

**IN THE NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH, HYDERABAD**

CP (IB) No. 475/9/HDB/2018

U/s 9 of IBC, 2016

R/w Rule 6 of I & B (AAA) Rules, 2016

IN THE MATTER OF M/S. PELICAN RUBBER LIMITED

M/s. Eswar Rubber Limited

Registered Office:

Surya Towers, 12 Maravaneri 2nd Cross,
Salem- 636007.

... Petitioner/Operational Creditor

VERSUS

M/s. Pelican Rubber Limited,

Registered Office:

#15-1-560, Siddiamber Bazar, Hyderabad

... Respondent/ Corporate Debtor

Date of order 13.08.2019



Coram:

Hon'ble Shri RatakondaMurali, Member (Judicial)

Hon'ble Shri Narender Kumar Bhola, Member (Technical)

Parties / counsels present:

For the Petitioner: P. Anil Mukherji, Advocate.

For the Respondent: Sharad Sanghi, Advocate.

Per: Hon'ble Shri Ratakonda Murali, Member (Judicial)

Heardon: 29.08.2018, 11.10.2018, 05.04.2019, 24.04.2019, 09.05.2019,
25.07.2019,08.08.2019.

Per: Hon'ble Shri Ratakonda Murali, Member (Judicial).

ORDER

1. This petition is filed by M/s.Eswar Rubber Private Limited who is the Operational Creditor, stating that M/s. Pelican Rubber Limited, the Corporate Debtor had defaulted in repaying a sum of Rs.7,17,65,096/-. Hence this petition is filed under Section 9 of Insolvency and Bankruptcy Code, 2016, R/w Rule 6 of Insolvency & Bankruptcy (Application to the Adjudicating Authority) Rules, 2016, seeking admission of the Petition, initiation of Corporate Insolvency Resolution Process, granting moratorium and appointment of Interim Resolution Professional as prescribed under the Code and Rules thereon.
2. The brief averments made in the petition are as follows:
 - a) It is averred that the Corporate Debtor is in to the business of manufacturing rubber products. The Operational creditor supplied raw material "Butyl Reclaimed Rubber" to the Corporate Debtor.
 - b) It is averred that the Operational Creditor has raised invoices on continuous basis and been receiving the payments against the Running Account bills. From 06.09.2014 to 25.09.2015 the Operational Creditor has raised various invoices to the tune of Rs. 5,73,15,250/- against the material supplied to the Corporate Debtor. The Corporate Debtor failed to pay the invoices amount and committed default.
 - c) It is averred that the Corporate Debtor issued cheques for the outstanding amount against the invoices raised and the said cheques were dishonored with an endroissement "Insufficient Funds". The Operational Creditor filed Compliant under Section 138 of NI Act.



- d) It is averred that the Corporate Debtor taken delivery of the goods and issued C Forms. This itself proves that there is no dispute with regard to delivery of goods.
3. The brief averments made in the counter are as follows:
- a) It is averred the Operational Creditor issued a notice dated 31.03.2016 demanding an amount of Rs. 2,50,00,000/-. The Corporate Debtor replied to the said notice and disputed the liability and made a counter claim of Rs.11,64,48,716/- as against the Operational Creditor.
- b) It is averred that the Corporate Debtor filed a civil suit for recovery of the amount of Rs.11,64,48,716/- under OSSR 4657/2017 on 18.12.2017 and same is pending before the XXIV Addl. Chief Judge- Cum-Judge Commercial Court, City Civil Court, Hyderabad.
- c) It is averred that the Operational Creditor filed a Criminal Complaint under Section 138 of Negotiable Instruments Act before the Judicial Magistrate No.III, Salem District vide STC 299/2017. The said criminal case is contested by the Corporate Debtor and pleaded "Not Guilty".
- d) It is averred that the Operational Creditor supplied inferior quality of goods to the Corporate Debtor and when the said inferior quality goods have been put in the manufacturing of the butyl tube, the entire material was scortched and scrapped and thereby the Corporate Debtor incurred loss of Rs. 11,68,64,716/- and the same is liable to be paid by the Operational Creditor.
- e) It is averred that the debt is time barred and hence the present application is barred by limitation.
4. The brief averments made in the Rejoinder are as follows:
- a) It is averred that civil suit is not numbered till date and there is no pursuance by the Corporate Debtor.
- b) It is averred that the Corporate Debtor issued C-Forms to the Operational Creditor and also Corporate Debtor claimed Central Vat Credits. Further, Directors of the Corporate



Debtor admitted debt through SMS Conversations held between the Operational Creditor and Corporate Debtor.

