

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI**

**Company Appeal (AT) (Insolvency) No. 653 of 2018**

[Arising out of order(s) dated 6<sup>th</sup> September, 2018 passed by Adjudicating Authority (NCLT, Hyderabad Bench, Hyderabad) in CP(IB) No. 100/9/HDB/2018 and CP(IB) No. 102/9/HDB/2018]

**IN THE MATTER OF:**

**R.S. Cottmark(India) Pvt. Ltd.**

**.. Appellant**

7/4, Satya Sadan,  
Snehlata Ganj,  
Indore(M.P.)- 452 003

**Vs.**

**Rajvir Industries Ltd.**

**.. Respondent**

1<sup>st</sup> Floor, Surya Towers,  
105, S.P. Road, Secunderabad,  
TG-500003

**With**

**Company Appeal (AT) (Insolvency) No. 654 of 2018**

**IN THE MATTER OF:**

**M/s. Krishna Bio Tech**

**.. Appellant**

7/4, Satya Sadan,  
Snehlata Ganj,  
Indore(M.P.)- 452 003

**Vs.**

**Rajvir Industries Ltd.**

**.. Respondent**

1<sup>st</sup> Floor, Surya Towers,  
105, S.P. Road, Secunderabad,  
TG-500003

**For Appellants: Mr. Rishabh Gupta, Advocate.**

**For Respondent: Present but appearance not marked.**

## J U D G M E N T

**05<sup>th</sup> August, 2019**

### **KANTHI NARAHARI, MEMBER(TECHNICAL)**

In view of common issue arising in both the appeals, we hereby pass common judgment.

2. The Appellants filed the present appeals against the impugned order(s) dated 6<sup>th</sup> September, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), Hyderabad Bench, Hyderabad whereby the Adjudicating Authority rejected the petitions bearing CP(IB) No. 100/9/HDB/2018 and CP(IB) No. 102/9/HDB/2018 filed by the Appellants after discussing the case on merit on the ground of existence of dispute.

3. Heard learned Counsel appearing for the respective parties.

4. Learned Counsel for the Appellants raises grounds as stated in the appeals, more particularly that 'no dispute', were brought on record by the Respondent ('Corporate Debtor') prior to delivery of Demand Notice under Section 8 as mandated by Insolvency & Bankruptcy Code, 2016 (in short **IBC**).

5. The other ground is with regard to Letter of Credit dated 01.12.2017 (henceforth referred to as **LOC**) whereby the Respondent (Corporate Debtor) issued in favour of one of the Petitioners in C.P. No. 101/9/HDB/2018 filed before the Adjudicating Authority (no appeal filed by him) namely M/s Samkit Bio Farms Pvt. Ltd is

concerned, it is submitted that the said LOC was issued by the Respondent to secure further consignments from M/s Samkit Bio Farms Pvt. Ltd but not to settle the dues of the Appellants. It is further submitted that the Respondent in pleadings has stated that the said LOC has been issued in full and final settlement of claim of Appellants and other parties and in accepting the said contention, the Adjudicating Authority passed the impugned order which is in direct contravention to “Illustration C” of Section 62 of the Indian Contract Act. It is contended that there is no dispute which was brought on record by the Respondent prior to deliver of Demand Notice under Section 8(1) of IBC. Further the Respondent referred to e-mail dated 01.01.2018 which has no bearing and has not been addressed to the Appellants and therefore, is not binding on them.

6. Learned Counsel for the Appellant(s) further submitted that there is no dispute with reference to the goods supplied and the Respondent (“Corporate Debtor”) acknowledged the amount as ‘operational debt’ for sale made upto March, 2017.

7. Learned Counsel appearing on behalf of the Respondent made his submissions contending that the Appellant in Company Appeal(AT)(Insolvency) No. 653 of 2018 i.e., M/s R.S. Cottmark (India) Pvt. Ltd. and M/s Krishna Bio Tech, Appellant in Company Appeal(AT)(Insolvency) No. 654 of 2018 and M/s Samkit Bio Farms Pvt. Ltd, Indore have filed Company Petitions before the Adjudicating Authority bearing CP(IB) No. 100/9/HDB/2018 and CP(IB) No.

