

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

CP IB 121-CHD-HRY-2017

Under Section 9 of IBC, 2016

In the matter of:

BRIJ LAL ASHOK KUMAR

having Its office at Shop No.58, Near
 Anaj Mandi, Ballabgarh, Dist.Faridabad
 Haryana

...Petitioner-Operational Creditor

Vs.

TARA CHAND RICE MILLS PVT.LTD.

having its registered office at
 4, Milestone Karnal Road,
 Nissing-132024, Karnal,
 Haryana

...Respondent-Corporate Debtor

Order delivered on : 16.03.2018

Coram: Hon'ble Mr.Justice R.P.Nagrath, Member (Judicial)
Hon'ble Mr.Pradeep R.Sethi, Member (Technical)

For the Petitioner : Mr.Rakesh Kumar, Advocate

For the Respondent : Mr.Nahush Jain, Advocate

Per: Pradeep R. Sethi, Member(Technical)

Judgment

The petitioner has initiated corporate insolvency resolution process in respect of the respondent M/s Tara Chand Rice Mills Pvt. Ltd. under Section 9 of Insolvency and Bankruptcy Code, 2016 (to be referred hereinafter as the Code) read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (for brevity, the Rules).

2. The respondent M/s Tara Chand Rice Mills Private Limited (Corporate Debtor) having registered office at 4, Milestone, Karnal road, Nissing Haryana-132024 is the exporter, producer and supplier of rice in India and across the world. Therefore, the matter falls under the jurisdiction of this Tribunal. The respondent was incorporated as a company on 08.02.2013 under the Companies Act, 1956 with authorised capital of ₹40 crores and paid up share capital of ₹31,69,01,170/- having been allotted CIN U1513HR2013PTC048297.

3. The petitioner, Brij Lal Ashok Kumar is a proprietorship concern working as Commission agent in New Anaj Mandi, Ballabgarh, Faridabad, Haryana. It is stated that on demand and request of the respondent-corporate debtor, the petitioner supplied paddy to the respondent from time to time commencing from 21.10.2014 to 03.01.2016 and raised the invoices accordingly.

4. It is further stated that the invoices so raised and the payment/part payment so received against the same from the respondent from time to time were duly debited and credited on regular basis on the running account maintained by the petitioner and this running account reflected debit balance of ₹2,23,89,593/- as on 27.07.2017 as due and outstanding against the respondent. It is stated that since the respondent failed to make the payment, the petitioner issued a Demand Notice dated 05.09.2017 in Form 3 under the Code which was duly delivered to the respondent on 07.09.2017 as per tracking report on file. It is stated that the Operational Creditor on the lapse of 10 days from the date of said Demand Notice was entitled to initiate a corporate insolvency resolution process in respect of the respondent, but instead of

initiating the corporate insolvency resolution process in respect of the respondent, the petitioner again sent a reminder to the Demand Notice dated 27.09.2017 which was delivered to the respondent on 05.10.2017 as per tracking report annexed with the petition. It is stated that there has been no repayment of the unpaid operational debt till date, there is no dispute between the petitioner and respondent and no notice of dispute has been received by the petitioner from the respondent.

5. The petitioner dispatched copy of the petition to the respondent on 07.11.2017 by speed post . Postal receipt is attached at page 245 of the paper book. As per tracking report on record, the item was delivered on 10.11.2017.

6. Notice of this petition was issued to the respondent-corporate debtor. When the matter was listed on 17.01.2018, certain defects in the application as affidavits Annexures A-6 and A-9 are insufficiently stamped and also not in the prescribed Form No.6 read with NCLT Form No.4 and that there was defect in the description of the institute of insolvency resolution professional in the written communication in Form 2. Notice of these defects was given to the petitioner and learned counsel representing the petitioner accepted the notice and it was directed to remove the defects within seven days.

7. The petitioner removed the defects by filing fresh affidavits in compliance with the order dated 17.01.2018 along with rectified consent letter from the proposed Interim Resolution Professional in Form 2 and revised index of invoices apart from other documents.

8. Learned counsel for the petitioner referred to the application and submitted that the requirements of Section 9 (1) to (3) of the Code as well as

Rule 6 of the Rules have been duly complied with. It was further submitted that rectified Form 2 was filed at Annexure AA-2 of diary No.318 dated 29.01.2018.

9. It was contended that the petitioner is working as a commission agent in New Anaj Mandi, Ballabgarh, Faridabad in the name and style of M/s Brij Lal Ashok Kumar and on the demand and request of the respondent, the petitioner was supplying paddy to it from time to time commencing from 21.10.2014 to 03.01.2016 and raised the invoices. It is stated that the invoices as well as payments were recorded on regular basis in the running account maintained by the petitioner and this running account reflected a debit balance of ₹.2,23,89,593/- as on 27.07.2017 which is due and outstanding against the respondent and the liability is duly acknowledged by the respondent. It is stated that no notice of dispute was received, despite issue of demand notices dated 05.09.2017 and 27.09.2017.

