

**BEFORE THE NATIONAL COMPANY LAW TRIBUNAL,
CHANDIGARH BENCH, CHANDIGARH.**

CP (IB) No.23/Chd/Hry/2017.

Date of Order: 22.05.2017.

Coram: HON'BLE MR. JUSTICE R.P.NAGRATH, MEMBER (JUDICIAL).

In the matter of:

M/s ANC Knit Craft,
579, Gandhi Cloth Market,
Chandni Chowk, Delhi-110006.

.. Applicant/Operational Creditor.

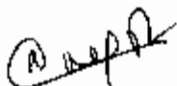
Versus.

M/s Foremost International Pvt. Ltd.
Plot No.71, Udyog Vihar, Phase-1,
Gurgaon, Haryana-122001.

....Respondent/Corporate Debtor.

Application by Operational Creditor to initiate corporate insolvency resolution process under Section 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

Present: Mr.Mohit Jolly and Mr.Vikas Malhotra, Advocates for
Applicant/Operational Creditor with
Ms.Kiran Sharma, Insolvency Professional.
Mr.Ashwani Kumar, Advocate for Respondent/Corporate Debtor.



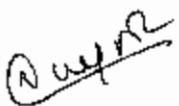
ORDER.

This petition has been filed by the Operational Creditor to set in motion the Corporate Insolvency Resolution Process as contemplated under Section 9 of the Insolvency and Bankruptcy Code, 2016 (for short to be referred here-in-after as the 'Code') in relation to M/s Foremost International Private Limited (for brevity 'Respondent/Corporate Debtor'). The petitioner is a partnership firm comprising of two partners, namely; Tarish Sahni and Ritu Sahni. Copy of the partnership deed dated 15.09.2010 is Annexure A-1. There is an affidavit of Tarish Sahni, partner of the firm in support of the averments contained in the application.

2. During the course of arguments on 17.05.2017, when the matter was part heard, the petitioner's counsel placed on record copy of Form A of the Registrar of Firms containing the names of both the partners and also Form B issued by the Registrar of Firms, Delhi showing the applicant firm having been registered on 23.03.2015. Another set of these Forms A and B have also been attached along with the index of the documents produced on 19.05.2017 for which the matter was fixed. The registered office of the respondent company is at Gurgaon and, therefore, the matter falls within the territorial jurisdiction of this Tribunal.

3. The Corporate Debtor was incorporated under the Companies Act on 11.12.2002. The petitioner has also provided the particulars of the issued and paid up share capital of the respondent.

4. According to the petitioner, the respondent/Corporate Debtor purchased huge quantity of fabric from the petitioner between 31.10.2015 to



24.01.2017 for an amount of ₹1,47,67,553/-. The Corporate Debtor has defaulted in making payment towards 72 bills for an amount of ₹84,27,531/-, the balance of ₹63,40,022/- having been adjusted by the Operational Creditor on account of payments received from the Corporate Debtor and purchases made from it. Apart from the principal amount of ₹84,27,531/-, the respondent is also liable to pay interest to the tune of ₹22,54,023.44Ps calculated at the rate of 24% per annum on account of delay in making payment for more than 60 days from the date of the bills. The total amount of claim, according to the Operational Creditor is thus ₹1,06,81,554.44Ps. Annexure A-3 is the computation of the amount specifying the dates of default in a tabular form.

5. The petitioner also attached Annexure A-4, copy of the statement of the Bank account of the petitioner, where the deposits are made or credits received normally by the Operational Creditor. During the course of arguments, learned counsel for the petitioner also filed a certificate from Oriental Bank of Commerce giving the particulars of amount credited into the current and cash credit amount of the petitioner from the Corporate Debtor for the period from 01.04.2015 to 24.01.2017 in a tabular form.

6. The instant petition was filed after the petitioner/operational creditor served a demand notice Annexure A-5 to the respondent in terms of Section 8 of the Code. This notice is dated 07.04.2017 and contains the aforesaid details of defaults along with computation of the amount due. The due dates of 72 bills are also set out in the tabulated computation attached with the demand notice. Along with the demand notice, copies of all the 72 bills were also sent to the Corporate Debtor. The petitioner requested the respondent to demonstrate about the payment of the outstanding amount within a period of

Quay

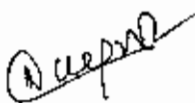
10 days of receipt of the notice by mentioning the particulars required by Section 8 of the Code.

