

**NATIONAL COMPANY LAW TRIBUNAL
AMARAVATI BENCH
(Video Conference)**

**PRESENT: JUSTICE TELAPROLU RAJANI – MEMBER JUDICIAL
ATTENDANCE-CUM-ORDER SHEET OF THE HEARING HELD ON 01.09.2023 AT 02:25 P.M.**

TC/CP. Nos.	CA/IA No.	Section/ Rule	Name of Parties
TCP(IB)/49/9/AMR/2019		9 of IBC	Posco Daewoo Corporation Vs Mohana Cotton Ginning Pvt Ltd

ORDER

Mr. Eakansh Gupta & Ms.Senu Nizar, Ld. Counsels for the OC and Mr.Ch.Srinivasa Rao, Ld. Counsel for the CD present. Orders pronounced. TCP(IB)/49/9/AMR/2019 is admitted, vide separate orders.

sd/-dated 1/9/23
MEMBER JUDICIAL

RSN

**NATIONAL COMPANY LAW TRIBUNAL
AMARAVATI BENCH AT MANGALAGIRI**

*** **

TP (IBC)/49/9/AMR/2019

**In the matter of a Petition under Section 9 of the Insolvency and
Bankruptcy Code, 2016 Read with Rule 6 of the Insolvency and
Bankruptcy (Application to Adjudicating Authority) Rules, 2016**

AND

**In the matter of
M/s. MOHANA COTTON GINNING PRIVATE LIMITED**

BETWEEN:

Posco Daewoo Corporation
Through Mr. Tae-Hoon Park
Posco Daewoo India Private Limited
703/12, Tower B, 7th Floor, Park Centra
NH-8, Sector-30, Gurgaon, UP- 122 001.

... Operational Creditor

AND

Mohana Cotton Ginning Private Limited
D.No.3-153, Garapadu (Post),
Vatticherukuru (Mandal), Guntur District
Andhra Pradesh – 522 017.

... Corporate Debtor

Date of pronouncement of orders: 01.09.2023

CORAM:

Justice Telaprolu Rajani, Member Judicial.

Appearance:

For Operational Creditor : Ms.Senu Nizar, Mr.Ekansh Gupta, &
Mr.Arsheya Sardha, Advocates.

For Corporate Debtor : Mr. Chandrasen Reddy, Sr. Counsel along
with Ms.Harshitha Datla, Advocate.

ORDER

(Per: Justice Telaprolu Rajani, Member Judicial)

1. This Petition is filed by the petitioner Posco Daewoo Corporation, i.e., the Operational Creditor (“in short OC”) against the Respondent M/s. Mohana Cotton Ginning Private Limited i.e., the Corporate Debtor (“in short CD”) seeking to initiate Corporate Insolvency Resolution Process (CIRP) against the CD, for the default committed by the CD in discharging the debt of USD 1,954 (Approximately INR 1,27,088.16 (conversion rate applied is USD 1 = INR 65.04, being the Official Exchange Rate as on March, 28, 2018) that was due to the OC.

2. The facts, briefly, as per the Petitioner are as follows:
 - a) The OC executed an International Shipment Contract on 10.11.2016 with the CD to the effect that the CD shall supply to the OC 200 MT of Indian Raw Cotton, for a total invoiced amount of USD 321,600 with Phong Phu Corporation in Vietnam as the ‘Notify Party’.

 - b) Thereafter, the CD supplied the goods to the OC under the initial contract. However, due to discrepancies in the quality of goods sold by the Corporate Debtor to the Operational Creditor, in terms of the Initial Contract, the parties agreed that the CD would pay an amount of USD 1,954. Consequently, the OC raised a debit note dated 25.10.2017 for the said sum, which was sent to the CD by the OC, vide email dated 25.10.2017. In terms of the

Debit Note, the CD has to pay the said amount by 15.11.2017. The CD admitted its liability to pay the amounts by an email dated 30.10.2017 and promised to remit the same within 12 working days. Despite the clear acknowledgment and undertaking, the CD failed to pay the said amount, several emails were exchanged later in which also the CD acknowledged the due amount but misrepresented that the amount has already been remitted to the OC. But the said amount was never received by the OC. Hence, a demand notice was issued by the OC for which the CD replied, admitting its liability, but however, stating that there was a pre-existing dispute in relation to the amount. It is evident from the reply notice that the amount was not paid by the CD. Hence, this Petition, seeking to initiate CIRP.

