

IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH- (COURT-II)

(IB)-169/ND/2021

IN THE MATTER OF:

M/s. I S PROTEINS PRIVATE LIMITED

Having its Registered Office At:

**18, Chanderlok Enclave,
Pitampura, Delhi-110034**

...Petitioner/ Operational Creditor

VERSUS

M/s. PRESTIGE OILS PRIVATE LIMITED

**LG-6, Plot No. 31, Road No. 44,
Vikas Tower, DDA Complex, Rani Bagh
Pitampura, Delhi - 110034**

...Respondent / Corporate Debtor

Order Delivered on : 18.08.2021

Section : 9 of the Insolvency and Bankruptcy Code, 2016

CORAM:

MR. ABNI RANJAN KUMAR SINHA, HON'BLE MEMBER (JUDICIAL)

MR. L. N. GUPTA, HON'BLE MEMBER (TECHNICAL)

PRESENT:

For the Operational Creditor : CS Chauhan, Advocate

For the Corporate Debtor : Mr. Ashutosh Kumar Pandey, Advocate

(IB)-169/ND/2021

M/S. I S Proteins Private Limited Vs. M/S. Prestige Oils Private Limited

ORDER

PER SHRI L. N. GUPTA, MEMBER (T)

1. The present Petition is filed under the Section 9 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'IBC, 2016') read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (for brevity, '**the Rules**') by M/s I S Proteins Private Limited through its authorized Representative Sh. Hemant Jindal (for brevity, '**Operational Creditor**'), with a prayer to initiate the Corporate Insolvency Resolution Process against M/s Prestige Oils Private Limited (for brevity, '**Corporate Debtor**').

2. It is submitted by the Applicant that a High Seas Sale Agreement dated 02.05.2018 was executed between the Applicant and Corporate Debtor/Respondent for import of Crude degummed Soyabean Oil of edible grade in bulk. Another High Seas Sale Agreement dated 27.10.2018 was executed between the parties for import of Crude Palm Oil of edible grade in bulk.

3. As per petition, it is the case of the Applicant that the Corporate Debtor/Respondent purchased 2000 metric tons of Crude degummed Soyabean Oil of edible grade in bulk supplied by applicant for which an Invoice being SI. No. 01/2018-19 dated 09.05.2018 for an amount of Rs.9,57,70,000/-was raised. It has been added that towards the aforesaid invoice, a payment of Rs.6,50,34,000/- only has been received till date and an amount of Rs.3,07,36,000/-remains due and payable.

4. Further, the Corporate Debtor/Respondent purchased 5000 metric tons of Crude Palm Oil of edible grade in bulk supplied by applicant for which an Invoice being SI. No. 10/2018-19 dated 05.11.2018 for amount of Rs.19,07,50,000/-was raised, against which no payment has been received till date.

5. It is averred by the Applicant in its application that :

“It is noteworthy to state that the goods were supplied as per agreed terms and were duly received by the Corporate Debtor. Further, the goods have been given to the entire satisfaction of the Corporate Debt and no dispute whatsoever was raised by the Corporate Debtor with regard to the said goods or towards the invoices raised as above.”

6. It is submitted by the Applicant that in spite of repeated oral requests, written reminders and personal visits, the Corporate Debtor failed pay the dues. Therefore, it is stated that the default of Rs.3,07,36,000 + Rs.19,07,50,000 = i.e., total Rs.22,14,86,000/- is continuing and subsisting and the applicant is legally entitled to receive the aforesaid amount of Rs.22,14,86,000/- from the Corporate Debtor along with interest @ 12% p.a., which is due and payable as on date.

7. That it is further submitted by the applicant that since the Corporate Debtor failed to make the payments, the Operational Creditor had initiated Arbitration Proceeding against the Corporate Debtor and accordingly, the Applicant herein referred the dispute relating to outstanding amount of Rs.22,14,86,000/- for Arbitration and proposed



the name of Mr. Sanjiv Kumar, Additional District & Session Judge (Retd.) as a Sole Arbitrator to adjudicate upon the dispute. It is added that the Corporate Debtor vide his letter dated 04.04.2019 had given no-objection for referring the dispute to the Sole Arbitrator proposed by the Applicant.

