

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

**CP (IB) No.21/Chd/Hry/2017.
Date of Order: 25.05.2017.**

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

In the matter of:

Achenbach Buschhütten GmbH & Co. KG a company incorporated under the laws of Germany having its office Siegener Straße, 152, 57223, Kreuztal, Germany.

. . Applicant/Operational Creditor.

Versus.

Arcotech Limited, a company incorporated under the Companies Act, 1956 having its registered office at 181, Sector 3, Bawal Growth Centre, Bawal-123501, Haryana.

....Respondent/Corporate Debtor.

Application under Section 9 of Insolvency and Bankruptcy Code, 2016 by the operational creditor to initiate corporate insolvency resolution process in respect of Arcotech Limited, respondent-corporate debtor.

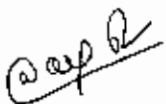
Present: Mr.Kanwalvir Singh Kang, Advocate for Applicant/Operational Creditor.
None for Respondent/Corporate Debtor.

Original

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 Arcotech Limited (for brevity 'Respondent/Corporate Debtor'). The petitioner-operational creditor is a company incorporated under the laws of Germany and engaged in the supply of one Achenbach 2-high non reversing second-hand hot rolling mill, 920x2150 MM roll barrel length, dismantled, repaired and packed in Pietermaritzburg/South Africa of worldwide reputation (here-in-after referred to as the "said goods").

2. The application to trigger the Insolvency Resolution Process has been filed in Form No.5 in terms of Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules 2016 (for brevity the 'Rules'). The respondent is a company incorporated on 13.08.1981 with registered office at 181, Sector 3, Bawal Growth Centre, Bawal-123501, Haryana and, therefore, the matter falls within the territorial jurisdiction of Chandigarh Bench of NCLT. The company has executed the power of attorney Annexure 8, by virtue of the resolution of the Board of Directors dated 20.11.2013 authorising Mr. Pankaj Sachdeva to institute and defend the civil suit and sign and verify the plaint including winding up petitions, pleadings etc. and to do all other legal matters before any Court/Tribunal including NCLT and NCLAT etc. from the lowest to the highest level and engage Advocates and Technical counsel for conduct of the proceedings. There is an affidavit of Mr. Sachdeva aforesaid in support of the contents of the application. Mr. Sachdeva has given 'vakalatnama' in favour



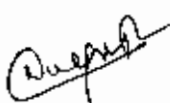
of Mr.Kanwalvir Singh Kang, Advocate through whom the instant petition has been filed and the address of Mr.Kang is stated to be the address for correspondence purposes in respect of the operational creditor.

3. According to the case set up by the petitioner, the respondent-corporate debtor approached the operational creditor for purchase of said goods in the month of December, 2014, which the petitioner agreed to sell. Pursuant thereto, the parties entered into a sale and purchase agreement dated 23.12.2014, whereunder respondent-corporate debtor accepted credit terms of payment to be made within 360 days after the said agreement. The documents relied upon by the petitioner-operational creditor are the two purchase orders dated 13.05.2014 Annexure 3 (Colly); sale and purchase agreement dated 23.12.2014 Annexure 2; payment guarantee/corporate guarantee dated 23.12.2014 for an amount of Euro 5,400,000.00 (five million four hundred thousand only). The goods were sent to the respondent-corporate debtor vide invoices Annexure 5 (Colly), which are dated 02.06.2015 of the amount of Euro 999,919,20; dated 30.09.2015 for an amount of Euro 1,484,000,00; dated 10.11.2015 for a sum of Euro 272,266.51 and the invoices dated 23.06.2016 for a sum of Euro 5,600,000.00.

4. The total amount of debt to be default is said to be Euro 4,472,638.99 (equivalent to ₹31,41,13,436.26 calculated at the rate of ₹70.23 per Euro) upto 02.03.2017 along with interest at the rate of 12% per annum. Against the column of date, on which the default occurred, it is stated that the payments were to be made within 360 days after signing of the sale and purchase agreement, which is dated 23.12.2014.

5. It is further the case set up by petitioner-operational creditor that a statutory notice dated 16.12.2016 was sent to the respondent-corporate debtor under Sections 433 and 434 of the Companies Act, 1956 stating the amount of default and giving the particulars of the invoice numbers and this notice is said to have been delivered upon the respondent on 22.12.2016 as per the track report of the postal department, which is part of Annexure 6 (Colly).

