Hasan Shafiq vs Ct Technologies Aps & Anr on 14 February, 2022

Author: Ashok Bhushan

Bench: Ashok Bhushan

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI
Company Appeal (AT) (Insolvency) No. 802 of 2020
(Arising out of Order dated 26.05.2020 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench - IV in CP(IB)4270/MB/C-IV/2018)

IN THE MATTER OF:
Hasan Shafiq
"BATUL", Plot No.14,
House No.917, Quetta Colony,
Lakadganj Layout, Nagpur 440008. .... Appellant

Vs

1. CT - Technologies ApS
A company incorporated under
the laws of Denmark
Trorodvej 63B, DK - 2950,
Vedback, Denmark,

2. Mr. Hajali Lal Saini,
Insolvency Resolution Professional,
No.704, "A" Wing, N.G. Sterling,
Opposite Queen Marry High School,
Old Golden Nest,
Mira-Bhayander Road, Mira Road (East),
Thane-401107, Maharashtra. ... Respondents

Present:
For Appellant: Mr. Anil Kaushik, Mr. Mohit K. Mudgal, Mr. Sachin Dubey and Mr. Mehul M. Gupta, Advocates.

For Respondents: Ms. Mrinali Prasad, Advocate for R-2 (IRP).

JUDGMENT

ASHOK BHUSHAN, J.

This Appeal under Section 61 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the 'Code') has been filed against Company Appeal (AT) (Insolvency) No. 802 of 2020 1 judgment dated 26th May, 2020 of National Company Law Tribunal, Mumbai Bench - IV admitting an Application filed under Section 9 of the Code by the Respondent - Operational Creditor.

2. Brief facts of the case and sequence of events necessary to be noticed for deciding this Appeal are:

> (i) The Corporate Debtor - B.Y. Agro & Infra Limited is a registered company, registered under the Companies Act, 1956.

Respondent No.1, the Operational Creditor is a company incorporated under the laws of Denmark, having its registered address at Vedbaek, Denmark.

(ii) The Corporate Debtor entered into a contract dated 25th March, 2012 with the Operational Creditor for purchasing PUF Sandwich Panels, installation accessories, PRV and Doors for fruits and vegetables processing units for an amount of Euros 275,410/-. The Operational Creditor delivered the materials to the Corporate Debtor in the month of July 2012 and thereafter completed its installation work in April, 2013 at premises located at Nagpur, state of Maharashtra. The Operational Creditor raised invoices dated 28th May, 2012 for an amount of Euros 94,103.86; invoice dated 1st June, 2012 for an amount of Euros 19,791.85; and invoice dated 17th June, 2012 for an amount of Euros 24,900. The Corporate Debtor gave its provisional installation certificates dated 2nd March, 2013.

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(iii) By letter dated 15th June, 2013, the Corporate Debtor acknowledged outstanding payment of Euros 246,940.70 and sought some more time to clear the outstanding. The Corporate Debtor also stated that it will try to release at least Euros 10,000 every month starting from September 2013. The Operational Creditor on 25th April, 2014 informed the Corporate Debtor that first installment as promised has not been received. On 14th November, 2014, the Corporate Debtor wrote the Operational Creditor to re-confirm its consent for acceptance of instalments in part payment. The Operational Creditor immediately on 15th November, 2014 confirmed that they shall waive the interest in respect of late payment of amount and communicated their willingness to accept payment in instalments, irrespective of the amount of each instalment. On 3rd April, 2015, the Corporate Debtor again wrote the Operational Creditor that they shall start making payment from second week of April 2015 onwards. Several emails were sent by Corporate Debtor thereafter including email dated 14th July, 2015, 9th October, 2015, 14th May, 2016, 23rd November, 2016, 10th February, 2017 and 31st October, 2017 reiterating their request for some more time to make the payment of the outstanding amount. The Corporate Debtor made payments on 9th June, 2015 (Euros 5,000), 28th July, 2015 (Euros 5,000) and 4th January, 2016 (Euros 19,960). Company Appeal (AT) (Insolvency) No. 802 of 2020 3

(iv) The Operational Creditor sent legal notice dated 6th November, 2017 for recovery of Euros 245,450 along with interest to the Corporate Debtor giving the details of payment received and

outstanding as on date. The legal notice dated 6th November, 2017 was replied by the Corporate Debtor vide reply dated 2nd January, 2018, where it accepted the contract and its commitment to make the payment.