7. The demand notice was sent to the respondent by registered post on 12.04.2017 as per the postal receipt Annexure A-6 and as per the track report of the postal department, the same was delivered to the respondent on 13.04.2017. The respondent sent reply dated 24.04.2017 Annexure A-8, after the expiry of 10 days of receipt of the notice. In any case, it is quite clear that at the time of filing of the instant petition before the Adjudicating Authority, reply raising the dispute had been received by the petitioner

8. This petition was listed for the first time on 08.05.2017 and appearance was made on behalf of the respondent-corporate debtor by the learned counsel. The learned counsel sought time for filing response to the petition along with documents. It was also observed that the written communication filed by the proposed insolvency resolution professional in Form No.2 was incomplete. The matter was thus adjourned to 17.05.2015 and the petitioner was directed to remove the aforesaid defect within one week

9. The perusal of record shows that on 15.05.2017, the petitioner/operational creditor filed fresh communication in Form No.2 from Ms.Kiran Sharma, Insolvency Resolution Professional registered with the IBBI bearing No.IBBI/IPA-003/IP-00109/2016-2017/1784. which is found to be in order. Advance copy of this communication was admittedly supplied to the learned counsel for the respondent.

10. I have heard learned counsel for the parties and have carefully gone through the record with their able assistance.



11. Learned counsel for the petitioner contended that the respondent/corporate debtor had received the demand notice on 13.04.2017, but the reply dated 24.04.2017 was despatched only on 26.04.2017 i.e. after the expiry of 10 days period provided in sub-section (2) of Section 8 of the Code and therefore, the respondent cannot be said to have validly raised the dispute as contemplated by the Code. I am, however, of the prima-facie view that if notice of the dispute is not received within a period of 10 days, Section 9 of the Code entitles the operational creditor to file the petition after the expiry of the said period. But the contention, that reply received after the expiry of 10 days period, cannot be considered at all, is unacceptable, especially when the notice of dispute was available with operational creditor, when the application under Section 9 of the Code was filed.

12. The respondent filed objections to the instant petition by way of counter affidavit of Mr.Varun Moudgil, the Director of respondent company supported by documents. Copy of the objections with documents was supplied to the learned petitioners counsel. The matter was heard in part on 17.05 2017 and it was adjourned for 19.05.2017. The respondent filed additional counter affidavit of Mr.Varun Moudgil along with the ledger account of the freight and insurance charges incurred during the financial year 2015-2016 and copies of six purchase orders, in which due to late delivery of the raw fabrics, the stitched garments were shipped by Air after paying the Air freight charges along with the Air freight bills.

13. The other conditions laid down in Section 9 of the Code having been complied, the Adjudicating Authority is to proceed in terms of sub-section (5) of Section 9 of the Code, which reads as under:

Amrinder

“(5) The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2) by 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 the 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 the proposed resolution professional;*

Provided that Adjudicating Authority, shall before rejecting an application under sub-clause (a) of clause (ii) give a notice to the applicant to rectify the defect in his application within seven days

Due to

of the date of receipt of such notice from the Adjudicating Authority."

The question that requires discussion in the instant case pertains to the issue raised in terms of clause (d) of sub-section 5 (i) and (ii) of Section 9 of the Code, as enumerated above.

14. The information utility has not yet been constituted and the point for determination is whether the receipt of reply by the petitioner from the respondent/corporate debtor to the demand notice, would be considered sufficient to say that the operational creditor duly received the notice of dispute, which would result in rejection of the application.

15. The term 'dispute' is defined in sub-section (6) of Section 5 of the Code as, including 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 "

The aforesaid definition is, therefore, inclusive and not exhaustive. Taking the aforesaid view, the Hon'ble Principal Bench of NCLT, New Delhi, in "**M/s One Coat Plaster Vs. M/s Ambience Private Limited**", Company Application No.(IB)07/Pb/2017 and Company Application No.(IB)08/PB/2017, it was held that under Section 8 (1) of the Code, adequate scope has been provided for 'NCLT' to ascertain the existence of a dispute.

16. Before discussing this issue, it needs to be noted that various transactions, which the parties have entered into, are not in question. The petitioner's claim is supported by 72 invoices, copies of which were sent to the respondent. The respondent has itself relied upon the statement of

Replied

confirmation of accounts for the period from 01.04.2015 to 31.3.2016 sent by the petitioner to the respondent. The said document dated 01.04.2016 Annexure 'B' is copy of the ledger account of the respondent maintained by the petitioner and relates to the financial year 2015-2016 ending on 31.03.2016. The copy of ledger account of the petitioner maintained by the respondent is at Annexure A attached with the counter affidavit.

