

**In the National Company Law Tribunal  
Single Bench, Chennai**

**CP/616/ (IB)/CB/2017**

Under Section 9 of the IBC, 2016

**In the matter of**

**M/S. AGARWAL COAL CORPORATION PRIVATE LIMITED**

**V/s**

**M/S. SUN PAPER MILL LIMITED**

Order delivered on: 15/11/2017

For the Petitioner/OC : Shri. Narendra Kumar Bhansali, PCS

For the Respondent/CD: Shri. K.K. Muralidharan, Advocate

**Per: K. ANANTHA PADMANABHA SWAMY, MEMBER (J)**

**ORDER**

Under consideration is a Company petition filed by M/s. Agarwal Coal Corporation Private Limited (in short **Petitioner/Operational Creditor**) against M/s. Sun Paper Mill Limited (in short **Respondent/Corporate Debtor**) under section 9 of the Insolvency and Bankruptcy Code, 2016 (in short **IB Code 2016**) r/w rule 6 of Insolvency & Bankruptcy (**Application to Adjudicating Authority**) Rules, 2016 (**for brevity, IB Rules 2016**)

2. Before proceeding with this matter, it would be appropriate to make a note of background facts for the purpose of determination of this petition.

3. The Petitioner/OC is a private limited Company incorporated under the Companies Act, 1956 and the registered office is situated at Agarwal House, 5 Yeswant Colony, Y. N. Road, Indore – 452 003 and the respondent is also a

Public Company registered under the Companies Act, 1956 having its registered office at 19/7, West College Road, Arumbakkam, Chennai – 600 106.

4. The learned Practicing Company Secretary for the Applicant submitted that the Applicant and Respondent had entered into Two High Seas Sale Agreements both on 04.11.2013 for the purpose of supplying Non cooking Coal in bulk of Indonesian Origin. In pursuance of the said agreements the coal was supplied and it was lifted by the Respondent between November, 2013 to February, 2014 and the Respondent owes an amount to the tune of Rs. 2,69,75,480/- for the supplies made under the said High Seas Sales Agreement dated 04.11.2013. The Respondent also owes to the Applicant to the tune of Rs. 4,58,455/- for the earlier supplies. After several demands, the Respondent paid an amount of Rs. 15,00,000/- on 15.04.2014. Since the Respondent was unable to pay its dues of Rs. 2,59,33,935/-, the Applicant issued a notice dated 03.07.2014 under section 434 of the Companies Act, 1956 and in response to the said notice the Respondent paid an amount of Rs. 20,00,000/- on 13.08.2014. As the Respondent failed to pay the balance amount of Rs. 2,39,33,935/-, the Applicant filed a winding up petition before Hon'ble High Court of Madras and on constitution of NCLT Benches, the same was transferred to this Tribunal. As the Applicant has not submitted relevant information required to be submitted on or before 15.07.2017, this Tribunal abated the proceedings vide its order dated 01.09.2017 as per notification of Ministry of Corporate Affairs No. GSR 732(E) dated 29.06.2017 and therefore the fresh petition under I& B Code, 2016 was filed before this Tribunal. The learned PCS submitted that the Applicant has also issued notice dated 24.05.2017 under the I&B Code, 2016.

5. The learned PCS for the Applicant has submitted that the Respondent has never disputed the dues payable to the Applicant and when the Corporate



Debtor is unable to pay its operational debt, then the Applicant, left with no other option except approaching this Adjudicating Authority claiming the payment of Rs. 2,59,33,935/- against the corporate debtor in the capacity of a Operational Creditor under the provisions of the IB Code, 2016 and thus prayed to initiate Corporate Insolvency Resolution Process against the Respondent/CD.

6. The learned Counsel for the Respondent vehemently opposed the contentions raised by the PCS for the applicant and submitted that the instant petition is not maintainable either in law or on facts. The learned Counsel for the Respondent while taking up the preliminary objections submitted that the earlier proceeding filed before the High Court which came to be transferred to this Tribunal was abated vide order dated 01.09.2017 and for the same cause of action, the second petition is filed and therefore it is not maintainable. This Tribunal has not given any liberty to file a fresh petition under I & B Code, 2016. The present CP is barred by Res-judicata and limitation, existence of dispute and pendency of litigation on the subject matter of claim between the parties before the Customs Authority.

