

**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH**

C.P. No. 1570/IB/2017

Under section 8 & 9 of the IBC, 2016

In the matter of

Fairmacs Shipping & Transport Services Pvt. Ltd.

....Operational Creditor

v/s.

Trimurti Corns Agro Foods Pvt. Ltd.

.... Corporate Debtor

Order Delivered on 20.11.2018

Coram:

Hon'ble Shri V. P. Singh, Member (Judicial)

Hon'ble Shri Ravikumar Duraisamy, Member (Technical)

For the Operational Creditor: Shri. Vishal Mughlikar, Counsel a/w.
Ms. Smriti Jha, i/b. Mulla & Mulla,
Advocates.

For the Corporate Debtor : Mr. Gaurangi Patil i/b. Sujay Joshi.

Per V. P. Singh, Member (Judicial)

ORDER

It is a Company Petition filed u/s 9 of Insolvency & Bankruptcy Code, 2016 by the Operational Creditor against the Corporate Debtor stating that the Corporate Debtor defaulted in making payment of ₹16,48,721.98/-, in view of the same, this Company Petition is filed for initiation of Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor.

2. The case of this Operational Creditor is a Private Limited Company incorporated on 08.06.1989 and engaged in the business of providing quality logistics for all kind of import, export and domestic movement of goods/ cargo.

3. The Operational Creditor issued a demand notice dated 29th May, 2017 under Section 8 of Insolvency & Bankruptcy Code, 2016,

stating that the Corporate Debtor is liable to pay sum of ₹16,48,721.98/- to the Operational Creditor which till date remained unpaid despite repeated requests. The operational Creditor submits that as per the terms of the invoice, interest is continuing to accrue with each passing day and will exceed the above sum and Corporate Debtor is liable to pay further interest thereon at the rate of 24% p.a. which amounts to ₹3,74,035.04/- and totally amounting to ₹20,22,757.02/-.

4. The Counsel for the Operational Creditor submits that on 3rd June, 2016, Corporate Debtor remitted a sum of ₹3,50,000/- to the Operational Creditor through RTGS and again on 10th August, 2016, the Corporate Debtor have remitted ₹1,00,000/- through RTGS to the Operational Creditor. As per the Company's practice, the above amount was adjusted towards the outstanding invoices of Corporate Debtor on First in first out basis and the remaining credit of ₹1,76,015.02/- was adjusted against invoice No. FSMUMIN/1516/7714 leaving a net outstanding of ₹98,154.98/- against the said invoice. The Counsel for the Operational Creditor submits that on 23rd August, 2016, the Corporate debtor as against its outstanding liability in the sum of ₹16,48,721.98/- has also the liability of its sister concern i.e. Mrunmaha Agro Pvt. Ltd. in the sum of ₹30,51,543.30/- executed a Promissory Note in favour of the Operational Creditor expressly undertaken and promised to pay a sum ₹46,67,815/- towards the collective amount due from the Corporate Debtor and sister concern, Mrunmaha Agro Foods Pvt. Ltd. Thereafter, the Marketing Director of the Corporate Debtor also issued following 6 (six) post-dated cheques drawn on Bank of Maharashtra in favour of the Operational Creditor.

Sr. No.	Name of the Issuer	Date	Cheque No.	Amount in ₹
1	Trimurti Corns Agro Foods Pvt. Ltd.	3.9.2016	856746	10,00,000

2	Trimurti Corns Agro Foods Pvt. Ltd.	5.9.2016	856747	10,00,000
3	Trimurti Corns Agro Foods Pvt. Ltd.	7.9.2016	856748	05,00,000
4	Trimurti Corns Agro Foods Pvt. Ltd.	10.10.2016	856749	10,00,000
5	Trimurti Corns Agro Foods Pvt. Ltd.	15.10.2016	856750	10,00,000
6	Mrunmaha Agro Foods Pvt. Ltd.	15.10.2016	056229	1,67,815

5. Theareafter, on 4.10.2016, the Operational Creditor presented the cheque dated 3.9.2016 for a sum of ₹10,00,000/- issued by the Corporate Debtor at Chennai Development Bank of Singapore (DBS). However, the said cheque was dishonoured by the Bank and returned with an advice "Payment stopped by Drawer". Being aggrieved, and in view of the Promissory Note dated 23.08.2016 being issued by the Corporate Debtor, the Operational Creditor addressed a Winding-up Notice dated 19.10.2016 to the Corporate Debtor calling upon Corporate Debtor to pay a sum of ₹46,67,815/- towards the total outstanding invoices.

