

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

CP (IB) No. 40/Chd/Hry/2019

**Under Section 7 of the
Insolvency & Bankruptcy
Code, 2016**

In the matter of:

**Maersk Trade Finance A/S, Denmark
(Formerly known as Sunrise 14 A/S)**

having its Registered office at:
Esplanaden 50,
1263, Kobenhavn K, Denmark

....Petitioner-Financial Creditor

Vs.

Arcotech Limited

having its Registered Office at:
181, Sector-3,
Industrial Growth Centre, Balwal-123501
District Rewari, Haryana, India.

...Respondent-Corporate Debtor

Judgment delivered on: 12.09.2023

**Coram: HON'BLE MR. HARNAM SINGH THAKUR, MEMBER (JUDICIAL)
HON'BLE MR. SUBRATA KUMAR DASH, MEMBER (TECHNICAL)**

Present :

For the Petitioner-Financial Creditor : Mr. Raghav Kapoor, Advocate

For the Respondent-Corporate Debtor : 1) Mrs. Munisha Gandhi, Senior
Advocate
2) Mr. Raghav Kakkar, Advocate

PER: HARNAM SINGH THAKUR, MEMBER (JUDICIAL)

JUDGMENT

The present petition has been filed by Maersk Trade Finance A/S (hereinafter referred to as 'Petitioner/Financial Creditor') through Manmohan Menon under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as 'Code') read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 to initiate the Corporate Insolvency Resolution Process ('CIRP') against Arcotech Limited (hereinafter referred to as 'Respondent/Corporate Debtor'). The petition is signed by Ms. Kanishka Chaudhary

2. The Corporate Debtor is stated to be incorporated on 13.08.1981. The company having its registered address at Industrial Growth Centre, District Rewari, Haryana. Therefore, the jurisdiction lies with this Bench of the Tribunal. The master data of the corporate debtor is stated to be filed as Annexure-1(B) of the petition.

3. The brief facts of the case are that the Trade Facility Agreement dated 18.04.2017 read with the Assignment deeds dated 22.12.2017, 26.12.2017, 27.12.2017, 05.02.2018, and 06.02.2018 both were executed between the parties. The facility extended under the agreement was capped at USD 1,000,000/-. The individual loan extended shall not exceed 80% of the invoice amount.

In accordance with Clause 3.1 (d) of the Agreement, it is stated that "*For the avoidance of doubt, all Disbursement made under this Facility shall be on a with recourse basis to the Seller.*" Clause 5.4 of the Agreement which inter alia provides that in the event the Purchase Price is not received by the Financial

Creditor from the buyer on the Due Date, the Corporate Debtor shall be liable to make payment to the Financial Creditor to the extent Upfront Payment made under a Receivable along with interest, default interest, overdue interest and all other related costs and charges as applicable to the Financial Creditor. In accordance with Clause 2 of the Assignment Deed, the Corporate Debtor assigned all rights to the Financial Creditor with respect to the payments under the Invoice.

It was a discounting facility on a recourse basis. A total 14 disbursement requests were made by the corporate debtor on the basis of purchase orders entered between Maximum International General Trading LLC and the corporate debtor. POs being issued by the buyer, the corporate debtor raised invoices upon the buyer for goods to be supplied. On December 27, 2017, and on February 06, 2018, Upfront Payment aggregating to USD 856,006 being 80% of the total Invoice values was accordingly disbursed by Financial Creditor to the Corporate Debtor. In accordance with the Assignment Deeds, the due date for payment to be made by the Buyer was 90 days from the Bill of Lading date. Payments under the Invoices EXP/17-18/029 to EXP/17-18/033, EXP/17-18/034 to EXP/17-18/038, and EXP/17-18/039 to EXP/17-18/042 were due on April 9, 2018, April 16, 2018 and May 21, 2018 respectively. However, till date, the Financial Creditor has not received the payments due to them. A demand notice dated 11.05.2018 was served. However, there was no reply. Thereafter, legal notice dated 29.06.2018 was served. The corporate debtor vide letter dated 12.07.2018 responded to the legal notice and denied all its liabilities under the Agreement read with the assignment deeds. Financial creditor responded to the reply vide letter dated 27.07.2018 stating that the corporate debtor is liable to make payments. A notice

dated 27.08.2018 was issued by the Advocate on behalf of the corporate debtor towards the financial creditor.