8. That the Ld. Sole Arbitrator Mr. Sanjiv Kumar, Additional District and Session Judge (Retd.) passed an Arbitral Award dated 24.09.2019, whereby the claim of the Applicant was dismissed being pre-mature. It is stated in the Award that since as per agreement, the Applicant had to raise issue of quality with the supplier first, on the basis of the complaint of the Respondent for supplying inferior & deteriorated quality of material on "As is Where is Basis" which was totally unfit for human consumption.

9. The scanned copy of the Arbitral Award dated 24.09.2019 as attached by the Applicant with the application is reproduced below :

ANNEXURE A-4

**BEFORE THE SOLE ARBITRATOR, SHRI SANJIV KUMAR, ADDITIONAL
DISTRICT AND SESSION JUDGE (RETIRED), HOUSE NO 1025, SECTOR 24B,
CHANDIGARH**

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IN THE MATTER OF

M/s IS PROTEINS PVT LTD,

18, CHANDERLOK, 2ND FLOOR,

PITAMPURA,

DELHI-110034

...Claimant

VERSUS

M/s PRESTIGE OILS PVT LTD.

SHOP NO. LG-6, PLOT NO. 31, ROAD NO-44,

VIKAS TOWER, DDA COMPLEX, RANI BAGH,

PITAMPURA, DELHI-110034

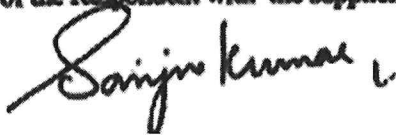
.....Respondent

(IB)-169/ND/2021

M/S. I S Proteins Private Limited Vs. M/S. Prestige Oils Private Limited

1. The brief facts of the case are that the Claimant and the Respondent executed Two High Seas Sales Agreement (hereinafter referred to as the Agreement) which are the subject matter of the present dispute. Certain disputes had arisen between the parties which have been referred to me as sole arbitrator for adjudication. I was appointed as arbitrator vide letter dated 09.04.2019. The parties had filed the pleadings and relevant documents. Number of hearings were held where both the parties were present and the case was heard at length and award was reserved on hearing 14.07.2019. The case was adjourned for pronouncement of award on 24.09.2019.

2. The Claimant vehemently argued that there is no reason as to why the Respondent should not pay the due amount of Rs.22,14,86,000 along with interest against the supply of Crude Palm Oil of Edible Grade. The Claimant argued that it's a transparent case of admitted supply of Oil to the Respondent and default on the part of the Respondent and hence the Claim of the Claimant be allowed and the Counter Claim of the Respondent be dismissed with cost. The claimant have further argued that the Palm Oil was supplied by the Claimant to the Respondent on High Seas Sales basis and on "As is Where is Basis" as per the High Seas Sales Agreements. On the contrary the respondent relied upon the Letter dated 31.01.2019 of the Claimant whereby by the Claimant admitted that the Claimant supplied the Crude Palm Oil of Edible Grade on "As is where is Basis". In the Letter dated 31.01.2019, the Claimant further assured to the Respondent that the Claimant will take up the Complaint of the Respondent with the supplier.





3. The Respondent argued that they have been doing business in the past and there has never been any default on the part of the Respondent in making payment to the Claimant in the past. The Respondent did not pay the said amount Rs.22,14,86,000/- because the material supplied by the Claimant to the Respondent was inferior / deteriorated quality unfit for human consumption which was destroyed and intimation of the same was sent to the Claimant. The Respondent submitted that vide Letter dated 04.04.2019, the Respondent brought it to the notice of the Claimant that the material supplied by the claimant to the Respondent was of inferior and deteriorated quality totally unfit for human consumption and the consignment was destroyed after the intimation of the same was sent to the Claimant. The Respondent informed the Claimant to lodge the Complaint of the Respondent with the supplier & the Respondent referred to as per Clause No. 10(C) of the High Seas Sales Agreement which is reproduced as under:-

"10(C). General Conditions

For any damage and deficiencies of goods in process of transit unloading due to accidents or should establish beyond reasonable doubt any or all damages and deficiencies of goods duly supported by documents after test/survey and batch survey and proof of their having loaded initial report and claim with the port trust and steam ship company. Claim as made settlement that may be arrived at between the sellers and their suppliers."

4. The Respondent submitted that the Claimant admitted vide letter dated 31.01.2019, that the supplied to the Respondent was on "As is Where is Basis" and the Claimant will lodge the Complaint of the Respondent. The respondent had initially paid a sum of Rs 6,50,34,000 for the supplies but when he came to know that Crude Oil (Edible

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Grade) was not fit for human consumption, hence it was immediately destroyed with intimation to the claimant and balance payment was withheld.

