

(2024) 04 NCLT CK 0008

National Company Law Tribunal, Mumbai Bench Court VI

Case No: CP (IB) No.219/MB/2022

Sucden India Private Limited

APPELLANT

Vs

Matoshri Laxmi Sugar

RESPONDENT

Co-Generationindustries Limited

Date of Decision: April 2, 2024

Acts Referred:

- Insolvency and Bankruptcy Code, 2016 - Section 4, 5(21), 8, 8(1), 9
- Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 - Rule 6

Hon'ble Judges: K. R. Saji Kumar, Member (J); Sanjiv Dutt, Member (T)

Bench: Division Bench

Advocate: Amir Arsiwala, Ninad Deshpande

Final Decision: Dismissed

Judgement

Sanjiv Dutt, Member (Technical)

1 BACKGROUND

1.1 This Application bearing C.P.(IB) No.219/MB/2022 was filed by Sucden India Private Limited, the Operational Creditor, on 20.01.2022 under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "the Code") read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 to initiate the Corporate Insolvency Resolution Process (hereinafter referred to as "CIRP") in respect of Matoshri Laxmi Sugar Co-Generation Industries Limited, the Corporate Debtor.

1.2 The Operational Creditor carries on the business of wholesale trading of granulated sugar, marketing and export of confectioner sugar and pure sugar. The Corporate

Debtor is engaged in the business of manufacturing and sale of sugar.

1.3 The Operational Creditor and the Corporate Debtor executed a Purchase Agreement bearing No. SIPL/PC/18-19/0109 dated 10.10.2018 under which the Operational Creditor agreed to purchase a minimum of 5,600 MTs and a maximum of 15,000 MTs of the sugar produced by the Corporate Debtor during the season 2018-2019 at a price to be mutually agreed upon as per the actual market price at the time of delivery/lifting of the sugar. However, the Corporate Debtor failed to supply the goods on time as per the agreed terms. Hence, the Corporate Debtor became liable to pay a sum of Rs.85,43,900/- (Eighty-Five Lakhs Forty-Three Thousand and Nine Hundred Rupees) to the Operational Creditor towards penalty for delay in supply of sugar. The Operational Creditor time and again requested the Corporate Debtor to make payment of the outstanding dues. However, the Corporate Debtor defaulted in meeting payment obligations. The Operational Creditor has claimed principal debt of Rs.85,43,900/- in the Application along with interest of Rs.30,02,069/- @ 15% p.a., aggregating to the total outstanding amount of Rs.1,15,45,969/- (One Crore Fifteen Lakhs Forty-Five Thousand Nine Hundred and Sixty-Nine Rupees) as on 01.11.2021.

1.4 The Operational Creditor issued Demand Notice dated 01.11.2021 to the Corporate Debtor, as required under Section 8 of the Code, seeking payment of the outstanding operational debt within 10 days of receipt of the notice. The Demand Notice was delivered to the Corporate Debtor on 11.11.2021. The Corporate Debtor replied to the same on 19.11.2021, disputing the said notice and stating that it was not liable to make payment as claimed by the Operational Creditor. Consequently, the Operational Creditor preferred the present Application seeking the commencement of CIRP in respect of the Corporate Debtor for the aforementioned operational debt.

2. AVERMENTS OF THE OPERATIONAL CREDITOR

2.1 As per the Purchase Agreement dated 10.10.2018, a minimum of 5,600 MTs to maximum 15,000 MTs of sugar was to be delivered to the Operational Creditor in the month of October, 2018 at a designated warehouse for the sole purpose and use of the Operational Creditor.

2.2 As per the terms of the said Agreement, the Operational Creditor made an advance payment of Rs.17,00,00,000/- (Seventeen Crores Rupees) as per industry practice vide two tranches of Rs.8,50,00,000/- each on 10.10.2018 and 15.10.2018.

2.3 Thereafter, the Corporate Debtor made belated supply of 5,200 MTs to the Operational Creditor in December, 2018. In view of the breach perpetrated by the Corporate Debtor, the Operational Creditor in its commercial wisdom decided to cancel further lifting of the sugar. The said decision was duly communicated to the Corporate Debtor which was accepted by the Corporate Debtor without any dispute or demur.

