

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

[Arising out of Orders dated (30th May, 2017)/1st June, 2017 passed by the Adjudicating Authority (National Company Law Tribunal) Allahabad Bench, Allahabad in Company Petition No. 13/ALD of 2017]

(Company Appeal (AT) (Insolvency) No. 66 of 2017)

IN THE MATTER OF:

Mr. Chetan Sharma **...Appellant**

Vs.

Jai Lakshmi Solvents (P) Ltd. & Anr. **...Respondents**

(Company Appeal (AT) (Insolvency) No. 67 of 2017)

IN THE MATTER OF:

Mr. Chetan Sharma **...Appellant**

Vs.

Abhi Agro Pvt. Ltd. & Anr. **...Respondents**

(Company Appeal (AT) (Insolvency) No. 68 of 2017)

IN THE MATTER OF:

Mr. Chetan Sharma **...Appellant**

Vs.

JR Agro Industries Pvt. Ltd. & Anr. **...Respondents**

(Company Appeal (AT) (Insolvency) No. 69 of 2017)

IN THE MATTER OF:

Mr. Chetan Sharma **...Appellant**

Vs.

Arohul Foods Pvt. Ltd. & Anr. **...Respondents**

(Company Appeal (AT) (Insolvency) No. 70 of 2017)

IN THE MATTER OF:

Mr. Chetan Sharma **...Appellant**

Vs.

Rungta Industries (P) Ltd. & Anr. **...Respondents**

**Present: For Appellant:- Shri Arun Kathpalia, Senior Advocate
assisted by Shri Dhrupad Das, Advocate.
Shri Amit Gupta, Company Secretary.**

**For Respondents:- Dr. U.K. Choudhary, Senior Advocate
assisted by Shri Arvind Kumar Gupta, Ms. Purti Marwaha
Gupta and Ms. Henna George, Advocates.**

J U D G E M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

As these appeals have been preferred by a common Appellant- Mr. Chetan Sharma, Director/Shareholder of the 'Corporate Debtor'- (Swadisht Oils Pvt. Ltd.) against the common order dated (30th May,

2017)/ 1st June, 2017 passed by the Adjudicating Authority (National Company Law Tribunal), Allahabad Bench, Allahabad, and as common question of law is involved, they were heard together and disposed of by this common judgment.

2. Five 'Operational Creditors' (Respondents of each appeal) filed five separate applications under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "I&B Code") for initiation of 'Corporate Insolvency Resolution Process' against 'Swadisht Oils Pvt. Ltd.' ('Corporate Debtor'). They were separately numbered and on notice they were heard by the Adjudicating Authority and by the common impugned order dated 30th May, 2017, one of the applications under Section 9 of the 'I&B Code' was admitted; order of 'Moratorium' was passed and an 'Interim Resolution Professional' was appointed with certain directions. The other applications were disposed of accordingly.

3. The Adjudicating Authority by separate order(s) all dated 1st June, 2017, forwarded the operative portions of the reasoned order dated 30th May, 2017, which are under challenge.

4. The particulars of the operational debts claim/ dues from the 'Corporate Debtor' were described by the 'Operational Creditors' as follows:

S.No.	Name of the Company	Case no.	Amount of debt due in Rs.
1.	J. R. Agro Industries Pvt. Ltd.	CP No. 13/ALD/2017	50843252/-
2.	Abhi Agro Industries Pvt. Ltd.	CP No. 14/ALD/2017	2859514/-
3.	Jai Lakshmi Solvents Pvt. Ltd.	CP No. 15/ALD/2017	2640525/-
4.	Arohul Foods Pvt. Ltd.	CP No. 16/ALD/2017	2475178/-
5.	Rungta Industries Pvt. Ltd.	CP No. 17/ALD/2017	1497879/-

5. All the 'Operational Creditors' (First Respondents herein) alleged that despite admitting of their liability to the extent as mentioned above, the 'Corporate Debtor' failed to pay such amount even after receipt of the demand notice(s) issued by the 'Operational Creditors' as per sub-section (1) of Section 8 of the 'I&B Code'.