6. On 02.01.2017, the Operational Creditor further presented two cheques issued by Trimurti Corns Agro Foods Pvt. Ltd. for ₹10,00,000/- each drawn on DBS Bank for realization and both the cheques were dishonoured and returned by the Bank with advice that "payment stopped by Drawer". On the same day, Operational Creditor presented another cheque dated 15.10.2016 for a sum of ₹1,67,815/- issued by the Corporate Debtor's sister concern i.e. Mrunmaha Agro Foods Pvt. Ltd. for realization to DBS Bank and that too dishonoured and return with a remark "Fund insufficient".

7. As no payment was forthcoming and all its efforts of recovery went in vain, and upon realizing that the Corporate Debtor is unable/incapable of paying the admitted operational debt to the Operational Creditor, the Operational Creditor served Demand Notice dated

28.2.2017 upon the Corporate Debtor in Form-3 u/S. 8 of the Insolvency and Bankruptcy Code, 2016. The Operational Creditor also severed second demand Notice dated 29.05.2017 calling upon Corporate debtor to pay the outstanding amount of ₹16,48,721.98/- along with accrued interest of ₹3,74,035.04/- but Corporate Debtor has neither raised any dispute about unpaid Operational debt nor has given any notice relating to a dispute of the unpaid operational debt.

8. The Operational Creditor submits that the Corporate Debtor had not in any way, disputed the fact that there was a contractual relation between the Operational Creditor and the Corporate Debtor under the invoices, under the virtue of the Demand Promissory Note dated 23.08.2016 duly signed and stamped by the Corporate Debtor and part payment made by the Corporate Debtor on 03.06.2017 establish that there is an admitted operational debt on the part of the Corporate Debtor based on invoices raised by the Operational Creditor. However, the Corporate Debtor has failed to discharge its admitted liability and as such is unable to pay its debts. To evident that this payment has not been made, the Operational Creditor has also filed Bank Certificate along with the copy of Company Petition and along with Section 8 notice dated 29.5.2017 demanding payment as reflected in the invoice, and for no payment has been made even after the receipt of this notice, the Petitioner filed this case against the Corporate Debtor.

9. The Counsel for the Corporate Debtor states that the Corporate Debtor is a Company incorporated and formed under the provisions of Companies Act, 2013 (earlier known as Companies Act, 1956) dealing in import/ export of Farm produce including fruits and vegetables and that the Operational Creditor is engaged into the business of facilitation of Export Import facilities including Freight Forwarding and acting as a Clearance and Forwarding Agent for the Corporate Debtor. According to Corporate Debtor Under the arrangement the Operational Creditor requires to facilitate the entire transaction upto the release of the Bill of Lading so that the Ship Master of the Ship affirms the same and the goods can sail in order to effect the final

sale and thereby completion of the transaction. However, the Operational Creditor withheld the bills of lading due to which the ship containing the goods was not able to sail off the port and the goods were required to be kept in the warehouse of the Port. It is a settled position of law that a Bill of Lading is a document which confirms the ownership of the goods and the possession of the same; and the said Bills of Lading are still with the Operational Creditor till date; and hence the said goods are still in possession of the Operational Creditor.

10. The Counsel for the Corporate Debtor also states that the Operational Creditor dispatched invoices and expressly communicated that till the invoices were not cleared no negotiation on the same shall be done and the bill of lading shall not be released. The Corporate Debtor also submits that, it is clear by this that the Operational creditor has been habitual in concealing and not releasing documents which is also evident from the said Operational Creditor concealing the vital documents of a property which were given with bonafide intent as security to the Operational Creditor by the Corporate Debtor. Technically speaking the person holding the Bill of Lading of the Goods has the possession of the Goods as this is a well settled principle of Law, and that the Bills of Lading have been held by the Operational Creditor and hence it has exercised its right of lien on the goods as a Seller who feels he is Unpaid.

11. The Corporate Debtor submits that due to the act of Operational Creditor, the entire cash flow of the Corporate Debtor is being hampered and that on multiple occasions it was requested to the Operational Creditor to release the said Bills of lading as the goods are perishable in nature, there have been demurrage charges and other penalties levied on the same by the port authorities, and further due to extreme climatic conditions and acts of force majeure, the Corporate Debtor had to face financial heat. The Corporate Debtor also submits that Non-performance of the Obligations of the Operational Creditor resulted into heavy losses to the Corporate Debtor.