2.4 The Corporate Debtor raised a tax invoice dated 04.04.2019 for supply/delivery of 5200 MTs of the sugar on the Operational Creditor aggregating to an amount of Rs.16,92,60,000/- (inclusive of taxes) against the advance payment of Rs.17,00,00,000/- made by the Operational Creditor thereby leaving a balance of Rs.7,40,000/- with the Corporate Debtor.

2.5 As per the terms of Clause 2 of the said Agreement, in case of delay in delivery of the sugar by the Corporate Debtor, it was agreed that the Corporate Debtor shall provide a cash discount of Rs.22/- PMT per day to the Operational Creditor on the entire un-lifted quantity of sugar from the date of advance payment made by the Operational Creditor to the Corporate Debtor. Accordingly, the Operational Creditor raised a debit note for Rs.91,56,420/- dated 30.06.2019 towards penalty for the delay in supply of sugar.

2.6 The Corporate Debtor had levied warehousing charges of Rs.14,77,753/-on account of failure of the Operational Creditor to collect the sugar from the warehouse. After adjustment and due deduction of the said warehousing charges, which were to be borne by the Operational Creditor, the net amount payable by the Corporate Debtor to the Operational Creditor is mentioned at Rs.85,43,900/- in Part-IV of the Application, although it is shown at Rs.84,18,667/- (Rs.7,40,000 + Rs.91,56,420 - Rs.14,77,753) in the ledger account of the Operational Creditor in the books of the Corporate Debtor, as communicated to the Operational Creditor vide letter dated 24.07.2019.

2.7 Several requests were made to the Corporate Debtor to make payment towards the outstanding operational dues amounting to Rs.85,43,900/- (Eighty Five Lakhs Forty Three Thousand and Nine Hundred Rupees) towards penalty for delay in supply of sugar. However, the Corporate Debtor failed to clear the outstanding dues although vide its letter dated 24.07.2019, it accepted the liability to make payment to the Operational Creditor.

2.8 Since the balance as informed by the Corporate Debtor was inaccurate, the Operational Creditor vide email dated 06.05.2020 informed the Corporate Debtor of the accurate amounts due and payable to the Operational Creditor and further requested the Corporate Debtor to make payment towards the said outstanding amount. The Corporate Debtor vide its email dated 06.05.2020 confirmed and accepted the amount due and payable thereby accepting its liability once again towards the Operational Creditor.

2.9 In view of the default committed by the Corporate Debtor, the Operational Creditor issued a legal notice on 07.10.2021 calling upon the Corporate Debtor to make the payment amounting to Rs.85,43,900/-. Despite issuing the said legal notice, the Corporate Debtor failed to make payment to the Operational Creditor.

2.10 Thereafter, the Operational Creditor issued Demand Notice dated 01.11.2021 to the Corporate Debtor under Section 8 of the Code. On receipt of the Demand Notice, the Corporate Debtor vide its reply dated 19.11.2021 raised untenable objections for the first time.

2.11 In view of the above facts and circumstances, it is submitted that the Corporate Debtor is liable to pay a sum of Rs.1,15,45,969/- to the Operational Creditor as on 01.11.2021 comprising of Rs.85,43,900/-towards the principal debt due along with interest 15% p.a. amounting to Rs.30,02,069/- which is charged at the prevailing market rate due to the losses suffered on the outstanding dues. The Operational Creditor has relied on judgment of the Hon'ble Supreme Court in Vijay Industries v. Natl Technologies Limited (2009) 3 SCC 527 in order to justify the aforesaid claim of interest. The Operational Creditor thus submits that the present Application filed under Section 9 of the Code satisfies all pre-requisites as contemplated under the Code as there is an admitted debt and default on the part of the Corporate Debtor in making payment of the same as per the terms and conditions of the Purchase Agreement dated 10.10.2018.