7. The learned Counsel for the Respondent on the merits of the petition submitted that the Applicant has filed the present petition on the basis of the two High Seas Sale Agreement dated 04.11.2013, however, there is a running account between the Applicant and the Respondent. The part payment of Rs. 20,00,000/- made on 13.08.2014 cannot extend the period of limitation. Therefore, the petition is barred by limitation. Further submitted that the Applicant has supplied "Bituminous coal" instead of "Steam coal" which was confirmed by the Customs Authorities on their own. The Customs Authorities have also filed cases against the Respondent on the ground that the Respondent has availed concession of customs duty by certifying that the coal imported is a Steam Coal. The Customs Authorities have also issued

show cause notice on 27.03.2013 and directed the Respondent to pay Rs. 79,67,557/- towards differential duty, Rs. 60 lakhs towards penalty and Rs. 71 lakhs as fine vide order dated 21.02.2014. In receipt of the demand notice, the Respondent issued a letter dated 06.07.2013 to the Applicant and informed them about withholding of the payment. The Respondent challenged the order dated 21.02.2014 before the High Court in a Writ and the High Court has also passed an interim injunction. The Respondent had also challenged the order dated 21.02.2014 before CESTAT and subsequently it was informed to the Respondent that there is a case pending before the Supreme Court and the present appeal before CESTAT would be proceeded further after the order of the Supreme Court. The learned Counsel for the Respondent has further submitted that the Applicant has calculated the total claim amount under two invoice value covered under the High Sea Sales Agreement dated 04.11.2013 and in Form 3 demand notice the Applicant has quoted 10 invoice numbers from November 2013 to February, 2014. The Respondent issued reply to the demand notice issued by the Applicant, seriously denying their liability to such amounts and stoutly disputing such demand in view of the inferior quality supplies by the Applicant which is subject matter before Customs Appellate Tribunal for decision. He has also submitted that the Respondent is commercially a solvent company and therefore, the petition is liable to be dismissed. The learned Counsel for the Respondent in support of his submissions relied on the following judgments:

- (a) Karthik Homes Vs S. Manvizhi (2015 (1) CTC 724) –To show that the suppression of material fact by litigant disqualifies such litigant from obtaining relief and if there is a false statement or a twisted fact placed before Court, then the Court should not hesitate to curb such practice.
- (b) S. P. Chengalvaraya Naidu (dead) by L. Rs Vs Jagannath (dead) by L.Rs and others (Manu/SC/0192/1994) --



Decree obtained by practicing fraud on court is a nullity. Person bases his case on falsehood has no right to approach the court and his case can be summarily thrown out at any stage or litigation.

- (c) Penugonda Satish babu Vs M/s. Amarpali Biotech India Private Limited (IB 0 58 PB/2017 before NCLT, Special Bench, New Delhi) – To show that the NCLT would not go into it for the non-performance obligations as contracted between the parties in the summary jurisdiction.
- (d) Deena (dead) by LRs Vs Bharat Singh (dead) by LRs (AIR 2002 Supreme Court 2768) – To show that Court must lack jurisdiction to entertain the suit - suit decided after adjudication on its merits.
- (e) Zafar Khan and others Vs Board of Revenue, UP and others (MANU/SC/025/1984) – to show that the appellant is not entitled to restitution where party failed in earlier proceedings on merits and not on defect of jurisdiction.
- (f) Mobilox Innovations Private Limited Vs Kirusa Software Private Limited (2017 (5) CTC 831) – to show that the Pre-existence of dispute alone is sufficient.

In view of the above, the learned Counsel for the Respondent prayed for the dismissal of the petition.

8. The learned Practicing Company Secretary for the Applicant submitted inter-alia that the earlier CP was not dismissed on merits and it was only abated and the Applicant is eligible to file the fresh Application under the I & B Code in pursuance to second proviso to Rule 5 of Companies (Transfer of Pending Proceedings), Rules, 2016. He has further submitted that the petition is not barred by limitation as the part payment was made on 13.08.2014 and the demand notice was issued on 24.05.2017. Section 238 of the I & B Code, 2016

is having an overriding effect over all other laws in force, therefore, the law of limitation does not have application to the proceedings under the I&B Code. The entire counter statement relates to the supplies made by the Applicant before the High Seas Sales Agreement dated 04.11.2013 and the Respondent never raised any dispute about the quality and therefore, the Respondent effected the payment even as late as 15.04.2014. With regard to the various invoices, the learned PCS for the Applicant has submitted that the Respondent has taken delivery of the coal in small quantities and invoices for such small delivery was raised by the Applicant. The Respondent has not raised any dispute till issuance of demand notice dated 24.05.2017 even after the communication received while the winding up petition was pending before the High Court. Only after the demand notice was issued to the Respondent on 24/05/2017, irrelevant issues to delay the proceedings are raised.

In view of the above submission, the learned PCS of the Applicant prayed for admitting the petition and initiate Corporate Insolvency Resolution Process against the Respondent.

9. Heard. Perused the pleadings and documents submitted by both the parties.

10. After perusing the pleadings and hearing submissions made by both the parties, the following issues arise before me for consideration:

- (i) Whether there is an existing dispute between the parties before the present petition filed under I & B Code, 2016;
- (ii) Whether the principle of Res-Judicata is applicable to the present petition;
- (iii) Whether the petition is barred by limitation;



- (iv) Whether the Applicant has made out a case for invoking the jurisdiction of this Tribunal under the I & B Code, 2016.

