BEFORE THE NATIONAL COMPANY LAW TRIBUNAL,
DIVISION BENCH, CHENNAI

Arguments heard on 15.06.2017
Order passed on 16.06.2017

CP/ 500 (IB)/CB/2017
(IND/1471/(IB)/CB/2017)
(Under Section 9 of the Insolvency And Bankruptcy Code 2016)

M/s. Phoenix Global DMCC.

Vs

M/s. A&A International Trading Private Limited

Applicant (Operational Creditor) Represented by :

Counsel Mr. A. Adithya for M/s. Paul & Paul Hudson Samuel & Partners

Respondent (Corporate Debtor) Represented by :

Sr. Counsel Mr. PH Arvindh Pandian

CORAM :

CH MOHD SHARIEF TARIQ, MEMBER (JUDICIAL) & S. VIJAYARAGHAVAN (MEMBER TECHNICAL)

O R D E R

CH MOHD SHARIEF TARIQ, MEMBER(JUDICIAL) :- (ORAL)

1. Under adjudication is CP/500/(IB)/CB/2017 that came be filed by M/s. Phoenix Global DMCC (Operational Creditor, for short) under Section 9 of the Insolvency and Bankruptcy Code, 2016 (I&B Code 2016, for short) read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority),

Rules, 2016(the Rules, for short), on 11.05.2017. The Application has been filed against M/s. A & A International Trading Private Limited (Corporate Debtor, for short). In the Application, the Operational Creditor claimed that the outstanding debt is to the tune of USD 445416 which fell due on 03.02.2016 but the default occurred on 07.07.2015. The Operational Creditor has also sent the Demand cum Statutory Notice on 05.04.2017 with acknowledgement due that has been received by the Corporate Debtor and the Corporate Debtor has given reply to the same on 13.04.2017 wherein for the first time some issues pertaining to the inferior quality, foreign exchange loss, storage loss and other such losses relating to the consignment which was supplied by the Operational Creditor through the Vessel MV Yasa Unsal Sunar. But, the objections raised seem to be an afterthought and in disregard to the terms and conditions of the sale and purchase contract dated 02.03.201. To make the factual position more clear the relevant detail is given in the following paras:-

2. The Corporate Debtor in this case had accepted the consignment at the port of discharge which has also been certified by the independent agency agreed to by both the buyer and seller. The Corporate Debtor after having accepted the consignment without any demur has claimed that the Sulphur content was more than specified in the agreement to sell which should have been within 0.70 or less, whereas it is mentioned in the Certificate of Analysis as 0.72 with respect to Sulphur content at the port of discharge.

3. The Corporate Debtor has raised Debit Note towards the cost of accepting the material which is not in conformity with the specifications based on the agreement. The price adjustment mentioned in clause 6 of the Sale Purchase Agreement is as follows:-

> *"6. Price Adjustment.*
>
> *6.1 The price is based on a Gross Calorific Value (GCV) on a "as received" basis and is calculated in Kcal/kg. If the GCV (ARB) of any*

shipment of Coal accepted by the Buyer is other than the typical GCV (ArB) set out in clause 2.1, the Base Price (as defined in clause 5) shall be adjusted up or down using the following formula (the "Price Adjustment Formula")".

From this, it is clear that any price adjustment for the consignment received will have to be based on Gross Calorific Value (GCV) on as "received basis". Since the variation pointed out by the Corporate Debtor is only on Sulphur content and there has been no shortfall on that account. No price adjustment is permissible as per the Sale Purchase Agreement. The Corporate Debtor has also given the copies of many Debit Notes received by the Corporate Debtor to whom they have purportedly supplied and sold the Coal. However, there is no evidence on record to link it to the consignment received from the Operational Creditor.

4. It may not be out of place to mention that under para 7.3 of the Sale Purchase Agreement, the analysis certificate given by an independent analyst certifying

the results is final, conclusive and binding on the parties save for fraud or manifest error (IGI for discharge port). Therefore, once the analyst's certificate is issued confirming the specifications as given in the contract to the quality of the coal and on the acceptance of the same by the Corporate Debtor, it is deemed as final, conclusive and binding on both of the parties. Therefore, any subsequent claim to the variations in the quality being raised by the Corporate Debtor is not sustainable in the light of the terms and conditions of the contract agreed upon nor the same can be termed as genuine dispute in its germane sense.

5. The Corporate Debtor has also tried to contest that the rate of interest as claimed by the Operational Creditor is exorbitant. The rate of interest as mentioned under clause 9 of the Sale Purchase Agreement may be on the higher side for delayed payments. But, the said rate of interest has been agreed upon by both the parties as per the Sale

Purchase Agreement dated 02.03.2015 as mentioned at page 100 of the typed set papers.

6. In terms of Article 17 of the Sale Purchase Agreement, no waiver by either party of any provision of the contract shall be binding unless made expressly and expressly confirmed in writing. Hence, any waiver of interest, at this stage, cannot be permitted without the express consent of the Operational Creditor as per the Sale and Purchase Agreement.