(v) The Operational Creditor thereafter issued a notice under Section 8 of the Code dated 26th February, 2018 claiming total debt for an amount of Euros 245,451, which was defaulted with by the Corporate Debtor with interest. The notice under Section 8 dated 26th February, 2018 was replied by the Corporate Debtor on 13th March, 2018 denying the liability and it was stated in the reply that as per Agreement dated 25th March, 2012, the Agreement would be governed by the Swiss Law, hence the present demand is untenable in law. The averments in the notice were denied. Reference of email dated 5th August, 2014 were also mentioned where the Corporate Debtor claims to have informed that there is 'leakage in freezer room no.2' and permanent solution was sought for.

(vi) The Adjudicating Authority gave several opportunities to the Corporate Debtor to file its reply and finally opportunity to file reply was closed vide order dated 15th July, 2019. The Corporate Debtor, however, filed written submission along with Company Appeal (AT) (Insolvency) No. 802 of 2020 4 compilation of judgments before the Adjudicating Authority. The Adjudicating Authority by the impugned judgment had held that there was default committed by Corporate Debtor in payment of outstanding dues. The Corporate Debtor had admitted default unequivocally. Regarding the submission of the Corporate Debtor that there being arbitration Agreement, Application under Section 9 was not maintainable and was to be rejected, it was held by the Adjudicating Authority that registered office of the Corporate Debtor being in the territorial jurisdiction of National Company Law Tribunal, Section 9 Application was fully maintainable. The Application was admitted. Interim Resolution Professional was appointed and Moratorium was declared by the Adjudicating Authority.

(vii) Aggrieved by the judgment and order dated 26th May, 2020, this Appeal has been filed by the Suspended Director of the Corporate Debtor - Hasan Shafiq.

3. Notice was issued in Appeal, in response to which, detailed reply has been filed by Respondent No.1 - Operational Creditor on 14th December, 2020. The Resolution Professional (RP) has also filed Status Report on 17th December, 2020. Although, time for the rejoinder affidavit was granted to the Appellant, but no rejoinder has been filed.

4. We have heard Shri Anil Kaushik, learned Counsel for the Appellant. Ms. Mrinali Prasad has appeared for Respondent No.2 - RP. No one has appeared on behalf of Respondent No.1.

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5. Shri Anil Kaushik, learned Counsel for the Appellant submitted that in pursuance of the Agreement dated 25th March, 2012, the dispute is to be settled by arbitration under the Swiss law, hence, the Application under Section 9 filed by Operational Creditor was not maintainable. He submits that Section 238 of the Code shall not apply in view of the Agreement between the parties that dispute should be settled by Arbitration as per Swiss Law. He submits that as per Section 45 of

the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Arbitration Act'), the Adjudicating Authority ought to have referred the matter for arbitration as per Agreement between the parties. He further submits that domestic arbitration may be barred after admission of Section 9 Application, but international arbitration is not barred.

6. Shri Kaushik further submits that there was pre-existing dispute between the parties, which was notified by the Corporate Debtor before issuance of Section 8 notice, hence, Application under Section 9 was not maintainable. It is submitted that the Corporate Debtor was a solvent company and proceedings under Section 9 ought not to have been admitted by the Adjudicating Authority, since Section 9 proceeding is not a mechanism to recover the money. It is submitted that although no reply could be filed by the Corporate Debtor before the Adjudicating Authority, but it filed its written submission raising all the aforesaid issues.

7. Ms. Mrinali Prasad, learned Counsel appearing for Respondent No.2 submitted that Corporate Debtor is not a profit making company and against the company there were claims of about Rs.50 crores. The Appellant Company Appeal (AT) (Insolvency) No. 802 of 2020 6 as Promoter of the Corporate Debtor has filed Resolution Plan giving Plan of only Rs.6.5 crores. The Corporate Debtor has admitted it liability and in their communications, they have not said about any dispute. The Appellant had filed two Resolution Plans during the Corporate Insolvency Resolution Process (CIRP), which could not be approved and on 26th November, 2021, the Committee of Creditors has voted for liquidation. The Application for liquidation has already been filed before the Adjudicating Authority on 08.12.2021.

8. Shri Kaushik, learned Counsel for the Appellant submits that company is a solvent company and the Counsel for Respondent No.2 has no authority to address submission on the merits of the Application.

9. Although, no one has appeared on behalf of Respondent No.1, but they have filed their detailed reply in the appeal on 14th December, 2020. We have perused the reply of Respondent No.1 and the documents filed along with the reply.