11. Having gone through the show cause notice issued by the Customs Authorities. It could be seen that the same was issued only to the Respondent, and the Applicant is not a party in it. The said show cause notice was issued on the ground that the Respondent has imported Bituminous Coal in the name of Steam Coal by which illegally availed customs duty concessions. It is also pertinent to note that High Seas Sales Agreement dated 04.11.2013 entered into between the Applicant and the Respondent and in the said agreement it was mentioned only "Non cooking coal in bulk of Indonesia Origin" and there was no mention about Steam Coal. Further, no document is filed to prove that the Applicant has disputed the quality of the coal even for the earlier supplies and thereby the amount of due is disputed. Therefore the claim of the Respondent that the Applicant has supplied Bituminous Coal in the place of Steam Coal and therefore the due was kept pending cannot be accepted. Further it is on record that the winding up petition was pending before the High Court and subsequently it was transferred to this Tribunal on its constitution. It is pertinent to note and it is on record that the Respondent never disputed the claim till issuance of the notice dated 24.05.2017. There is no document to prove that there was a dispute between the parties, therefore while answering

Issue (i) - I conclude that there is no any dispute between the Applicant and the Respondent in relation to the above said transaction.

Issue (ii) - With regard to the application of principle of Res-Judicata to the present proceedings, it is on record that the Applicant has filed a winding up petition before the High Court and the same was transferred to this Tribunal on its constitution. It is also on record that on the failure of the Applicant (the

petitioner therein) in submitting required information, the petition was abated as per the notification of Ministry of Corporate Affairs No. GSR 732(E) dated 29.06.2017 and in the same notification the parties are given liberty to file fresh petition under I & B Code, 2016, therefore, the submission that the principle of Res-Judicata is applicable to the present proceeding is unsustainable.

Issue (iii) - With regard to the submissions of applicability of limitation to the present proceedings, it is on record that the Applicant has issued demand notice dated 24.05.2017 and thereafter the Respondent raised the dispute. In my considered view, the notice has been issued within the period of three years of limitation i.e. from 13.08.2014, and there was a payment of Rs. 20,00,000/- on that day, and it was replied by the Respondent and therefore the submission that the present proceeding is barred by limitation is not accepted and unsustainable. In view of that I also answer the question (iii) above in negative.

Issue (iv) - with regard to the question as to whether the Applicant has made out a case to invoke the jurisdiction of this Tribunal under I & B Code, it is on record that the Respondent owes money to the Applicant and the Respondent never disputed the same till the issuance of the demand notice dated 24.05.2017. The quality of the coal was never disputed by the Respondent and there is no document filed by the Respondent before this Tribunal. Therefore I conclude that the Applicant has made out a case to initiating insolvency proceeding against the Respondent under I&B code 2016.

12. In view of my above observations, I am inclined to admit the petition as the Applicant has made out a case and also satisfied this Adjudicating Authority for admitting the petition. It is also proved that there is a debt due payable by the Respondent/CD and they have defaulted in making payments. The objections raised by Counsel for the Respondent are not convincing and valid



ground for rejection of the instant petition and case laws are also not applicable to the facts and circumstances of the present case.

13. Therefore, the instant petition is admitted and I order commencement of the Corporate Insolvency Resolution Process which shall ordinarily get completed within 180 days, reckoning from the day this order is passed.

14. I direct the Registry to take up the matter with the Insolvency & Bankruptcy Board of India (IBBI) for appointing a Interim Resolution Professional (IRP) as the Applicant has not proposed any name of the IRP to be appointed. On the appointment, the IRP is directed to take charge of the Respondent/Corporate Debtor's management immediately. He is also directed to cause public announcement as prescribed under Section 15 of the I & B Code, 2016 within three days from the date of the copy of this order is received and call for submissions of claim in the manner as prescribed.

15. I declare the moratorium which shall have effect from the date of this order till the completion of corporate insolvency resolution process for the purpose referred to in Section 14 of the I & B Code, 2016. I order to prohibit all of the following, namely:

- (i) 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.
- (ii) Transferring, encumbering, alienating or disposing of by the corporate debtors any of its assets or any legal right or beneficial interest therein;
- (iii) 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 Re construction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002)

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

16. 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 414 shall not apply to such transactions, as notified by the Central Government.

17. The IRP so appointed shall comply with the provisions of sections 13(2), 15, 17 & 18 of the Code. The directors, Promoters or any other person associated with the management of Corporate Debtor are directed to extend all assistance and cooperation to the IRP as stipulated under Section 19 and for discharging his functions under Section 20 of the I & B Code.

18. The petitioner/OC as well as the Registry is directed to send the copy of this order to IRP on his appointment so that he could take charge of the Corporate Debtor's assets etc. and make compliance with this order as per the provisions of the I & B Code, 2016.

19. The Registry is also directed to communicate this order to the Operational Creditor and the Corporate Debtor.

20. With the above directions the petition is disposed of.

  
**K. Anantha Padmanabha Swamy**  
**Member (Judicial)**