

IN THE NATIONAL COMPANY LAW TRIBUNAL

NEW DELHI (COURT NO. III)

IB-65(ND)/2021

(Under Section 9 of the Insolvency and Bankruptcy Code, 2016)

IN THE MATTER :-

M/s. BASF India Ltd.

Registered office at: The Capital, 'A' Wing, 1204-C,
12th Floor, Plot No. C-70, 'G' Block,
Bandra-Kurla Complex,
Sandra (East) Mumbai-400051

.... Applicant/Operational Creditor

Versus

M/s. Meghaarika International Pvt Ltd.

Registered office at: 703, 7th Floor, DLF Tower- B,
District Centre, Jasola,
New Delhi-110044

.... Respondent/Corporate Debtor

Pronounced on: 25.01.2023

CORAM:

SHRI. BACHU VENKAT BALARAM DAS, MEMBER (JUDICIAL)

Dr. BINOD KUMAR SINHA, MEMBER (TECHNICAL)

Parties / Counsels present


For the Applicant: P. Nagesh, Sr. Advocate

For the Respondent: Suhail Dutt, Sr. Advocate

ORDER

Per: Bachu Venkat Balaram Das, Member (Judicial)

1. The present petition has been filed u/s 9 of the IBC, 2016 by the Applicant alleging a default in payment of operational debt amounting to Rs. 1,72,85,197.34/- (Rupees One Crore Seventy Two Lakhs Eighty Five Thousand One Hundred Ninety Seven and Thirty Four paise) which includes principal amount of Rs.1,52,25,950/- and interest calculated at 18% per annum which is Rs. 20,59,247.34/. The controversy in the present petition arises out of a High Seas Sale agreement entered into between the Petitioner and the Respondent on 15.01.2020, whereunder the Petitioner agreed to sell and the Corporate Debtor had agreed to purchase on "High Seas Sales Basis" Isobutanol on the terms and conditions set out in the said agreement. The said agreement provided for various terms and conditions including the days for procuring delivery of "Isobutanol" from the customs and for clearance and handling and transportation etc., from the port etc. Pursuant to the agreement, the Corporate Debtor issued a purchase order to the




OC bearing reference No. MAIL/2019-20/PO/IBA/3 for supply of a certain product viz. "Isobutanol".

- 2.** The Petitioner/OC after signing of the agreement, issued a letter dated 15.01.2020 enclosing therein all relevant documents including a copy of the bill of lading required for the purpose of clearing the goods from the port.
- 3.** As per the agreement, the goods/Isobutanol was sold to the Corporate Debtor which was confirmed by the Corporate Debtor vide letter dated 15.01.2020 saying that it had purchased the consignment of goods on High Seas Sales Basis from the Operational Creditor.
- 4.** On 15.01.2020, the OC raised invoice on the Corporate Debtor, bearing invoice no.OS2719140882 dated 15.01.2020 for Rs. 1,52,25,950/-.The invoice stipulated the period of credit as 60 days and the due date for payment of the invoice was 15.03.2020. On 24.01.2020, GAC Shipping (India) Private Limited issued a Delivery Order to the Corporate Debtor, directing Vessel MT ELM Galaxy carrying the Operational Creditor's cargo of Isobutanol to directly deliver the same to the Corporate Debtor. On 24.01.2020, the Corporate Debtor duly took physical delivery of the cargo containing the ordered quantity of Isobutanol.

5. Thus it is submitted that the goods ordered by the Corporate Debtor were duly sold, supplied and delivered by the Operational Creditor to the Corporate Debtor and the Corporate Debtor duly received the same. Further, no complaint was made by the Corporate Debtor till date about the quality or the quantity of the products supplied. Since the amount of Rs. 1,52,25,950/- which was due for payment by the Corporate Debtor on 15.03.2020 was not paid by the Corporate Debtor to the Operational Creditor, the Operational Creditor addressed a letter dated 22.04.2020 to the Corporate Debtor calling upon it to pay an outstanding amount of Rs. 4,32,36,530/- (for INR. 1,52,25,950/- for the invoice dated 15.01.2020 and INR 2,80,10,580/- for the invoice dated 03.01.2020 for another default which is under consideration of this Adjudicating Authority vide a separately filed application under Section 9 of the IB Code, 2016. The Petitioner has claimed interest @ 18% per annum as provided in the terms of sale and which are also part of the two invoices.

6. Since the Corporate Debtor did not pay the said amount, the Operational Creditor issued a demand notice in Form -3 on 19.10.2020 under the provisions of Section 8,IBC. The Corporate Debtor did not reply to the said notice.