5. After examination of pleadings i.e. Statement of Claim of the Claimant, Statement of Defense of the respondent, Rejoinder of the claimant, documentary evidence produced before me and hearing the Parties, this Tribunal is of the view that there is no dispute about the inferior & deteriorated quality of Oil which was totally unfit for human consumption & the consignment was destroyed by the Respondent. On examination of the High Seas Sales Agreement, it is found that there is no clause with regard to supply of goods on "As is Where is Basis". In general, the term "As is Where is Basis" definitely leave doubts about the quality of the goods supplied. More so, the Claimant have admitted that the Claimant is in the process of filing the complaint of the Respondent with the supplier as per Clause No.10 (c) of the High Seas Sales Agreement. The Claimant admitted that after filing of the Claim with the supplier if they receive any amount they will refund the same to the Respondent. In view of the aforesaid facts since the material supplied is on "As is Where is Basis" leaving considerable doubt about the quality of the Oil supplied and the Claimant have not yet lodged the Complaint of the Respondent with Supplier as stipulated as per Clause No. 10 (c) of the Agreements and other factors, I am of the firm opinion that it is premature for the Claimant to file the present Claim as the Claimant should have first filed its Claim with the supplier on the basis of the complaint of the Respondent and claimed the amount of Ra.22,14,86,000. Resultantly the Claim of the Claimant is dismissed and the Claimant is given liberty to file fresh Claim if any, only after the Claimant have lodged he Claim/Complaint of the Respondent with the supplier on the basis of the complaint of the Respondent for supply of inferior & deteriorated quality of material on "As is Where is Basis" which was



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totally unfit for human consumption & the consignment was destroyed by the Respondent. The Claimant is directed to take all possible legal remedies to recover its Claim with the Supplier till the last stage. The Counter Claim of the Respondent is also resultantly dismissed and will be considered only after the claimant has failed to take all possible legal remedies to recover the Claim of the Respondent with the Supplier.

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Sanjiv Kumar,

Additional District and Session Judge (Retired)

24.09.2019

10. It is stated by the Applicant that the default of Rs.22,14,86,000/- is continuing and subsisting as on date and the Operational Creditor is legally entitled to recover this amount from the Corporate Debtor along with interest @ 12 % per annum.

11. The Applicant has submitted that under the circumstances, the Operational Creditor was constrained to issue a Demand Notice dated 28.01.2021 under Section 8 of the Insolvency and Bankruptcy Code, 2016 to the Corporate Debtor through speed post which was received by the Corporate Debtor at its registered office.

12. That the Corporate Debtor through its Counsel replied to the Demand Notice vide its reply dated 05.02.2021, whereby the Corporate Debtor denied the debt due and further disputed the claimed amount. The Corporate Debtor has referred to the Operational Creditor's letter dated 31.01.2019, whereby the Applicant admitted the Corporate Debtor's complaint with regard to the deteriorated quality of the Crude

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Palm Oil and assured that it will take up the issue with the supplier and in case they get any refund from the suppliers against the deteriorated quality of the Crude Palm Oil supplied, they will refund the same. The Corporate Debtor has also referred to the Arbitral Award dated 24.09.2019 and hence, raised dispute against the claim of applicant/Operational Creditor.

13. That the Ld. Counsel for the Corporate Debtor on the last date of hearing held on 02.08.2021, submitted that the Corporate Debtor does not wish to file reply and therefore, their right to file reply was closed. Ld. Counsel for the Corporate Debtor argued that there has been existence of a dispute prior to the service of demand notice, for which the application is not maintainable. He further added that the Corporate Debtor, in its reply to the Section 8 Demand Notice, has stated that the dispute was referred by the Applicant to the Sole Arbitrator, who has rejected the claims/counter claims of both the parties. Arguments of the parties were heard and the order in the matter was reserved.

14. After hearing arguments of both the parties and going through the application and documents on record, we observe that the present claim of Rs 22,14,86,000/- of the Applicant has arose out of the two High Seas Sales Agreement, the dispute relating to which was referred by the Applicant to the Sole Arbitrator.