3. The CD filed counter, contending that the Petition is without jurisdiction and that the OC has an alternative remedy since there was an arbitration clause incorporated in the contract. It is also contended that the petition fails due to non-compliance of Section 9(3) (b) (c) of IBC. However, it admitted that the CD entered into contract as stated by the OC, but denied that on account of discrepancies in the quality of goods, the CD under initial contract, agreed that it would pay the claim amount and that a debit note was raised in that regard. The CD never agreed to pay the trash loss as stated, as such the CD cannot be made liable. The OC suppressed the factual aspects.

After executing the projected contract dated 10.11.2016, the CD, as per agreed terms, supplied the cotton material. The OC appointed

international controller SHG, who conducted pre shipment inspection only after verifying all the details, cargo loaded into the containers by the controller pointed by the OC. Hence the alleged claim or trash loss is not liable to be paid by the CD. It is false to say that the CD agreed to pay the debit note and the same is not counter signed by the CD and is denied.

If there arises any dispute relating to this contract, it shall be resolved through arbitration in accordance with the byelaws of the ICS. The OC cannot directly invoke the jurisdiction of this Tribunal.

The CD was forced to accept the terms to pay the trash loss amount in the email dated 30.10.2017, only on the assurance from the OC, that the cargo would be released to them, further the OC over telephonic conversation intimated to the CD that they would still continue with the business relations despite there being a dispute in the subject matter and in view of continuing the business relations the CD accepted, but the cargo was kept illegally in their custody, as such the OC is not entitled to the claim. The OC breached the terms of the purchase agreement dated 10.10.2016 which is the parent contract and the claim amount is different from the agreed terms. After receiving the demand notice, the CD issued reply, denying the liability. This is not the forum to adjudicate and quantify as to what amount is due and payable. Hence, this petition is liable to be dismissed.

4. Rejoinder is filed by the OC, contending that the contention that the OC has to invoke the arbitration clause is misplaced. The unpaid

operational debt arises out of the debit note, which has been raised by the Applicant on the Respondent in relation to the initial contract. After the issuance of the debit note, the Respondent admitted its liability to pay the unpaid operational debt to the applicant in an email dated 31.10.2017. As regards, the certificate under Section 9 (3) (b) (c) of IBC, in view of the judgment of the *Supreme Court in Civil Appeal No.15135 of 2017 between Macquarie Bank Limited vs. Shilpi Cables Technologies Ltd., (2018) 2 SCC 674*, the certificate need not be filed. The CD never raised any disputes. It is only for the first time, in the reply notice, that it is mentioned that there is a dispute. Hence, the petition is liable to be admitted.

5. Heard both the counsels. As regards the objection raised by the CD that the applicant failed to comply Section 9 (3) (b) (c) of IBC, the counsel for the Applicant relies on the judgment of the *Supreme Court in Civil Appeal No.15135 of 2017 between Macquarie Bank Limited vs. Shilpi Cables Technologies Ltd. (2018) 2 SCC 674*, wherein at paragraph 17, the Supreme Court observed: “there may be situations of operational creditors who may have dealings with a financial institution as defined in Section 3(14) of the Code. There may also be situations where an operational creditor may have as his banker a non-scheduled bank, for example, in which case, it would be impossible for him to fulfil the aforesaid condition. A foreign supplier or assignee of such supplier may have a foreign banker who is not within Section 3(14) of the Code. The fact that such foreign supplier is an operational creditor is established from a reading of the definition of “person” contained in section 3(23), as including persons resident

outside India, together with the definition of “operational creditor” contained in Section 5(20), which in turn is defined as “a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred”. That such person may have a bank/financial institution with whom it deals and which is not contained within the definition of Section 3(14) of the Code would show that Section 9(3)(c) in such a case would, being a condition precedent, amount to a threshold bar to proceeding further under the Code. The Code cannot be construed in a discriminatory fashion so as to include only those operational creditors who are residents outside India who happen to bank with financial institutions which may be included under Section 3(14) of the Code. It is no answer to state that such person can approach the Central Government to include its foreign banker under Section 3(14) of the Code, for the Central Government may never do so.” In the light of the above, the failure of the Applicant to file the certificate under Section 9 (3) (c) does not become fatal to this application.

