



IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-IV

CP (IB) No.903/MB-IV/2022

Under Section 9 of the IBC, 2016

In the matter of

Korea Trade Insurance Corporation

[Business Registration No: 102-82-06816]

...Operational Creditor

v/s.

Amrit Polychem Private Limited

[CIN: U24233MH2012PTC228844]

...Corporate Debtor

Order Delivered on: 02.08.2023.

Coram:

Mr. Prabhat Kumar
Hon'ble Member (Technical)

Mr. Kishore Vemulapalli
Hon'ble Member (Judicial)

Appearances (via videoconferencing):

For the Operational Creditor:

Mr. Rajeev a/w Mr. Khursheed, Ld.
Counsel.

For the Corporate Debtor:

Mr. Nausher Kohli a/w Mr. Pranav
Avhad and Mr. Darshna Naval, Ld.
Counsel.



ORDER

Per: Prabhat Kumar, Member (Technical)

1. This is a Company Petition filed under section 9 of the Insolvency & Bankruptcy Code, 2016 (IBC) by Korea Trade Insurance Corporation (“the Operational Creditor”), seeking initiation of Corporate Insolvency Resolution Process (CIRP) in the matter of Amrit Polychem Private Limited, the Corporate Debtor.

1.1. The Company Petition is filed on 21/07/2020 claiming an amount of Rs. 1,92,46,284/- in default. The date of default as specified in Part IV of the petition is 29.07.2017 (*As per the Proforma Invoice No. JT-17-04-21-AMRIT dated 21.04.2017 and Commercial Invoices No. JT-17-04-21 AMRIT dated 29.04.2017, the Corporate Debtor had to pay the aforesaid Operational Debt amount within 90 days of the issuance of Bill of Lading dated 29.04.2017, i.e. on or before 28.07.2017*).

2. The Corporate Debtor approached JT Corporation (Insured) for supply of certain goods (hereinafter referred to as 'said goods') to be supplied and shipped to the Corporate Debtor in India. M/s. JT Corporation supplied and delivered the certain goods to the Corporate Debtor in India, in accordance with their specifications and requirements as stated in its purchase order and raised invoices for the shipping and delivery of goods.

2.1. However, the Corporate Debtor failed to make payment for the outstanding sum. The Corporate Debtor admitted its complete liability towards the Insured, M/s JT Corporation. vide its email dated September 26, 2017 (addressed to the Applicant) and assured that all outstanding payments shall be made.



- 2.2. The aforesaid transaction was insured by the Applicant, Korea Trade Insurance Corporation (K-Sure), who is one of the official Export Credit Agencies wholly operated by the Korean Government. The Applicant herein had been continuously involved and assisting M/s JT Corporation following up the matter with the Corporate Debtor. The Corporate Debtor had been aware of the Applicant and has in this respect also communicated with the Applicant on various occasions.
- 2.3. That the Applicant reimbursed M/s JT Corporation, the loss caused to them in the aforesaid transaction and pursuant thereto, M/s JT Corporation had assigned all its rights against the Corporate Debtor under or in relation to the aforesaid Sales, including the right to recover the aforementioned outstanding amount from the Corporate Debtor, in favour of the Applicant herein, vide a Letter of Assignment dated December 20, 2017.
- 2.4. It is submitted that despite the assurances given by the officials of Corporate Debtor, it has failed and wilfully ignored to make any further payment to the Applicant. The Applicant being aggrieved by the conduct of the Corporate Debtor and feeling cheated at the hands of Corporate Debtor, despite it showing good faith and belief, issued a demand notice dated October 3, 2019 under section 8 of the Insolvency and Bankruptcy Code, 2016 ("Statutory Demand Notice") to the Corporate Debtor, through its Counsel, calling upon it to make the full and final payment of its admitted outstanding to the Applicant.
- 2.5. That the Corporate Debtor failed to respond to the Statutory demand Notice within the mandatory 10 days period of receipt of the notice and also failed to make the payment of the outstanding dues within the said permitted period. The Corporate Debtor, however, sent a reply dated 1.12.2019 through its Counsel. The Corporate Debtor in the above stated reply raised



certain irrelevant facts regarding some vague dispute about some previous transactions between the Corporate Debtor and M/s JT Corporation. The Corporate Debtor also refused to accept the assignment of debt to the Applicant. It is, however, pertinent to mention that the Corporate Debtor did not deny its liability for the specific amount as claimed by the Applicant, which was acknowledged vide its email dated 26.09.2017. The reply of the Corporate Debtor was rebutted and responded by the Applicant through its Counsel on 07.01.2020.

