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National Company Law Tribunal

Allahabad Bench

CP NO.(IB)14/ALD/2017

ATTENDANCE-CUM-ORDER SHEET OF THE HEARING OF ALLAHABAD BENCH OF THE NATIONAL COMPANY LAW TRIBUNAL ON 01.06.2017

NAME OF THE COMPANY: Abhi Agro Industries Pvt Ltd

SECTION OF THE COMPANIES ACT: U/S 9 of I & B Code 2016

<u>Sl. NO.</u>	<u>Name</u>	<u>Designation</u>	<u>Representation</u>	<u>Signature</u>
<u>1.</u>				
<u>2.</u>				

The present company (I & B) petition are fixed today for pronounced of the order in respect of C.P. Nos. 13, 14, 15, 16 and 17 of 2017 as these petitions are based on same / similar nature of facts hence are being disposed of though a common order.

The reasoned order in detail is recorded separately, the operative portion reads as under.

As these applications are found complete in terms of Section 9(5)(2) of the Insolvency and Bankruptcy Code, hence deserve admission, we observe and find that there is no repayment of unpaid operational debt despite the invoices for payment were raised by the operational creditors and goods have been delivered to the corporate debtor in terms of its purchase and supply order, thus, the corporate debtor company is in default of making payments of the debts in respect of C.P. No. 13 of 2017, M/s J.R. Agro Industries Private Limited for Rs. 5,08,43,252/- in C.P. No. 14 of 2017 to M/s Abhi Agro Industries Private Limited for Rs. 28,59,514/- in C.P. No. 15 of 2017 to the M/s Jai Lakshmi Solvents Private Limited for Rs. 24,66,392/- in C.P. No. 16 of 2017 to M/s Arohul Foods Private Limited for Rs. 24,75,178/- and in C.P. No. 17 of 2017 M/s. Rungata Industries Private Limited for Rs. 14,97,879/-. It is apparent from the bank statements furnished and certificates issued by the financial institution that the operational creditors have not received so far full payment of supply of the goods made to the corporate

debtor company against which invoices were raised. Further it is found in statutory return and the record of corporate debtor company itself that goods have been purchased and received from operational creditor's and their names are reflected in company's purchase list which was duly prepared by the corporate debtor company and submitted along with its Tax returns to the Commercial Tax Department of the State Government. The amount of debts has neither been received from the corporate debtor company nor from Mr. Dinesh Arora or his concern, pursuant a memorandum of understanding stated to have been entered between the corporate debtor company. That apart this Bench is also of the view that there exists no privity of contract among the operational creditors and other sundry creditor corporate debtors company and Mr. Dinesh Arora with regard to the above stated MOU in question. Therefore, such MOU can not have a binding effect on the operational creditors nor any liability there basis can be fasten to Mr. Dinesh Arora group, nor the operational creditors can be insisted legally to recover the such amount of goods supplied only from Mr. Dinesh Arora or his group of company and not from the present corporate debtor. Because there is no assent of creditors / supplier concern including the present operational creditors/ and other sundry creditors, whose name are shown in the body of the above MOU dated 19.05.2016. Under the sound Principle of Indian Contract Act and as per the illustration (C) given in Section 62 of the Act. It is also a settled legal proposition that a company is a legal person, while the definition of Insolvent person is given in under section 2 (8) of that a person is said to be Insolvent who has ceased to pay his debts in ordinary course of business or cannot pay his debts as they become due is declared to be insolvent. Whether he has committed an act of Insolvency and or not. Hence the present corporate debtor being a corporate person fall within the definition of insolvent as it has committed the default for making payment and an action can be taken against him under section 55 to 58 of the Sales of Goods Act. The Hon'ble Supreme Court in the matter of **Shakti Tubes Limited Vs. State of Bihar** came to examine the provisions of Section 62 of the Contracts Act and illustration 'C' given therein and observed if there is not assents of a third party, no new contract is said to have entered into between such parties. Further in the matter of **Innovative Industries Ltd. Vs. ICICI Bank and another** (Hon'ble NCLAT Appeal (IB) Nos. 1 & 2 of 2017), it is held that the change of subsequent agreement does not absolve the