102/9/HDB/2018 and CP(IB) No. 101/9/HDB/2018 against this Respondent seeking similar claims. The Adjudicating Authority rejected all the petitions on the ground of existence of dispute. He further submitted that the dispute existed prior to the date of Demand Notice issued by Appellant(s) dated 20.11.2017.

8. The learned counsel for Respondent further submitted that pursuant to deal confirmation letter dated 17.02.2017, the Respondent intimated its requirement of 100 bales of BCI Cotton of 25 mm length and 3.8 Micronaire to the Appellant. Accordingly, the Appellant in Appeal No. 653 of 2018 had dispatched Lot 145 comprising of 100 bales vide invoice No. 87 dated 28.02.2017 and Lot 58 comprising of 25 bales vide invoice No. 857 dated 08.03.2017 i.e., in total 125 bales. It is further submitted that the quality test was conducted on the said Lots on 29.03.2017 using Premier High Quality testing machine. The quality of goods was not upto the mark as required by the Respondent and the same was intimated to the Market Intermediary, viz. Apex Cotton Agency (I) Limited on 29.03.2017 as it is the business practice to address the quality concern pertaining to vendor through Market Intermediaries. The outcome of the test report was also addressed to the Appellant in Appeal No. 653 of 2018 vide Blue Dart Courier consignment No. 13719724745 on 29.03.2017 itself. As the Appellant (in appeal No. 653 of 2018) had not provided their e-mail ID to the Respondent and

to the best of knowledge of the Respondent, the same was delivered to the Appellant.

9. From the perusal of the impugned order dated 06.09.2018, the Adjudicating Authority had also noticed that the Appellants sold cotton bales to the Respondent ('Corporate Debtor') vide invoice no. 87 dated 28.02.2017 amounting to Rs. 20,58,679/- and vide invoice No. 857 dated 08.03.2017 amounting to Rs. 5,34,354/- and the amount in respect of the two invoices are outstanding and the Appellants also claimed interest. Further, the claim of the Appellant in Company Appeal(AT)(Insolvency) No. 654 of 2018 is that the Respondent admitted the transaction and claim amount of Rs. 28,40,840/- (Rupees Twenty-Eight Lakhs Forty Thousand Eight Hundred Forty only).

10. Whilst there is no dispute with regard to Demand Notice issued by Appellant dated 20.11.2017 and it has not been denied by the Respondent. However, the crux of the issue is with regard to the existence of dispute. The Appellants have not denied that M/s Apex Cotton Agencies (I) Pvt. Ltd. acted as intermediary to resolve the claims, difference or dispute between the buyer and seller arising out of the dealings, contracts and the transactions and dispute in relation to quality, and quantity of the physical delivery for transactions that are routed through M/s Apex Cotton Agencies (I) Pvt. Ltd. Admittedly, the parties have initiated dispute reconciliation discussion in the month of November, 2017 with all the stockholders including the

Appellants M/s R.S. Cottmark (India) Pvt. Ltd. in Company Appeal(AT)(Insolvency) No. 653 of 2018, M/s Krishna Bio Tech, Appellant in Company Appeal(AT)(Insolvency) No. 654 of 2018 and M/s Samkit Bio Farms Pvt. Ltd.. It was resolved in the said dispute reconciliation meeting that the parties were in good faith and trust agreed to resolve the said disputes amicably. In accordance with same, the Respondent got issued irrevocable LOC numbered as 0910317LC000097 in favour of M/s Samkit Bio Farms Pvt. Ltd. from its Banker, State Bank of India, Industrial Finance Branch, Hyderabad for a sum of Rs. 39,15,148/- (Rupees Thirty-nine Lakhs Fifteen Thousand and One Hundred Forty-Eight) and the said LOC was honoured by Respondent's Banker on 20.01.2018 and from the account of the Respondent the amount was debited on 31.01.2018 to the extent of Rs. 39,15,148/- (Rupees Thirty-nine Lakhs Fifteen Thousand and One Hundred Forty-Eight). However, the Appellants denied the fact that the LOC issued by Respondent in favour of M/s Samkit Bio Farms Pvt. Ltd. was for sale of their goods to the Respondent & Appellants claim that the LOC issued by the Respondent cannot be treated as payments made to the Appellants i.e., M/s R.S. Cottmark (India) Pvt. Ltd. and M/s Krishna Bio Tech. However, we are not inclined to accept the stand taken by the Appellants.

