

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI
COMPANY APPELLATE JURISDICTION

Company Appeal (AT) (Insolvency) No. 33 of 2017

(arising out of Order dated 07.04.2017 passed by the National Company Law Tribunal, Chandigarh Bench, in CP (IB) No. 13/CHD/HRY/2017 and CP (IB) No. 14/CHD/HRY/2017)

IN THE MATTER OF:

M/s. Meyer Apparel Ltd. & Anr **...Appellants**

Vs

M/s. Surbhi Body Products Pvt. Ltd. **...Respondent**

Alongwith Company Appeal (AT) (Insolvency) No. 34 of 2017

M/s. Meyer Apparel Ltd. & Anr. **...Appellants**

Vs

M/s. Godolo & Godolo Exports Pvt. Ltd. **...Respondent**

Present: For Appellant: - Mr. Rajbirbal, Sr. Advocate with Ms. Raavi Birbal, Mr. Govil and Ms. Swastika Kumar, Advocates.

For Respondent: - Ms. Isha Aggarwal and Mr. Rhishabh Jetley, Advocates.

J U D G E M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

In both the appeals as Appellant is common and common order is under challenge, we have heard both the appeals together and disposed of by this common judgement.

2. The Respondent M/s. Surbhi Body Products (P) Ltd., claimed to be the 'Operational Creditor' filed application under Section 9 of Insolvency & Bankruptcy Code, 2016 (hereinafter referred to as I&B Code) seeking to set in motion the Corporate Insolvency Resolution Process in relation to Appellant – M/s Meyer Apparel Limited – Corporate Debtor.

3. Another M/s Godolo and Godolo Exports Pvt. Ltd. also claimed to be 'Operational Creditor' and filed similar application under Section 9 of the I&B Code against Appellant/Corporate Debtor.

4. Both the aforesaid applications were heard together and by impugned common order dated 7th April 2017, the Adjudicating Authority admitted both the applications and initiated Corporate Insolvency Resolution Process, declaring moratorium prohibiting the institution of suits, continuation of pending suits and other proceedings against Corporate Debtor.

5. The main ground taken by the Appellant is that the petition under Section 9 of the I&B Code was not maintainable there being existence of dispute between the parties with regard to the debt claimed by Operational Creditor.

6. In Appeal No. 33 of 2017, it is stated that the respondent issued a notice for recovery-cum-winding up proceedings dated 2nd March 2015 allegedly claiming an amount of Rs. 2,13,570/- (Rupees two lakh thirteen thousand five hundred and seventy) along with 24% interest. Pursuant to the aforesaid notice under Section 433, 434 and 450 of the Companies Act 1956 a case has been instituted before the Hon'ble High Court of Punjab & Haryana in C.P. No. 164 of 2015 with an application for appointment of Provisional Liquidator.

7. It is further stated that Appellant No. 1 company suffered loss due to inferior quality of goods supplied by Respondent/Operational Creditor and based on notices dated 27th February 2015, 4th September 2015, 8th September 2015 and 21st September 2015 and the debit note dated 8th September 2015, the Appellant/Corporate Debtor has already filed a Suit for recovery of Rs. 2,16,610/- against the Respondent/Operational Creditor before the Court of Civil Judge (Senior Division), Gurugram.

8. It is further pleaded that in the meantime, pursuant to the petitions preferred by the Corporate Debtor, the Hon'ble High Court has already passed order on 8th September 2015 and then on 9th January 2017.

9. Exactly similar ground has been taken in the other appeal. Both the Operational Creditor (s) have appeared and accepted that disputes were pending with regard to the amount of debts claimed by them. A joint petition has been filed by the parties, along with supporting affidavit for disposal of both the appeal (s) in the light of the 'settlement' entered between the parties with supporting affidavits.

10. Ld. Counsel for one of the 'creditor' appeared and submitted he has instruction to file a petition for intervention as the creditor has already filed claim pursuant to notice of advertisement issued by Interim Resolution Professional.