3. CONTENTIONS OF CORPORATE DEBTOR

3.1 The Corporate Debtor vide its reply dated 22.06.2022, has raised several objections on maintainability as well as merits of the present Application. The preliminary objection raised by the Corporate Debtor is that the Application is not maintainable, because the Operational Creditor has clubbed together principal amount of claim along with interest thereon to meet the threshold amount of Rs.1 crore for filing the Application. The amount of Rs.1,15,45,969/- as claimed includes of Rs.7,40,000/- towards unutilised advance amount, Rs.78,03,900/- towards losses/damages arising as a result of delayed delivery; and Rs.30,02,069/- towards interest at the rate of 15% per annum on the alleged outstanding amount even though there is no provision for charging interest in the Purchase Agreement. Therefore, it is clear that the principal amount of debt claimed by the Operational Creditor is only Rs.85,43,900/- and interest of Rs.30,02,069/- is added just to meet the threshold of Rs.1 crore provided under Section 4 of the Code.

3.2 The amount claimed by the Operational Creditor in the Application is substantially in the form of alleged losses/damages arising out of so-called delayed delivery which cannot be regarded as an operational debt. This amount of damages has been claimed by the Operational Creditor in an arbitrary manner without providing any details regarding the basis on which the amount of damages has been calculated.

3.3 The Corporate Debtor has consistently disputed the amount of damages claimed by the Operational Creditor and, therefore, such amount is as yet uncertain and not crystallized. Given the dispute between the parties, it would be necessary that the

amount of damages should be ascertained and crystalized by a competent court or arbitral Tribunal. It is a settled principle of law that this Tribunal under summary jurisdiction cannot adjudicate and determine claim amount pertaining to loss/damages arising from breach of contract. This proposition has been reiterated by the Hon'ble NCLAT in its judgement in Neeraj Jain Vs. Cloudwalker Streaming Technologies Private Limited and another [Company Appeal (AT) (Insolvency) 1354/2019]. Therefore, the Application is not maintainable since it is based on claims regarding damages which are disputed and yet to be ascertained by a competent authority. Further, the claim for loses/damages allegedly arising out of breach of contract cannot be categorised as operational debt. The Operational Creditor has thus failed to establish that the amount claimed is an "operational debt" within the meaning of Section 5(21) of the Code.

3.4 As can be seen from perusal of replies and rejoinders to the Demand Notice issued by the Operational Creditor, there is a serious dispute between the parties with regard to (A) whether there was any delay in supply of sugar by the Corporate Debtor and whether the Operational Creditor was also equally responsible for the delay; (B) whether any damages are payable by the Corporate Debtor on account of delayed delivery and if so, what is the period of delay and the resultant quantum of damages; and (C) whether the Operational Creditor has calculated the damages amount in an arbitrary manner. It is submitted that the disputes arising between the parties are fundamental to the transaction and require detailed evaluation of evidence by a competent court and such disputes cannot be decided by this Tribunal in exercise of its summary jurisdiction. The present Application must, therefore, fail on the ground of pre-existing dispute.

3.5 The Corporate Debtor on the point of delay in delivery of sugar submits that the sugar factory sector runs under stringent guidelines of the Government and is dependent on supply of sugarcane. Further, the Purchase Agreement lays down that the Corporate Debtor has to deliver sugar ranging between 5600 MTs to 15000 MTs. During the crushing season 2018-19, the Corporate Debtor delivered a quantity of 5200 MTs of sugar to the Operational Creditor between October, 2018 and December, 2019. It is claimed that during the crushing season of 2018-19, the sugar sector faced scant supply of sugarcanes as a result of which the sugar factories could only operate for 113 days out of 180 operational days. Notwithstanding the same, the Corporate Debtor met the requirements of the Operational Creditor. It is contended that the supply schedule was affected due to reasons beyond the control of the Corporate Debtor. However, the Operational Creditor was not oblivious to these circumstances and accepted the delivery without any demur.