4. It is stated in Part-IV of Form No.1 that the petitioner has provided a loan amount of USD 903,028 (Including LIBOR interest and default interest till 31 October 2018) and the date of default is 21.05.2018 i.e. the date on which the Invoice No. EXP/17-18/039 to EXP/17-18/042. Copies of Trade Finance Facility Agreement dated 18.04.2017 (Annexure-I (D)), assignment deeds (Annexure-I (E)), Invoices (Annexure-I(H)), Notice of assignment (Annexure-I (I)), Acknowledgment of notice of assignment dated 16.07.2017 (Annexure-I (J)), 14 notices of assignment (Annexure-I (K)), Transaction details for disbursement on 27.12.2017, .2018 (Annexure-I (L-N)), Bill of lading (Annexure-I (O,T,Y)), letter addressed by Musafir Trave LLC to Maersk Line dated 21.01.2018, 04.02.2018 (Annexure-I(R,W)), letter addressed by buyer to Maersk Line dated 04.02.2018, 28.02.2018 (Annexure-I(V,AA)), Letter of guarantee (Annexure-I(S,X, CC)), letter addressed by Euro Star World FZE to Maersk Line dated 28.02.2018 (Annexure-I(BB)), Delivery Order Nos. 1800091047 dated 05.02.2018, 1800154484 dated 28.02.2018 (Annexure-I(Z)), Statement of Bank Account (Annexure-I(JJ, KK)).

5. The notice of this petition was issued to the respondent corporate debtor to show cause as to why this petition be not admitted. The Affidavit of Service was filed vide Diary No. 1757 dated 05.04.2019. The reply was filed vide Diary No. 23.05.2019 wherein it is stated that there are no monies either due or payable by the respondent to the petitioner, therefore, there is no question of the default. The petitioner owes the respondent a substantial sum of money on account of a breach of understanding between the parties. The documents annexed show that

there is no debt due from the respondent. The dispute can only be resolved through civil court. The trade facility agreement is an unsigned, unexecuted document. The bill of lading shows that the goods in question were being transported through the vessel of the petitioner. It is denied that the agreement between the parties provides that in the event the purchase price was not received by the petitioner from the buyer on the due date, the respondent would be liable to make the payment to the financial creditor. The petitioner would have to recover the balance 20% of the consideration amount from the buyer and to make over same to the respondent after deducting its costs, expenses and charges.

6. The rejoinder was filed vide Dairy No. 3298 dated 09.07.2019 wherein it is stated that the Agreement, Assignment Deed and other documents in connection therewith are digital in nature and have been entered into between the parties electronically. Hence, execution of the aforesaid documents has been effected in a digitized form on a secure electronic portal as opposed to a physical form with a hand signature. The 14 disbursements made under the Agreement are preceded by a First Disbursement. The Notice of Assignment (First Disbursement) dated June 20, 2017, was issued by the Corporate Debtor the receipt thereof was duly acknowledged in electronic form by the Buyer on 16.07.2017. On June 21, 2017, the Financial Creditor disbursed an amount of USD 241,271 to the Corporate Debtor, as the First Disbursement. Thereafter, in accordance with the terms of the Agreement and Assignment Deed, on October 2, 2017, the Buyer made payment of the Purchase Price (i.e. Invoice amount) for an amount of USD 312,166. Accordingly, pursuant to the First Disbursement, all payments from the Buyer under the Agreement were received by the Financial Creditor. After retaining the Spread (i.e. fees, interest charges and the one-time line opening fee for the grant

of the facility), the balance amount of USD USD 59,380 was repaid to the Corporate Debtor by the Financial Creditor on October 4, 2017. In view of the aforesaid, the Corporate Debtor is stopped from disputing the legality and validity of the Agreement. There is an amount due and which amounts to default. Having a financial creditor as a consignee is standard business practice which has also been employed by the parties involved. The financial creditor is in the business of providing trade finance solutions to its customers and does not undertake any shipping business. The relevant goods have been shipped through another company namely 'Maersk Line' and is the separate legal entity from the Financial Creditor. The Financial Creditor and Maersk Line are each an A.P. Moller Entity.

