

**IN THE NATIONAL COMPANY LAW TRIBUNAL
“CHANDIGARH BENCH, CHANDIGARH”**

CP (IB) NO. 71/Chd/Hry/2017

**Under Section 9 of the Insolvency
and Bankruptcy Code, 2016**

In the matter of:

Shrivarad Polyfab (P) Limited

having its registered office at 48,
Industrial Area, Near Nakrali Dhani, Rau,
District Indore, Madhya Pradesh.

... Petitioner-Operational Creditor

Vs.

Olam Agro India Private Limited

having its registered office at
DLF Building No. 8, Tower 8,
Ground Floor, Phase-II,
Cyber City, Gurugram,
Haryana-122002.

...Respondent-Corporate Debtor

Judgement delivered on : 03.10.2017

Coram: Hon’ble Mr. Justice R.P. Nagrath, Member (Judicial).

For the petitioner : Mr. Vivek Dalal, Advocate.

For the respondent. : Mr. Vishnu Langawat, Advocate.

JUDGEMENT

This petition has been filed by the petitioner-operational creditor in terms of Section 9 of the Insolvency and Bankruptcy Code, 2016 (for short, to be referred hereinafter as the “Code”) in Form No. 5 as prescribed in Rule 6(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (for brevity, the ‘Rules’) to initiate the corporate insolvency resolution process against the respondent-corporate debtor.

2. The petitioner is a company registered with the Registrar of Companies with CIN U25202MP2014PTC032727 having its registered office at Indore (Madhya Pradesh). The respondent-company was incorporated on 27.01.2006 having its registered office at Gurugram and therefore, the matter falls within the territorial jurisdiction of this Tribunal. It has a paid-up capital of ₹64,13,95,520/-. The application has been filed by the petitioner-company through Mr.Pravin Gupta, Director of the company in whose favour the company has passed resolution dated 25.07.2017 as at page 254 of the paper book. There is another resolution at page 255 of even date authorizing Mr.Vivek Dalal, Advocate to represent the company, to issue demand notice and also to file petition for initiating insolvency resolution process against the respondent-corporate debtor. The contents of the application are supported by affidavit dated 21.08.2017 of Mr. Pravin Gupta aforesaid.

3. It is averred that the respondent placed purchase order dated 23.09.2016 for the purchase of 7,20,000 PP Bags (specification – 150 grams Mass of Sack with liner) for a total amount of ₹1,07,28,000/- excluding taxes and another order dated 02.11.2016 for 10,200 PP Hot sealing bags for a total consideration of ₹3,58,938/-. In terms of these purchase orders, the operational creditor dispatched the goods to the corporate debtor vide seven invoices given at Sr. No. 1 (c) of Part-IV of the application as under:-

Date	Quantity	Invoice No.	Grade
10.10.2016	60000	198	M Grade
20.10.2016	45000	222	M Grade
20.10.2016	15000	222	S2 Grade
23.10.2016	15,000	224	M Grade
23.10.2016	45,000	224	S2 Grade

07.11.2016	38,000	245	M Grade
07.11.2016	10,000	245	S2 Grade
07.11.2016	10,200	246	Other bags
20.11.2016	30,000	259	S1 Grade
20.11.2016	30,000	259	S2 Grade
05.12.2016	32,000	291	S2 Grade

4. The respondent is said to have paid amount of invoice Nos. 198, 245 & 222 but did not pay for the remaining invoice Nos. 224, 246, 259 and 291 amounting to ₹30,15,548/-. The respondent-corporate debtor was supplied 3,20,000 bags on various dates from 10.10.2016 to 05.12.2016 along with Test Reports. Report of rejection of PP Bags was received by the petitioner from the respondent and the petitioner asked the respondent to return 30000 PP Bags but the same was not complied. The petitioner was, however, informed that the entire 3,30,000 PP Bags have since been used and hence form C was sent on 20.06.2017 in terms of Section 8 (4) of the Central Sales Tax Act, 1956 without making any deductions towards the alleged rejection. There are even series of correspondence on emails exchanged between the parties from which it is evident that no dispute *qua* the quality of the goods exists. The corporate-debtor is said to have paid for almost entire invoices pertaining to M Grade PP Bags and only correspondence was pertaining to the alleged poor quality of M grade bags and there was no whisper with regard to the quality of S1 and S2 grade bags.

5. It is further stated that the respondent has not even disputed the testing report dated 29.09.2016 and 02.11.2016 sent with every consignment as these were strictly in terms of the specifications given in the Purchase Orders. The amount of remaining four invoices was not paid despite repeated reminders.

