

NATIONAL COMPANY LAW TRIBUNAL
PRINCIPAL BENCH
NEW DELHI

C.P NO. (IB)-64(PB)/2017
CA NO.

CORAM:

PRESENT: CHIEF JUSTICE M. M. KUMAR
Hon'ble President

SH. R.VARADHARAJAN
Hon'ble Member (J)

ATTENDANCE-CUM-ORDER SHEET OF THE HEARING BEFORE PRINCIPAL BENCH OF
THE NATIONAL COMPANY LAW TRIBUNAL ON

NAME OF THE COMPANY: Macquarie Bank Ltd.

V/s.

Shilpi Cable Technologies Ltd.

SECTION OF THE COMPANIES ACT: U/s 9 of Insolvency and Bankruptcy Code 2016

S.NO.	NAME	DESIGNATION	REPRESENTATION	SIGNATURE
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For the Petitioner : Shri Vivek Sibal, Advocate

Ms. Pooja Saigal, Advocate

For the Respondent : Shri U.K. Chaudhary, Sr. Advocate

Shri Ajay Garg, Advocate

Shri Himanshu Vij, Advocate

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ORDER

Macquarie Bank Limited (for brevity the 'Applicant'), being an assignee of the S.V. Overseas Private Limited (for brevity the 'Supplier') has filed the instant application under Section 8 and 9 of the Insolvency and Bankruptcy Code, 2016 (for brevity the 'Code') against Shilpi Cable Technologies Limited, New Delhi-the Corporate Debtor (for brevity the 'Corporate Debtor'), for committing default in making the payment of operational debt amounting to US Dollar 3,010,150.00, which is equivalent to Rs.19,55,39,344.00/- (Nineteen Crore Fifty-Five Lakh Thirty Nine Thousand and Three Hundred Forty Four only). The amount has been calculated @ 1 USD equivalent to Rs. 64.96/- as it was on 29.03.2017. The aforesaid amount has been claimed alongwith interest thereon @ 12% per annum from the date the amount was due till the date of its payment.

2. Brief facts of the case necessary for disposal of the controversy raised are that the Corporate Debtor, Shilpi Cable Technologies Limited approached the Supplier and offered to purchase Copper Rods on credit. The 'Applicant'-Operational

Creditor is a company incorporated under the laws of Australia and claims to be a leading financial service provider and trade related insurance solutions provider. The application has been filed through its Power of Attorney holder, Mr. Sahil Bhatia, who has been duly authorised vide Power of Attorney dated 06.02.2017 (Annexure-2). The Corporate Debtor is a company incorporated under the provisions of the Companies Act, 1956, which has its registered office at New Delhi.

3. The debt originates from a transaction of supply of Copper Rods by the supplier. The Corporate Debtor had offered to purchase the Copper Rods. After various round of discussion, parties entered into a contract of sale and purchase of copper rods on 18.01.2016. It is evident that the Corporate Debtor agreed to purchase the invoiced quantity of copper rods from the supplier from time to time against the purchase orders placed. The payment was to be made on demand by the Corporate Debtor upon presentation of commercial invoice by the Operational Creditor. If the payment was not made within a period of 180 days then it was to become due with interest calculated at 1% per month. The parties agreed to the terms of the contract and executed purchase

confirmation dated 04.03.2016 for supply of copper rods (Annexure- 4 and 5).

4. In terms of the contract, goods were supplied by the supplier, which was duly received by the Corporate Debtor vide commercial invoice bearing Invoice No. SVO/15-16/555 dated 28.03.2016 was raised (Annexure-6). The supplier supplied the goods to the Corporate Debtor and shared the copies of the Bill of Lading bearing Nos. ATSJEANHS160409 to ATSJEANHS160423 (Annexure-7). The Bill of Exchange issued by the supplier directed the Corporate Debtor to make payment of US Dollar 3,870,000.00 to the Operational Creditor upon expiry of 180 days from the date of Bill of Lading. The Bill of Exchange has been accepted by the Corporate Debtor (Annexure-8).