5. We heard both sides. The Petitioner filed this petition under Section 9 of Insolvency and Bankruptcy Code, 2016 on the ground the Corporate Debtor committed default of Operational debt of Rs.7,17,65,096/- which includes interest of Rs. 1,44,49,846/-.
6. The Corporate Debtor is doing business of manufacturing the rubber product and having business relationship with Operational Creditor since two decades who supply "Butyl Reclaimed Rubber" to the Corporate Debtor. "Butyl Reclaimed Rubber" is used as raw material for manufacturing rubber products. The Operational Creditor has been continuously supplying the material to Corporate Debtor , raising invoices on continuous basis and has been receiving the payment against Running Account Bills.
7. The case of Operational Creditor is that it supplied rubber between 06.09.2014 to 25.09.2015 and raised invoices of Rs. 5,73,15,250/- and interest accrued thereon is Rs. 1,44,49,846/-. The working sheet is attached as Annexure-2 to the petition. Invoices raised are shown as Annexure-3 to the petition.
8. It is the case of Corporate Debtor that it issued reply raising dispute to the notice issued under Section 138 of Negotiable Instruments Act. It is the case of Corporate Debtor is has suffered damage due to supply of inferior quality of rubber and that it had filed Civil Suit in City Civil Court, Hyderabad for recovery of a sum of Rs.15,66,06,716/- in O.S.S.R. No. 4657/2017.It is shown at page 86-98 of paper book filed by the Corporate Debtor. It is also the case of Corporate Debtor that notice of dispute was raised vide reply dated 05.04.2016 which was also reiterated in the reply on 14.06.2017 appearing at Page No. 83 of the Counter. Thus, according to the Corporate Debtor there is a pre-existing dispute in the form of reply as well in the form of filing Civil Suit. Therefore, petition is liable to be rejected.
9. The case of Operational Creditor is that there is no pre-existing dispute as alleged by the Corporate Debtor. Counsel contended,



Corporate Debtor issued cheques towards part payment of the outstanding amount due. These cheques were dishonored with endorsement "Funds Insufficient. A notice was issued under Section 138 of the Negotiable Instruments Act to the Corporate Debtor dated 31.03.2016 and Corporate Debtor gave reply on 05.04.2016 in which Corporate Debtor for the first time raised dispute on the quality of goods supplied. Prior to that such a dispute was never raised by the Corporate Debtor. On the other hand, the Corporate Debtor used the rubber supplied during the period from 06.09.2014 to 25.09.2015 and for the first time when notice was issued under Section 138 of NI Act, Corporate Debtor raised frivolous dispute with regard to alleged inferior quality of the goods supplied.

10. The Learned Counsel for the Operational Creditor would contend no credence can be given to the alleged frivolous dispute raised by Corporate Debtor. The dispute referred in the reply notice to the notice issued under Section 138 of NI Act is imaginary, hypothetical and there is nothing to substantiate the same. It is true prior to the notice issued under Section 138 of NI Act, the Corporate Debtor never raised any dispute about alleged inferior quality of rubber supplied. Had it been true that Operational Creditor supplied inferior quality of goods, then immediately Corporate Debtor should have raised the dispute. Only when Operational Creditor issued notice for dishonor cheques under Section 138 of NI Act, the Corporate Debtor came forward with alleged dispute. Secondly, there is no material filed by the Corporate Debtor to substantiate that the goods were of inferior quality. It is a mere allegation levelled against the Operational Creditor. The very fact the Corporate Debtor issued cheques towards part payment of the amount due, itself goes to show that there is no truth in its allegations that the goods were of inferior quality. If goods are actually of inferior quality, then why Corporate Debtor issued cheques towards part payment. So, the alleged dispute falls to ground. It cannot be looked into. The Operational Creditor issued Demand Notice dated 03.06.2017 for



which the Corporate Debtor issued reply raising the same dispute. Hon'ble Apex Court has clearly held in the decision of Mobilox Innovations Private Limited V. Kirusa Software Private Limited at Paragraph No:40 of the judgment held as follows:

"It is clear, therefore, that once the operational creditor has filed an application, which is otherwise complete, the adjudicating authority must reject the application under Section 9(5)(2)(d) if notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility. It is clear that such notice must bring to the notice of the operational creditor the "existence" of a dispute or the fact that a suit or arbitration proceeding relating to a dispute is pending between the parties. Therefore, all that the adjudicating authority is to see at this stage is whether there is a plausible contention which requires further investigation and that the "dispute" is not a patently feeble legal argument or an assertion of fact unsupported by evidence. It is important to separate the grain from the chaff and to reject a spurious defence which is mere bluster. However, in doing so, the Court does not need to be satisfied that the defence is likely to succeed. The Court does not at this stage examine the merits of the dispute except to the extent indicated above. So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application."



