

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

CP 21/I&BP/NCLT/MAH/2018

Under Section 9 of the I&B Code, 2016

In the matter of
TATA Chemicals Limited

....Operational
Creditor

v/s.

**Raj Process Equipments and Systems Private
Limited**

....Corporate Debtor

Order Delivered on 30.11.2018

Coram: Hon'ble Shri V.P. Singh, Member (Judicial)
Hon'ble Shri Ravikumar Duraisamy, Member (Technical)

For the Petitioner: Mr. Rohan R. Sonawane, Advocate
For the Respondent: Mr. Karl Tamboly, Advocate a/w Mr. Kunal Kanungo,
Advocate and Mr. Malcolm Sigantoria, Advocate.

Per V. P. Singh, Member (Judicial)

ORDER

1. Petitioner, TATA Chemicals Limited, has filed this Petition under Section 9 of the Insolvency and Bankruptcy Code, 2016 for initiation of CIRP against the Corporate Debtor, Raj Process Equipments and Systems Private Limited, having identification number as U29299PN2003PTC017672 with share Capital of ₹20,00,00,000.
2. It is stated in the Petition that Operational Creditor approached the Corporate Debtor for designing, building, transporting, erecting and commissioning a Double Effect Evaporator at the Operational Creditor's plant located at Sirperumbudur, Tamil Nadu and render such services at its manufacturing plant as being agreed upon between the Operational Creditor and Corporate Debtor. Based on the discussions and Letter of Intent dated 22.6.2016 entered between the parties, a Purchase Order dated 2.7.2016 was raised on the Corporate Debtor by the Operational Creditor for manufacturing, delivery, providing technical assistance for

installation and commissioning of the said evaporator at the plant, which was duly received and accepted by the Corporate Debtor.

3. It is further stated in the Petition that as per the arrangement agreed between Operational Creditor and Corporate Debtor, Operational creditor accordingly made advance payment of ₹4,40,000 being the 10% of the total purchase amount, i.e. ₹44,00,000 (excluding tax) of the said Purchase Order. According to the Purchase Order, the delivery date of the said evaporator was up to 30.9.2016. Despite of repeated reminders and visit to the Corporate Debtor's site, Corporate Debtor defaulted and failed to deliver the said evaporator on the scheduled delivery date i.e. up to 30.9.2016 and within the further unilaterally extended period till 5.11.2016 by Corporate Debtor. The Operational Creditor, vide its letter dated 31.1.2017, 14.2.2017, 27.2.2017 and 15.3.2017 respectively kept requesting Corporate Debtor to cause delivery of the said equipment and also to provide all such necessary documents as being agreed upon about the said evaporator. The Operational Creditor tried to resolve the matter amicably but failed to get any positive response from the Corporate Debtor. Therefore, by legal notice dated 21.4.2017, the Operational Creditor terminated the Purchase Order and also called upon the Corporate Debtor to return the advance payment, i.e. ₹4,40,000/- and also ₹9,15,00,000 towards financial loss suffered by Operational Creditor.
4. The petitioner is claiming that as on 21.04.2017, the Corporate Debtor defaulted on advance payment of sum of ₹4,40,000/- paid to the Corporate Debtor. In addition to this, it is claiming ₹9,15,00,000/- as actual financial damages till 21.4.2017. The operational creditor is also claiming interest @ 18% per annum on ₹4,40,000/-, i.e. ₹34,066/- and interest amount from 17.7.2017 till the date of filing the petition @ 18% per annum on ₹9,15,00,000 i.e. on compensation amount. The total amount of debt is shown as ₹9,90,58,377/-.
5. In Part IV of the application, the petitioner has shown the details of the operational dues of ₹9,90,58,377, which is as below:

Date	Particulars (in ₹)
21.4.2017 (Advance Payment)	4,40,000
21.4.2017 (actual financial damages)	9,15,00,000
17.7.2017 till present day @ 18% per annum on ₹4,40,000/-	34,066
17.7.2017 till present day @ 18% per annum on ₹9,15,00,000	70,84,311
Total	9,90,58,377

