
(2023) 07 NCLT CK 0044

National Company Law Tribunal, Chandigarh Bench

Case No: IA No.313/2023 And CP (IB) No. 2/Chd/Chd/2019

Cotton Impex

APPELLANT

Vs

Cheema Spintex Ltd

RESPONDENT

Date of Decision: July 25, 2023

Acts Referred:

Insolvency and Bankruptcy Code, 2016 " Section 9, 9(4), 9(5)(i), 13(1)(b), 14(1), 14(3), 16(5), 17, 18(1)(f), 31(1), 33, 60(5), 238#Companies Act, 2013 " Section 128#Negotiable Instrument Act 1881 " Section 138#National Company Law Tribunal Rules 2016 " Rule 11#Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 " Regulation 6

Citation: (2023) 07 NCLT CK 0044

Hon'ble Judges: Harnam Singh Thakur, Member (J); Subrata Kumar Dash, Member (T)

Bench: Division Bench

Advocate: Mayank Mathur, P.R. Singhania

Final Decision: Disposed Of

Judgement

Harnam Singh Thakur, Member (Judicial)

IA No.313/2023

1. The present application has been filed by the operational creditor i.e. M/s Cotton Impex under Section 60(5) of the IBC, 2016, read with Rule 11 of

NCLT rules, 2016 for the replacement/change of proposed IRP.

2. The Operational Creditor, in accordance with Section 9 (4) of the Code, proposed the name of the Insolvency Professional Mr. Neeraj Bhatia

having registration No. IBBI/IPA-001/IP-P00824/2017-2018/11400 as the Interim Resolution Professional for carrying out the Corporate Insolvency

Resolution Process ("CIRP") of the Corporate Debtor. However, due to internal policies/reasons, the Operational Creditor has proposed Mr. Sunil

Sethi as a new Interim Resolution Professional of the Corporate Debtor. Form-2 dated 21.01.2023, along with Form-B in which his AFA Certification

is upto 22.09.2023 along with a certificate of registration issued by the Insolvency and Bankruptcy Board of India has been submitted along with the

application.

3. Therefore, in view of the above, IA No 313/2023 is allowed and stands disposed of accordingly.

4. The present petition is filed, under Section 9 of the Insolvency and Bankruptcy Code, 2016 (for brevity "IBC" / "Code"), by M/s Cotton

Impex through its Principal Accountant and Authorised Representative Mr. Rohit Sharma (for brevity "Operational Creditor" /

"Petitioner"), with a prayer to initiate Corporate Insolvency Resolution Process (CIRP) in case of Cheema Spintex Limited (for brevity

"Corporate Debtor" / "Respondent").

5. The Corporate Debtor, namely, Cheema Spintex Limited, is a Company incorporated on 10.10.1994 under the provisions of the Companies Act,

1956 with CIN No. U17115 CH1994PLC015140 with its registered office at Sector-41A, Chandigarh India. Hence, the territorial jurisdiction lies with

this Adjudicating Authority. Copy of the master data of the corporate debtor is attached with the main petition and marked as Annexure-P7.

6. The facts of the case, briefly, as stated in the petition are that the operational creditor was engaged in the business of the sale and purchase of the

cotton and is a proprietor of Mr. Mahesh Sharda. The corporate debtor purchased cotton from the operational creditor and various invoices were

raised by the operational creditor.

7. It is submitted by the petitioner in Form 5, Part IV that amount claimed to be in default is Rs. 7,20,82,686/- (Rupees Seven Crore, Twenty Lakh,

Eighty Two Thousand, Six Hundred and Eighty Six Only) which includes 15% interest per annum till realisation. The default occurred on 22.06.2016

i.e. date on which the last default of Rs. 17,28,788.00/- against Bill No. RJ/17 occurred.
Copy of invoices (Annexure P2), Statement of

Account/Ledger (Annexure P3), Complaints under Section 138 Negotiable Instrument Act (Annexure P4), Letter/Certificate acknowledging the debt

given by the corporate debtor (Annexure P6) is attached with the main petition.

8. A demand notice in Form 3 is stated to be issued by the operational creditor on 01.10.2018 and the same has been delivered to the corporate debtor

vide registered post as the postal receipts and tracking report is attached at Annexure P5 of the petition. The corporate debtor gave reply dated

20.10.2018 to demand notice wherein it is stated that the amount demanded is arbitrary. The entire calculations were made illegally. The company

was informed about the inferior quality of the goods and suffered huge financial losses. The representative also inspected the quality of cotton at the

factory site and promised to issue credit notes. But neither goods were replaced nor credit notes were issued. As the goods were of inferior quality

resultant yarn was also of inferior quality.