10. From the submissions and the pleadings on record, following are the questions, which arise for consideration in this Appeal:

> (1) Whether in view of Clause 8 of the Agreement between the parties dated 25th March, 2012 for settlement of dispute by the Court of Arbitration of Switzerland, Application under Section 9 could not have been entertained by Adjudicating Authority.

Further, in view of Section 45 of the Arbitration and Conciliation Act, 1996, whether Adjudicating Authority was Company Appeal (AT) (Insolvency) No. 802 of 2020 7 obliged to refer the dispute between the parties to the Arbitration as per Agreement?

(2) Whether there was any pre-existing dispute between the parties on account of which, the Application under Section 9 was liable to be rejected?

(3) Whether in the facts of present case, the Application under Section 9 was not maintainable, since the Corporate Debtor was a solvent Company?

Question No.1

11. Clause 8 of the Agreement dated 25th March, 2012 entered into between the Corporate Debtor and the Operational Creditor provides for following:

> "8 Venue and applicable law 8.1 Any and all disputes, which may arise in connection with this contract, shall be settled amicably.
>
> Should the parties hereunder fail to reach an agreement, the said disputes shall be referred for settlement to the court of Arbitration of Switzerland.
>
> 8.2 Any decision of the arbitrators is final and binding for both parties.
>
> 8.3 The law, which is to apply to this contract, is Swiss law, and the Contract shall be construed in accordance with that law."

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12. the learned Counsel for the Appellant referred to Section 45 of the Arbitration Act, which also needs to be noticed as follows:

> "45 Power of judicial authority to refer parties to arbitration. --Notwithstanding anything contained in Part I or in the Code of Civil Procedure, 1908 (5 of 1908), a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement referred to in section 44, shall, at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."

13. The present is a case where Operational Creditor is a company registered under the companies incorporated under the laws of Denmark and is a foreign entity, whereas the Corporate Debtor is a company registered under the Companies Act, 1956, which was within the territorial jurisdiction of National Company Law Tribunal, Mumbai. The Insolvency and Bankruptcy Code, 2016 was enacted to consolidate and amend the laws relating to reorganization and insolvency resolution of corporate persons. The Statement of Objects and Reasons of the enactment provides as follows:

> "Statement of Objects and Reasons.--There is no single law in India that deals with insolvency and bankruptcy. Provisions relating to insolvency and bankruptcy for

companies can be found in the Sick Industrial Companies (Special Provisions) Act, 1985, the Recovery of Debt Due to Banks and Financial Institutions Company Appeal (AT) (Insolvency) No. 802 of 2020 9 Act, 1993, the Securitisation and reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and the Companies Act, 2013. These statues provide for creation of multiple for a such as Board of Industrial and Financial Reconstruction (BIFR), Debt Recovery Tribunal (DRT) and National Company Law Tribunal (NCLT) and their respective Appellate Tribunals. Liquidation of companies is handled by the High Courts. Individual bankruptcy and insolvency is dealt with under the Presidency Towns Insolvency Act, 1909, and the Provincial Insolvency Act, 1920 and is dealt with the Courts. The existing framework and insolvency and bankruptcy is inadequate, ineffective and results in undue delays in resolution, therefore, the proposed legislation.

2. The objective of the Insolvency and Bankruptcy Code, 2015 is to consolidate and amend the laws relating to reorganization and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximization of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders including alteration in the priority of payment of government dues and to establish an Insolvency and Bankruptcy Fund, and matters connected therewith or incidental thereto. An effective legal framework for timely resolution of insolvency and bankruptcy would support development of credit markets and encourage entrepreneurship. It would also improve Ease of Doing Business, and facilitate more investments leading to higher economic growth and development."

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14. Section 9 of the Code entitles an Operational Creditor to file Application after 10 days of the delivery of notice or invoices demanding payment. The argument, which has been raised before us is that in view of the arbitration clause contained in Clause 8 of the Agreement, Section 9 Application ought not to have been entertained and the matter ought to have been referred to arbitration. During the course of submission, learned the Counsel for the Appellant has also sought to raise a submission that Operational Creditor being a foreign entity, Section 9 of the Code could not have invoked. The said submission has no locus to stand and admittedly, the Corporate Debtor is a company registered under the Companies Act, 1956 and is fully covered with the definition of Section 3, sub-section (7) of the Code, which defines 'corporate persons', which clarifies that Application under Section 9 is fully maintainable.