17. It is quite apparent from the facts of the case and the documents placed on record that there was an outstanding amount of about ₹84,27,531/-, but that is tried to set off on the basis of certain debit notes in respect of financial years 2015-2016 and 2016-2017. Copy of the ledger account of the petitioner maintained by the respondent company for the financial year 2016-2017 i.e. the period ending on 31.3.2017 is Annexure D.

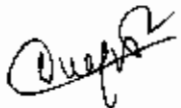
18. The disputed debit notes for the year 2015-16 are part of Annexure C (Colly) attached with the counter affidavit. These are two debit notes dated 31.03.2016. One debit note bears Sr.No.4547, dated 31.03.2016 for an amount of ₹35,00,000/- relating to the expenses incurred in Air freight due to late supply of fabric and the second such debit note of the even date i.e. 31.03.2016 is Sr.No.4548 for ₹30,50,000/- and this is also based on exactly the same reason of fabric delay due to Air freight. The remaining debit notes in dispute pertain to the financial years 2016-2017 which are attached at Annexure E (Colly) with the counter affidavit. Out of these, the first is debit note No.4586, dated 26.04.2016 for ₹7,30,000/- being on account of fabric rejected and the other is being at Sr.No.4629, dated 30.06.2016 for an amount of ₹6,82,500/- on account of fabric being rejected. For the same reason, the debit note No.4636, dated 08.07.2016 is issued for an amount of ₹7,19,500/-. There are two more

Copy

such debit notes of the financial year 2016-2017, which are not being considered for determining existence of the dispute, because debit notes bearing No.4615, dated 13.06.2016 for an amount of ₹1,60,763/- shows that it has been issued on account of bad quality of the goods and at the same time this debit note refers to three of the bills/invoices to which it relates. The other is debit note bearing No.4686, dated 10.08.2016 for an amount of ₹8,906/- seemingly on account of shortage of the supply.

19. The respondent/corporate debtor has also attached about 36 copies of the debit notes in the name of Ajay & Co., the promoter of which is the real brother of Tarish Sahni, partner of the petitioner firm and the husband of Ritu Sahni, the other partner. Relying upon these debit notes, it is contended that there has been a practice to issue such debit notes, which thus cannot be disputed. The debit notes filed by the respondent in respect of Ajay & Co. are for the period from 08.12.2010 to 10.03.2015.

20. Learned counsel for the petitioner vehemently contended that the respondent/corporate debtor has manipulated its record and forged the disputed debit notes after the service of demand notice, for setting up a defence to the proceedings under the Code, which the petitioner intended to trigger. To rebut this contention, learned counsel for the respondent submitted that even various debit notes issued in name of Ajay & Co. i.e. at page 46 of Annexure G, dated 14.05.2009 for ₹1,000/-; dated 31.03.2010 for ₹12,000/- at page 51; dated 02.02.2011 for ₹75,000/- at page 53; dated 30.03.2011 for ₹3,86,570/- at page 55, another dated 04.04.2017 for ₹9,788/- at page 56 of the counter affidavit; dated 24.06.2011 at page 57 for ₹13,430/-; dated 09.08.2012 at page 63 for an amount of ₹6,20,120/-; debit note dated 10.01.2013 at page 71 for



₹1020/-; dated 31.03.2014 at page 76 for ₹1,00,000/- and the other dated 10.03.2015 at page 81 for ₹44,800/- do not bear the bill numbers, but no objection to the said debit notes was ever raised. The learned counsel for the respondent, thus, wanted to say that issuance of the debit notes was a practice. A minute perusal of the aforesaid debit notes would show that although these do not bear particulars of the bill to which these relate, but are signed by the representative of Ajay & Co. except the bill at page 81 dated 10.03.2015. In any case this debit note dated 10.03.2015 contains the details reasons of rejecting some of the goods.

21. Learned counsel for the petitioner would further contend that the respondent-corporate debtor, had admittedly received the statement of ledger account of the respondent being maintained by the petitioner for the financial year 2015-2016, but it is not shown that any objection that Ledger Account was ever conveyed to the petitioner to the correctness thereof.

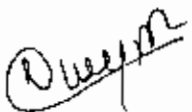
22. It was thus submitted that the last two entries in the ledger account relating to two debit notes for an amount of ₹65,50,000/- are clearly ante-dated. It was further contended that the debit notes are issued for huge amounts, but do not contain particulars of the bills, to which these relate nor these are signed by any authorised representative of the petitioner and thus these entries and documents should be out-rightly rejected. The learned counsel would further submit that the debit note at page 23 of the objection petition filed by the respondent bears Sr.No.4427, dated 31.03.2016 and the disputed debit notes bear serial nos.4547 and 4548 of the same date, there being difference of more than 100 in the serial numbers, which is highly an improbable version.