- 
7. The Petitioner/OC filed the present petition under Section 9 of IBC seeking initiation of CIRP against the Corporate Debtor for failure to make the payment.
 8. In reply to the petition under Section 9 of IBC, the Respondent raised several objections which are enumerated hereunder:

Objection No. 1: *The OC has suppressed material facts and has approached this Tribunal with unclean hands in an attempt to mislead the Tribunal and therefore the OC is guilty of suppressio very suggestion falsi,.*

Objection no. 2: *The present case pertains to a banking dispute because of information fulfilment of conditions of the letter of credit, since the agreed payment was made by the payment through letter of credit (LC) and hence the present transactions does not fall within the purview of Section 9 of IBC.*

Objection No. 3: *The present petition is barred under Section 10A of IBC, 2016 and there exists a pre-existing dispute in view of the arbitration proceedings.*

9. We have heard Ld. Counsel for both the parties and perused the paper books and records. Mr. P. Nagesh, Ld. Sr. Counsel invited our attention to clause 5(a) and (d) of the High Seas Sale agreement and submitted that the seller is required to inform about the defects in goods but not later than 30 days in writing otherwise the same shall be deemed to be in order. The date of




delivery of the goods in the present case was on 24.01.2020 and therefore the defects should have been notified by the Corporate Debtor by 23.02.2020. However, there is nothing on record to say that the defects were raised by the Corporate Debtor within 30 days. The only argument pressed by the Corporate Debtor is alleged invocation letter dated 05.03.2020 which is beyond the period of 30 days and therefore no defects were raised within 30 days and as per clause 5(d) of the High Seas Sale agreement goods are deemed to be in proper condition. Further, the alleged letter invoking Arbitration clause does not mention the details of the defects. He further submitted that as per the clause 13.4 of general conditions of sale, in case of defects in goods, the Corporate Debtor had to inform the Operational Creditor and in that case the Operational Creditor would have replaced it but the Corporate Debtor never informed by any mode of communication and never sought any replacement of goods or asked the Operational Creditor to take back the goods. This shows that the Corporate Debtor had used the goods but did not make the payment.

10. Before deciding the present Application, we shall discuss the issues raised by the Corporate Debtor at length:


1. Issue with regard to Section 10A of IBC:

Mr. Suhail Dutt, Ld. Sr. Counsel appearing for the Corporate Debtor submitted that the present petition is barred under



Section 10A of IBC, because the Operational Creditor has wrongly mentioned the date of default to be 15.03.2020 which is not correct. Infact, 15.03.2020 was the due date for discounting of letter of credit by the South Indian Bank, subject to approval of LC documents by the Bank of Baroda, which was further subject to submission of complete and proper documents by the Operational Creditor. The non-release of payment on 15.03.2020 was due to the fact that the Operational Creditor did not submit complete and proper documents in a timely manner to the Bank and therefore there was no default on the part of the Corporate Debtor as on 15.03.2020. According to him the date of default would be 08.04.2020 because the discrepancies in the documents were notified by Bank of Baroda to South Indian Bank vide letter dated 08.04.2020 which were required to be removed/corrected by the Operational Creditor and therefore the liability to pay, if any on part of the Corporate Debtor's Banker could have arisen only after 08.04.2020.

It is further submitted that the Operational Creditor sought payment from the Corporate Debtor for the first time vide communication dated 22.04.2020, therefore the default on the part of Corporate Debtor can be either 22.04.2020 or thereafter. In either case, since the default occurred after 25.03.2020, the present case is barred under Section 10A of IBC.




Mr. P. Nagesh, in response to the submissions made by Corporate Debtor with regard to the maintainability under Section 10A IBC, 2016, submitted that the due date for payment of goods as mentioned in the invoice is 60 days from the date of invoice i.e., 15.01.2020 and therefore the payment had to be made by 15.03.2020. Since the Corporate Debtor failed to make any payment on the said date, the date of default, in the present case, will be 15.03.2020 and therefore would not be hit by Section 10A of IBC.

Having heard the submissions of both the Ld. Counsels on the issue of applicability of Section 10A of IBC, we agree with the submissions made by Mr. P. Nagesh, Ld. Sr. Counsel that the date of default is 15.03.2020 and therefore are of the considered view that the present petition is not barred by Section 10A of IBC, 2016.


2. Issue with regard to Arbitration proceedings:

Mr. Suhail Dutt, Ld. Sr. Counsel submitted that the Corporate Debtor issued a notice under Section 22 of the Arbitration and Reconciliation Act, 1996, seeking appointment of Arbitrator to Adjudicate upon the dispute pertaining to the quality of the goods supplied, since the goods/material received by the Corporate Debtor were of extremely poor quality.