6. To wriggle out of the payment due to the petitioner, the respondent invented excuse stating *inter alia* that 30,000 PP Bags (S1) were not according to the specifications and hence the operational creditor was asked to lift and replace these 30,000 Bags fictitiously. The matter was, however, amicably settled and after lapse of six months, the respondent issued statutory C Form on 20.06.2017. The amount of default is stated to be ₹30,15,548/- and the petitioner has added interest 24% per annum to the tune of ₹5,43,554/- for the delay. The last invoice was issued on 08.12.2016 which is stated to be the date on which the default occurred.

7. The petitioner sent demand notice dated 25.07.2017 apparently in Form No. 3 as required by Rule 5(1)(b) of the Rules. The notice along with documents has been attached from page 8 to 40 of the Paper Book. The dispute pertains to 7 invoices with respect to supplying 3,30,200 bags. In the demand notice, there is mention of invoice Nos. 198,222, 224,245, 246,259 and 291 out of which the amount in respect of invoice Nos. 198, 245 and 222 was paid whereas for rest of the invoices, the payment was not made for which the value comes to ₹30,15,548/- and the respondent is stated to have admitted the default. Along with this demand notice, the petitioner sent copy of the ledger account of the respondent being maintained by the petitioner showing the outstanding balance along with copies of four disputed invoices and also the CST form sent by the respondent in respect of the entire consignment of seven invoices. The copies of e-mails exchanged between the parties were also sent.

8. This demand notice dated 25.07.2017 was sent by speed post as per postal receipt at page 41 of the Paper Book and this was delivered to the respondent-corporate debtor on 01.08.2017 as per track report at page 42.

The respondent sent reply dated 09.08.2017 to the demand notice copy of which is at pages 43 to 46 of the paper book

9. There is affidavit of Mr. Pravin Gupta, authorized signatory of the petitioner that the copy of this petition was sent to the corporate-debtor by Registered Post AD on 21.08.2017 and the affidavit is at page 256-A of the Paper Book.

10. When the matter was listed on 08.09.2017, notice of this petition was directed to be issued to the respondent for 03.10.2017 to show cause as to why this petition be not admitted. The respondent filed the reply to contest the petition by way of affidavit of Mr. Sanjeev Mishra the authorized representative of the Corporate Debtor.

11. It is stated that there is a dispute with respect to the quality of goods supplied by the operational-creditor. Immediately, on receipt of the goods, the respondent conveyed to the petitioner about the quality of goods supplied which is clearly reflected in the e-mail dated 22.11.2016 attached by the petitioner at page 236 of the Paper Book. There was a joint meeting between the parties on 25.11.2016 wherein officers of both the parties agreed to replace the defective goods. The corporate-debtor rejected around 30,000 PP Bags (S2 Grade) and 26000 PP Bags (M Grade) totaling 56,000 PP Bags supplied by the operational-creditor and debit note of ₹24.55 lakh was issued. The petitioner did not choose to respond to the same but cleverly asked the respondent showing intention to take back 56,000 rejected PP Bags vide e-mail dated 23.03.2017 which is being relied upon by the petitioner at page 159 of the petition.

12. It is further stated that the respondent is dealing in the food business especially the sugar for which the Food Safety and Standards Act, 2006 and the rules and regulations framed thereunder are applicable on the entire business of the corporate-debtor. So the rejected goods have to be destroyed or defaced in the presence of the persons of the corporate debtor to avoid misuse and misbranding under the stringent Food Laws but the petitioner never gave undertaking in this regard to the corporate-debtor. Thereafter the respondent requested the director of the operational-creditor to visit their sugar factory which they avoided on one pretext or the other. Thereafter, the petitioner wrote a threatening e-mail dated 12.06.2017 to the respondent-corporate debtor to release the payment immediately, else the operational creditor shall raise the issue before various authorities and also the trade bodies and that e-mail is relied upon by the petitioner-operational creditor at pages 62 and 63 of the Paper Book.

13. With regard to Form C, it is stated that the settlement alleged by the petitioner is misplaced, illusory and not maintainable since the operational-creditor had supplied substandard goods for which the corporate-debtor suffered losses. The same was communicated to the operational-creditor vide e-mail dated 20.03.2017 much prior to the issuance of demand notice. The corporate-debtor suffered heavy losses and damages for which the amount has been quantified at ₹1,34,99,054.

14. I have heard the learned counsel for the parties and carefully perused the record with their able assistance.

15. In order to comply with the requirement of Section 9 (3) (c) of the Code, the petitioner has attached certificate from the Bank of India dated 24.08.2017 which contains the payments received till date from the

respondent-corporate debtor on 27.04.2016, 29.11.2016 and 02.12.2016. This certificate is issued with regard to the payments received from 01.04.2016 to 24.08.2017. The copy of the statement of Bank Account of the petitioner has also been annexed. It is contended that these entries have also been reflected in the ledger account of the respondent being maintained by the petitioner.