12. The Counsel for the Corporate Debtor submits that the Operational Creditor has been responsible to provide all the end to end facilitation regarding the Clearing the Goods of the Corporate Debtor and effecting the same to be loaded into the ship to sail. The letter received by Mr. Ahmed Gamal Saleh Qasem, proprietor of Walid Ahmed Al Yahafi for Trading Establishment, Saudi Arabia from Corporate Debtor. It clearly states that there has been losses due to delay in delivery of documents causing detention/ demurrage to be paid to Port Authorities in Saudi Arabia in the year 2015 and 2016 amounting to a total USD 37,544/- (US Dollars Thirty Seven Thousand Five hundred Forty Four only).

13. The Corporate Debtor submits that it had to compensate an amount of USD 4000/- (US Dollars Four thousand only) in a settlement due to the deficiency in performance of the Operational Creditor, due to which the goods to be sold to the customer of the Corporate Debtor at their respective port. The Corporate Debtor further submits that there are other similar issues where the delay in issuance of Bills of Lading due to this entire aspect of Deficiency in services, caused heavy losses to the Corporate Debtor.

14. The Counsel for the Corporate Debtor states that the Operational Creditor has grossly been unable to discharge his obligations and conditions of the arrangement with the Corporate Debtor which has resulted in loss of ₹42,00,000/-. The Operational Creditor holds various Bills of Lading which means he is in possession of the Goods of the Corporate Debtor. The Operational Creditor is also holding original Title Deed of the Property to the tune of ₹27,00,000/-.

15. It appears from the record that the Corporate Debtor having defaulted in making payment to the operational creditor. As discussed above there being no dispute in respect of the quality of goods or service, the dispute which has been raised after receiving the demand notice is not covered under the meaning of existence of dispute under the Insolvency and Bankruptcy Code, 2016. Thus arguing that dispute

is pre-existence in respect to the services provided by the Operational Creditor is not sustainable.

16. This Bench has view that under I & B Code, it need not be seen whether the company is unable to make payment or that the relief sought has bonafide or not. The only criterion to be looked into is as to whether debt and default are in existence as on the date of filing case. Under Section 9 of the Code, if corporate debtor brings it to the notice of operational creditor that debt is in dispute, then such claim cannot lie under section 9 of the Code. To see how this clause "existence of dispute" plays out, we have to read the judgment of Hon'ble Supreme Court delivered in **Mobilox Innovations Private Limited v. Kirusa Software Private Limited** (September 21st 2017) as to this; the para relevant is as below:

"54. 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)(ii)(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 defense which is mere bluster. However, in doing so, the Court does not need to be satisfied that the defense 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."

17. On perusal of this Company Petition and the documents thereof, this Bench has observed that this Company Petition is complete in all respects as mentioned u/s 8 and 9 of the Insolvency & Bankruptcy Code, Corporate Debtor defaulted in making payment of ₹16,48,721.98/-, as on 28.04.2017, after receiving of Demand Notice no dispute has been raised, henceforth it is hereby admitted with reliefs as follows:

- (a) That this 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 the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002; the recovery of any property by an owner or lessor where such property is occupied by or in the 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) That the order of moratorium shall have effect from 20.11.2018 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, as the case may be.

- (e) That the public announcement of the corporate insolvency resolution process shall be made immediately as specified under section 13 of the Code.

17. That this Bench hereby appoints Mr. Sandeep Dar, Registration No. IBBI/IPA-002/IP-N00161/2017-18/10430, Contact No. 09137318572, Address: 208, Plot No. 1A, Jalaram Market, Sector 19, Vashi, Navi Mumbai- 400705, as Interim Resolution Professional to carry out the functions as mentioned under Insolvency & Bankruptcy Code.

18. Accordingly, this Petition is admitted.

19. The Registry is hereby directed to immediately communicate this order to the Operational Creditor, the Corporate Debtor and the Interim Resolution Professional even by way of email and by speed post. List on 10th Dec, 2018 for filing progress report.

SD/-

RAVIKUMAR DURAISAMY
MEMBER (TECHNICAL)

SD/-

V. P. SINGH
MEMBER (JUDICIAL)