11. From the common impugned order dated 07.04.2017 passed by the Adjudicating Authority, Chandigarh Bench, Chandigarh in CP (IB) No. 13/CHD/HRY/2017 & CP (IB) No. 14/CHD/HRY/2017, while we find that the Adjudicating Authority noticed the purchase and supply of various qualities of interlining and linen items by Corporate Debtor

worth Rs.2,13,500 (Rupees two lakh thirteen thousand five hundred only) from one of the Operational Creditor, the Adjudicating Authority also noticed that a legal notice dated 2nd March 2015 was issued under Section 433 read with Section 434 of the Companies Act, 1956 for payment of the amount. The Adjudicating Authority further noticed that a letter dated 4.9.2015 was written by the Corporate Debtor raising the dispute about “quality of goods being inferior and poor quality” and for failure to make payment, a Company Petition No. 164 of 2015 for winding up was filed by the Operational Debtor which is pending before the Punjab & Haryana High Court since 28th August, 2015. The Adjudicating Authority further noticed the order of the Hon’ble High Court dated 6.9.2016 wherein the Hon’ble High Court noticed the question of maintainability of the winding up petition filed by Corporate Debtor in view of the pendency of matter before the Board for Industrial & Financial Reconstruction (hereinafter referred to as BIFR). In such background, the Operational Creditor withdrew the winding up petition.

12. In relation to the other case, the Adjudicating Authority noticed that the purchase orders were given by the Corporate Debtor from time to time with the condition that the payment will be made within sixty days of delivery. The invoices, 32 in number, show that out of total amount of Rs.16,09,152/- (Rupees sixteen lakh nine thousand one hundred and fifty-two only), amount payable is Rs.12,49,307.50 paise (Rupees twelve lakh forty-nine thousand three hundred and seven and paise fifty only). The due date of payment against each invoices were mentioned and it was clearly mentioned in the invoices, that the defects/shortage/rate difference have to be notified in writing by the Corporate Debtor. The Corporate Debtor paid a sum of Rs. 80,473.50 (Rupees eighty thousand four hundred and seventy-three and paise fifty only) on 26.2.2015 and balance outstanding amount of Rs.11,68,834/- (Rupees eleven lakh sixty eighty thousand eight hundred and thirty-four) along with interest was not paid. When the notice for winding up was issued, the Corporate Debtor raised the question of quality of goods and alleged inferior quality in the letter dated 21.9.2015.

13. However, all the aforesaid stand taken by the Corporate Debtor about the objections as were raised earlier in proceeding under Section 433 of the Companies Act, 1956 and inferior quality of materials supplied by Operational Creditor was not accepted by the Ld. Adjudicating Authority for the following reasons: -

“29. Therefore, the dispute relating to quality of goods and service would also be included in the said definition. The question basically is whether raising this dispute in the Notice dated 27.9.2015 more than one year after the last transaction is covered within the scope of the term ‘dispute’, especially when the recourse to the recovery of the outstanding amount by filing a civil suit seems to have been taken just at the time of sending reply to the demand notice under Section 8 of the ‘Code’ in February, 2017.”

14. From the impugned order dated 7th April 2017, we find that the Adjudicating Authority relied on the decision of the Punjab & Haryana High Court in “*Max India Limited vs Unicoat Tapes (P) CP No. 99 of 1994 decided on 4.7.1997*” to find out the meaning of ‘dispute’, though we find specific definition of ‘dispute’ has been defined under sub-Section (6) of Section 5 of the I&B Code.

15. In the present case the Respondents have accepted that disputes were pending prior to issuance of notice under Section 8 of I&B Code. Apart from aforesaid admitted position, we find that since 2015 there was a dispute raised by the Appellant (s)/ Corporate Debtor (s) about quality of goods.

16. The question as to what does ‘dispute’ and ‘existence of dispute’ means for the purpose of maintaining a petition for Corporate Insolvency Resolution Process under Section 9 of I&B Code was considered by this Appellate Tribunal in “*Kirusa Software Private Ltd. v. Mobilox Innovations Private Limited in Company Appeal (AT) (Insolvency) 6 of 2017*” by its judgment dated 24th May 2017 while noticed the different provisions of the I&B Code, including the meaning of ‘dispute’ as defined in sub-section (6) of Section 5 and the sentence “*existing of a dispute, if any “and” record of pendency of suit or arbitration proceeding*” as defined in sub-section (2) of Section 8 and Section 9 of the I&B Code respectively and held as follows: -

“17. For the purposes of Part II only of the Code, some terms/ words have been defined.