15. The question that a foreign supplier can invoke Section 9 of the code has no more res-integra in view of the judgment of the Hon'ble Supreme Court in (2018) 2 SCC 674 - Macquarie Bank Limited vs. Shilpi Cable Technologies Limited. In paragraph 21 of the judgment, following has been laid down:

> "21. There may be situations of operational creditors who may have dealings with a financial institution as defined in Section 3(14) of the Code. There may also be situations where an operational creditor may have as his banker a non-scheduled bank, for example, in which case, it would be impossible for him to fulfil the aforesaid condition. A foreign supplier or assignee of such supplier may have a foreign banker Company Appeal (AT) (Insolvency) No. 802 of 2020 11 who is not within Section 3(14) of the Code. The fact that such foreign supplier is an operational creditor is established from a reading of the definition of "person"

contained in Section 3(23), as including persons resident outside India, together with the definition of "operational creditor" contained in Section 5(20), which in turn is defined as "a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred".

16. In the Macquarie Bank Ltd., the Corporate Debtor was the corporate person within the meaning of Code and the Operational Creditor was assignee from foreign entity. The submission of Shri Kaushik that Section 9 Application was not maintainable in view of Clause 8 of the Agreement also has no merit. The Code has been given an overriding effect on other laws including any instrument having effect by virtue of such law. The Section 238 of the Code is as follows:

> "238. Provisions of this Code to override other laws.
>
> - The provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law."

17. Section 45 of the Arbitration Act, which Section 45 is invoked on the basis of Agreement dated 25th March, 2012 containing an arbitration clause, shall also be overridden by provision of Section 238 of the Code. The submission of learned Counsel for the Appellant that Section 9 may be overridden in respect of domestic arbitration, but shall not affect any international arbitration Agreement also does not commend us. Company Appeal (AT) (Insolvency) No. 802 of 2020 12 Admittedly, the Corporate Debtor is a company registered under the Companies Act, 1956, which is having its office in the State of Maharashtra. The Corporate Debtor cannot be heard in contending that since it entered into an Agreement with a foreign entity where clause was for settlement of dispute by arbitration under the Swiss law, Section 9 of the Code, shall be overridden by virtue of Section 45 of the Arbitration Act read with Agreement. The Hon'ble Supreme Court had occasion to consider the scope of Application under Section 9 qua the Arbitration and Conciliation Act, 1996 in (2021) 6 SCC 436 - Indus Biotech Private limited vs. Kotak India Venture (offshore) Fund and Ors. In the above case an Arbitration Petition was filed by Indus Biotech Private Limited under the Arbitration and Conciliation Act, 1996 before the Hon'ble Supreme Court for appointment of Arbitrator. Along with Arbitration Petition, an Appeal was also taken for consideration arising out of an order passed by National Company Law Tribunal dated 09.06.2020, by which the NCLT has allowed the Application filed by Indus Biotech Private Limited and dismissed Application filed under Section 7 of the Code. In the above context, the Hon'ble Supreme Court had occasion to

consider the question. The Hon'ble Supreme Court laid down in the above case that if the Adjudicating Authority is satisfied that there is a debt and default, in the event of default Adjudicating Authority can very well admit the Application under Section 7. In paragraph 27 of the judgment, the Hon'ble Supreme Court laid down following:

> "27. .....The position of law that the IB Code shall override all other laws as provided under Section 238 of Company Appeal (AT) (Insolvency) No. 802 of 2020 13 the IB Code needs no elaboration. In that view, notwithstanding the fact that the alleged corporate debtor filed an application under Section 8 of the 1996 Act, the independent consideration of the same dehors the application filed under Section 7 of IB Code and materials produced therewith will not arise. The adjudicating authority is duty-bound to advert to the material available before him as made available along with the application under Section 7 of IB Code by the financial creditor to indicate default along with the version of the corporate debtor. This is for the reason that, keeping in perspective the scope of the proceedings under the IB Code and there being a timeline for the consideration to be made by the adjudicating authority, the process cannot be defeated by a corporate debtor by raising moonshine defence only to delay the process. In that view, even if an application under Section 8 of the 1996 Act is filed, the adjudicating authority has a duty to advert to contentions put forth on the application filed under Section 7 of IB Code, examine the material placed before it by the financial creditor and record a satisfaction as to whether there is default or not. While doing so the contention put forth by the corporate debtor shall also be noted to determine as to whether there is substance in the defence and to arrive at the conclusion whether there is default. If the irresistible conclusion by the adjudicating authority is that there is default and the debt is payable, the bogey of arbitration to delay the process would not arise despite the position that the agreement between the parties indisputably contains an arbitration clause."