16. The petitioner being an operational-creditor is not bound to propose the name of Insolvency Resolution Professional in terms of Section 9 (4) of the Code. So the relevant column of the application in Part-III states that the petitioner-operational creditor requests this Tribunal to appoint the Insolvency Professional in terms of Rule 16 of the NCLT Rules, 2016 though it should have been Section 16 (3) (a) of the Code which reads as under:-

“(3) Where the application for corporate insolvency resolution process is made by an operational creditor and –

(a) No proposal for an interim resolution professional is made, the Adjudicating Authority shall make a reference to the Board for recommendation of an insolvency professional who may act as an interim resolution professional; ”

17. The only question that survives for discussion is that whether the respondent has raised a ‘dispute’ or paid the money after service of the Demand Notice. Clause (b) of sub-section (3) of Section 9 of the Code says that the operational creditor shall along with the application furnish an affidavit to the effect that there is no notice given by the corporate-debtor relating to a dispute of unpaid operational debt. It is stated in the affidavit dated 21.08.2017 of Pravin Gupta at page 257 of the Paper Book that the respondent has given reply to the notice which is attached with the petition but it is contended that

the contents of the reply do not show the existence of a dispute but only illusory defence.

18. The application is required to be dealt with by the Adjudicating Authority under sub-section (5) of Section 9 of the Code the other conditions having been fulfilled. Sub-section (5) of Section 9 of the Code reads as under:-

“(5) The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), by an 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 any 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 any 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.”

19. The primary document to support this contention of the petitioner is the issuance of Form C dated 20.06.2017 by the respondent-corporate debtor in respect of all the seven invoices. I am of the view that the transaction between the parties having taken place, the respondent was bound to issue Form C and in any case this by itself cannot be said to be a settlement of dispute between the parties for enabling the petitioner to trigger the insolvency resolution process.

20. Learned counsel for the petitioner referred to e-mail dated 23.03.2017 sent to the respondent conveying that they are lifting 56,000 bags on Monday i.e. 27.03.2017 (page 92 of the Paper Book). But the respondent responded vide e-mail dated 24.03.2017 asking the petitioner to hold the vehicle placement till further information from the respondent. The respondent intimated that they were having internal discussion and once it is concluded, they will let them know. Therefore, it is contended that it is quite apparent that even these bags were consumed. It was submitted that there was no dispute relating to the quality of rest of the bags.

21. The petitioner had sent e-mail dated 18.03.2017 to the respondent, demanding payment of the outstanding balance as at page 87 of the Paper Book. The respondent sent reply dated 20.03.2017 stating therein that (i) the value of 56,000 rejected bags is ₹,9,78,888/- lying in the stock with a request to lift the same from the site; (ii) for loss due to damaged bags in S1 and S2, there is debit note raised to the tune of ₹ 24,54,936/- ; and (iii) loss due to damaged bags in M grade was yet to be calculated.

22. Learned counsel for the petitioner referred to Purchase order dated 23.09.2016 placed by the respondent for the purchase of PP Bags M Sugar, S2 Sugar and S1 Sugar for filling 50 Kgs. of Sugar in each bag. At

page 32 of the Purchase Order is the specification of PP Bags required by the petitioner with Mass of sack with liner to be 150 grams (+/- 4 grams). The supply to the respondent was made exactly according to the Purchase Order. The learned counsel further referred to the standards laid down by the Bureau of Indian Standards (BIS) relating to the Polyethylene (HDPE)/Polypropylene (PP). As per the Bureau standards, the mass of the sack liner should be 160 grams as given at page 247 of the Paper Book.

23. Learned counsel for the respondent also referred to e-mail dated 22.11.2016 sent to the petitioner annexed at page 236 of the petition which states that the respondent is getting quality complaint on account of strength in recent supplies and matter is very serious. It was, therefore, requested to depute the representative of the petitioner to the unit of the respondent and to take corrective measures. At page 237 is the information dated 23.11.2016 on the basis of analysis report dated 22.11.2016 which was showing less weight of various PP Bags, weight of some of which is even less than 144 grams, 142 grams and 140 grams etc. This report pertains to invoice No. 259 in respect of 30,000 No. of bags. This is one of the invoice for which the payment was not made by the respondent. It is contended that this was the random checking in which this defect regarding less weight was found in the quality of the bags in comparison to the required specifications. Vide e-mail dated 23.11.2016 at page 240, it was intimated to the petitioner that as per quality check report, S2 bag lot was rejected.