3.6 Further, as per clause 2 of the Agreement, upon the subsequent failure of time-bound delivery of sugar, the Corporate Debtor will be liable to provide a cash discount to the tune of Rs.22 PMT per day, deductible from the last installment of the

payment due upon the completion of delivery of 15000 MTs of sugar. However, the Operational Creditor abruptly terminated the Purchase Agreement and, consequently, the Corporate Debtor could not supply the entire lot of 15000 MTs of sugar. In these circumstances, it is argued that the condition for deduction of cash discount amount from last installment does not get triggered. Therefore, it is submitted that the Operational Creditor's claim for damages for delayed delivery is premature. Further, once the Purchase Agreement was terminated, the Operational Creditor could not rely on the terms of the same Agreement to claim damages.

3.7 It is submitted that the Operational Creditor did not lift the sugar from the warehouse for two to three months due to which the Corporate Debtor had to bear the unjust costs of Rs.14,77,753/- . These charges have been acknowledged and accepted by the Operational Creditor. This clearly depicts the mischief on the part of the Operational Creditor, where on one hand, it charges liquidated damages for delayed sugar supply and on the other hand, it failed and neglected to collect the sugar even after 3 months from the delivery. The Operational Creditor was speculating on the price of sugar with the malicious intent of paying less by lifting the sugar on the particular dates when the rate of the sugar was lesser than the average. It is argued that by doing so, it has committed the fraudulent act of hoarding sugar by lifting sugar at a low rate and keeping it languishing in the warehouse through contractual arrangement with Corporate Debtor.

3.8 It is contended that the amount of damages worked out by the Operational Creditor is arbitrary and baseless. The Operational Creditor has failed to disclose the basis for arriving at the amount of damages, including the number of days of delay or the quantity of sugar to which discount is applied.

3.9 There is no provision for interest in the Purchase Agreement. Despite the same, the Operational Creditor has arbitrarily applied interest at the rate of 15% per annum on the claim amount. It is a settled principle of law that "operational debt" does not include any interest component. It is submitted that the Operational Creditor's claim regarding interest component can neither be considered as "operational debt" nor can it be taken into account for determining whether the Operational Creditor meets the threshold criteria of claim amount of Rs.1 crore.

3.10 In view of the above, it is submitted that the present Application involves complex questions of law and fact which cannot be adjudicated upon by this Tribunal in exercise of its summary jurisdiction. It is urged that the Application being not maintainable deserves to be dismissed with heavy costs.

4. ANALYSIS AND FINDINGS

4.1 Upon due consideration of the pleadings and written submissions and hearing the Learned Counsel for both the parties, it is observed that the only issue which arises for determination is whether the amount claimed in the Application is an 'operational debt' within the meaning of Section 5(21) of the Code.

4.2 In order to qualify as an 'operational debt' under Section 5(21) of the Code, the amount in default must represent "a claim in respect of the provision of goods or services". In the instant case, the Operational Creditor has made the claim on the Corporate Debtor as per clause 2 of the Purchase Agreement dated 10.10.2018 which provides that "**in case of delay in delivery from The Seller, The Seller will give a "Cash Discount" of Rs.22 PMT per day as mutually agreed price on the entire un-lifted quantity from the date of payment made to The Seller**". Clause 4 of the Purchase Agreement provides that the "Cash Discount" shall be deducted from the payment to be made for the last 5,000 MT of the agreement. Thus, it is clear that the amount claimed by the Operational Creditor in the present Application is not on account of provision of goods but on account of penalty or damages for the delay in delivery of sugar by the Corporate Debtor.

4.3 In this connection, it is noticed that the Operational Creditor raised a debit note dated 30.06.2019 on the Corporate Debtor for a sum of Rs.91,56,420/-inclusive of GST towards penalty for late delivery of sugar against purchase contract/Agreement dated 10.10.2018. There is merit in the Corporate Debtor's contention that the Operational Creditor has nowhere explained the basis and manner of calculation of the said amount of penalty/ damages. Later, the Operational Creditor sent a Legal Notice dated 07.10.2021 to the Corporate Debtor seeking payment of outstanding dues amounting to Rs.85,43,900/- towards penalty for delay in supply of sugar (after deduction of warehousing charges) within fifteen days from the receipt of the notice failing which appropriate civil and criminal proceedings would be initiated against the Corporate Debtor. Finally, it is noticed that the Operational Creditor issued Demand Notice dated 01.11.2021 under Section 8(1) of the Code calling upon the Corporate Debtor to repay the unpaid dues of Rs.1,15,45,969/- including principal debt of Rs.85,43,900/- and interest of Rs.30,02,069/- within ten days from the receipt of said notice. A careful perusal of all above materials reveals that the principal amount of Rs.85,43,900/- claimed by the Operational Creditor in the application is on account of penalty for the delay in delivery of goods by the Corporate Debtor.