11. We are of the considered view that there is an existence of dispute as on the date of issue of Demand Notice by the Appellants

to the Respondent. Apart from above, the Respondents also raised the issue with regard to quality of the bales supplied by the Appellants to the Respondent.

12. To establish the existence of dispute, the learned Counsel for the Respondent relied upon the documents at pages 144 and 147 of Paper Book filed by the Appellant in Company Appeal(AT)(Insolvency) No. 653 of 2018 whereby the Respondent vide its invoices dated 02.03.2017 and 11.03.2017 to the Appellant with a remark "*As per quality Control Report, the consignment rejected informed R.S. Cottmark(India) Pvt. Ltd.*" And in Company Appeal(AT)(Insolvency) No. 654 of 2018, learned Counsel for the Respondent relied upon at pages 124 and 126 of the Paper Book filed by the Appellant shows that the Corporate Debtor vide its invoices dated 15.06.2017 and 10.07.2017 to the Appellant- M/s Krishna Bio Tech with a remark- "*As per QC Report, the consignment is not fit for uses., hence Rejected. A/cs to be informed of same for onward communication to supplier. Sd/- 19.06.17*" and "*As per QC Report, the consignment is not fit for production and rejected. Stores has been informed for onward communication to Krishna Biotech cotton merchant.*" These are handwritten remarks. From the perusal of the dates of the said letters, it is apparent that the letters have been issued much prior to issuance of Demand Notice (dated 20.11.2017) by the Appellants to the Respondent. However, the learned Counsel for the Appellants denied and claimed that the letters are manufactured and created for

purpose of raising a dispute to defeat the right of the Appellants to invoke the jurisdiction of the Adjudicating Authority under Section 9 of IBC, 2016.

13. Adjudicating Authority, considering records and accepted that there is pre-existing dispute. On mere denial of documents by Appellants, we are unable to disturb the findings of Adjudicating Authority after perusing the documents concerned.

14. Section 5(6) of the IBC 2016 defines dispute as:

“dispute” includes a 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

From the aforesaid letters addressed by the Respondent to the Appellants, it is evident that the Respondent raised a dispute with regard to quality of goods which is prior to issuance of Demand Notice.

15. The Hon’ble Supreme Court in **“Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software (P) Limited - 2017 1 SCC Online SC 353”** it is held that the ‘existence of dispute’ and/or the suit or arbitration proceeding must be pre-existing i.e. it must exist before the receipt of the Demand Notice or Invoice as the case may be and observed

“33. The scheme under Sections 8 and 9 of the Code, appears to be that an operational creditor, as defined, may, on the occurrence of a default (i.e. on non-payment of a debt, any part whereof has become due and payable and has not been repaid), deliver a demand notice of such unpaid operational debt or deliver the copy of an invoice demanding payment of such amount to the corporate debtor in the form set out in Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 read with Form 3 or 4, as the case may be [Section 8(1)]. **Within a period of 10 days of the receipt of such demand notice or copy of invoice, the corporate debtor must bring to the notice of the operational creditor the existence of a dispute and/or the record of the pendency of a suit or arbitration proceeding filed before the receipt of such notice or invoice in relation to such dispute [Section 8(2)(a)]. What is important is that the existence of the dispute and/or the suit or arbitration proceeding must be pre-existing i.e. it must exist before the receipt of the demand notice or invoice, as the case may be. ....”**

At paragraph 51 it is held:

*“51. .... 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.”*

....