3. The Corporate Debtor vide its affidavit in reply dated 01.05.2023 states that there is a pre-existing dispute between the parties, accordingly CIRP cannot be initiated against the Corporate Debtor on account of existence of dispute ; the Operational Creditor has suppressed material facts pertaining to pre-existing disputes between the parties; the purpose of the code is not to be used as Debt Recovery Mechanism; and the petition is barred by limitation.
4. The Operational Creditor has filed rejoinder dated 13.06.2023 stating that is abundantly clear that the default has occurred under the code and occurrence of such default is not in dispute; the Hon'ble Supreme Court in the case of *E S Krishnamurthy & Ors vs. M/s Bharath Hi Tech Builders Pvt. Ltd, (2022) 3 SCC 161* has held that the Adjudicating Authority must either admit or reject any application and cannot compel a party to the proceedings before it to settle a dispute; there is no pre-existing dispute and any existing dispute that the Corporate Debtor may or may not have with any other entity cannot be a ground to disallow the captioned application of the Operational Creditor; the present petition is maintainable under IBC and is not barred by limitation. The Corporate Debtor has concealed the existence of email dated 26.09.2017 to the applicant admitting that the Corporate Debtor has failed to pay the amount due to the insured and they had no intentions to hold the payment.



Findings:

5. We have heard the arguments of Learned Counsel for Operational Creditor and the Corporate Debtor.
- 5.1. This bench finds that section 5(20) of the Code defines Operational Creditor to include any person to whom an Operational Debt has been legally assigned or transferred. In this case it is not in dispute that the amount of debt is an Operational Debt qua Insured, and such debt came to be assigned to the applicant under the contract of insurance. Accordingly, the applicant is an Operational Creditor.
- 5.2. As per material on record the Operational Creditor has placed reliance on the email dated 26.09.2017, which shows admission of liability on the part of Corporate Debtor in relation to the amount claim to be due in the present petition, however, the said email also indicates the existence of a counter claim of the Corporate Debtor on the insured which pertains to another transaction. This bench finds the principal issue for consideration in the present petition is whether an admitted debt arising from a transaction can be said to be in dispute if the Corporate Debtor had an uncrystallised counter claim against the insured in relation to another transaction.
 - 5.2.1. From the perusal of email dated 26.09.2017 relied upon by the Operational Creditor to plead acknowledgement of debt by the Corporate Debtor, this bench notices that this email was addressed to the applicant and conveys the existence of unsettled counter claim in relation to another transaction. This email was sent by the Corporate Debtor to the applicant in response to its email dated 26.09.2017 seeking clarification on the reason for non -payment and other connected facts. The contents of the emails are reproduced here as under –

IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-IV

CP (IB) No.903/MB-IV/2022

----- Forwarded Message -----

From: Abhishek Aggarwal <abhishek.aggarwal@ksure.or.kr>

To: appl@ymail.com

Cc: hemant@amritpolychem.com; appl@ymail.com; sales@induschem.com; info@induschem.com; 박장희/뉴
델리지사 <pjh0449@ksure.or.kr>; amritchm@vsnl.com

Sent: Tuesday, 26 September 2017 2:01 PM

Subject: Re: Unsettled Transactions between JT Corporation, Korea and Amrit Polychem Private Limited, India.

Dear Mr. Mukesh Amritlal Bakhai,

As per our discussion regarding the unpaid transaction in the subject matter, I like to ask you some questions as follows,

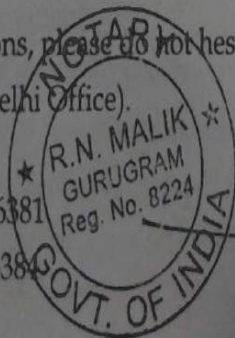
Ksure Questionnaire

- The reason for nonpayment
- The final locations of exported goods
(does your company still have them or already sold them out, any inventories or in customs?)
- Your company business operations and financial situation at the moment
- For how long your company has trade relations with the exporter?
- Any other business or relations except the above between your company and the exporter.
- Your payment schedule regarding the above transactions
- Any side contracts which mitigates your payment liabilities?
- others

If you have any questions, please do not hesitate to contact me or Mr. Jang Hee Park (Chief Representative, New Delhi Office).