10. In the reply filed by respondent it was alleged that as per Index of invoices filed with the petition at Annexure-4 (colly) particulars of two Bill Nos. 19 and 20 have been given which are both dated 10.11.2014 but no such Bills are annexed with the petition. These Bill Nos.19 and 20 are not even entered in the ledger account Annexure A2 relied upon by the respondent. Moreover, the particulars of Bill Nos.21 to 25 shown to dated 11.11.2014, 13.1.2014, 13.11.2014, 16.11.2014 and 02.12.2014 as per Index 4 (colly) are totally inconsistent with the entries in the ledger record of respondent being maintained by the petitioner. Aforesaid Bills are not even attached with the invoices relied upon by the petitioner. Similarly, description of Bill No.26, 27 and 28 dated 02.12.2014, 03.12.2014 and 06.12.2014 is wrong as per record. In fact the Bills at pages 57, 58 and 59 as entered in the Index of Bills are different. It is further

stated that in respect of Bill No.29, wrong details have been given and for Bill No.39, there are no details.

11. It is also averred that there exists a dispute with the respondent in respect of the supply of paddy. According to the respondent, paddy purchased there arose a dispute with regard to the quality of the paddy sold by the petitioner which was the ground not to disburse further payments. With regard to paddy purchased in the year 2014-15, there was no dispute in terms of quality and purchases were made. However, most of the paddy received against the bills raised in the year 2015-16 was of inferior quality. As a matter of practice, every time the paddy is received from any commission agent/supplier, testing analysis is done describing the quality of paddy and it is finally reported to the commission agent /supplier that their paddy is accepted or rejected. A copy of the these reports prepared for every bill for the year 2014-15 and year 2015-16 are annexed as Annexure R-2 with the reply.

12. It is further averred that in the year 2015-16 from 29.10.2015 to 01.03.2016, 54 bills were raised on different dates for a total of 30000 bags of paddy amounting to Rs.3,74,27,920/- and out of the total 54 bills, paddy received against 24 bills was of inferior quality and contained high moisture and was thus rejected. The value of rejected paddy amounted to Rs.1,71,02,402/- and that at every instance, whenever the paddy was tested of inferior quality, the petitioner was duly informed of the same and the petitioner was further asked to recall the said inferior paddy. At every such instance, the petitioner requested the respondent to unload and store the said inferior paddy in their premises itself, and further suggested that the petitioner shall get that paddy lifted by itself from there or will settle the rate of such inferior paddy later on with

the respondent, as the petitioner did not want to incur the loss of around 9% of recalling the said paddy. It is stated that in this manner, at various instances the paddy received against the 24 bills was unloaded and stored in the premises of the company, at the instructions of the petitioner and that this is a market practice also.

13. It is further averred that another reason for not recalling the paddy by the petitioner was that the petitioner was expecting the market rate of the paddy to increase (as had happened in the year 2013 when the rate escalated upto around Rs.4500/-) so that the loss of inferior paddy may be covered up. It is stated that the paddy received against the said 24 bills was stored by the company in its premises on the basis of trust and faith for around 1.7 years when petitioner instructed the respondent to use and process the said paddy and sell its output in the market and thereupon, the petitioner will settle the account on the basis of whatever are the sale proceeds. It is submitted that due to this reason, a payment of ₹5,00,000/- was also made to the petitioner on 27.07.2017 and the said inferior and damaged paddy for 24 bills was processed to produce rice grain but since the paddy kept lying for around 1.7 years, it got further deteriorated, blackened and there was further breakage in the grain and such quality of processed rice grain could be sold only for around ₹.46,00,000/- in the market. The petitioner was informed of this fact that out of ₹2,23,89,593/-, the rejected goods worth ₹1,71,02,402/- were sold for ₹.46,00,000/- and accordingly the respondent offered to pay the remaining ₹98,87,191/-. The petitioner denied to accept and settle the account as above and sent demand notice of ₹2,23,89,593/- and deliberately suppressed the material details pertaining to the

quality dispute of the paddy which forms the part of the transactions of the respondent.

14. As already noted, the petitioner filed the details and removed the defects vide diary No.318 dated 29.01.2018. Learned counsel for the respondent referred to these details submitted that by order dated 17.01.2018, the petitioner was required to only file fresh affidavits and fresh written communication in Form No.2 and therefore, Annexure AA-3 – revised index of invoice as corrected and Annexure AA-4 – copy of Form AS-26 for the financial year 2015-16 in the name of Mr.Ashok Kumar, Corporate Creditor have been filed without any permission of the Tribunal. It is also contended that filing of additional documents amounts to amendment of the application filed under Section 9 of the Code. On merits, the learned counsel for the respondent has referred to Annexure AA-3 – revised index of invoice as corrected and has pleaded that there were still the mistakes therein.