6. The second contention of the CD is that there is a pre-existing dispute between the parties, hence the Petition is not maintainable. As regards pre-existing dispute, the contention is that the OC orally, over telephonic conversation, intimated that they would continue the business relations despite there being a dispute in the subject matter. But unfortunately, the said telephonic conversation, when denied by the OC, has to be proved by more concrete evidence, than the mere averment in the pleadings. On the other hand, as contended by the OC there is a clear admission by the CD that the short weight and quality

claim are accepted by the CD and are under process. It is also promised that the amount towards the same would be remitted within 12 working days from thereon. Instructions were also been reported to have been given to the office, pertaining to the said payment. There is absolutely, nothing mentioned in the said mail with regard to any prior dispute. There is an unequivocal undertaking given by the CD with regard to the claim in this petition. There was only an email addressed to the CD on 26.12.2017, that the information with regard to the swift copy which was promised to be given by one Mr.Ojas was not received. Except mentioning in the reply, that there is a pre-existing dispute, the CD did not, infact, raise any dispute earlier. Mere mentioning in the reply notice that there exists a dispute even prior to the issuance of the demand notice, does not relieve the CD from the obligation which arises from the contract and which is acknowledged in clear terms by the CD.

7. The contention that if there is any dispute, the parties have to invoke arbitration clause under contract cannot be appreciated, since there is no dispute between the parties, except the non-discharge of debt, which is admitted by the CD. Hence, when there is a debt, default and acknowledgment, Section 9 of IBC can very well be invoked. Hence, I am of the considered view that it is a fit case to admit and order initiation of Corporate Insolvency Resolution Process (CIRP) against the CD. The OC did not suggest any name as Insolvency Resolution Professional (IRP) and sought the Tribunal to appoint an IRP. Hence, **Mr. Chaitanya Kiran Immaneni**, (Registration No. **IBBI/IPA-**

002/IP-NO1257/2023-2024/14280) is appointed as Insolvency Resolution Professional (IRP).

ORDER

The Company Petition is admitted. The Corporate Insolvency Resolution Process of the Corporate Debtor shall commence from this date and shall be completed within 180 days hence.

- i. **Mr. Chaitanya Kiran Immaneni**, (Registration No. **IBBI/IPA-002/IP-NO1257/2023-2024/14280**), having office at 40-26-22, Mohiddin Street, Opp. BSNL Exchange, Labbipeta, MG Road Vijayawada, Krishna, Andhra Pradesh-520010; e-mail: **cimmaneni@outlook.com**; Mobile: (+91) **9951789558** is appointed as the Interim Resolution Professional. No disciplinary proceeding is pending against him as per the IBBI website.
- ii. He is directed to take charge of the Corporate Debtor's management forthwith and take necessary steps in furtherance of the CIRP in terms of Sections 13(2), 15, 17, 18 and 20 of Code and Rules made thereunder.
- iii. Moratorium in respect of the Corporate Debtor is hereby declared in terms of Section 14 of the Code.
- iv. The Directors, Promoters or any other person(s) associated with the management of Corporate Debtor shall extend all assistance and

cooperation to the IRP as stipulated under section 19 of the Code for effectively discharging his functions under the Code.

- v. The Registry shall communicate the order to the Operational Creditor and the Corporate Debtor forthwith.
- vi. The Operational Creditor and the Registry shall send the copy of this order to IRP for necessary compliance.

**Sd/- dated 01.09.2023
JUSTICE TELAPROLU RAJANI
MEMBER JUDICIAL**

Swamy Naidu(PS)