9. The notice of this petition has been issued to the corporate debtor to show cause as to why this petition be not admitted. The affidavit of service

was filed vide Diary No. 661 dated 08.02.2019. The corporate debtor has filed a reply vide diary No. 6184 dated 07.11.2019 wherein it is stated that

the present petition is not maintainable as the petitioner is a proprietorship firm and the proprietorship firm is not entitled to initiate insolvency

proceedings. The operational creditor is not entitled to initiate insolvency proceedings against the respondent-corporate debtor. The instant application

is defective, invalid and incomplete. There is a pre-existing dispute between the parties regarding the quality of the goods as it had excess moisture,

trash and less strength as compared to standard norms. The application is barred by limitation. There is no evidence on record whether or not copy of

invoice or notice was filed with the information utility. The petitioner has neither furnished any certificate nor the applicant has mentioned its non-

availability along with the reasons. There was no agreement between the corporate debtor and the applicant for payment of any interest. The

operational creditor misused the cheques issued by the respondent corporate debtor. The post-dated cheques were given due to the reason of pending

huge quality claims so confirmation for the deposit of the cheque may be given only after settlement of the dispute on account of quality claims. The

balance confirmation certificate does not support the debt of the operational creditors. In the present application, invoices are for more than three

years old which are time-barred.

10. The rejoinder was filed vide Diary No.602 dated 22.01.2020, wherein it is stated that even if the proprietary firm is not taken to be a person yet the

application cannot be held to be non-maintainable. If there is any misdescription and is corrected by the applicant, the application cannot be rejected in

limine on this ground. There is no pre-existing dispute in the present case, however, a corporate debtor in order to avoid his liability has concocted the

story about a dispute which simply did not exist. The application is not barred by limitation as the corporate debtor himself admitted his liability wide

letter/certificate dated 18.02.2016 which is placed on record. The petition has been filed within three years of the same i.e. 27.11.2018. The

information utility had recently been notified and was not operational further there is the record of the respondent on the information utility could not be

found. Regarding the non-furnishing of the supporting documents, it is submitted that they are not required. It is wrong that the cotton supplied was of

bad quality. There was a clear-cut agreement that if payment is delayed interest at 15% would be applied to it as is clearly borne out by

acknowledgment given by the corporate debtor (Annexure-6). The operational creditor has only encashed the cheque as and when the amount

became due. There were no claims made by the corporate debtor regarding the quality. The application is not barred under section 238 of the code.

Acknowledgment of debt by the corporate debtor in the year 2016 as well as the fact that the account between the parties was a running account

proves that the present application is within limitation.

11. The short written submissions have been filed by the petitioner vide Diary No.00342/01 dated 13.12.2022 and by the respondent corporate debtor

vide diary No.00342/02 dated 14.03.2023.

12. We have heard the learned counsel for the petitioner and corporate debtor and have perused the records.

13. The first issue for consideration is whether the demand notice in Form 3 dated 01.10.2018 was properly served. A demand notice dated

01.10.2018 has been delivered to the corporate debtor vide registered post as the postal receipts and tracking report is attached at Annexure P5 of the

petition. The corporate debtor gave a reply dated 20.10.2018 to demand notice. Therefore, demand notice was duly served upon the corporate debtor.

14. The next issue for consideration is whether the operational debt was disputed by the corporate debtor. It is deposed by way of an affidavit by an

operational creditor that there is no existence of dispute or record filed by the corporate debtor on or before the receipt of the Demand notice or any

pendency of suit or arbitration proceedings filed before the receipt of the demand notice. It is further deposed that there is no notice given by the

corporate debtor relating to the dispute of the unpaid operational debt till the demand notice.

Although, it is pleaded by the corporate debtor that there is a pre-existing dispute between the parties regarding the quality of the goods as it had

excess moisture, trash and less strength as compared to standard norms. However, this contention of the corporate debtor is untenable in law as there

is no cogent and convincing evidence placed on record to prove this contention of the corporate debtor. Hence, it can be safely concluded that there is

no pre-existing dispute regarding the claim in hand.