6. Thereafter the petitioner-operational creditor submitted that before filing of this petition, the operational creditor also sent a notice dated 07.02.2017 Annexure-7 in terms of Section 8 of the 'Code' making a demand of total amount of Euro 4,472,638.99 giving all the particulars. Along with the notice, the documents i.e. sale and purchase agreement dated 23.12.2014; both the purchase orders dated 13.05.2014; payment guarantee-corporate guarantee dated 23.12.2014 and all the four invoices were also sent to the respondent-corporate debtor. The notice further states that if the respondent-corporate debtor raises the existence of dispute or the amount of unpaid operational debt in default is paid, the respondent was asked to provide the same within 10 days of receipt of the letter of the pendency of the suit or arbitration proceedings in relation to such a dispute filed before the receipt of this notice. With regard to the other requirements of Section 8 of the 'Code' dealing with the demand notice, the particulars have also been mentioned in the notice. Along with Annexure-7, the petitioner has also attached postal receipt of the despatch of the notice by a registered post on 07.02.2017 and the track report of the postal department showing that the item was delivered on 13.02.2017. In the affidavit of Mr.Pankaj Sachdeva the authorised representative, it is stated that no notice was served by the corporate debtor

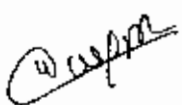


raising a dispute in relation to the existence or amount of the unpaid operational debt due to the operational creditor.

7. The matter was listed before the Adjudicating Authority for the first time on 08.05.2017, when the learned counsel for the petitioner sought time to place on record the reply received from the respondent-corporate debtor to the demand notice. The matter was adjourned for 12.05.2017 with a direction to file affidavit and also the copy of the reply received supported by affidavit with the postal receipt and track report of the postal department stating that the instant petition along with the entire paper book was sent to the corporate debtor by a registered post, which is the requirement of sub rule (2) of Rule 6 of the 'Rules'.

8. The learned counsel for the petitioner-operational creditor filed in the registry his own affidavits dated 11.05.2017. With one affidavit the reply dated 28.03.2017 received from the respondent was filed. The other is the affidavit of service of the corporate debtor by attaching the postal receipt of despatch of the copy of the application with the paper book. Alongwith this affidavit, the track report was also filed showing that the item was delivered to the corporate debtor on 05.05.2017. However, there is no representation from the corporate debtor despite the case having been fixed for various dates.

9. On 12.05.2017 it was noticed that the column at serial No.7 of part V of the application in Form 5 contains a statement that it is not applicable, whereas it is the requirement of the provisions to file the statement of Bank Account, where the deposits are made or the credits received normally by the operational creditor in respect of the debt of the corporate debtor. It was observed that the information supplied in the application was incomplete. It was further observed that the petitioner-operational creditor has not even stated as



to when the last payment was made by the respondent-corporate debtor pursuant to the purchase order. The learned counsel for the petitioner-operational creditor accepted the notice of these defects and sought time to file the documents along with affidavit as well as packing list and bill of lading as mentioned in the agreement and the matter was adjourned to 17.05.2017.

10. On 17.05.2017, it was observed that as per sub-section (5) of Section 9 of the Code, the applicant could rectify the defects within 7 days of the receipt of notice of the defects. The compliance having not been made on 17.05.2017, the matter was adjourned to 22.05.2017 for arguments and the petitioner was directed to make the compliance by 19.05.2017.

11. The petitioner-operational creditor made the compliance by way of affidavit of Mr.K.S.Kang, Advocate and attached a Bank certificate Annexure A-10 (Colly) packing list Annexure A-11 and Bill of lading Annexure A-12 (Colly).

12. Such applications are to be decided within a period of 14 days from the date, when the matter was first listed before the Bench. By excluding 10th May, 2017, which was a holiday and weekly off days falling on 13th, 14th, 20th and 21st of May, the matter is, therefore, considered as being disposed of within 14 days. Anyhow, even the period from 08.05.2017 to 12.05.2017 can be excluded because the petitioner's counsel had sought time on 08.05.2017 to place on record the reply, which was received from the respondent-corporate debtor after filing of the application in the registry. The copy of reply dated 28.03.2017 sent by the respondent was filed along with the application and affidavit of Mr.K.S.Kang, Advocate.

13. I have heard the learned counsel for the petitioner-operational creditor and have carefully perused the record with his able assistance.

(Signature)

14. Learned counsel for the petitioner contended that the respondent-corporate debtor received the demand notice on 13.02.2017, but no reply thereto raising the dispute was received despite expiry of 10 days period nor the payment was made and therefore, the respondent-corporate debtor 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, then Section 9 of the Code entitles the operational creditor to file the petition after expiry of the said period, but the contention that the reply received after expiry of 10 days period, but before the case is listed before the Tribunal, should not be considered at all, is unacceptable.

15. 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:

"(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

Order

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

In the instant case, the petitioner has not proposed the Interim Resolution Professional.

16. The first 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.

17. The information utility has not yet been constituted. The point for determination is whether the receipt of reply, by the petitioner from the respondent/corporate debtor, to the demand notice, would amount to receipt of notice of dispute, thereby resulting in rejection of the application.