Phone No: 91-124- 410 6381

Fax No : 91-124- 410 6384



IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-IV

CP (IB) No.903/MB-IV/2022



EXHIBIT F 40

RE: Unsettled Transactions between JT Corporation, Korea and Amrit Polychem Private Limited, India.

From "Hemal Parekh" <hemal@amritpolychem.com>
To "Abhishek Aggarwal" <abhishek.aggarwal@ksure.or.kr>
Cc. appl@ymail.com, sales@induschem.com, info@induschem.com

2017-09-26 17:43 (GMT +0530)


Dear Sir,

With reference to your below , we would like to inform you that we are in business relationship with JT Corporation since 2015 and we had done volume business with them till date and our all payment made to them are on time as per due date. We had booked 40 Mts of TOLUENE DIISOCYANATE 80/20 at USD 3100/MT totaling to USD 124000.00 vide their Offer No. JT-17-01-02-AMRIT Dt. 02/01/2017 to be shipped on or before 31/01/2017 as per contract copy of the same is attach for your ready reference. After that when we asked for shipping schedule to their Agent Induschem on 19/01/2017 they informed that OCI has gone shutdown and shipment will take place around 10/02/2017. This are all are not true reason for delay in shipment by that price of raw material increased lot and they purposely not honor their commitment due to which we have incurred huge loss as we have to buy from local market at Higher price to fulfil our commitment given to our customers. At present market price of material is around USD 4800.00 I,e increased by USD 1700/-PMT Totaling for 40 Mts difference will be USD 68000.00 . We are in market from last 38 years & we never fail in our commitments to our customers as well as our suppliers. We had good reputation in market. We had write many email to them to settle the issue but they are not willing to settle and giving false statement . Even though we had order another product Polymeric MDI M-200 100 MTS @USD 2850.00 PMT Totaling to USD 285000.00 which they shipped Vide their Invoice No. JT-17-04-19-AMRIT Dt.29/04/2017 for USD 114000.00 & JT-17-04-21-AMRIT Dt.29/04/2017 for USD 171000.00 which is due for payment after 90 days from BL Date I,e on 28/07/2017 during this period also we requested them to settle the issue but they have not take any action.


Even though we had paid Invoice of USD 114000.00 on 03/08/2017 which clearly shows our intention that we are not willing to hold their payment or not interested in refusal of payment but as businessmen they should also have some ethics and have to accept our loss claim & settle the same so that we can release their payment but they have not willing to do so. We had also paid payment of other business deal of USD 98560.00 on due date of 19/09/2017. We are enclosing herewith copy of ledger of JT Corporation from 01/04/2016 till date for your reference.

We hope that you will understand our situation & position in this deal.

Best Regards,
Hemal Parekh



AMRIT POLYCHEM PVT LTD
JP-349, OPP APNA BAZAR,
NEAR JAIN MANDIR,
NEAR D.N. NAGAR METRO STATION,
ANDHERI (W), MUMBAI-400053
TEL: 76245127/4787162/8636970
FAX: 2626870/IGRAM
Call: 9819186604 8224
EMAIL: hemal@amritpolychem.com
PIN No: 054236MBR012PTC228844



Insurance
[Signature]
[Stamp]

Notarially Certified & Attested to be True Copy of the Original

R.N. MALIK, ADVOCATE
NOTARY, GURUGRAM, HR. (INDIA)

15 JUL 2020



5.2.2. It is also noticed that the assignment in favour of applicant by the insured took place 20.12.2017, which is the date after the aforesaid email communication between the parties to the present proceedings. The applicant, in the present case, stepped in to the shoes of the insured on the principle of subrogation as prevalent under the Contract of Insurance, whereby the insurance company, in the present case applicant, gets right to recover the amount from the debtor due to the insured upon payment of said debt under insurance to the insured in terms of Contract of Insurance. It follows therefrom that the applicant was aware of existence of counter claim of the Corporate Debtor, on account of non-settlement of which the Corporate Debtor had withheld the amount of debt claimed to be in default in the present petition. Accordingly, this bench is of the considered view that there exists a prior dispute and the existence of the dispute was in the Knowledge of the applicant before stepping into the shoes of the Insured. The Corporate Debtor has relied on *Gajendra Parihar v Devi Industrial Engineers [2020 SCC online NCLAT, Hon'ble NCLAT while determining the existence of a pre-existing dispute observed as follows:*