Answer

23. To further support the contention of the petitioner, learned counsel relies upon the documents filed on 19.05.2017, which are the purchase orders of fabrics/goods supplied by the operational creditor to the corporate debtor along with the statement of delivery for both the financial years, for suggesting that all the purchase orders were promptly responded and there is no question of delay in delivery of the goods for enabling the respondent to claim any loss because of the change in the shipment of the goods from sea to Air carriage.

24. The arguments raised by the petitioner sound quite attractive, but the Adjudicating Authority while exercising summary jurisdiction under the Code cannot possibly dwell upon these complicated disputes of fact. A notice of the dispute was sent by the corporate debtor by way of reply to the demand notice. It is stated in the reply that as per the books/ledger account of the petitioner for the financial year ending 31.03.2016, the opening balance was ₹58,452/-, which was paid on 17.11.2015. The total purchases made during the said year from the petitioner was ₹1,21,80,347/-, but it is explained that after adjustments and payments, debit note was issued for a total amount of ₹65,53,043/-. There is also reference to the debit notes in the next financial year.

25. The respondent has filed along with the documents, copy of the ledger account of the petitioner maintained by it showing the entries dated 31.03.2016 of three debit notes. Accordingly, on 31.03.2016, there was a total credit of ₹35,25,849/-, which was carried forward in the next financial year. There is also the certificate of the Chartered Accountant of the respondent/corporate debtor dated 13.05.2017 verifying the aforesaid figure of the closing balance as on 31.03.2016. The learned counsel for respondent



further submitted that on the basis of the books of account maintained by the respondent, the Annual Report for the year 2015-2016 containing the balance sheet as on 31.03.2016 with figures of the previous year ending on 31.03.2015 was prepared and signed by the directors of the respondent-company and countersigned by the aforesaid Chartered Accountant Anil Kumar Bansal on 02.09.2016, much before the filing of the instant petition or even the enforcement of the Insolvency and Bankruptcy Code. The learned counsel further referred to statement of ledger account of the petitioner maintained by the respondent Annexure D, in which the entries of the debit notes relating to the financial year 2016-2017 have been made.

26. The learned counsel for the petitioner, however, contended with vehemence that it is quite improbable that the respondent purchased the goods worth ₹1,47,67,553/- in the two financial years from the petitioner, who is shown to have incurred the expenditure in respect of this supply for more than ₹84 lacs on the Air freight charges on account of any supposed delay. I am of the view that if the respondent has prepared forged and fabricated record of its accounts and the debit notes in order to create a defence in the proceeding under the Code, that would be a matter of serious concern, for which the petitioner can always apply for prosecuting the respondent at the appropriate stage on determination of the dispute by a civil court. But to adjudicate upon the issue of forgery of the record is the handicap of the Adjudicating Authority in the summary jurisdiction.


27. A question had also cropped up during the course of arguments on 17.05.2017, as to whether expenditure in respect of the aforesaid amount of debit notes was reflected in the Balance Sheet of the Corporate Debtor for the

(Rupali)

year 2015-16. The balance sheet for the year 2015-2016 was showing an amount of ₹53,84,532/- towards Air freight charges under the head fabrication charges and other manufacturing charges. It seems that the above expenditure incurred by the respondent pertains only to the manufacturing process. The respondent filed the ledger account of the freight and insurance for the year 2015-16 with the additional counter affidavit suggesting that the total amount of freight charges incurred by the respondent was ₹2,09,61,964.05 out of which ₹53,84,531.94 is mentioned in this statement Annexure R-1 to be the domestic Air freight. As already observed, the Adjudicating Authority may not be able to determine this controversy in exercise of its jurisdiction under the Code.

28. The present is thus not a case in which it can be safely inferred that no notice of dispute was received by the operational creditor for entitling the petitioner to an order of admission under clause (i) of sub-section 5 of Section 9 of the Code. Having said so, there is no alternate except to hold that the notice of dispute has been received by the operational creditor and, therefore, the petition deserves to be rejected.

29. In view of the above, the instant petition is rejected. Copy of this order be supplied to the parties immediately.


(Justice/ R.P.Nagrath)
Member (Judicial)

Pronounced.
May 22, 2017.
Ashwani