24. Learned counsel for the respondent also referred to the minutes of meeting between officers of both the companies held on 25.11.2016 as at page 215. The issues, those were explained in the said meeting, have been discussed in detail in the minutes. Learned counsel for the petitioner has

challenged the correctness of this document on the ground that this does not bear the signature of officers who are shown to be present on behalf of the petitioner. Such a contention to challenge correctness of the document cannot be looked into for disposal of the petition in the summary proceedings by the Adjudicating Authority. This document is said to have been received by the petitioner with the e-mail from the respondent. Learned counsel has not referred to any response having been sent by the petitioner to this document challenging the correctness of these minutes.

25. Learned counsel for the petitioner has, however, not disputed the correctness of report of joint analysis done by the parties on 27.11.2016 which is signed by the representatives of petitioner also. The weight of various PP Bags as per this report has been found to be less than the specifications of the order placed upon the petitioner.

26. Even subsequent to the e-mails dated 24.03.2017 to 27.03.2017 referred to by learned petitioner's counsel to contend that there was an offer for accepting the rejected bags which was avoided by the respondent. There is exchange of more e-mails. The petitioner sent e-mail on 06.04.2017 as at pages 84/85 of the paper book wherein the petitioner has expressed denial of all the points mentioned in the e-mail sent by the respondent. The petitioner had been in constant touch with Bharat Kundal and Mr. Ishwar Dhiman over the issue. It is stated that the petitioner had been getting assurance that the issue is being internally discussed by the respondent organization. It is further stated in this e-mail that the representative of the petitioner has been asked to visit head office of the respondent at Gurgaon/ Rajgoli for resolving the matter but due to some illness of the concerning persons, the visit was not immediately possible and a request was again made to release the overdue

payment. There is another e-mail dated 06.04.2017 sent at 10.37 A.M. at page 85 of the paper book intimating the response about the proposed visit of the representative of the petitioner that the respondent would be informed of the itinerary about the visit of the representative. With the e-mail dated 28.03.2017 at page 209, the respondent sent debit note calculations to the petitioner.

27. There is also an e-mail dated 07.06.2017 at page 204 of the paper book, before the issuance of demand notice. In this e-mail, it was stated that the respondent had been requesting the petitioner to visit Rajgoli Unit of respondent to have a look. It is further intimated in this e-mail that the damage percentage which they mentioned in all the earlier communications was 10 to 11%, but when they started rebagging, the respondent found more than 70% damaged bags in M Grade Sugar bags.

28. There is a response to this e-mail dated 07.06.2017 (page 204 of the paper book) itself wherein the petitioner intimated that the mother of Pravin Gupta, the authorized representative of the petitioner, was unwell because of which the visit of petitioner's representative was not possible. In the meanwhile, request was made for making the payment.

29. At page 203 is e-mail dated 12.06.2017 sent by the petitioner to the respondent in which it was stated that the respondent is prolonging the matter unnecessarily and putting the petitioner under tremendous pressure. The petitioner requested the respondent to release the payment and not to force the petitioner to raise the issue with Commissionarate of Sugar, Pune, All India Flat Tape Manufacturers Associations, New Delhi (AIFTMA), ISMA - Indian Sugar Mills Association and AISTA -All India Sugar Trade Association, AIPMA – All India Plastic Manufacturers Association, Mumbai, Indian Plast

Pack Forum, M.P. Indore and they can also go to the court to secure the rights of small scale industries.

30. With the aforesaid serious issues, the present case cannot be said to be a matter where there is no dispute raised by the Corporate Debtor enabling the petitioner to an order of admission. Rather all this correspondence which the petitioner has attached with the present case, emanated before the issuance of demand notice dated 25.07.2017. In response to the demand notice, the respondent has taken the stand relating to the quality of the goods. The respondent further stated as under:-

“Our client would like to state that our client has retained the aforesaid amount of INR 30,15,548/- towards following as it was our client which has suffered damages and losses due to supply of sub-standard quantities of PP Bags by your client which was duly communicated to your client numerous time:-

Sr. No.	Particular	Amount(in ₹)
1.	Cost of Rejected Bags (Number 56000)	978880/-
2.	Loss due to damaged Bags in S1 (Grade-Sugar) and S2 (Grade-Sugar): Debit Note raised to your client.	2454936/-
3.	Loss due to damaged Bags in M (Grade-Sugar)	10065238/-
	GRAND TOTAL.	13499054/-

31. The Hon’ble Supreme Court held in **Mobilox Innovations Private Limited Versus Kirusa Software Private Limited (Civil Appeal No. 9405 of 2017)** as under:-

“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.”

32. In view of the above, there being existence of a dispute relating to the quality of the goods, the instant petition is rejected.

33. Copy of this order be communicated to both the parties.

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

October 03, 2017
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