Case

18. 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, held that under Section 8 (1) of the Code, adequate scope has been provided for 'NCLT' to ascertain the existence of a dispute.

19. In the reply dated 28.03.2017 Annexure A-9, the respondent has raised many serious issues which amount to raising of dispute as intended by the Legislature in the definition of Section 5 (6) of the Code. It is stated in the reply that as per terms of the agreement, the petitioner was under an obligation to despatch the entire Mill within 11 months of signing of the agreement, but the petitioner failed to deliver the same within the stipulated period. It is further stated that due to delay in despatching the said equipment, not only the objective of respondent to purchase the same has been frustrated, but also the respondent has suffered huge loss of money due to non-installing the same in time and commencing the business. It was emphasised that on that account, the respondent was not obliged to accept delivery, making the payment of the equipment and rather, claimed the refund of the amount already paid.

20. The petitioner-operational creditor has relied upon two purchase orders dated 13.05.2014 in respect of the consignment, which are at Annexure

A-3 (Colly). In first such purchase order dated 13.05.2014, the condition was that the delivery of the mill, description of which is given in the purchase order, shall be made within 20 months. In the second purchase order, the period of delivery is specified as 15 months. So, the period of the delivery according to the purchase orders relied upon by the petitioner would have expired in November and April, 2015 respectively. It is, however, the petitioner's own case that two of the consignments were sent vide invoices dated 10.11.2015 for Euro 272,266.51 and the other dated 23.6.2016 for Euro 5,600,000.00.

21. However, the sale and purchase agreement dated 23.12.2014 also contains clause No.4 relating to delivery period of whole of the consignment covered under both the purchase orders. This clause says that the seller shall deliver the Mill as specified under chapter 1 of the agreement CIF Seaport Mumbai/India, according to INCOTERMS 2010, including seaworthy packing within 11 months after signing this agreement. Even, according to this term, the entire consignment was to be delivered by November, 2015. In view of the above, I am of the considered opinion that the respondent has raised a valid dispute regarding huge delay in delivery.

22. It is further the contention of respondent-corporate debtor in the reply dated 28.03.2017, that as per clause 6 of the agreement, it was specifically agreed that prior to despatch, respondent-corporate debtor was entitled to verify and inspect the equipment (mill), but the operational creditor in utter violation of the understanding, despatch the consignment dated 23.06.2016, for Euro 5,600,000.00 to the respondent-corporate debtor without pre inspection and verification. It is further stated that the consignment was to be despatched directly from the Port at South Africa to the respondent, but

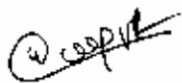
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without the knowledge of the respondent, the operational creditor first despatched the same to themselves at Germany and thereafter without pre-inspection of the same despatched it to the respondent.

23. Learned counsel for the petitioner-operational creditor vehemently contended that the respondent in reply has not been able to categorically say about any defect in the equipment. The learned counsel referred to the contents of reply wherein the respondent only expressed **strong apprehension** that the petitioner has routed the despatch through Germany with the sole motive to make manipulation in the equipment. Further the respondent averred that it **appears** from the aforesaid conduct that the consignment is not as per the specification. In paragraph 3 of the reply to the demand notice, it is further stated that this consignment dated 23.06.2016 was despatched without pre inspection and the respondent has **fair doubt** that parts sent through the said consignment are correct and in order and contains the parts of the Mill agreed to be purchased. Therefore, it is submitted that the respondent has come up merely on the basis of surmises and conjectures and cannot be said to have raised any genuine dispute.

24. It would be relevant to refer to the relevant extracts of the sale and purchase agreement dated 23.12.2014 as under:

"ARCOTECH as the BUYER is interested in purchasing the second hand hot rolling mill H2 Ø 920x2150 mm Roll Barrel Length – hereinafter referred to as the "Mill"- from the SELLER which, however, firstly has to be brought by ACHENBACH from Hulamín Corporate – hereinafter referred to as "HULAMIN"-. Currently the Mill is located on the plant ground of HULAMIN at Moses, Mabhida Road, in Pietermaritzburg, 3200, South Africa,



where it has to be dismantled and packed for the oversea transport to Mumbai/India.

.....

ACHENBACH is determined to buy initially the "Mill" from HULAMIN in South Africa to repair the mill to the extent described in the technical specification, (Appendix 1) and sell this equipment dismantled and packet to the ARCOTECH in India.

.....

2. Price and Delivery Term.

The total price of this agreement is a firm and fixed price based on the specified equipment (article 1) as it is, where is, dismantled, repaired, packed Pietermaritzburg/South Africa and the agreed time schedule of this agreement.

.....

3. Terms of Payment.

EURO 200.000.—(two hundred thousand EURO only) of the total price of the present AGREEMENT as down payment already paid on 15th of May, 2014 through Punjab National Bank, New Delhi, India.