6. Alongwith the Petition, Petitioner has attached the legal notice for termination of purchase order as Annexure G, which shows that on 21.4.2017, Petitioner has terminated the said contract by way of legal notice. Petitioner has also annexed a copy of the Demand Notice in Form 3, as Annexure J, and copies of all documents referred in the petition and copy of the relevant Bank Certificate dated 8.12.2017 as "Annexure M" from the Bank maintaining the Account of the Operational Creditor, confirming that there is no payment received from the Corporate Debtor. The Petitioner has also attached particulars of claim as "Annexure L", Copy of the Board Resolution delegating powers to authorised person to appoint persons to act on behalf of the Operational Creditor as "Annexure N", Copy of the Power of Attorney delegating powers to authorised person as "Annexure O", Letter of Authority dated 16.10.2017 of the Operational Creditor authorising Mr. Dipak D Choudhary and Mr. Rahul Gupta as authorised officers and signatory of the Operational Creditor as "Annexure P", Letter of Authority dated 27.12.2017 of the Operational Creditor authorising Advocate Rohan R. Sonawane to act and plead on behalf of the Operational Creditor as "Annexure Q" and Affidavit in support of Petition.
7. In reply to the above petition, the Corporate Debtor has filed Counter Affidavit stating that the present Petition is tainted with malafide

motives and deserves to be dismissed in limine. It is stated by the Corporate Debtor that in compliance of the terms and conditions of the Purchase Order, the Corporate Debtor furnished the Advance Bank Guarantee equivalent to the 10% of the total value of the order on 3.3.2016.

8. It is stated by the Corporate Debtor that as per the letter of Intent, the Delivery Date of the said Evaporator was 30.9.2016. However, the frequent changes, rectifications to the drawings suggested by the applicant affected the technical specifications and revised the calculation of the Evaporator. These frequent changes and the constant delay in inspection of the documents and site on applicant's part impeded the Corporate Debtor from expediting manufacture of the Evaporator. The Corporate Debtor continually informed the applicant over the emails dated 13.12.2016 and 13.2.2017 that the said evaporator was ready to be dispatched and delivered and was waiting for the applicant's confirmation. Corporate Debtor has annexed with the reply the copies of the emails dated 13.12.2016 and 13.2.2017 which is marked as Exhibit R-1. The Corporate Debtor has further stated that it continuously conveyed its readiness and willingness to deliver the said evaporator to the applicant which can be inferred from the above mentioned emails and also from the various letters correspondence between the applicant and the Corporate Debtor dated 14.2.2017 and 17.2.2017, which is annexed with the reply as Exhibit R2.
9. The Corporate Debtor has further stated that the applicant was not really interested in lifting the machinery but only interested in making a claim against the Corporate Debtor and with that intention insisted on renewal of Bank Guarantee. However, since the delay was not attributable to the Corporate Debtor but to frequent changes and modifications by the employees of the applicant, the Corporate Debtor pressed for inspection and lifting the goods. However, the applicant did not take any steps for arranging inspection but was only interested in supply of Bank Guarantee. Despite of the Corporate Debtors continually conveyed readiness and willingness to deliver the said evaporator, the applicant

sent a contract termination letter dated 21.4.2017, thereby autocratically terminating the Purchase Order dated 2.7.2016 and also demanded a baseless and hyper inflated a claim of ₹9,15,00,000/-.