15. The other issue for consideration is whether this application is filed within limitation. A demand notice issued dated 01.10.2018 in Form 3 attached

as (Annexure P5) was duly served on the corporate debtor. However, the period of limitation would begin from the default that occurred on

22.06.2016 i.e. date on which the last default of Rs. 17,28,788.00/- against Bill No. RJ/17 occurred. Moreover, there is a Balance Confirmation

Certificate dated 18.02.2016 wherein the corporate debtor has admitted the claim of Rs. 7,20,58,584/- as on 31.01.2016. So, this contention of the

respondent-corporate debtor that invoices as well as the claim is time-barred is devoid of legal force. This application was filed vide Diary No. 4619

on 27.11.2018 and was re-filed on 14.12.2018 vide Diary No.4932. Therefore, this Adjudicating Authority finds that this application is filed within 3

years prescribed period of limitation.

Although, it is contended by learned counsel for the respondent-corporate debtor that an application under Section 9 of the IBC,2016 cannot be filed

by a proprietorship firm. But, this contention is also not much convincing because if any individual can file an application under Section 9 of the

Insolvency and Bankruptcy Code, 2016 then as to how the proprietorship firm is barred. No law/ authority has been relied upon by the learned counsel

for the corporate debtor. Moreso, if at all there is any miscalculation about the interest component then also the principal amount is above the threshold

limit.

16. We have gone through the contents of the application filed in the Form 5 and find the same to be complete. As discussed above, there is a total

unpaid operational debt (in default) of Rs. 7,20,82,686/- (Rupees Seven Crore, Twenty Lakh, Eighty Two Thousand, Six Hundred and Eighty Six Only)

which includes 15% interest per annum till realisation. Copy of invoices (Annexure P2), Statement of Account/Ledger (Annexure P3), Complaints

under Section 138 Negotiable Instrument Act (Annexure P4), Letter/Certificate acknowledging the debt given by the corporate debtor (Annexure P6)

are attached with the main petition. Accordingly, the petitioner proved the debt and the default, which is more than Rupees one crore.

17. It is noted that the corporate debtor has failed to payback the aforesaid amount due as mentioned in the statutory notice till date. Thus, the

conditions under Section 9 of the Code stand satisfied. It is evident that from the aforesaid discussed facts that the liability of the corporate debtor is

undisputed. Accordingly, the petitioner proved the debt and the default, which is above threshold limit.

18. In the present petition all the aforesaid requirements have been satisfied. It is seen that the petition preferred by the petitioner is complete in all

respects. The material on record clearly goes to show that the respondent committed default in payment of the claimed operational debt even after

demand made by the petitioner. In view of the satisfaction of the conditions provided for in Section 9(5)(i) of the Code, we admit the petition for

initiation of the CIR Process in the case of the Corporate Debtor, Cheema Spintex Limited and also direct moratorium to take effect and appoint

Interim Resolution Professional as below.

19. In Part-III of Form No. 5, Mr. Neeraj Bhatia Interim Resolution Professional (IRP has been proposed by the petitioner. However, vide IA No.

313 of 2023, Mr. Sunil Sethi has been proposed as a new IRP. The Law Research Associate of this Tribunal has checked the credentials of Mr. Sunil

Sethi and there is nothing adverse against him. In view of the above and the order passed in the IA No. 313/2023,, we appoint Mr. Sunil Sethi,

Registration No. IBBI/IPA-003/ICAIN00426/2022-2023/14179, E-mail: s
ethi412@gmail.com, Mobile No. +91-9888390276, the Interim Resolution

Professional with the following directions:-

i.) The term of appointment of Mr. Sunil Sethi shall be in accordance with the provisions of Section 16(5) of the Code;

ii.) In terms of Section 17 of the Code, from the date of this appointment, the powers of the Board of Directors shall stand suspended and the management of the

affairs shall vest with the Interim Resolution Professional and the officers and the managers of the Corporate Debtor shall report to the Interim Resolution

Professional, who shall be enjoined to exercise all the powers as are vested with Interim Resolution Professional and strictly perform all the duties as are enjoined on

the Interim Resolution Professional under Section 18 and other relevant provisions of the Code, including taking control and custody of the assets over which the

Corporate Debtor has ownership rights recorded in the balance sheet of the Corporate Debtor etc. as provided in Section 18 (1) (f) of the Code. The Interim

Resolution Professional is directed to prepare a complete list of inventory of assets of the Corporate Debtor;

iii.) The Interim Resolution Professional shall strictly act in accordance with the Code, all the rules framed thereunder by the Board or the Central Government and in

accordance with the Code of Conduct governing his profession and as an Insolvency Professional with high standards of ethics and moral;

iv.) The Interim Resolution Professional shall cause a public announcement within three days as contemplated under Regulation 6 of the Insolvency and Bankruptcy

Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 of the initiation of the Corporate Insolvency Resolution Process in terms of