Sub Section (6) of Section 5 defines “dispute”, to include, unless the context otherwise requires, a dispute pending in any suit or arbitration proceedings relating to:

- (a) existence of amount of the debt;*
- (b) quality of good or service;*
- (c) breach of a representation or warranty.*

The definition of “dispute” is “inclusive” and not “exhaustive”. The same has to be given wide meaning provided it is relatable to the existence of the amount of the debt, quality of good or service or breach of a representation or warranty.

18. *Once the term “dispute” is given its natural and ordinary meaning, upon reading of the Code as a whole, the width of “dispute” should cover all disputes on debt, default etc. and not be limited to only two ways of disputing a demand made by the operational creditor, i.e. either by showing a record of pending suit or by showing a record of a pending arbitration.*

The intent of the Legislature, as evident from the definition of the term “dispute”, is that it wanted the same to be illustrative (and not exhaustive). If the intent of the Legislature was that a demand by an operational creditor can be disputed only by showing a record of a suit or arbitration proceeding, the definition of dispute would have simply said dispute means a dispute pending in Arbitration or a suit.

“21. Admittedly in sub-section (6) of Section 5 of the ‘I & B Code’, the Legislature used the words ‘dispute includes a suit or arbitration proceedings’. If this is harmoniously read with Section (2) of Section 8 of the ‘I & B Code’, where words used are ‘existence of a dispute, if any, and record of the pendency of the suit or arbitration proceedings,’ the result is disputes, if any, applies to all kinds of disputes, in relation to debt and default. The expression used in sub-section (2) of Section 8 of the ‘I & B Code’ ‘existence of a dispute, if any,’ is disjunctive from the expression ‘record of the pendency of the suit or arbitration proceedings’. Otherwise, the words ‘dispute, if any’, in sub-section (2) of Section 8 would become surplus usage.

22. Sub-section (2) of Section 8 of the ‘I & B Code’ cannot be read to mean that a dispute must be pending between the parties prior to the notice of demand and that too in arbitration or a civil court. Once parties are already before any judicial forum/authority for adjudication of disputes, notice becomes irrelevant and such an interpretation renders the expression ‘existence of a dispute, if any,’ in sub-section (2) of Section 8 itiose.”

“25. The true meaning of sub-section (2)(a) of Section 8 read with sub-section (6) of Section 5 of the ‘I & B Code’ clearly brings out the intent of the Code, namely the Corporate Debtor must raise a dispute with sufficient particulars. And in case a dispute is being raised by simply showing a record of dispute in a pending arbitration or suit, the dispute must also be relatable to the three conditions provided under sub-section (6) of Section 5 (a)-(c) only. The words ‘and record of the pendency of the suit or arbitration proceedings’ under sub-section (2)(a) of Section 8 also make the intent of the Legislature clear that disputes in a pending suit or arbitration proceeding are such disputes which satisfy the test of sub-section (6) of Section 5 of the ‘I & B Code’ and that such disputes are within the ambit of the expression, ‘dispute, if any’. The record of suit or arbitration proceeding is required to demonstrate the same, being pending prior to the notice of demand under sub-section 8 of the ‘I & B Code’.

26. It is a fundamental principle of law that multiplicity of proceedings is required to be avoided. Therefore, if disputes under sub-section (2)(a) of Section 8 read with sub-section (6) of Section 5 of the ‘I & B Code’ are confined to a dispute in a pending suit and arbitration in relation to the three classes under sub-section (6) of Section 5 of the ‘I & B Code’, it would violate the definition of operational debt under sub-section (21) of Section 3 of the ‘I & B Code’ and would become inconsistent thereto, and would bar Operational Creditor from invoking Sections 8 and 9 of the Code.

27. Sub-section (6) of Section 5 read with sub-section (2)(a) of Section 8 also cannot be confined to pending arbitration or a civil suit. It must include disputes pending before every judicial authority including mediation, conciliation etc. as long there are disputes as to existence of debt or default etc., it would satisfy sub-section (2) of Section 8 of the ‘I & B Code’.