7. The short written submissions are filed by petitioner-financial creditor vide Dairy No. 01200/3 dated 08.12.2022 which was re-filed vide Dairy No. 01200/4 dated 12.12.2022 and vide Dairy No.01200/3 dated 19.09.2022. The short written submissions are filed by the respondent-corporate debtor vide Dairy No. 01200/2 dated 14.07.2022.

8. We have heard the learned counsels for the petitioner and the respondent-corporate debtor and have also perused the record carefully.

9. Section 7(5)(a) of the Code is as follows:-

*“5) Where the Adjudicating Authority is satisfied that—
(a) a default has occurred and the application under sub-section (2) is complete, and there is no disciplinary proceedings pending against the proposed resolution professional, it may, by order, admit such application.”*

10. The issue for consideration is whether the present application is filed within limitation. It can be seen from the records that the date of default is 21.05.2018 i.e. the date on which the Invoice No. EXP/17-18/039 to EXP/17-18/042 are generated and the the present petition was filed on 4703 vide Dairy No.

30.11.2018 which was refiled vide Dairy No. 99 dated 09.01.2019. Therefore, the present petition is filed within limitation.

11. Another issue for consideration is whether there is default in payment or not. It is observed from the record that in the present case, the default is not evidenced by the Trade Finance Facility Agreement dated 18.04.2017 (Annexure-I(D)), assignment deeds (Annexure-I(E)), Invoices (Annexure-I(H)), Notice of assignment (Annexure-I(I)), Acknowledgment of notice of assignment dated 16.07.2017 (Annexure-I(J)), 14 notices of assignment (Annexure-I(K)), Transaction details for disbursement on 27.12.2017, .2018 (Annexure-I(L-N)), Bill of lading (Annexure-I(O, T,Y)), letter addressed by Musafir Trave LLC to Maersk Line dated 21.01.2018, 04.02.2018 (Annexure-I(R,W)), letter addressed by buyer to Maersk Line dated 04.02.2018, 28.02.2018 (Annexure-I (V,AA)), Letter of guarantee (Annexure-I (S,X, CC)), letter addressed by Euro Star World FZE to Maersk Line dated 28.02.2018 (Annexure-I (BB)), Delivery Order Nos. 1800091047 dated 05.02.2018, 1800154484 dated 28.02.2018 (Annexure-I (Z)), Statement of Bank Account (Annexure-I (JJ, KK)). As per the 5th meeting of the Board of Directors of Arcotech Limited for the financial year 2016-17 held on 14.02.2017 board passed the resolution:-

“Be and are hereby authorised to sign such documents and to do all other acts and things they in their full discretion deem necessary to enforce the taking and effecting of such credit facility and giving this cargo as security, including without limitation requesting disbursements, sign and/or endorse bills of lading issued for funded cargo and to execute and deliver to Sunrise 14 A/S any such documents as may deemed necessary to take out and fully comply with the terms of the credit agreement and any security granted in connection therewith.

“RESOLVED FURTHER THAT The Board of Directors further decided that the decisions taken herein may be relied upon by Sunrise 14 A/S, until it has received a board resolution from the Company revoking or modifying what is otherwise set out herein”.

There is no convincing evidence to act upon the agreement.