In response, Mr. P. Nagesh submitted that the Corporate Debtor in order to avoid the CIRP had initiated arbitration proceedings to create a dispute by raising a false plea that it had invoked the arbitration clause under the High Seas Sale agreement on 05.03.2020. He submitted that the notice of invocation of arbitration clause was never sent to the OC by the Corporate Debtor and no tracking report has been filed by the Corporate Debtor. He further submitted that the arbitration has not commenced even after two years from the date of alleged invocation letter/notice.

It is submitted by Mr. P. Nagesh that, this Tribunal on 14.04.2021 directed the Corporate Debtor to produce the tracking report to show that the invocation notice was served upon the OC but the Corporate Debtor failed to do so. The Operational Creditor wrote emails dated 15.04.2021 and 16.04.2021 to Blue Dart requesting them to give information and tracking report in respect of the delivery of the invocation notice but the Blue Dart gave a reply saying that the Airway bill mentioned on the receipt have not travelled in their network. Mr. P Nagesh further submitted that the said letter was never sent by the Corporate Debtor. On the contrary Mr. Suhail Dutt, Ld. Sr. Counsel submitted that Corporate Debtor also sent an email to Blue Dart, who replied that they do not retain proof of delivery for more than three months from the



date of dispatch and therefore, the Corporate Debtor could not produce the tracking report before this Tribunal.

As regards the issue as to whether the invocation notice was duly served upon the OC or not, the OC has placed on record a report from the courier Company Blue Dart to the effect that the Airway Bill mentioned on the receipt submitted by the CD to establish dispatch of arbitration notice never travelled on their network. The CD on the other hand, has just referred to the general reply from the Blue Dart that they do not retain the proof of delivery beyond a period of three months which in no way establishes the issue and service of the impugned Arbitration notice and therefore, we do not wish to lay much credence to the submission made by Mr. Suhail Dutt that the notice invoking arbitration clause was sent to Operational Creditor and that there exists a pre-existing dispute. This issue is answered accordingly in favour of Operational Creditor.

- 11.** Since we have already decided the issue of maintainability of the present petition under Section 10A of IBC and the pre-existing dispute in view of the invocation of arbitration clause in favour of the Petitioner/ Operational Creditor, we would like to consider the submissions raised by the parties with regard to merits of the case i.e., whether the Operational Creditor has been able to establish all the ingredients that are required to be proved for maintaining the application under Section 9 of IBC,

2016. In this regard, reliance is placed on the Hon'ble Supreme Court's judgement in **Mobilox Innovations Private Limited Vs Kirusa Software Private Limited [Civil Appeal No. 9405 of 2017 para 34,** wherein the Hon'ble Supreme Court laid down what the Adjudicating Authority has to examine in an Application under Section 9 and held as under:

“Therefore, the adjudicating authority, when examining an application under Section 9 of the Act will have to determine:

- (i) Whether there is an “operational debt” as defined exceeding Rs 1 lakh? (See Section 4 of the Act)*
- (ii) Whether the documentary evidence furnished with the Application shows that the aforesaid Debt is due and payable and has not yet been paid? and*
- (iii) Whether there is existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before the receipt of the demand notice of the unpaid operational Debt in relation to such dispute?*

If any one of the aforesaid conditions is lacking, the Application would have to be rejected. Apart from the above, the adjudicating authority must follow the mandate of Section 9, as outlined above, and in particular the mandate of Section 9(5) of the Act, and admit or reject the Application, as the case may be, depending upon the factors mentioned in Section 9(5) of the Act.”

12. Further, in the judgement dated 12.07.2022 of the Hon'ble Supreme Court in the case Vidharbha Industries Power Limited vs. Axis Bank Limited [Civil Appeal No. 4633 of 2021], the Hon'ble Supreme Court observed as follow: -


“ Sub-section (5) of Section 9 of the IBC provides that the Adjudicating Authority (NCLT) shall, within 14 days of the receipt of an application of an operational creditor under sub-section (2) of Section 9, admit the application and communicate the decision to the Operational Creditor and the Corporate Debtor, provided, the conditions stipulated in clauses (a) to (e) of Section 9(5)(i) of the IBC are satisfied. The Adjudicating Authority (NCLT) must reject the application of the Operational Creditor in the circumstances specified in clauses (a) to (e) of Section 9(5)(ii) of the IBC.

An application of an Operational Creditor for initiation of CIRP under Section 9(2) of the IBC is mandatorily required to be admitted if the application is complete in all respects and in compliance of the requisites of the IBC and the rules and regulations thereunder, there is no payment of the unpaid operational debt, if notices for payment or the invoice has been delivered to the Corporate Debtor by the Operational Creditor and no notice of dispute has been received by the Operational Creditor. The IBC does not countenance dishonesty or deliberate failure to repay the dues of an operational creditor.”