“31. The dispute under I&B Code, 2016 must relate to specified nature in clause (a), (b) or (c) i.e. existence of amount of debt or quality of goods or service or breach of representation or warranty. However, it is capable of being discerned not only from in a suit or arbitration from any document related to it. For example, the ‘operational

creditor' has issued notice under Code of Civil Procedure Code, 1908 prior to initiation of the suit against the operational creditor which is disputed by 'corporate debtor. Similarly notice under Section 59 of the Sales and Goods Act if issued by one of the party, a labourer/employee who may claim to be operation creditor for the purpose of Section 9 of I&B Code, 2016 may have raised the dispute with the State Government concerning the subject matter i.e. existence of amount of debit and pending consideration before the competent Government. Similarly, a dispute may be pending in a Labour Court about existence of amount of debt. A party can move before a High Court under writ jurisdictions against Government, corporate debtor (public sector undertaking). There may be cases where one of the party has moved before the High Court under Section 433 of the Companies Act, 1956 for initiation of liquidation proceedings against the corporate debtor and dispute is pending. Similarly, with regard to quality of goods, if the 'corporate debtor' has raised a dispute, and brought to the notice of the 'operational creditor' to take appropriate step, prior to receipt of notice under sub-section (1) of Section 8 of the 'I & B Code', one can say that a dispute is pending about the debt. Mere raising a dispute for the sake of dispute, unrelated or related to clause (a) or (b) or (c) of Sub-section (6) of Section 5, if not raised prior to application and not pending before any competent court of law or authority cannot be relied upon to hold that there is a 'dispute' raised by the corporate debtor. The scope of existence of 'dispute', if any, which includes pending suits and arbitration proceedings cannot be limited and confined to suit and arbitration proceedings only. It includes any other dispute raised prior to Section 8 in this in relation to clause (a) or (b) or (c) of sub-section (6) of Section 5. It must be raised in a court of law or authority and proposed to be moved before the court of law or authority and not any got up or malafide dispute just to stall the insolvency resolution process."

17. In the present case, we find that the Appellants/ Corporate Debtor in both the cases have already raised dispute relating to quality of goods which culminated into pendency of Company Petition before the Punjab & Haryana High Court, no matter whether it was withdrawn, we hold that the dispute as raised by the Appellants/Corporate Debtor fall within the ambit of expression "*dispute, if any*" as defined under sub-section (6) of Section 6 of the I&B Code and also within the ambit of expression '*existence of a dispute, if any*' as mentioned under sub-Section (2) of Section 8 of I&B Code. The aforesaid fact has also been admitted by both the Respondents.

18. In view of the fact that we have given a specific finding merit, we have not taken notice of '*agreement, if any reached between the parties*' as brought on record for determination of the issue.

19. For the reason aforesaid, the impugned common order dated 7th April 2017 passed by the Adjudicating Authority, Chandigarh Bench in Company Petition (IB) No. 13/Chd/Hry/2017 and in Company Petition (IB) No. 14/Chd/Hry/2017 cannot be upheld and the same is accordingly set aside. In effect the appointment of Interim Resolution Professional (s), order declaring moratorium, freezing of account and all other order passed by Adjudicating Authority pursuant to impugned order and action taken by the Interim Resolution Professional, including the advertisement published in the

newspaper calling for applications are declared illegal. The Adjudicating Authority is directed to close the proceeding. The appellant company is released from the rigour of law and allow the appellant company to function independently through its Board of Directors from immediate effect.

20. At this stage, we may only add that once in a petition under Section 7 or 9 of the I&B Code when corporate resolution process is initiated, the Adjudicating Authority has no jurisdiction to initiate another corporate resolution process against the same very Corporate Debtor, though it may allow the Financial Creditor/Operational Creditor to file claim pursuant to the advertisement issued, before the 'interim resolution professional'.

21. Both appeals are allowed with aforesaid observation and direction but in the facts and circumstances there shall be no order as to cost.

SD/-
(Mr. Balvinder Singh)
Member (Technical)

SD/-
(Justice S.J. Mukhopadhaya)
Chairperson

NEW DELHI

31st MAY, 2017

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