6. The case of the Appellant is that the 'Corporate Debtor' ordered for purchase of 'crude rice bran oil' from the 'Operational Creditors' on various occasions. However, no supplies were received by the 'Corporate Debtor' against the various purchase orders placed by it; without delivering the products, the 'Operational Creditors' raised various invoices against alleged purchase of the crude oils, as claimed and noted above.

7. According to the Appellant, one Mr. Dinesh Arora, the then Managing Director of the Company fraudulently, with the aid and support of the 'Operational Creditors', caused the invoices for these goods to be raised in the name of the 'Corporate Debtor'. The Appellant verily believe that the delivery of the goods were made to Mr. Dinesh Arora and not to the 'Corporate Debtor'.

8. The factum of Mr. Dinesh Arora's frauds was subsequently discovered by the 'Corporate Debtor', who immediately asked him to resign and take over the liability of debts fraudulently incurred by him. With a view to end the dispute, a meeting was held between the 'Corporate Debtor' and Mr. Dinesh Arora, wherein a Memorandum of Understanding was signed on 19th May, 2016, between the 'Corporate Debtor' and Mr. Dinesh Arora. As per the agreement, Mr. Dinesh Arora undertook all the liabilities of the 'Corporate Debtor' incurred by him fraudulently. Thus, according to the Appellant, a novation of the contract took place, which makes the alleged sums recoverable only from Mr. Dinesh Arora and not from the 'Corporate Debtor'.

9. Learned Senior Counsel appearing on behalf of the Appellant submitted that Mr. Dinesh Arora also signed the Balance Sheets of the 'Corporate Debtor', wherein the sums set out in the Memorandum of

Understanding dated 19th May, 2016, were written off from the books of the 'Corporate Debtor'.

10. It was submitted that all the three parties to the transaction: (i) the 'Corporate Debtor', (ii) the 'Operational Creditors' and (iii) Mr Dinesh Arora; were in *consensus ad idem* when the 'Operational Creditors' and the 'Corporate Debtor' agreed that Mr. Dinesh Arora shall stand in relation to the 'Corporate Debtor' and would be liable for the debts incurred by the 'Operational Creditors'. Thus a novation of the contract under Section 62 of the Indian Contract Act, 1872, took place, by which the 'Operational Creditors' are bound by law and cannot resile.

11. Learned counsel appearing on behalf of the 'Operational Creditors' disputed the aforesaid claim. It was submitted that the 'Operational Creditors' were not parties to any of the Memorandum of Understanding signed between the 'Corporate Debtor' and Mr. Dinesh Arora. Such so-called Memorandum of Understanding was reached between them fraudulently with a view to deny the claim of the 'Operational Creditors'.

12. Learned counsel for the 'Operational Creditors' submitted that Appellant- Mr. Chetan Sharma, on behalf of the 'Corporate Debtor' has admitted the liability in Company Appeal (AT) (Insolvency) No. 68 of 2017, which arises out of the main case Company Petition No. 13/ALD of 2017 relates to J.R. Agro Industries (P) Limited-('Operational Creditor').

13. It was submitted that the said 'Operational Creditors' received the balance confirmation letter dated 30th November, 2015 from the 'Corporate Debtor' signed by the authorised Director of the 'Corporate Debtor', wherein they confirmed that as per their books of accounts, there is a credit balance of Rs. 5,08,43,252/- in the ledger account of the said 'Operational Creditors' as on 30th November, 2015.

14. It was also submitted by the learned Senior Counsel for the 'Operational Creditors' that there was no pre-existing dispute between the parties.

15. It is a settled law that unilateral 'transfer' of liability does not constitute a 'dispute' within the meaning of Section 5(6) of the 'I&B Code'. The 'dispute' under Section 5(6) of the 'I&B Code' has to be between the 'Corporate Debtor' and the 'Operational Creditors' and an *inter-se* dispute between two groups of shareholders of the 'Corporate Debtor' does not constitute a 'dispute' in reference to 'Operational Creditors'.