10. The Corporate Debtor has stated that they sent reply dated 16.11.2017 to the Demand and termination letter. It is further stated in the reply that the Purchase Order dated 2.7.2016 clearly record that **"in case if the vendor fails to deliver order/services on or before 30.9.2016, the applicant shall be entitled to claim a discount of 18% of the total amount of the price agreed upon the date on which the final delivery of the order services are to be made. It was further mentioned in the letter of intent that in case the delivery is delayed beyond 30.9.2016, the applicant shall levy liquidated damages at 0.5% per week of delay subject to maximum of 5% of the contract value."** Despite both the parties agreeing to the aforesaid condition, applicant has without any reason escalated the amount of the transaction and have arrived at an exorbitant, baseless, unjustifiable and hyper inflated amount of ₹9,90,58,377.
11. We have heard the arguments of both the parties and perused the record. On perusal of the record, it appears that the Operational Creditor has filed this Petition on the basis of termination of the contract, which was given to the Corporate Debtor for supplying the evaporators and ₹4,40,000 amount was advanced to the Corporate Debtor for supply of goods and on termination of the contract, Operational Creditor claimed ₹9,15,00,000 as actual financial damages and ₹70,84,311/- and further ₹34,066 as interest, total debt amounting to ₹9,90,58,377/-
12. Ld. Counsel for the Corporate Debtor emphasized the maintainability of the Petition under Section 8 and 9 of the IBC, 2016. It is argued on behalf of the Corporate Debtor that "an Operational Creditor may on the occurrence of a default, deliver a demand notice of unpaid operational debtor copy of an invoice demanding payment of the amount involved in the default to the corporate debtor in such form and manner as may be prescribed." It is argued on behalf of the Corporate Debtor that the Operational Debt as defined in the Code in Section 5(21) means "a claim

in respect of the provision of goods or services including employment or a debt in respect of the repayment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority.”

13. It is further stated that Section 3(11) of the Code provides that “Debt” means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt. Operational Debt as defined under Section 5(21) means “a claim in respect of the provision of goods or services including employment or a debt in respect of the repayment of dues arising under any law.”
14. **Refund of advance money is not in connection with the goods/services including employment or a debt in respect of repayment of dues.** Corporate Debtor has taken order from the petitioner for supply of goods. The contract/order has been terminated by the Petitioner. **Therefore, refund of advance amount, which has been taken by the Corporate Debtor, is not on account of goods/services or employment.**
15. Ld. Counsel for the Corporate Debtor has raised the argument that Operational Creditor’s claim on compensation or damages on account of alleged breach of contract is not admitted by the Corporate Debtor, in fact, Corporate Debtor has raised a demand for payment for losses on the Petitioner.
16. It is further contended by the corporate debtor that before claiming compensation, **Petitioner ought to have crystallised the damages then only, it would have claimed the amount of compensation.** Then only on failure to make the payment, he has every right to initiate Insolvency Proceedings against the Corporate Debtor.
17. Section 73 of the Indian Contract Act provides that “when a contract has been broken, the party who suffers by such breach is entitled to receive, from the party, who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew,

when they made the contract, to be likely to result from the breach of it.

18. It is further stated that when an obligation resembling those created by contract has been incurred and has not been discharged, any persons injured by the failure to discharge it, is entitled to receive the same compensation from the party in default, as if such person has contracted to discharge it, and had broken his contract.
19. In this case, the Petitioner has raised claim of ₹5,00,000 per day for loss of production, which is not only in nature of consequential damages, but also completely arbitrary and baseless, which cannot be relied upon in absence of adjudication. **The alleged claim is not adjudicated by any competent authority in law, and hence, such a claim cannot be described as "Operational Debt."**
20. In case of E-City Media Private Limited vs Sadhrta Retail Limited in CP No.367 of 2009, the Hon'ble High Court of Judicature at Bombay has held that **"The Petition for winding up cannot be maintained upon a claim for damages. Damages become payable only when they are crystallised upon adjudication. Until and unless an adjudication takes place with a resultant decree for damages, there is no debt due and payable. Damages require adjudication. Until then, the liability of a party in alleged breach of a contract does not become crystallised."**
21. Further, in case of Union of India vs Raman Iron Foundry (1974 AIR 1265, 1974 SCR (3) 556), it has been held that **" the claim for unliquidated damages does not give rise to a debt until the liability is adjudicated upon and damages assessed by an adjudicatory authority. When there is a breach of contract, the party who commits the breach does not eo instanti incur any pecuniary obligation nor does the party complaining of the breach become entitled to a debt due from the other party. The only right which the party aggrieved by the breach has is the right to sue for damages, and this is not an actionable claim."**