13. Having regard to the law laid down by the Hon'ble Supreme Court, this Tribunal has to examine as to whether the Petitioner/Operational Creditor has established its case and has been able to meet the requirements of the law for initiating CIR Proceedings u/s 9, IBC, 2016. In the instant case, the Petitioner has been able to establish the existence of Operational Debt and has also established that the said debt is not barred by Section 10A, IBC, 2016. The Respondent has failed to establish existence of dispute prior to issuance of notice u/s 8, IBC, 2016 and has failed to establish that the notice invoking Arbitration clause was duly served upon the Operational Creditor. This Tribunal is satisfied that there exists no pre-existing dispute between the parties. Therefore, it can be said that the Operational Creditor has established its case.

14. From the above discussion, we are of the considered view that the Operational Creditor has been able to establish that there has been a default by the Corporate Debtor beyond any doubt and therefore, the present petition ought to be **admitted** and CIRP be initiated against the Corporate Debtor.

15. The name of Insolvency Resolution Professional has not been proposed in the Application filed by the Operational Creditor. This Adjudicating Authority, hereby appoints Mr. Shaikh Nafis Anjum (Email – sn.anjum123@gmail.com), Reg. No: IBBI/IPA-003/IP-N00211/2018-2019/12363 to act as Insolvency



Resolution Professional from the panel of Insolvency Professionals (IPs) valid from the period 01.01.2023 to 30.06.2023 issued by IBBI in terms of Section 16(4) of the IBC, 2016. He shall take such other and further steps as are required under the statute, more specifically in terms of Section 15, 17 and 18 of the Code and file his report within 30 days before this Bench..

- 16.** The Applicant shall deposit a sum of Rs. 2 lakhs to enable the IRP to meet the immediate expenses. The same shall be accounted for by the IRP and shall be reimbursed to the Applicant to be recovered as costs of the CIRP.
- 17.** In pursuance of Section 13 (2) of the Code, we direct that public announcement shall be made by the Interim Resolution Professional, immediately (3 days as prescribed by Explanation to Regulation 6(1) of the IBBI Regulations, 2016) with regard to admission of this application under Section 9 of the Insolvency & Bankruptcy Code, 2016.
- 18.** We also declare moratorium in terms of Section 14 of the Code. The necessary consequences of imposing the moratorium flows from the provisions of Section 14 (1) (a), (b), (c) & (d) of the Code. Thus, the following prohibitions are imposed:

“(a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of


any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;

(b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;

(c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;

(d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

19. It is hereby clarified that notwithstanding anything contained in any other law for the time being in force, a license, permit, registration, quota, concession, clearances or a similar grant or right given by the Central Government, State Government Local Authority, Sectoral Regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of Insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license, permit, registration, quota, concession, clearances or a similar grant or right during the moratorium period.



20. It is made clear that the provisions of moratorium shall not apply to transactions which might be notified by the Central Government and the supply of essential goods or services to the Corporate Debtor, as may be specified, are not to be terminated or suspended or interrupted during the moratorium period. In addition, as per the Insolvency and Bankruptcy Code (Amendment) Act, 2018, which has come into force w.e.f. 06.06.2018, the provisions of moratorium shall not apply to the surety in a contract of guarantee to the corporate debtor in terms of Section 14 (3) (b) of the Code.

21. The Interim Resolution Professional shall perform all his functions contemplated, inter-alia, by Sections 15, 17, 18, 19, 20 & 21 of the Code and transact proceedings with utmost dedication, honesty and strictly in accordance with the provisions of the Code, Rules and Regulations. It is further made clear that all the personnel connected with the Corporate Debtor, its promoters or any other person associated with the management of the Corporate Debtor, are under legal obligation under Section 19 of the Code to extend every assistance and cooperation to the Interim Resolution Professional, as may be required by him, in managing the day-to-day affairs of the 'Corporate Debtor'. In case there is any violation committed by the ex-management or any tainted/illegal transaction by ex-directors or anyone else, the Interim Resolution Professional

would be at liberty to make appropriate application to this Tribunal with a prayer for passing an appropriate order. The Interim Resolution Professional shall be under duty to protect and preserve the value of the property of the 'Corporate Debtor' as a part of his obligation, imposed by Section 20 of the Code and perform all his functions strictly in accordance with the provisions of the Code, Rules and Regulations.

- 22.** The office is directed to communicate a copy of the order to the Financial Creditor, the Corporate Debtor, the Interim Resolution Professional and the Registrar of Companies, NCT of Delhi & Haryana, at the earliest possible but not later than seven days from today. The Registrar of Companies shall update its website by updating the status of 'Corporate Debtor' and specific mention regarding admission of this petition must be notified to the public at large.

SD/-

(Dr. Binod Kumar Sinha)
Member (Technical)

SD/-

(Bachu Venkat Balaram Das)
Member (Judicial)