5. The 'Supplier' in the meanwhile under subsisting receivables purchase agreement dated 08.07.2015 with the Operational Creditor, vide a purchase order dated 30.03.2016, requested the 'Applicant' to purchase the receivables arising out of the Invoice no. SVO/15-16/555 dated 28.03.2016 for an invoice value of USD 3,870,000.00 against which supplies had been effected by the

supplier to the Corporate Debtor. A copy of the purchase request dated 30.03.2016 (Annexure-9) and the receivables purchase agreement dated 08.07.2015(Annexure-11) have been placed on record. The receivables were purchased by the 'Applicant' vide purchase confirmation dated 14.04.2016. Accordingly, the Applicant cum Operational Creditor become the assignee of debt owed by Corporate Debtor to the seller for the goods supplied. A copy of the purchase request dated 30.03.2016 has been placed on record (Annexure-10).

6. In terms of Section 8 of the Code, the Applicant-Operational Creditor issued demand notice dated 08.03.2017 under registered post AD calling upon the Corporate Debtor to pay the outstanding amount within a period of 10 days from the date of receipt of the notice. The notice was sent at the registered office address as well as the other address of the Corporate Debtor-Respondent and the same has been duly received by it. A copy of the demand notice dated 08.03.2017 has been placed on record (Annexure-12).

7. The Corporate Debtor sent its reply on 20.03.2017 to the Demand Notice. It does not state or disclose record of existence of

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and/or pendency of any suit or arbitration proceedings filed before the receipt of the Demand Notice as contemplated by Section 8(2)(a) of the Code. In fact the Corporate Debtor in its reply has acknowledged the outstanding amount and has requested some more time to settle the accounts on the ground that they were under financial hardship. A copy of the reply has been placed on record (Annexure 13). The Applicant (Operational Creditor) has sent rejoinder reply dated 28.03.2017 to the Corporate Debtor (Annexure-14) declining their request for extension of time.

8. In the aforesaid facts and circumstances the Operational Creditor has alleged that the Corporate Debtor is unable to pay its debts or it must be deemed to be unable to pay its debts. The Corporate Debtor appears to be in grave financial difficulty and is otherwise in commercially insolvent circumstances. Therefore, it is just and appropriate to initiate insolvency resolution process against it.

9. In the reply filed by the Corporate Debtor, preliminary objections have been raised. It is alleged that frivolous demand of US Dollar 3,010,150.00 with interest @ 1% per month raised by

the Applicant is liable to be rejected at the outset because the amount is not due and payable by the Answering Respondent. It is asserted that the Application under Section 8 & 9 of the Code is not maintainable in law. It is also alleged that the particulars of the person who moved the Application have been wrongly given in column 6. The Applicant has wrongly mentioned the name of the legal firm instead of the name and address of Mr. Sahil Bhatia, who is authorised to sign the Application as Power of Attorney. It has also been alleged that the Applicant has neither supplied any goods to the Answering Respondent nor it has rendered any services. As such it is not covered by the provisions of Section 5(20) of the Code. According to the aforesaid provisions an Operational Creditor is a person to whom an operational debt is owed and as per Section 5(21) an operational debt is a claim in respect of the provision of goods or services including employment and government dues. There is no legal assignment of the claim in favour of the Applicant and the Operational Debtor is liable to make the payment to the supplier namely S.V. Overseas Pvt. Ltd. and not to the Applicant under the English Law. The Answering Respondent has not acknowledged the assignment of claim in favour of the Applicant. Therefore, the Applicant cannot be an

Operational Creditor and therefore, no direct claim can be raised by it against the Answering Respondent. The amount of the transaction is insured with the Insurance Company Euler Hermes, Singapore. The insurer had provided credit insurance cover to the Corporate Debtor against invoices raised on it which have been wilfully suppressed in the present application.