corporate debtor from its debt liability. Thus there is no legal sanctity for cessation of its liability in its book accounts on the basis of MOU, which is neither consented to nor agreed by the operational creditors. In the light of above stated decision. We are constrained to feel that the corporate debtor raised only speculative defence of alleged fraud in its company which is illusory and does not finds support from its own statutory return and auditors report and also contrary to its purchase list records maintained by the company. Hence such defence appears to have been raised to avoid payments hence cannot be treated as bonafide one in the light of the Hon'ble Delhi High Court decision in the matter of **Olam Agro India Limited Vs. Mother Impex Private Limited (2014) 7 High Court Cases 638** and further the decision of Hon'ble Madras High Court decision in the matter of **Motorola India Pvt. Ltd. Vs. B P L Cellular Mobile** reported in **2002 L.W. 315**.

It is also held that the present petition filed by the authorised signatory / managing Director of the operational creditor company and has further been ratified by the Board Resolution passed by the operational creditor companies is found to be in order in view of a Larger Bench decision of the NCLT, Kolkata dated 12.04.2017 passed in **C.P. No. 37 of 2017, ICICI Bank Ltd. Vs. Palogix Infrastructure Private Ltd.** Further the Hon'ble Apex Court in the matter or **National Institute of Technology Vs. Pannalal Chowdhary** (reported in 2015 (11) SCC Page 669) has settled the legal position in respect of ratification of an act done by an authorised signatory to retrospectively validate and it is permissible in law . As present petitions are filed by their authorised signatory / Managing Director and has further been ratified by its operational creditors company hence are found to be find properly and is in order.

It is also found that unpaid debts / liability towards sundry creditors were duly entered and admitted in the books of account of corporate debtor company before signing of the MOU dated 19.05.2016 and only on the strength of such MOU these liabilities are written off and revised balance sheet is prepared. But we have already held that there exists no previty contract among the interested / affected parties e.g. sundry creditors, nor it has been consented to or ratified by these sundry creditors / including the present operational creditors then writing of such liability cannot be treated to be valid one and have legal sanctity as per the Section 62

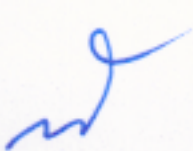


illustration 'C' of the Indian Contract Act nor the same appear to be bonafide on a sound principle of law of Contract, previty of contract and meeting of minds among contracting parties nor its in conformity with equity and fair play. In the light of above given facts and circumstances of the case and considering the above referred judicial citations of Hon'ble Courts. We feel the present petition deserve to be allowed hence is hereby admitted. Consequently an order for moratorium is passed as per Sections 13 & 14 of the I & B Code, 2016.

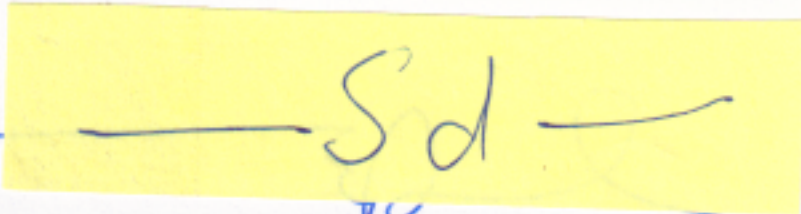
.....6. A copy of this order shall be duly sent by the Registry to both the Corporate Debtor as well as to the 'Operational Creditor' as contemplated under the IBC, 2016. However, moratorium as contemplated under the provisions of Section 14, as extracted herewith shall also follow suit in relation to the Corporate Debtor.

- (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 nay count 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 of 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 less or where such property is occupied by or in the possession of the corporate debtor.
7. We further refer the matter to Insolvency & Bankruptcy Board of India for the limited purpose of nominating Insolvency Resolution Profession (IRP) including the name of proposed IRP by the operational creditor to act as the interim Resolution Professional within a period of 10 (ten) days as mentioned under Section 16(4) of IBC, 2016.

However, a paper publication in respect of moratorium to be made after appointment / nomination or of IRP is received from the Insolvency and Bankruptcy Board of India.

No order as to costs.

Order Date: 01.06.2017
Sharad Srivastava


(H.P. CHATURVEDI, MEMBER (Judicial))