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18. The above pronouncement makes it clear that if an Application under Section 9 of the Arbitration and Conciliation Act is filed before the Adjudicating Authority, the Adjudicating Authority shall first proceed to find out whether any default is there and in the event there is default, it will proceed to admit the Application, rejecting the prayer for arbitration. Further, similar observation was made in paragraph 28 of the above judgment to the following effect:

> "28. That apart if the conclusion is that there is default and the debt is payable, due to which the adjudicating authority proceeds to pass the order as contemplated under sub-section (5)(a) of Section 7 of IB Code to admit the application, the proceedings would then get itself transformed into a proceeding in rem having erga omnes effect due to which the question of arbitrability of the so-called inter se dispute sought to be put forth would not arise. On the other hand, on such consideration made by the adjudicating authority if the satisfaction recorded is that there is no default committed by the company, the petition would stand rejected as provided under sub-

section (5)(b) to Section 7 of IB Code, which would leave the field open for the parties to secure appointment of the Arbitral Tribunal in an appropriate proceedings as contemplated in law and the need for NCLT to pass any orders on such application under Section 8 of the 1996 Act would not arise."

19. In the present case, the debt and default is fully admitted. The Adjudicating Authority has also observed that even the date of defaults has not been disputed by the Corporate Debtor by filing any reply to Section 9 Company Appeal (AT) (Insolvency) No. 802 of 2020 15 Application. We, thus, conclude that Application under Section 9 of the Code was fully maintainable and could not have been thrown out on the ground that there was a clause in Agreement dated 25th March, 2012. Despite there being clause of arbitration in Agreement, Application under Section 9 was fully maintainable and could be proceeded with by Adjudicating Authority. The proceedings under Code having been given overriding effect, the right to initiate Application under Section 9 shall not be taken away by the Operational Creditor by any Agreement of arbitration in the contract, when Operational Creditor elect to initiate proceedings under Section 9, it cannot be rejected on the aforesaid ground. We, thus, do not find any substance in the above submission of learned Counsel for the Appellant.

Question No.2

20. The contract between the Corporate Debtor and the Operational Creditor was entered on 25th March, 2012, under which Corporate Debtor was to purchase PUF Sandwich Panels, installation accessories, PRV and Doors for fruits and vegetables processing units. The Operational Creditor delivered the material to the Corporate Debtor and completed the installation work in April 2013. The three invoices were also issued, duly supported with relevant packaging details and bills of lading. The Corporate Debtor himself has given a provisional installation certificate dated 2nd March, 2013, which certificate contain following "We whereby confirm that the job has been performed as per above mentioned contract and has been taken over as of today". The Operational Creditor had issued Company Appeal (AT) (Insolvency) No. 802 of 2020 16 three invoices, where total amount claimed was Euros 245,451. The Corporate Debtor had made payment under three installments of Euros 5,000 9th June, 2015; Euros 5,000 on 28th July, 2015 and Euros 19,960 on 4th January, 2016 and thereafter no payments were made by the Corporate Debtor. The Corporate Debtor vide letter dated 15th June, 2013 acknowledged the outstanding payment of Euros 246940.70 and in the said letter further stated that they shall release Euros 10,000/- every month starting from September, 2013 and very soon shall clear all outstanding. It shall be useful to extract the contents of letter dated 15th June, 2013 written by Corporate Debtor to Operational Creditor, which was filed along with Section 9 Application and also brought on record in the reply of Respondent No.1, which is to the following effect:

"Agro & Infra Pvt. Ltd.

BYIPL/CT/01/2013 15-06-2013

To
CT - Technologies ApS

Trorodvej 63 B
DK-2950 Vedbaek
Denmark

Kind Attention: - Mr. Carsten Thorsen.

Sub: - Confirmation of debt of 246940.70 Euros.

Dear Mr Carsten, It is to confirm that our company B.Y. Agro & Infra Pvt. Ltd. has an outstanding payment of 246940.70 Euros. To be paid to your company CT - Technologies ApS this amount could not be paid to you inspite of all our efforts, Company Appeal (AT) (Insolvency) No. 802 of 2020 17 since we are short of funding from our banks and our project cost have escalated.

We sincerely thank CT - Technologies ApS for co-

operating with us, as informed we have just commissioned our plant and very soon we will start our cash flows from the operations, it will take some more time for us to clear your outstanding payments but we will try to release at least 10,000.00 Euros every month starting from September 2013 and very soon we will clear all your outstanding.

Once again our sincere thanks for all the timely help and guidance.

Regards, For B.Y. Agro & Infra Pvt. Ltd.