15. In response to the above reply, the learned counsel for the petitioner submitted that in para 4 of the reply the respondent has accepted that the amount due to the petitioner as per the outstanding invoices was of ₹2,23,89,593/-. The learned counsel for the petitioner has emphasised that the mistakes in Annexure AA-3 – revised index of invoice as corrected vide diary No. 318 dated 29.01.2018 were of no significance in view of the acceptance of the liability as above and in view of confirmation by the respondent of the ledger account of the respondent in the books of the petitioner from 01.04.2015 to 28.03.2017 showing debit closing balance of ₹2,28,89,593/-. It is stated that there was a further credit of ₹5,00,000/- on 27.07.2017 in the ledger account of the respondent in the petitioner's books and therefore, before this date, the

balance as per the account at page 27 of the application of ₹2,28,89,330.42 was less than the confirmation of debit balance of ₹2,28,89,593/- given by the respondent at page 26 of the application.

16. We have carefully considered the application, reply and other documents filed as well as the arguments of the learned counsels for the petitioner and the respondent.

17. Section 9 of the Code reads as under:-

“(1) After the expiry of the period of ten days from the date of delivery of the notice or invoice demanding payment under sub-section (1) of section 8, if the operational creditor does not receive payment from the corporate debtor or notice of the dispute under sub-section (2) of section 8, the operational creditor may file an application before the Adjudicating Authority for initiating a corporate insolvency resolution process.

(2) The application under sub-section (1) shall be filed in such form and manner and accompanied with such fee as may be prescribed.

(3) The operational creditor shall, along with the application furnish—

(a) a copy of the invoice demanding payment or demand notice delivered by the operational creditor to the corporate debtor;

(b) an affidavit to the effect that there is no notice given by the corporate debtor relating to a dispute of the unpaid operational debt;

(c) a copy of the certificate from the financial institutions maintaining accounts of the operational creditor confirming that there is no payment of an unpaid operational debt by the corporate debtor; and

(d) such other information as may be specified.

(4) An operational creditor initiating a corporate insolvency resolution process under this section, may propose a resolution professional to act as an interim resolution professional.

(5) The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), by an order—

(i) admit the application and communicate such decision to the operational creditor and the corporate debtor if,—

- (a) the application made under sub-section (2) is complete;*
- (b) there is no repayment of the unpaid operational debt;*
- (c) the invoice or notice for payment to the corporate debtor has been delivered by the operational creditor;*
- (d) no notice of dispute has been received by the operational creditor or there is no record of dispute in the information utility; and*
- (e) there is no disciplinary proceeding pending against any resolution professional proposed under sub-section (4), if any.*

(ii) reject the application and communicate such decision to the operational creditor and the corporate debtor, if—

- (a) the application made under sub-section (2) is incomplete;*
- (b) there has been repayment of the unpaid operational debt;*
- (c) the creditor has not delivered the invoice or notice for payment to the corporate debtor;*
- (d) notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility; or*
- (e) any disciplinary proceeding is pending against any proposed resolution professional:*

Provided that Adjudicating Authority, shall before rejecting an application under subclause (a) of clause (ii) give a notice to the applicant to rectify the defect in his application within seven days of the date of receipt of such notice from the adjudicating Authority.”

18. We find that the requirements of Section 9(1) to (3) are satisfied in the present case. The petition has been filed more than 10 days after the delivery of demand notice dated 27.09.2017. The petitioner filed his affidavit affirming that there is no dispute of unpaid operational debt pending between the parties in any court of law or authorities as on 15.11.2017. (Annexure 9 of the application). Copy of the certificate from HDFC Bank Ltd. maintaining

account of the operational creditor confirming that there is no payment received from the corporate debtor after 27.07.2017 i.e. no payment of unpaid operational debt by the corporate debtor has been filed at Annexure 3 (colly) of the application. Copy of the petition was also dispatched to the respondent and as per tracking report on file, the same was delivered to the respondent on 10.11.2017. The proviso to Section 9(5) of the Code makes it mandatory for the Adjudicating Authority to provide opportunity to the corporate debtor to remove the defects which was timely complied. As discussed above, these matters were covered by further documents filed by the petitioner vide diary No.318 dated 29.01.2018. The documents filed vide diary No.318 dated 29.1.2018 were carefully considered and taken on record as per order dated 29.01.2018. The respondent's contention filed vide diary No.643 dated 05.03.2018 that Annexure AA-3 – revised index of invoice as corrected and Annexure AA-4 – copy of Form AS-26 for the financial year 2015-16 were not filed under the directions of this Tribunal is, rendered infructuous especially as the total amount outstanding for the invoices of sale of paddy was admitted in the reply with the only contention of the poor quality of rice. Therefore, the requirements of Section 9 (1) to (3) are satisfied and the only issue requiring consideration as to whether there is an existence of a “dispute”.

