babulal Agarwal Vs. Solartex India Pvt. Ltd. and Ors., Civil Appeal No.2199 of 2021 decided on 13.10.2022 by Hon'ble Supreme Court of India.*** He has also placed reliance upon ***Talbot & Company Vs. Austin Distributers Pvt. Ltd. passed by Hon'ble NCLAT, New Delhi in Company Appeal (AT) (Ins.) No.1470 of 2022 dated 10.01.2023.*** In the last mentioned authority, it has been held by the Hon'ble NCLAT *"that it is well settled that in Section 9 proceedings the Adjudicating Authority is not to enter into final adjudication with regard to existence of dispute between the parties regarding operational debt. What has to be looked into is whether the defence raises a dispute which needs further adjudication by a competent Court. Disputes pertaining to contractual issues are not to be resolved in Section 9 proceedings. If we apply the test laid down in Mobilox by the Hon'ble Apex Court to the facts of the present case, it is clear that the defence raised by the corporate debtor in their reply filed in Section 9 application is not illusory or moonshine. The present is neither a case where there is undisputed debt for which*



insolvency can be asked by the appellant to be initiated. The Adjudicating Authority has, therefore, correctly applied the ratio of the Mobilox Judgment in dismissing the Section 9 application. The foregoing reasons, we are of the view that the Adjudicating Authority has rightly dismissed the application of the appellant filed under Section 9 of IBC. We are satisfied that the impugned order does not warrant any interference.”

14. Turning to the facts of the case in hand, we are of the considered view that there is a pre-existing dispute with respect to the price of Silica Sand charged by the petitioner and the same is pending before a Civil Court which is competent to adjudicate upon the controversy considering claim and counter-claim of the parties. Thus, the application filed under Section 9 of the Code is not maintainable before us in presence of a pre-existing dispute. Consequently, the present application under Section 9 is rejected and dismissed with cost of Rs.5,000/- to be deposited in Prime Minister Cares Fund.

-sd-
(Subrata Kumar Dash)
Member (Technical)

-sd-
(Harnam Singh Thakur)
Member (Judicial)

February 21, 2023
SM/TB