Further, it is evident from the documents placed on record that there is no physical document. It is an e-document that is digitally signed. The trade Finance Facility Agreement dated 18.04.2017 relied upon is an unsigned and unexecuted document. It is worthwhile to note that an affidavit vide Dairy No. 1200/9 dated 20.04.2023 has been filed on behalf of the petitioner wherein it is stated that *“the unexecuted version of the Agreement was created by one Mr. Akash Shinde, who is termed as the Maker of the draft Agreement. The Agreement was created on April 18, 2017 at 12:41 pm. Subsequent thereto, the Agreement so created was accessed by Mr. Ankur Agarwal, who is termed as the Approver of the Agreement for the Financial Creditor. The Agreement so created was approved by the Approver on April 18, 2017 at 3:33 pm. This event marks the execution of the Agreement by the Financial Creditor. Upon execution of the Agreement by the Financial Creditor, it was accessed by the authorised signatory of the Corporate Debtor- Mr. Radhanath Pattanayak (Director of Corporate Debtor) for confirmation of the Agreement and execution thereof. Upon reviewing and accepting the terms of the draft Agreement, Mr. Radhanath Pattanayak (Director of Corporate Debtor) approved the draft Agreement on April 18, 2017 at 6:57 pm. This event marked the execution of the Agreement by the Corporate Debtor. The Agreement was executed by Mr. Radhanath Pattanayak (Director of Corporate Debtor) pursuant to the Board Resolution dated February 14, 2017 passed by the Corporate Debtor”*.

Moreso, Clause 23, of the agreement dated 18.04.2017 provides governing law and jurisdiction as under:-

“22.1 This Agreement shall be governed by and construed in accordance with English law.

22.2 Any dispute arising out of or in connection with this Agreement shall be referred to arbitration in London in accordance with the Arbitration Act 1996 or any statutory modification or reenactment thereof.

22.3 The arbitration shall be conducted in accordance with the London Maritime Arbitrators Association (LMAA) Terms current at the time when the arbitration proceedings are commenced.

22.4 In cases where neither the claim nor any counterclaim exceeds the sum of US\$50,000 (or such other sum as the parties may agree in writing) the arbitration shall be conducted in accordance with the LMAA Small Claims Procedure current at the time when the arbitration proceedings are commenced”.

Therefore, in the presence of the English laws and arbitration clause between the parties, the present agreement cannot be relied upon. Moreover, the agreement dated 18.04.2017 is neither modified nor any modified agreement is executed between the parties as was required on the comments of Mr. Radhanath Pattanayak (Director of Corporate Debtor) which has been placed on record. Even, the digital signatures of Mr. Radhanath Pattanayak (Director of Corporate Debtor) are also not proved on the agreement. Thus, there is no cogent evidence to prove the debt and the default.

It is submitted on behalf of the respondent/corporate debtor as to why the arbitration clause in the said agreement was not acted upon in case of any default. Thus, the question of whether a default has occurred under the Agreement was to be decided in accordance with English law and the same had to be decided by Ld. Arbitral Tribunal in London therefore, the said dispute between the parties cannot be adjudicated upon in the present proceedings when remedy is already provided in the said agreement relied upon by the petitioner.

Although, learned counsel for the petitioner has relied on the judgment of ***The Hon'ble Supreme Court in Innoventive Industries Limited VS ICICI Bank (Civil Appeal Nos. 8337-8338 of 2017)***, while contrasting the Application under

Section 7 and Section 9 of the Code has held that in the case of a corporate debtor who commits a default of a financial debt, the adjudicating authority has merely to see the records of the information utility or other evidence produced by the financial creditor to satisfy itself that a default has occurred. It is of no matter that the debt is disputed so long as the debt is "due" i.e. payable unless interdicted by some law or has not yet become due in the sense that it is payable at some future date. It is only when this is proved to the satisfaction of the adjudicating authority that the adjudicating authority may reject an application and not otherwise". However, this authority relied upon by the learned counsel for petitioner is not applicable to the facts and circumstances of the present case as no debt or default is proved at all.

12. As a sequel to the above discussion and the facts as well as circumstances explained since there is no cogent evidence to show the debt and the default, thus, the petition is not maintainable under Section 7 of IBC, 2016. The petition consequently stands dismissed, however, with no order as to costs.

Sd/-
(Subrata Kumar Dash)
Member (Technical)

September 12, 2023

VN/TBG

Sd/-
(Harnam Singh Thakur)
Member (Judicial)