22. **It is also important to point out that Petitioner had neither provided any goods nor any services to the Corporate Debtor. There is no amount given by the Petitioner to the Respondent in nature of debt. On the other hand, the Corporate Debtor is a vendor, and the applicant has not made payment to it. Hence the petitioner is not an Operational Creditor as defined under the IBC.**
23. Argument has been further advanced regarding the **existence of dispute**. It is clear from the bare perusal of the correspondence (Exhibit R1, mail of 7.2.2017) between the parties that there is clear dispute between the parties. The petitioner was not ready to deploy anybody for inspection of the material until and unless the Corporate Debtor provides the renewed Bank Guarantee. Further, the Corporate Debtor was taking a stand that it shall supply the renewed Bank Guarantee only on written assurance that Bank Guarantee will not be invoked. (R2 letter dated 17.2.2018).
24. The Corporate Debtor maintained that delay was on account of the modification instructions given by the employees of the Applicant as also their reluctance in carrying out inspection and lifting the goods.
25. **The claim of the Operational Creditor is not based on the operational debt, because goods/services was to be rendered by the Corporate Debtor himself.** It has been argued that **the claim of the Operational Creditor is not relating to the goods/services including employment or the debt in respect of the repayment of the dues**, but it is **related to non payment of the advance money** and claiming further compensation on account of the alleged loss incurred by the Operational Creditor. The same is not covered under the definition of the Operational Debt as provided under Section 5(21) of the Code.
26. **It is pertinent to mention that till filing of the petition, alleged compensation amount of ₹9,15,00,000 was not even quantified.** Even though the Petitioner, in Part IV of the Petition has mentioned **actual financial damages of ₹9,15,00,000**. Further, the petitioner

has mentioned **₹9,19,40,000 as principal amount**, *whereas amount given as advance to the corporate debtor was only ₹4,40,000/-*.

27. The above assertion in the petition clearly shows that **the petition has been filed on wrong facts to start CIRP by giving false information**. There is no such case of the Petitioner that it has advanced ₹9,19,40,000 as principal amount to the Corporate Debtor. By advance of ₹4,40,000/-, the Petitioner has filed this petition, showing the **principal amount of ₹9,19,40,000/-** and has further filed the Affidavit certifying the contents of the Petition. This clearly shows that Petitioner has filed this Petition for initiation of CIRP fraudulently or with malicious intent for any purpose other than for the resolution of insolvency, which comes under the purview of Section 65 of the IBC. Actual amount advanced was ₹4,40,000/-, but the Petitioner has falsely claimed ₹9,19,40,000/- as the principal amount, which is 209 times of the actual advance amount.

28. The petitioner's claim regarding actual financial damages of ₹9,15,00,000/- is without any adjudication. It is also pertinent to mention that purchase order which was given to the Corporate Debtor provides that **"the goods were to be supplied by 30.9.2016 or earlier, in case of delay in delivery beyond 30.9.2016, the applicant shall levy liquidated damages at 0.5% per week of delay subject to maximum of 5% of the contract value."** Since the total contract value as per the Purchase order was ₹44,00,000, therefore the maximum compensation/penalty, in case of breach of contract by the corporate debtor, which could have been claimed, would have been 5% of the contract value, i.e. ₹2,20,000. The copy of the purchase order has been filed with this Petition as Annexure.

29. Since the Petitioner filed this petition with false information alleging the principal amount as ₹9,19,40,000/- instead of ₹4,40,000/- without going into the merits, we are of the considered view that the Petition has been filed with ulterior motive to get insolvency petition admitted which comes under purview of Section 65 of the IBC.

30. Petitioner's claims do not fall within the definition of Operational Debt. Petitioner has filed false affidavit to prove that the actual principal amount due is ₹9,19,40,000/- instead of ₹4,40,000/-. Therefore, Petition is dismissed with costs of ₹10,00,000/- which is to be paid by the Operational Creditor within 30 days from today. The cost of ₹10,00,000/- is to be paid in the account of the "Prime Minister National Relief Fund."

Sd/-

RAVIKUMAR DURAISAMY
Member (Technical)

Sd/-

V. P. SINGH
Member (Judicial)

30th November, 2018