Section 13 (1) (b) of the Code read with Section 15 calling for the submission of claims against Corporate Debtor;

v.) It is hereby directed that the Corporate Debtor, its Directors, personnel and the persons associated with the management shall extend all cooperation to the Interim

Resolution Professional in managing the affairs of the Corporate Debtor as a going concern and extend all cooperation in accessing books and records as well as

assets of the Corporate Debtor;

vi.) The Suspended Board Of Directors is directed to give complete access to the Books of Accounts of the corporate debtor maintained under section 128 of the

Companies Act. In case the books are maintained in the electronic mode, the Suspended Board of Directors are to share with the Resolution Professional all the

information regarding Maintaining the Backup and regarding Service Provider kept under Rule 3(5) and Rule 3(6) of the Companies Accounts Rules, 2014 respectively

as effective from 11.08.2022, especially the name of the service provider, the internet protocol of the Service Provider and its location, and also the address of the

location of the Books of Accounts maintained in the cloud. In case accounting software for maintaining the books of accounts is used by the corporate debtor, then

IRP/RP is to check that the audit trail in the same is not disabled as required under the notification dated 24.03.2021 of the Ministry of Corporate Affairs. The

statutory auditor is directed to share with the Resolution Professional the audit documentation and the audit trails, which they are mandated to retain pursuant to SA-

230 (Audit Documentation) prescribed by the Auditing and Assurance Standards Board ICAI. The IRP/Resolution Professional is directed to take possession of the

Books of Account in physical form or the computer systems storing the electronic records at the earliest. In case of any non-cooperation by the Suspended Board of

Directors or the statutory auditors, he may take the help of the police authorities to enforce this order. The concerned police authorities are directed to extend help to

the IRP/RP in implementing this order. For retrieval of relevant information from the systems of the corporate debtor, the IRP/RP may take the assistance of Digital

Forensic Experts empanelled with this Bench for this purpose. The Suspended Board of Directors is also directed to hand over all user IDs and passwords relating to

the corporate debtor, particularly for government portals, for various compliances. The Interim Resolution Professional is also directed to make a specific mention of

non-compliance, if any, in this regard in his status report filed before this Adjudicating Authority immediately after a month of the initiation of the CIRP.

vii.) The Resolution Professional is directed to approach the Government Departments, Banks, Corporate Bodies and other entities with request for

information/documents available with those authorities/institutions/others pertaining to the corporate debtor which would be relevant in the CIR proceedings. The

Government Departments, Banks, Corporate Bodies and other entities are directed to render the necessary information and cooperation to the Resolution

Professional to enable him to conduct the CIR Proceedings as per law.

viii.) The Interim Resolution Professional shall after collation of all the claims received against the Corporate Debtor and the determination of the operational position

of the Corporate Debtor constitute a Committee of Creditors and shall file a report, certifying constitution of the Committee to this Tribunal on or before the expiry of

thirty days from the date of his appointment, and shall convene first meeting of the Committee within seven days of filing the report of constitution of the Committee;

and

ix.) The Interim Resolution Professional is directed to send a regular progress report to this Tribunal every fortnight.

20. We declare the moratorium in terms of sub-section (1) of Section 14 of the Code, as under:-

a) 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;

b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;

c) 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

Securitization and Reconstruction of Operational Assets and Enforcement of Security Interest Act, 2002;

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

21. It is further directed that the supply of essential goods or services to the corporate debtor as may be specified, if any, shall not be terminated or

suspended or interrupted during moratorium period. The provisions of Section 14(3) shall however, not apply to such transactions as may be notified by

the Central Government in consultation with any operational sector regulator and to a surety in a contract of guarantee to a corporate debtor.

22. The order of moratorium shall have effect from the date of this order till completion of the corporate insolvency resolution process or until this

Bench approves the resolution plan under sub-section (1) of Section 31 or passes an order for liquidation of corporate debtor under Section 33 as the

case may be.

23. The petitioner is directed to deposit an amount of ₹1,00,000/- (Rupees One lakh Only) with the Interim Resolution Professional to meet the

immediate expenses of the CIRP within two weeks. The same shall be fully accountable by Interim Resolution Professional and shall be reimbursed

by the Committee of Creditors (CoC) to the petitioner to be recovered as the CIRP cost.

24. A copy of this order be communicated to both the parties. The learned counsel for the petitioner shall deliver a copy of this order to the Interim

Resolution Professional forthwith. The Registry is also directed to send a copy of this order to the Interim Resolution Professional at his email address

forthwith.

25. This petition is accordingly admitted.