“The exchange of different email between the parties as referred above, it clearly establishes that there was pre-existing dispute between the parties regarding services rendered and the Corporate Debtor had continuously through Emails referred to page 250,251, and 252 made complaints regarding the deficiency of services and loss caused to the project and bill raised by the Operational Creditor/Respondent No. 1”

5.2.3. It is also worthwhile to note that the demand notice u/s 8 of the Code was sent on 03.10.2019, which is after the date of communication

between the parties to the present petition, accordingly, even failure to respond within 10 days of the said notice on the part of Corporate Debtor cannot negate the fact of existence of prior dispute. The Corporate Debtor has relied on *Brand Realty Services Ltd. v Sir John Bakeries India Pvt. Ltd. [2022 SCC online NCLAT 290]*, has held that

“The statutory scheme under Section 8 and 9 does not indicate that in an event Reply to Notice is not filed within 10 days by Corporate Debtor or no Reply to Notice under section 8(1) have been given, the Corporate Debtor is precluded from raising the question of dispute.

..... We thus are of the considered opinion that mere fact that Reply to notice under section 8(1) having not been given within 10 days or no reply to demand notice having been filed by the Corporate Debtor does not preclude the Corporate Debtor to bring relevant materials before the Adjudicating Authority to establish that there are pre-existing dispute which may lead to rejection of Section 9 application”

5.2.4. It is trite law that an Application under Section 9 of the Code cannot be admitted in relation to disputed debt as held by the Hon’ble Supreme Court in *Mobilox Innovations Private Limited vs. Kirusa Software Private Limited* held that, in the event there is a pre-existing dispute between the parties, an Application under Section 9 of the Code would have to be rejected.

5.2.5. The question ‘whether the Corporate Debtor has a right to withhold payment of the undisputed debt in a transaction on the ground of unsettled counter claim against the insured in relation to another transaction’ requires adjudication as to whether the Corporate Debtor

can be said to have the right to withhold the undisputed debt pending settlement of its counter-claim in relation to another transaction, even if such claim is still not crystallised, to appropriate its counter-claim against the debt claimed to be in default in the present petition?

5.2.6. It is trite law that a petition u/s 9 does not lie in case there exists a prior dispute. Accordingly, this petition is not maintainable u/s 9(3)(b) of the Code.

5.3. Nonetheless, the reliance of the applicant on email dated 26.09.2017 to extend the limitation on the ground of acknowledgement of debt vide said email, is misplaced as the Corporate Debtor has specifically stated that “*we are not willing to hold their payment or not interested in refusal of payment but as businessman they should also have some ethics and have to accept our loss claim & settle the same so that we can release their payment but they have not willing to do so. We had also paid payment of other business deal of USD 98560.00 on due date of 19/09/2017.*” This statement cannot be taken as an acknowledgement of debt so as to extend the period of limitation.

5.4. In view of the above, we find that the present case is fit for dismissal under Section 9(5)(ii)(d) read with Section 8(2)(a) of the Insolvency and Bankruptcy Code, 2016 in view of pre-existing dispute between the parties, which requires adjudication which is beyond the powers vested in this Bench in proceedings arising from an application filed under sec. 9 of the code and deserves to be **Dismissed**.

ORDER

6. The petition bearing C.P. (IB) No. 903/MB/C-IV/2022 under section 9 of the Insolvency & Bankruptcy Code, 2016 (IBC) filed by Korea Trade Insurance Corporation (“the Operational Creditor”), seeking initiation of Corporate



Insolvency Resolution Process (CIRP) in the matter of Amrit Polychem Private Limited, the Corporate Debtor is **dismissed**.

7. We make it clear that any observations made in this order should not be construed as expressing opinion on merits. The right of the petitioner before any other judicial forum shall not be prejudiced on the grounds of dismissal of the present petition as it barred by the law.

Sd/-
PRABHAT KUMAR
MEMBER (TECHNICAL)
02.08.2023.

Sd/-
KISHORE VEMULAPALLI
MEMBER (JUDICIAL)