19. Section 5(6) of the I&B Code, 2016 defines ‘dispute’ as follows:-

“(6) “dispute” includes a suit or arbitration proceedings relating to—

- (a) the existence of the amount of debt;*
- (b) the quality of goods or service; or*
- (c) the breach of a representation or warranty”*

20. It is the settled principle of law that the above definition is inclusive and not confined only to the instances where the dispute is pending in the Civil Suit or arbitration proceedings.

21. In the facts of the present case, no notice has been given by the corporate debtor relating to a dispute of the unpaid operational debt in response to the demand notices dated 27.09.2017 issued by the petitioner. 54 Bills raised in the year 2015-16 from 29.10.2015 to 01.03.2016 for a total of 30000 bags of paddy amounting to ₹3,74,27,920/- was supplied by the petitioner. It is averred that paddy received against 24 bills was of inferior quality and contained high moisture and was thus rejected, the value of which is ₹1,71,02,402/-. It is further stated that the rejected goods worth ₹1,71,02,402/- were sold for ₹46,00,000/- and accordingly, the respondent is liable to pay ₹98,87,191/-. The respondent has referred to testing and analysis reports prepared by it for paddy received against every bill of the petitioner. The copies of these reports prepared for every bill for the year 2014-15 and year 2015-16 have been annexed as Annexure R-2 of diary No.2949 dated 18.12.2017.

22. However, there is no evidence that these reports were brought to the notice of the petitioner. The respondent's contention is all in the air to the effect that at every instance, whenever paddy is tested for inferior quality, the petitioner was duly informed of the same and the petitioner was asked to recall the inferior paddy is without any evidence. There is also no document to suggest that petitioner ever suggested that he will get the paddy lifted by himself from there or will settle the rate of such inferior paddy later on with the company. The contention that there were instructions from the petitioner that the inferior and damaged paddy for 24 bills be processed to produce rice grain is not

substantiated by any document. The intimation of sale of rejected goods worth ₹1,71,02,402/- for ₹46,00,000/- claimed to have been made to the petitioner is not supported by any proof. In these circumstances, the contention of the respondent that the liability to pay only ₹98,87,191/- is not substantiated.

23. As discussed above, the petitioner has filed the confirmation of the respondent for the account of the respondent in the books of the petitioner from 01.04.2015 to 28.03.2017 showing closing debit balance of ₹2,28,89,593/-. This is not disputed by the respondent. As already discussed above, the balance confirmed of ₹2,28,89,593/- is almost the same as the balance shown of the respondent in the petitioner's books for the period 01.04.2017 to 27.07.2017. In these circumstances, the contentions raised with regard to defects in the index of invoices filed along with the application as well as in the revised index of invoice as corrected (Annexure AA-3 of diary No.318 dated 29.01.2018) do not have any significance. Therefore, we conclude that there is no plausible contention of the respondent which requires further investigation and that the "dispute" is a patently feeble argument or an assertion of fact unsupported by evidence. The dispute is, therefore, spurious, hypothetical and illusory.

24. The petitioner, being an operational creditor, is not bound to propose the name of the Resolution Professional to be appointed as Interim Resolution Professional. The petitioner, however, has filed written communication in Form 2 (Annexure A-10 of application and Annexure A-2 of diary No.2831 dated 11.12.2017) from Mr. Sameer Rastogi, registered Resolution Professional having allotted Registration No. IBBI/IPA-002/IP-N00226/2017-18/10677, giving all the necessary particulars as required in the form and that he is presently not serving as IRP/RP/Liquidator in any

proceedings. It is also stated by him that there are no proceedings pending against him with the Insolvency and Bankruptcy Board of India (IBBI) or ICSI. Having perused the form, we find the same to be in order.

25. In result, thereof, we find that all the compliances have been made and the application is complete and the petition deserves to be admitted. In view of the above, the instant petition is admitted declaring moratorium for prohibiting all of the following in terms of Section 14(1) of the Code: -

- (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 Securitisation 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.

26. It is further directed that the supply of essential goods or services to the Corporate Debtor as may be specified, if continuing, shall not be terminated or suspended or interrupted during moratorium period. The

provisions of sub-section (1) shall however not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

27. The order of moratorium shall have effect from the date of this order till 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.

28. The matter be listed on 21.03.2018 for passing of the formal order of appointment of Interim Insolvency Resolution Professional with further directions. Copy of this order be communicated to both the parties.

Sd/-
(Justice R.P.Nagrath)
Member (Judicial)
Adjudicating Authority

Sd/-
(Pradeep R.Sethi)
Member(Technical)
Adjudicating Authority

March 16, 2018
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