16. In the present case, the existence of dispute apparently establishes that the goods supplied by the Appellants have been rejected as per Quality Control Report. In the impugned judgement, the Adjudicating Authority gave his finding to establish the existence of dispute with regard to LOC issued by the Respondent to the extent of Rs. 39,15,148/- (Rupees Thirty-nine Lakhs Fifteen Thousand and One Hundred Forty-Eight), at Paragraphs 48, 49 & 50 passed in C.P. 100/2018 which are extracted as under:

*“48. This Tribunal is of the view that there exists a dispute and because of the resolution of the said dispute only, Respondent/Corporate Debtor issued LC for Rs. 39,15,148/- in favour of M/s SAMKIT BIO FARMS LIMITED with an understanding that after encashment of LC, M/s SAMKIT*

*BIO FARMS LIMITED would pay amounts to the Petitioner and M/s. KRISHNA BIO TECH.*

49. *Therefore, the contention of the Respondent require further investigation and enquiry. It requires oral evidence even from the Company that acted as mediator in the resolution process.*

50. *In fact, the Respondent/Corporate Debtor also raised dispute regarding the quality of the cotton bales supplied. Further, it is the case of the Respondent that the consignment of cotton bales has been rejected. There are endorsements on the copies of the invoices filed by the Corporate debtor along with the counter to the effect that consignment has been rejected with date 29.03.2017. According to the Respondent the same has been communicated to the Petitioner but the Petitioner denies the same. Therefore, a dispute has already been raised by the Respondent even in respect of the quality of cotton supplied by the Petitioner.”*

17. The Adjudicating Authority gave his finding with regard to existence of dispute at paragraph Nos. 45,46,47,48 and 49 of the impugned order dated 06.09.2018 passed in CP 102/2018 which reads as under: -

*“45. This Tribunal is of the view that there exists a dispute and because of the resolution of the said dispute only, Respondent/Corporate Debtor issued LC for Rs. 39,15,148/- in favour of M/s. SAMKIT BIO FARMS LIMITED with an understanding that after encashment of LC, M/s SAMKIT BIO FARMS LIMITED would pay amounts to the Petitioner and M/s. R.S. COTTMARK(INDIA) PVT LTD.*

*46. Therefore, the contention of the Respondent required further investigation and enquiry. It requires oral evidence even from the Company that acted as mediator in the resolution process.*

*47. In fact, the Respondent/Corporate Debtor also raised dispute regarding the quality of the cotton bales supplied. Further, it is the case of the Respondent that the consignment of cotton bales has been*

*rejected. There are endorsements on the copies of the invoices filed by the Corporate Debtor along with the counter to the effect that consignment has been rejected with dated 29.03.2017. According to the Respondent the same has been communicated to the Petitioner but the Petitioner denies the same. Therefore, a dispute has already been raised by the Respondent even in respect of the quality of the cotton supplied by the Petitioner.*

*48. Therefore, in view of the above findings there are no merits to admit this Petition.*

*49. Petition is rejected. No order as to costs.”*

18. It is reiterated that the IBC, 2016 is not a recovery proceeding. We are of the view that the Adjudicating Authority rightly rejected the petitions with aforesaid reasons. Hence

(a) We uphold the decision of the Adjudicating Authority and the present Appeals bearing Company Appeal(AT)(Insolvency) No. 653 of 2018 and Company Appeal(AT)(Insolvency) No. 654 of 2018 are dismissed. No order as to costs.

(b) however, the Appellants are at liberty to avail alternative remedy available under law with regard to their claims.

(Justice A.I.S. Cheema)  
Member(Judicial)

(Kanthi Narahari)  
Member(Technical)

AKC