Sd/-

Hasan Shafiq Director"

21. The Corporate Debtor on 3rd April, 2015 communicated to Operational Creditor that it shall start making payment from second week of April onwards. In the above email the Corporate Debtor stated:

"From: Hasan Shafiq - B.Y. Agro & Infra Pvt. Ltd. hasan@byagroinfra.com.

Sent: 03 April 2015 20:50 To: Carsten Thorsen; 'Amir Kulenovic' Subject: FW: Delayed payment of CT Technologies Attachments: BOI_CT. pdf Dear Mr. Carsten, Forwarding you the approval letter received from bank for making payments in instalments to Ct Technologies.

Company Appeal (AT) (Insolvency) No. 802 of 2020 18 Will start making payments from second week April onwards.

Hope you must have read the EOI report of Mega Food Park, I have spoken to Mr Sivakumar and forwarded a copy to him as well, awaiting his reply and future action plan.

Regards Hasan Shafiq Director B.Y. Agro & Infra Pvt Ltd 1 982 303 4461 www.byagroinfra.com"

22. On July 14, 2015, after remitting 5000 Euros, the Corporate Debtor by email again acknowledged the debt and assured to speed the payments in bullet installments. The email dated 14th July, 2015 stated:

"Til: Carsten Thorsen Cc: Hasan Shafiq - B.Y. Agro & Infra Pvt. Ltd.; Sarah Shafiq - B.Y. Agro & Infra Pvt. Ltd.

Emne: Re: Payment of installments Dear Mr Carsten, We are happy to inform that today we have remitted 5000 Euros to your account as part payment. Please be informed that for another 4 months we will be making installments of 5000 Euros till the time our cash flows get stabilized and we get some relief from our bankers and after that we will try and speed the payments in bullet installments.

As regards to your request for 8% interest from Aug 2015 on unpaid amount we request you to kindly consider our request for charging interest from Jan 2016 and the same will be paid to you in cash as we have already given in writing to Reserve Bank of India that no interest will be Company Appeal (AT) (Insolvency) No. 802 of 2020 19 charged hence not going in the legal matter we will settle it in cash.

Regards Hasan Shafiq On Tue, Jul 14, 2015 at 10:46 PM, Carsten Thorsen ct@ct-technologies.dk wrote:"

23. On the letter received from Operational Creditor for payment, on 9th October, 2015 again the Corporate Debtor wrote following email:

"Fra: hasan.byagroinfra@gmail.com [mailto:hasan.byagroinfra@gmail.com Sendt: 9. Oktober 2015 09:52 Til: Carsten Thorsen Cc: Amir Kulenovic Emne: Re: SV: Visit to Anuga Mr. Carsten The last two months were very tight due to deadline for approval from Govt of India for mega Food Park, Iso Exports to dubai were delayed because of Ramadan and Summer holidays.

Don't worry in November we will make the payments including the delayed instalments.

Sorry couldn't not respond to your previous reminders since the work with Govt of India was very crucial and we didn't want to ask them for any time extension. Regards"

24. Even on 31st October, 2017, the Corporate Debtor acknowledged its liabilities and assured to give results very soon. Following email was written on 31st October, 2017:

> "From: Hasan Shafiq <hasan.byagroinfra@gmail.com> Sent: 31 October 2017 06:52 To: Carsten Thorsen CC: sarah@byagroinfra.com Company Appeal (AT) (Insolvency) No. 802 of 2020 20 Subject: Re:Pending payments.
>
> Dear Mr. Carsten, We reached back safely after a very good show at Anuga, got some interesting enquiry from Europe and Russian markets.
>
> We thank you so much for standing behind with us and supporting our efforts, unfortunately we couldn't stand to your expectations inspite of all the efforts goes down the drain because of the end results not being as desired.
>
> The process of turnaround have started and inshallah very soon it will start giving results.
>
> Warm regards"

25. It is on 6th November, 2017 that legal notice was sent by Operational Creditor to the Corporate Debtor demanding outstanding payment of Euros 245,450. Legal notice was replied on 2nd January, 2018 by Corporate Debtor, which has also been brought on record in the reply of Respondent No.1 and was also part of the Section 9 Application. In the reply, there is a clear acknowledgement of supply and delivery of material on site. It was admitted that only Euros 30000 has been paid. In the whole reply, no kind of any dispute was referred, rather all details were given including further promise to clear the outstanding dues. It shall be useful to notice only paragraph 2, 4 and 13 of the reply to the following effect:

> "2) Yes in the year 2012 our company approached your clients seeking quotation for design, supply, and installation of PUF sandwich panels, installation accessories, PRV Doors and fruit and vegetables processing unit. Thereafter a quotation no.173.02.12.b dated 16march 2012 was Company Appeal (AT) (Insolvency) No. 802 of 2020 21 received, subsequently we and your client entered into a contract dated 25th March 2012 ("Contract") where under you client undertook to design, deliver and install PUF sandwich panels, installation accessories, PRV and Doors as specified in the quotation dated 16 march 2012 for a contract value of Euro 246940 (for materials) and Euro 28470 (for installation)
>
> 4) In compliance with the terms of contract your client delivered and installed the materials at site as per contract specifications.
>
> 13) Yes we are in the process of making payments to your clients and the same fact is acknowledged and accepted by your client during our meeting with him in Cologne Germany on 10th October 2017 at Anuga Food Exhibition at our Stall. We have been

> upraised your client about our restructuring of debt proposal with our banker Bank of India, We are expecting that the restructuring proposal should be cleared by the end of February 2018."

26. Section 8 notice was issued by the Operational Creditor on 26th February, 2018, copy of which has been brought on record in which Operational Creditor demanded outstanding amount of Euros 241,451.00 (INR 1,91,28,631) with interest. It was only in reply to Section 9 notice that Corporate Debtor made a reference of email dated 5th August, 2014 by which information of leakage in freezer room No.2 was mentioned. In paragraph 5 of the reply in reference to email dated 5th August, 2014, following statement has been made:

> Company Appeal (AT) (Insolvency) No. 802 of 2020 22 "5. That, it is pertinent to mention that the terms of the agreement, particularly the payment terms were mutually altered and your client company had agreed to supply and install the materials at site and handover it to my client without accepting payment. It is pertinent to mention here that the contract was entered into on 25.03.2012, for design, delivery and installation of PUF sandwich panels, installation accessories, PRV and doors for Fruit and Vegetable Processing Unit, as per the specification specified in the quotation dated 16.03.2012. However, your client could not install the materials at the site to the satisfaction of my client.

Reference of the said purpose could be made to the e-mail dated 05.08.2014, whereby my client had informed that there is a leakage in freezer room No.2 and a permanent solution was sought for. It will not be out of place to mention that your client in response to the same had admitted if it is happening only in room No.2, then it looks like the joint between the two last ceiling panels of the rooms had opened and air can get in some places.

Although your client had advised some steps to be taken, but the same were of no avail. As a result of which the problem still persists. Thus my client is not liable to make any payment to your client till the time the problem reported is fixed permanently. Your client has deliberately concealed the said fact as a result of which there is no reference to the e-mail dated 05.08.2014 in your notice under reply. As a result of an ongoing dispute between my client and your client on the subject matter of the demand notice served upon my client, amongst other averments made herein, this letter should be Company Appeal (AT) (Insolvency) No. 802 of 2020 23 treated as a notice of existence of a dispute under section 8(2)(a) of the Insolvency & Bankruptcy Code, 2016."

27. Section 9 Application was filed, copy of which has been brought on record along with Appeal. In Section 9 Application Operational Creditor has filed all correspondence, all relevant documents, which are referred to in Item No.8 of Part V. All e-mails and correspondence exchanged between the parties from 2012 to 2018 were filed along with Section 9 Application. It is relevant to notice that Corporate Debtor did not file any reply to Section 9 Application despite opportunities granted to it by the Adjudicating Authority. The Adjudicating Authority in its judgment in paragraph 6 has referred to opportunities given to Corporate Debtor and order dated 15th July, 2019, by which opportunity to file reply was closed. The emails and letters as notified above contain

acknowledgement of debt and liability has been reiterated by the Corporate Debtor as noticed above, an unescapable conclusion can be drawn that Corporate Debtor at all times accepted its outstanding debt and always requested some more time for repayment. The request for Corporate Debtor to make payment in installments was also acceded to by the Operational Creditor and right from 2013 to 2017 repeated opportunities were granted by Operational Creditor to the Corporate Debtor to clear the dues. The last payment was made by the Corporate Debtor on 4th January, 2016 and there being acknowledgement of the debt time and again till 2016, the Adjudicating Authority has returned a finding that Application was well within time and debt stood proved.