16. On perusal of the documents, we find that there is no pre-existing dispute between the 'Corporate Debtor' and the 'Operational Creditors'.

17. An outstanding in the account of a borrower (customer), is a debt due and payable by the borrower to the Creditor. The Creditor is the

owner of such debt. Such debt is an asset in the hands of a Creditor, whether 'Secured Creditor' or 'Unsecured Creditor' or 'Operational Creditor' or 'Financial Creditor'. The creditor can always transfer its assets (debt) to an assignee but the borrower cannot transfer its liability of debt to a third party. Therefore, the Appellant cannot take advantage of agreement of transfer of liability of debt of 'Corporate Debtor' to Mr. Dinesh Arora.

18. The alleged Memorandum of Understanding was never signed by the 'Operational Creditors'. It is not the case of the Appellant that the Memorandum of Understanding was signed on behalf of the 'Corporate Debtor'; in fact, the Memorandum of Understanding relied upon was signed as an *inter-se* agreement between shareholders of the 'Corporate Debtor' with Mr. Dinesh Arora, which has no binding effect on the 'Operational Creditors'.

19. The 'Corporate Debtor' is a separate corporate entity under Section 9 of the Companies Act, 2013. The order was given by the 'Corporate Debtor' based on which the supply was made to the 'Corporate Debtor' by the 'Operational Creditors'. Who received the supply on behalf of the 'Corporate Debtor' is an *inter-se* dispute amongst the Directors and the Staff Officers or the Employees of the 'Corporate Debtor'. In absence of privity of contract between the 'Operational Creditors' and Mr. Dinesh Arora, the 'Operational Creditor' could not have made any claim against

him based on an agreement reached between two shareholders of the 'Corporate Debtor'.

20. The Appellant- Mr. Tilak Raj Sharma has already purchased the full stake of the other partner i.e. Mr. Dinesh Arora as pleaded by the 'Operational Creditors' and not disputed by the Appellant. Mr. Tilak Raj Sharma, provided exit to Mr. Dinesh Arora from the Company ('Corporate Debtor') before the takeover of the management by Mr. Tilak Raj Sharma Group in the year 2016. If there is any fraud played by one or other shareholders or ex shareholders of the 'Corporate Debtor', the aggrieved shareholder may take appropriate step against the other shareholder but that will not absolve the 'Corporate Debtor' of its liability of payment to 'Operational Creditors'.

21. In the case of J.R. Agro Industries (P) Limited a specific plea has been taken that demand notice under sub-section (1) of Section 8 of the 'I&B Code' was issued by the said 'Operational Creditor' on 18th January, 2017, which was received by the 'Corporate Debtor' on 23rd January, 2017. The Insolvency application under Section 9 was filed on 20th February, 2017 and no reply was filed within the stipulated period of ten days. The notice of dispute under Section 8(2) was issued on 2nd March, 2017, which cannot be taken into consideration to hold that there was 'existence of dispute'.

22. The 'Operational Creditors' have brought to the notice of the Adjudicating Authority the copies of Commercial Tax (Sales Tax) monthly returns of the 'Corporate Debtor'. Therein the 'Corporate Debtor' has taken plea before the Commercial Tax Department, Kanpur that during the relevant period supplies were made by the 'Operational Creditors' and thereby acknowledged the purchase made in their monthly tax returns. On the basis of such, the 'Corporate Debtor' having already taken 'input tax credit' from the Tax Department, now cannot take plea that the 'Corporate Debtor' do not owe any debt to the 'Operational Creditors'.

23. We find no merit in these appeals. They are accordingly dismissed. However, in the facts and circumstances of the case, there shall be no order as to costs.

(Justice S.J. Mukhopadhaya)
Chairperson

(Justice Bansi Lal Bhat)
Member(Judicial)

NEW DELHI
10th May, 2018

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