7. The Ld. Counsel for the Operation Creditor has submitted one judgement that has been passed by the Hon'ble NCLAT in **Kirusa Software Private Ltd. Vs. Mobilox Innovations Private Ltd.**, wherein, the term "dispute" as mentioned under Section 8 (2) (a) of I&B Code, 2016, which is further mentioned under Section 9 (5) (d) of I&B Code, 2016 has been interpreted. Ld. Sr. Counsel for the Corporate Debtor submitted another judgement of the Hon'ble NCLAT that has been delivered on 31.05.2017 in **MCL Global Steel Pvt. Ltd. And Ors. Vs. Essar Projects India Ltd. And Ors.**,

Global Steel Pvt. Ltd. And Ors. Vs. Essar Projects India Ltd. And Ors., wherein the interpretation of the term "dispute" given in Kirusa's case (*supra*), was followed. The Hon'ble NCLAT in Kirusa's case (*supra)* explained the meaning of the term "dispute" and laid down the principle under para 33 of the judgement which is as follows:-

> *".....if there is a genuine dispute raised before any court of law or authority or pending in a court of law or authority including suit and arbitration proceedings. Mere a dispute giving a colour of genuine dispute or illusory, raised for the first time while replying to the notice under Section 8 cannot be a tool to reject an application under Section 9 if the operational creditor otherwise satisfies the adjudicating authority that there is a debt and there is a default on the part of the corporate debtor."*

Therefore, in the light of the principle laid down in the above noted cases by the Hon'ble NCLAT, we observe that the Corporate Debtor is raising the objections which are not genuine. The terms and conditions of the Sale Purchase Agreement entered into

between the Operational Creditor and Corporate Debtor on 02.03.2015 are very clear on the aspects in question. Therefore, the arguments submitted by the Ld. Sr. Counsel for the Corporate Debtor are devoid of merits as the objection raised by the Corporate Debtor is not a genuine dispute, though the Counsel tried to give a colour to the objection as genuine dispute. Hence, the purported dispute is illusory in its nature. Based on this, the arguments advanced on behalf of the Corporate Debtor stands rejected.

8. Ld. Sr. Counsel for the Corporate Debtor also referred to the ruling that had been passed by the Hon'ble Apex Court of India titled **Fateh Chand Vs. Balkishan Dass** reported in *(1964) 1 SCR 515,* which provides that in case of breach of the contract, the compensation has to be ascertained having regard to the conditions existing on the date of the breach of the contract. This authority is not applicable to the facts and circumstances of the case because there does not appear any breach of the contract by the Operational Creditor in this case. The Ld. Sr. Counsel also tried to

lead us to the Tamilnadu Prohibition of the Charging Exorbitant Interest Act, wherein Section 3 provides that no person shall charge exorbitant interest on any loan advanced by him. But, this enactment is confined to the Money Lending Loan Advance. It does not relate to other commercial transactions. Therefore, the Act relied upon by the Counsel representing the Corporate Debtor is not relevant to the issue under discussion.

9. The Ld. Counsel for the Operational Creditor in his submissions has stated that the purported dispute is not a genuine as has been raised by the Counsel on behalf of Corporate Debtor, the Counsel for Operational Creditor reiterated the terms and conditions of the Sale and Purchase Agreement entered into between the Operational Creditor and Corporate Debtor on 02.03.2015 and has established that the Corporate Debtor has defaulted in the payment as to the outstanding debt.

10. In view of the above discussion, we hold that the claim made by the Corporate Debtor is not genuine.

We have perused the documents placed on the file including the bank statement and the affidavit in compliance to Section 9 (3 (b) and (c) of the I&B Code, 2016. In the affidavit the Operational Creditor stated that the objections/dispute raised by the Corporate Debtor is not a valid and genuine dispute and the Corporate Debtor is falsely objecting to the same in order to evade the liability to pay the outstanding debt. Therefore, having been satisfied that all the requirements under law have been fulfilled, we are inclined to admit the Petition and order the commencement of the Corporate Insolvency Resolution Process which ordinarily shall get completed within 180 days, reckoning from the day this order is passed.

11. The Operational Creditor did not propose the name for appointment of Interim Insolvency Professional. Therefore, we direct the Registry to make a reference to the IBBI for recommending the name an Interim Insolvency Professional within 10 days of the reference. However, we declare the moratorium which shall have effect from the date of this Order till the

completion of Corporate Insolvency Resolution Process, for the purposes referred to in Section 14 of the I&B Code, 2016. We Order to prohibit all of the following, namely :

(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 any court 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 to 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 (54 of 2002);

(d) The recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

12. The supply of essential goods or services of the Corporate Debtor shall not be terminated or suspended or interrupted during moratorium period. The provisions of Sub-section (1) of Section 14 shall not apply to such transactions, as notified by the Central Government.

13. On receiving the recommendation of the IBBI, the Registry is directed to place the matter before this Bench for appointing the Interim Insolvency Professional as recommended by the IBBI.

14. Accordingly, the application is admitted. The Registry is directed to communicate this Order to the Operational Creditor and the Corporate Debtor. Order pronounced in open court.

S. VIJAYARAGHAVAN
MEMBER (TECHNICAL)

CH.MOHD SHARIEF TARIQ
MEMBER (JUDICIAL)

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