10. The Corporate Debtor had also alleged that the Applicant is guilty of wilful suppression of material facts and has approached the Tribunal with uncleaned hands. It has suppressed the fact that in the event of default, the payments were to be made by the insurance company to the Applicant. In that regard, a reference has been made to a communication sent by email by the recovery agent of the Insurance Company, M/s. Unified Credit Solutions Pvt. Ltd. on 05.12.2016 (R-2). Another email dated 17.04.2017 was also sent by the Insurance Company to the Corporate Debtor (R-3) stating that they have agreed to support the Corporate Debtor's repayment plan subject to fulfilment of certain obligations by it. It has also been submitted that agreement dated 18.1.2016 entered into between the supplier and the Corporate Debtor is governed by the English law and the Applicant is estopped from

initiating any action under the Indian law. All proceedings or claims or disputes or controversy arising out of the agreement dated 18.01.2016 are governed by and its terms are to be interpreted in accordance with English Law. In that regard, a reference has been made to clause 6.1 of the agreement which is to the effect that the agreement would be governed by and construed in accordance with English law and there is specific bar on initiating court proceedings except only for interlocutory relief as per the mandate of clause 6.2 of the agreement. A reference has also been invited to clause 6.4 to submit that any dispute arising out of or in connection with the agreement were to be referred to and finally resolved by arbitration in Singapore in accordance with the Arbitration Rules of the Singapore International Arbitration Centre. The Corporate Debtor claims to have initiated arbitration proceedings against the Supplier-namely S.V. Trades at the Singapore International Arbitration Centre by issuing a notice dated 19.4.2017. A copy of the notice has also been served upon the supplier at Singapore (R-4).

11. On merits, the Corporate Debtor has highlighted its cordial relations with the supplier i.e. SV Trades, Singapore since 2014.

The agreement dated 18.01.2016 has been admitted and Confirmation Note dated 04.03.2016 has also not been disputed. The goods were shipped across by 5 separate bills of lading bearing No. ATSJEANHS160409 to No. ATSJEANHS160423 dated 23.03.2016. These bills have also been admitted. Invoice dated 28.03.2016 for an amount of US Dollar 3,870,000.00 has also been accepted. It is also conceded as a fact that the payment of invoice was to be made on Documents against Acceptance, 180 days after the bills of lading dated 23.03.2016 which was to be considered as a due date. However, the debt has been subsequently assigned to the Applicant in April 2016 despite the request of extension having been made for payment. An attempt has been made by the Corporate Debtor to show that the Applicant and the supplier had agreed to the extension of time to make payment of the Invoice Sum on the condition that the Corporate Debtor would trade directly with the Applicant on further trades on 180-day credit payment terms. On the aforesaid basis, it is sought to be submitted in para 20 and 21 of the reply that the terms of agreement stood amended *by conduct* to the effect that the Applicant would conduct and complete further trades with the Corporate Debtor on a 180-day credit terms which was not limited

to the other agreements but was inclusive of the invoice under dispute. In para-22, it has also been submitted that the agreement was amended to the effect that the due date was no longer binding on the Corporate Debtor and it was allowed further time to make payments towards the Invoice Sum to the supplier. Accordingly, the Corporate Debtor made part payments towards the Invoice Sum which are as under:

- i. US\$109,850 on 29 September 2016
- ii. US\$250,000 on 15 November 2016; and
- iii. US\$500,000 on 28 December 2016

On facts, it is evident that the claim made by the Applicant is after defraying the part payments already made which come to US\$3,010,150.00.

12. The Corporate Debtor has also raised the issues concerning damage to reputation by sudden termination of the agreement causing financial crisis in its company. It has also been reflected in paras 27 & 28 that proposal for gradual tapering down of debt was made but without considering the same demand notice was sent by the Applicant on 08.03.2017.

13. We have heard the learned Counsel for the parties at length.

14. It is not disputed that the Corporate Debtor has not been able to pay its debt in accordance with the terms and conditions of agreement dated 18.01.2016. The aforesaid fact in terms has been admitted. It satisfies the provisions of Section 4 of the Code that the default amount is more than rupees one lac. The Applicant also fulfills the requirements of Section 5(20) & Section 5(21) of the Code. The application has been filed in the jurisdictional bench at New Delhi which meets the requirement of Section 60 of the Code. All legal documents as per the requirement of Section 8 & 9 of the Code have been placed on record which include the Bank Statement, Invoices, Demand Notice so on and so forth. An affidavit has also been filed by the assignee of the Operational Creditor that there is no record of dispute in the shape of a suit or arbitration proceedings at the time of sending demand notice dated 08.03.2017. The Applicant (Operational Creditor) has also furnished a copy of the invoice demanding payment from the Corporate Debtor and a copy of the certificate from the Financial Institution. The Applicant however, has not proposed any interim insolvency resolution professional as per requirement of Section 9(4) of the Code. Therefore, a reference is required to be made to