EURO 5.400.000,— (five million four hundred thousand EURO only) of the total price of this agreement, shall be paid latest 360 days after signing of this agreement, against presentation of the following documents:

- Packing list
- Original invoice
- Bill of Lading."

25. So, from the above, it seems that the Mill was to be despatched, repaired and packed in Pietermaritzburg/South Africa, from where it was transported to Mumbai (India) The perusal of the bills of lading Annexure A-12 pages 105 to 115 along with the affidavit of Mr.K.S.Kang, Advocate would show that all the consignments before 18.05.2015 were loaded from Durban in South Africa and despatched directly for Mumbai. There is no indication in

Q. u. p. m.

these bills of lading that the consignment was first sent to Germany for any logistic reason and then to shipped to India.

26. However, the bill of lading dated 02.11.2015 in respect of the consignment of the third and final partial shipment, it is quite clear that this consignment was first sent from Durban (South Africa) to Hamburg (Germany) and the same consignment after more than one month was sent from Hamburg (Germany) to Mumbai. The particulars of this consignment are exactly the same as per the bills of lading at page 107 and 108 of the documents filed on 19.05.2017. Similarly, the consignment dated 30.06.2016 was also sent from Hamburg (Germany) to Mumbai, as per the Bill of lading at page 106 comprising of three containers. Anyhow, there is no document/bill of lading for suggesting as to when this part of the equipment was sent to Germany from Durban (South Africa) for porting further to Mumbai (India). The above facts would clearly show that there is a bona fide dispute raised by the respondent in reply to the notice.

27. The other important aspect relates to compliance of sub-section (3) of Section 9 of the Code, which reads as under:-

"(3) The operational creditor shall along with the application furnish-

(a).....

(b).. ...

(c) a copy of certificate from the financial institutions maintaining account of the operational creditor confirming that there is no payment of an unpaid operational debt by the corporate debtor."

28. The above deficiency was noticed, when the matter was listed on 17.05.2017. In order to comply with the aforesaid requirement, the Bank

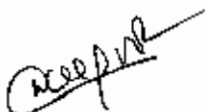
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Certificate Annexure A-10 from pages 5 to 10 of the application dated 19.05.2017 was filed. A-10 is the certificate dated 10.05.2017 purportedly issued by the Landesbank Baden-Wurtemberg. It is stated that there is requirement to check the account of the operational creditor. Account number is mentioned in the said statement. This is with regard to the requirement as to whether there has been any payments received from February 2, 2016 from Arcotech Ltd. India. The information supplied in this certificate is that the sole amount received in the account of the operational creditor on 02.02.2016 from the respondent was Euro 927344,01 and no further payments or similar details have been received upto 09.05.2017. The other is the certificate dated 07.05.2017 issued by Sparkasse Siegen, the financial institution. It is certified that the amount received into the account of the petitioner from respondent was on 15.05.2014 to the tune of Euro 199.964,00. It is further stated that the said institution can check further payments in individual cases only with the help from concrete date, transfer day, transferred amount, payment order, operator bank and so on. The above cannot be considered as an authentic record as the authorised representative of the petitioner by virtue of the power of attorney has not filed his affidavit in support of this document. So, there is non-compliance of the mandatory requirement of the aforesaid provision.

29. There is clause 8 of the sale and purchase agreement relating to the arbitration, which reads as under:

"ARBITRATION.

Any and all disputes arising from or related to this Agreement will be settled amicably and promptly upon consultation between the parties. If the parties do not succeed in reaching such amicable resolution, then all such disputes shall be settled by arbitration



without submission to ordinary courts of law. The board will also decide upon the charging of the parties with the costs resulting from the dispute.

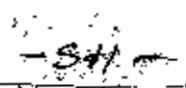
In case of arbitration, all disputes arising in connection with the present Agreement including the question of its validity shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce in Paris by three arbitrators appointed in accordance with the said Rules. The arbitrators shall base their decisions on the provisions of this Agreement.

The arbitration shall be conducted in Zurich/Switzerland. This Agreement shall be subject to Swiss law.

The arbitration award shall be final and binding upon the parties hereto. The award shall also indicate, how to distribute arbitrator's fee and arbitration expenses between the parties. Disputes leading to arbitration shall not entitle any Party to suspend or retain any supplies and services."

So, as per the above arbitration clause, the petitioner can also seek the remedy. The learned counsel for the petitioner, however, vehemently contended that the respondent has not invoked the arbitration clause despite the expiry of about one year of the last delivery. I am of the view that this is no reason to accept the contention that the respondent has not raised the dispute, as is evident from the contents of the reply to the notice.

30. In view of the above, there being a notice of dispute raised by the petitioner and also on account of the defect, as discussed above, the instant petition is rejected. Copy of this order be communicated to both the parties.


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

Pronounced.
 May 25, 2017.
 Ashwani