11. Thus, Hon'ble Apex Court has clearly held that "dispute" is not a patently feeble legal argument or an assertion of fact unsupported by evidence and is spurious, hypothetical or illusory. Thus in the present case the Corporate Debtor raised a feeble legal arguments unsupported by evidence that goods were of inferior quality.
12. The next contention of Corporate Debtor that it had filed civil suit against the Operational Creditor for recovery of damages as it has sustained loss for supply of inferior quality of rubber which is estimated at Rs.11,68,64,716/-. It is also the case of Corporate Debtor it has filed O.S.S.R No.4657/2017 on the file of City Civil Court, Hyderabad. It was stated to have been filed in 2017. It is not

yet numbered in the sense it is not yet registered. Mere filing of a plaint without it being registered cannot be taken in to consideration that there is dispute with regard to the claim. The Corporate Debtor sensing action to be initiated against it by Operational Creditor must have filed plaint and did not take steps for registering the same. Even till date the alleged suit is not registered. Mere filing of plaint cannot be treated as a pre-existing dispute unless it is registered.

13. Therefore, this cannot be a ground for rejecting the petition as if there was a dispute. There is absolutely no dispute about supply of rubber for which invoices were raised. There is also no dispute with regard to the amounts covered by invoices which were not paid and Corporate Debtor had committed default. The alleged dispute is not substantiated and it is only imaginary, illusory and not supported by any evidence.

14. Therefore, Petition is liable to be admitted.

15. The Operational Creditor has failed to name anyone as interim resolution professional and has requested the tribunal to appoint one for the Corporate Insolvency Resolution Process. The Insolvency and Bankruptcy Board of India (IBBI) has recommended a panel of Insolvency Professionals for appointment as Insolvency Resolution Professional for the period 1st July, 2019 to 31st December, 2019 in compliance with Section 16(3)(a) of the Code in order to avoid delay. Accordingly, this tribunal appoint Mr. Nukala Sreedhar, IP Registration No: IBBI/IPA-001/IP-P00432/2017-2018/10755, E-mail Id: sreenuka_1@yahoo.com, Mobile No:9848146369 as an Interim Resolution Professional. The aforesaid interim resolution professional has no disciplinary proceedings pending against him. He shall file his written communication and all relevant paper immediately before Registrar of this Tribunal but not later than three days from the date of this order.

16. Hence, the Adjudicating Authority admits this Petition under Section 9 of IBC, 2016, declaring moratorium for the purposes referred to in Section 14 of the Code, with following directions:-



- (a) The Bench hereby prohibits 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; Transferring , encumbering, alienating or disposing of by the Corporate Debtor any of its assets or any legal right or beneficial interest therein; any action to foreclose, recover or enforce any security interest created by the Corporate Debtor in respect of its property including any action under Securitization and Reconstruction of Financial Assets and Enforcement of Security interest Act, 2002 (54 of 2002); the recovery of any property by an owner or lessor where such property is occupied by or in possession of the corporate Debtor;
- (b) That the supply of essential goods or services to the Corporate Debtor, if continuing, shall not be terminated or suspended or interrupted during moratorium period.
- (c) That the provisions of sub-section (1) of Section 14 shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.
- (d) The interim resolution professional shall perform all his functions religiously and strictly which are contemplated, inter alia, by Sections 15, 17,18,19,20, and 21 of the Code. He must follow best practices and principles of fairness which are to apply at various stages of CIRP. His Conduct should be above Board and independent and he should work with utmost integrity and honesty. It if 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 affairs of the Corporate Debtor. The interim resolution professional is under duty to protect and preserve



the value of the property of the Corporate Debtor and shall perform all his functions strictly in accordance with the provisions of the Code.

- (e) The Petitioner is directed to pay a sum of Rupees 1,00,000/- (One Lakh Only) to the interim resolution professional to meet out the expenses to perform the functions assigned to him in accordance with regulation 6 of IBBI (Insolvency Resolution Process for Corporate Person) Regulations, 2016. This shall, however, be subject to adjustment by the committee of creditors as accounted for by interim resolution professional and shall be paid back to the petitioner.
- (f) That the order of moratorium shall have effect from 13.08.2019 till the completion of the Corporate Insolvency Resolution Process or until this Bench approves the Resolution Plan under Sub-Section (1) of Section 31 or passes an order for liquidation of Corporate Debtor under Section 33, whichever is earlier.
- (g) That the Public announcement of Corporate Insolvency Resolution Process shall be made immediately as specified under section 13 of the code.



Accordingly, this Petition is admitted.

NK
13.8.19
NARENDER KUMAR BHOLA
MEMBER (TECHNICAL)

Ratakonda Murali
13.8.19
RATAKONDA MURALI
MEMBER (JUDICIAL)

Viswaraj
Dy. Regr./Asst. Regr. Court Officer/
National Company Law Tribunal, Hyderabad Bench

VISWARAJ
(Law Research Associate)

प्रमाणित प्रति
CERTIFIED TRUE COPY
केस संख्या: Cp (NS) No. 4756/2018
निर्णय का तिथि: 13/08/2019
DATE OF JUDGEMENT: 13/08/2019
प्रति तैयार किया गया तारीख
COPY MADE READY ON: 14/08/2019