the Insolvency and Bankruptcy Board of India (IBBI) under Section 16(3) of the Code for appointing an insolvency professional who would act as interim insolvency professional.

15. We have not been able to persuade ourselves to accept any one of the objections raised by the Corporate Debtor through its learned Counsel. All such objections are being disposed of. The first objection; The Applicant is not an Operational Creditor because neither any goods have been supplied by the Applicant nor any service is rendered by it. The Applicant (Operational Creditor) is merely an assignee of the debt. This argument does not require any detailed consideration because the expression 'Operational Creditor' has been defined in Section 5(20), which reads as under:

20. "Operational creditor" means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred".

16. A bare perusal of the aforesaid provision taken from Part-II, Chapter-I of the Code and is applicable to Insolvency Resolution and Liquidation for corporate persons would show in unequivocal term that an Operational Creditor is a person to whom an

operational debt is owed and include any person to whom such debt has been legally assigned or transferred. The assignment to the Applicant is lawful and no legal flaw would ensue if the Corporate Debtor has not acknowledged it. Mr. Chaudhary, learned Counsel has not been able to show us any legal provision to that effect. By no stretch of imagination, the objection raised on behalf of the Operational Creditor would merit acceptance. Accordingly, the objection is over-ruled and rejected.

17. The second objection raised by Mr. Chaudhary is that the arbitration proceedings have been triggered as notice in terms of clause 6.4 of the agreement has been issued by the Corporate Debtor against the supplier on 19.04.2017(R-4) and with the issuance of notice, the arbitration proceedings are deemed to have commenced. Again, the aforesaid argument is liable to be rejected because under Section 8(2)(a) of the Code, the Corporate Debtor is required to bring to the notice of the Operational Creditor within a period of ten days of the receipt of the demand notice or a copy of the invoice mentioned in sub-section (1) that there is an existence of a dispute and record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoice in

relation to such dispute have been placed on record. It is a conceded fact that in the present case, notice of demand for unpaid debt under Section 8(1) of the Code by the Applicant (Operational Creditor) was issued on 08.03.2017 and the reply by the Corporate Debtor was sent on 20.03.2017. The notice for interim arbitration as per their own showing of the 'Corporate Debtor' has been issued on 19.04.2017, which is much later than the receipt of demand notice. The statutory provision under Section 8(1)(2)(a) is absolutely clear and does not admit any doubt that the dispute in the form of a civil suit or arbitration proceedings is required to be pending before the receipt of demand notice or invoice in relation to such dispute. The notice for interim arbitration is clearly after thought having been issued on 19.04.2017 which is after the reply sent on 20.3.2017 by the 'Corporate Debtor'. The aforesaid provision is set out below for facility of reference:

"Insolvency resolution by operational creditor.

8.(1) 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.

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(2) The corporate debtor shall, within a period of ten days of the receipt of the demand notice or copy of the invoice mentioned in sub-section (1) bring to the notice of the operational creditor-

(a) existence of a dispute, if any, and record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoice in relation to such dispute”.