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28. Before us, the finding of the Adjudicating Authority that Application was filed within time was not even questioned. The learned Counsel for the Appellant submits that the dispute was raised as early on 5th August, 2014 by email and has referred to reply to notice dated 13th March, 2018. As noticed above, in paragraph 5 of the reply to notice, the Appellant has referred to email dated 5th August, 2014, which mentioned "my client had informed that there is a leakage in freezer room No.2 and a permanent solution was sought for". The above information which was sent on 5th August, 2014 cannot be read to raise any dispute towards the debt. It is also relevant to notice that in the Appeal, the Appellant during submission relied on the said email, but has not even brought the said email on record to know the context and content of the said email. Be that as it may, even after 5th August, 2014, there are categorical statement and acknowledgement by the Appellant for payment of outstanding debt without raising any dispute in any of the correspondence. We are of the view that the submission raised before us that there was pre-existing dispute is completely false and meritless.

29. In Mobilox Innovations Private Limited vs. Kirusa Software Private Limited, (2018) 1 SCC 353, what Hon'ble Supreme Court has laid down is that, all that Adjudicating Authority has to see as to whether there is a plausible contention which requires further investigation and that the "dispute" is not patently feeble legal argument or an assertion of fact unsupported by evidence. In paragraph 51 of the judgment, following has been laid down:

> Company Appeal (AT) (Insolvency) No. 802 of 2020 25 "51. It is clear, therefore, that once the operational creditor has filed an application, which is otherwise complete, the adjudicating authority must reject the application under Section 9(5)(2)(d) if notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility. It is clear that such notice must bring to the notice of the operational creditor the "existence" of a dispute or the fact that a suit or arbitration proceeding relating to a dispute is pending between the parties. 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. It is important to separate the grain from the chaff and to reject a spurious defence which is mere bluster. However, in doing so, the Court does not need to be satisfied that the defence is likely to succeed. The Court does not at this stage examine the

merits of the dispute except to the extent indicated above.

So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application."

30. When we apply the ratio of above judgment, we have no doubt that the dispute sought to be raised by the Appellant is patently feeble legal argument, unsupported by any evidence. The evidence is rather to the contrary that Corporate Debtor at all time in all correspondence has accepted and acknowledged the dues and has been always begging for further time to make payment. The 'dispute' which has been contemplated Company Appeal (AT) (Insolvency) No. 802 of 2020 26 under Section 9, which may be basis for rejecting an Application under Section 9 has to be genuine dispute. A dispute, which is invented for the purpose of case to get away from liabilities to pay debt, cannot be a dispute, on the basis of which the Application has not to be rejected. We are fully satisfied that there was no dispute at all prior to issuance of Section 8 notice by the Operational Creditor and there is overwhelming evidence that Corporate Debtor always acknowledged outstanding dispute and never disputed the debt or its liability to pay and now to only get away from its liability to pay its debt is making submission before us that there was pre- existing dispute between the parties. We, thus, do not find any substance in the contention of the learned Counsel for the Appellant that there was dispute regarding the default, hence, the Application under Section 9 ought not to have been admitted.

Question No.3

31. The learned Counsel for the Appellant has submitted that the Corporate Debtor was an ongoing and solvent company, hence, the invocation of Section 9 was uncalled for and proceedings under IBC are not recovery proceedings to entitle the Operational Creditor to invoke the proceedings for recovery of its debt. The details of correspondence exchanged between the parties, which we have noticed while considering Question No.2, clearly indicate that Corporate Debtor was unable to pay its debt, which was admitted throughout and for more than three years, Corporate Debtor only requested for more time to pay the same. On the perusal of all the evidence and facts, which has emerged, we have no doubt Company Appeal (AT) (Insolvency) No. 802 of 2020 27 that invocation of Section 9 IBC proceedings by Operational Creditor was in accordance with law. A Status Report has been filed by Interim Resolution Professional. The learned Counsel for the RP has submitted before us that Appellant itself has submitted twice the Resolution Plan, which could not be approved. There being debt of more that Rs.50 crores, the Resolution Plan, which was submitted by the Appellant was only for Rs.6.5 crores, which did not find favour with the Committee of Creditors. In the facts, which have been brought on record, we do not find any substance in the submission of learned Counsel for the Appellant that Application under Section 9 by the Operational Creditor was not maintainable.

32. In view of the forgoing discussion, we do not find any error in the judgment of the Adjudicating Authority admitting Section 9 Application filed by Operational Creditor - Respondent No.1. There is no merit in the Appeal, which deserves to be dismissed. The Appeal is dismissed. No order as to costs.

[Justice Ashok Bhushan] Chairperson [Dr. Alok Srivastava] Member (Technical) NEW DELHI 14th February, 2022 Ash/NN Company Appeal (AT) (Insolvency) No. 802 of 2020 28