15. That while going through the Arbitration Award (Supra), we observe that the Ld. Sole Arbitrator, in para 5 of the Award, has concluded that :

“.....The Claimant admitted that after filing of the Claim with the supplier if they receive any amount they will refund the same to the Respondent. In view of the aforesaid facts since the material supplied is on "As is Where is Basis" leaving considerable doubt about the quality of the Oil supplied and the Claimant have not yet lodged the Complaint of the Respondent with Supplier as stipulated as per Clause No. 10 (c) of the Agreements and other factors, **I am of the firm opinion that it is premature for the Claimant to file the present Claim as the Claimant should have first filed its Claim with the supplier on the basis of the complaint of the Respondent and claimed the amount of Rs.22,14,86,000. Resultantly the Claim of the Claimant is dismissed** and the Claimant is given liberty to file fresh Claim if any, only after the Claimant have lodged the Claim/ Complaint of the Respondent with the supplier on the basis of the complaint of the Respondent for supply of inferior & deteriorated quality of material on "As is Where is Basis" which was totally unfit for human consumption & the consignment was destroyed by the Respondent. **The Claimant is directed to take all possible legal remedies to recover its Claim with the Supplier till the last stage.** The Counter Claim of the Respondent is also resultantly dismissed and will be considered only after the claimant has failed to take all possible legal remedies to recover the Claim of the Respondent with the Supplier.
.....”

16. We further notice that the Operational Creditor has claimed the same amount of Rs.22,14,86,000/- in Part IV of the present Petition filed

under Section 9 of the IBC 2016, which was the subject matter of the Arbitration (initiated at the behest of the Applicant) and already rejected by the Ld. Arbitrator. That further, there is no submission made by the Applicant/Operational Creditor in its Petition with regard to the steps taken for raising its claim with the original Supplier on the basis of the complaint of the Corporate Debtor/Respondent in terms of the Arbitration Award dated 24.09.2019.

17. Admittedly, the Corporate Debtor has raised dispute over the claim of the applicant within 10 days, as prescribed under Section 8 of the Code, vide its reply to the Demand Notice dated 28.01.2021. The Corporate Debtor in paragraphs 5, 6 and 7 of the reply dated 05.02.2021 to the demand notice, has referred to the Arbitration Proceedings and claimed pre-existing dispute. Further, we notice that the applicant itself had initiated the Arbitration Proceeding to resolve the dispute relating to its claim, which resulted in dismissal of the claim being pre-mature.

18. Here, we consider it worthwhile to refer to the Para-40 of the Judgement dated 21.09.2017 in the matter of **Mobilox Innovations Private Limited V/s. Kirusa Software Private Limited in Civil Appeal No. 9405 of 2017**, wherein the Hon'ble Supreme Court has observed that:

“40. 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

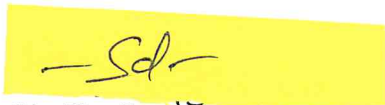
been received by the operational creditor or there is a record of dispute in the information utility. It is clear that such notice must bring to the notice of the operational creditor the “existence” of a dispute or the fact that a suit or arbitration proceeding relating to a dispute is pending between 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.”

19. Further, in the case of **Transmission Corporation of Andhra Pradesh Limited V/s. Equipment Conductors and Cables Limited - Civil Appeal No. 9597 of 2018**, the Hon’ble Supreme Court has observed that:

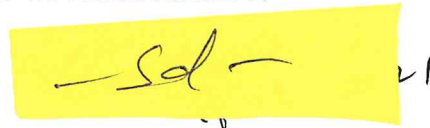
“15. In a recent judgment of this Court in *Mobilox Innovations Private Limited vs. Kirusa Software Private Limited*¹, this Court has categorically laid down **that IBC is not intended to be substitute to a recovery forum. It is also laid down that whenever there is existence of real dispute, the IBC provisions cannot be invoked.....**”

20. We find that the documents on record sufficiently indicate that there has been a pre-existing dispute between the parties prior to issuance of demand notice. Hence, there being a pre-existing dispute and a situation in which the Applicant/Operational Creditor itself has referred the dispute to the Arbitration proceeding, which resulted in dismissal of the claim of the Applicant being pre-mature, the operational Creditor has failed to prove that its operational debt is undisputed. In terms of Section 9 (5)(ii)(d) of the IBC, the moment it is established that there is a pre-existing dispute, the Corporate Debtor gets out of the clutches of the I&B Code.

21. In sequel to the above, **the petition is DISMISSED.**



(L. N. Gupta)
Member (T)



(Abni Ranjan Kumar Sinha)
Member (J)