18. A perusal of the aforesaid statutory mandate admits no other interpretation except one that the dispute must be in existence before the receipt of demand notice or invoice in relation to such dispute. In the present case, admittedly the demand notice was sent on 08.03.2017 and reply to the demand notice was sent by the Corporate Debtor on 20.03.2017, which is much earlier than the notice for interim arbitration sent on 19.04.2017. The Judgment of this Bench in the case of Annapurna Infrastructure Pvt. Ltd. & Ors. v. M/s. SORIL Infra Resources Limited - C.P. No. (IB)-22(PB)/2017 dated 24.03.2017 has been relied upon. However, we find that the reliance on Annapurna's case is wholly misplaced because the aforesaid view is no authority for the proposition that the demand notice even if received earlier to the date of dispute then the Corporate Debtor can invoke the bar to

trigger the insolvency and bankruptcy process. In that case, the arbitration proceedings have come to an end and even an Application under Section 34 of the Arbitration Act had been decided. An appeal under Section 37 of the Arbitration Act against the order of the learned Single Judge of the High Court was pending and the 'Operational Creditor' had already initiated execution proceedings and, therefore, it was much before the date of issuance of notice of demand under Section 8 of the Code. It was in those circumstances we did not admit the Petition and dismissed the same.

19. Another argument based on the judgment rendered in the case of One Coat Plaster v M/s. Ambience Pvt. Ltd., [Company Application No. (1.B)07/PB/2017] has also not impressed us because in that case after examining the controversy on merit we have concluded that there is a valid dispute between the parties. The aforesaid views are also commended to us because the information utility has not yet been started. In the present case the Operational Debt has not been disputed and the arbitration has not been disputed. A reference to arbitration notice or civil suit has to be reached before the receipt on demand notice in



accordance to the expressed provision of code. In case there is genuine dispute concerning quality and quantity then it may be considered on merit by the Tribunal. Accordingly, we find that there is no dispute raised with regard to quality and quantity. Accordingly, the argument fails and the same has been rejected.

20. Accordingly, we do not find any substance in the aforesaid objection raised by the Corporate Debtor and reject the same. We are also unable to appreciate as to how the amount is not due and the argument to the contrary raised by the Corporate Debtor does not merit acceptance.

21. We are also not able to find any substance in the argument that the amount of transaction is insured and the insurer had provided credit insurance cover to the Corporate Debtor against invoices raised against it and in dispute on these proceedings. The argument again lacks substance because the Operational Creditor has no privity of contract with the insurance company and it is a matter between the Corporate Debtor and the Insurance Company. We do not find that there is suppression of material fact so as to dismiss the Petition. Another argument that the Corporate Debtor is covered by the English Law and the Operational Creditor is

estopped from filing any application has also not impressed us and is liable to be rejected. Apart from mentioning that the English Law is applicable nothing has been pointed out how English Law provides any remedy different than the Insolvency provided by the Code. It was again a 'touch and go' argument.

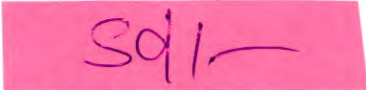
22. Then lastly an insignificant error has been pointed out in filling the particulars in Col. No. 6. The Applicant should have filled up the name and address of the Power of Attorney. Erroneously it has given the details of the legal firm. This is condonable fault and cannot constitute a basis to throw this application. Accordingly, this last submission too is rejected.

23. As a sequel to the above discussion, the Application is admitted. We declare a moratorium in terms of Section 13 of the Code for the interim resolution professional to follow various provision and comply with each one of those. Section 14 of the Code shall also come in operation. The Interim Resolution Professional shall take all steps in terms of Section 13(2), Section 14 & 15 of the Code. As no insolvency resolution professional has been named by the Applicant we request the Insolvency and


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Bankruptcy Board of India (IBBI) to appoint one. Let a reference be made to the Insolvency and Bankruptcy Board of India to furnish the name of a resolution professional within a period of ten days in accordance with Section 16(4) who shall, thereafter, perform all functions and duties as per the provisions of Sections 13,14,15,17,18 of the Code so on and so forth. All the personnel of the Corporate Debtor, its promoter or any other person associated with the management of the Corporate Debtor are duty bound to extend all assistance and co-operation to Interim Resolution Professional as may be required for managing the affairs of the Corporate Debtor. In case such co-operation is not rendered, then the interim resolution professional shall be entitled to file application before this Tribunal as per the terms of Section 19(2) of the Code.

24. The Application stands disposed of in the above terms.


(CHIEF JUSTICE M.M.KUMAR)
PRESIDENT

24.05.2017


(R.VARADHARAJAN)
MEMBER(JUDICIAL)