4.4 It is a settled principle of law that 'operational debt' under the Code does not include penalty or liquidated damages. A claim for penalty does not become an operational debt until the liability is adjudicated upon by a civil court and the damages are assessed and crystallised. Claim for liquidated damages for breach of contract cannot trigger insolvency process unless adjudicated by a competent court. Liquidated damages, even if stipulated, can only be crystallised on legal adjudication. This

Adjudicating Authority is not the appropriate forum to decide on the questions of reasonableness and quantum of liquidated damages. Proceedings under Section 9 of the Code are not meant for ascertaining or crystallising the quantum of damages.

4.5 As the amount of Rs.85,43,900/- claimed by the Operational Creditor towards penalty for delay in supply of sugar in terms of the Purchase Agreement is disputed by the Corporate Debtor and the same is yet to be crystallised and adjudicated upon by a competent court of law, it cannot be held to be an 'operational debt' within the meaning of Section 5(21) of the Act. It is a claim not in respect of the provision of goods or services by the Operational Creditor to the Corporate Debtor but in respect of recovery of penal charges/liquidated damages by the Operational Creditor on account of the delay in supply of sugar by the Corporate Debtor. A claim of penalty or liquidated damages which is yet to be determined and crystallised cannot be characterised as 'operational debt' under Section 5(21) of the Code. Hence, the claim made by the Operational Creditor in the Application being premature fails on this account.

4.6 It is also seen from the record that there was no stipulation for charging of interest either under the terms of the Purchase Agreement executed between the parties or in the tax invoice. In the absence of mutual agreement or any promise to pay interest, the Operational Creditor's claim for interest of Rs.30,02,069/- from the Corporate Debtor is found to be untenable. The judgment of the Hon'ble Supreme Court in **Vijay Industries v. Natl Technologies Limited** (supra) relied upon by the Operational Creditor is found to be not apposite, because unlike the present case, there was a stipulation in the invoices as to payment of interest in case of delay in payment; the principal amount resulting from supply of goods by the creditor was admitted; debtor company had signed the invoices as a token of acceptance and had in principle agreed to compensate the creditor for delay in payment in that case.

4.7 Mere balance confirmation by the Corporate Debtor will not convert the amount of claim to an 'operational debt', because the Operational Creditor will have to independently discharge the onus of proving with credible materials that the claim is in respect of provision of goods or services so as to qualify as 'operational debt' within the meaning of Section 5(21) of the Code and that there has been a default in payment thereof. We find that there is no mention of the specific date of default in Part-IV of the Application. No attempt has been made by the Operational Creditor to clarify as to when the amount of penalty or damages for delay in supply of sugar became due and payable but was not paid by the Corporate Debtor. In view of its failure to discharge such onus, the issue is accordingly decided against the Operational Creditor and, hence, the amount of penalty or liquidated damages claimed by the Operational Creditor is held to be not eligible for being categorised as 'operational debt' in terms of Section 5(21) of the Code. The entire claim of the Operational Creditor is found to be an unascertained and uncrystallised claim which cannot be adjudicated by us in exercise

of our summary jurisdiction.

4.8 As the Applicant has failed to establish the existence of a crystallised and undisputed operational debt due and payable by the respondent/Corporate Debtor and the default in payment thereof, we find that the present Application is not maintainable under Section 9 of the Code and is liable to be dismissed.

ORDER

In view of the aforesaid findings, this Application bearing C.P.(IB) No.219/MB/2022 filed under Section 9 of the Code by Sucden India Private Limited, the Applicant, for initiating CIRP in respect of Matoshri Laxmi Sugar Co-Generation Industries Limited, the Respondent is rejected.

However, the rejection of this Application shall not cause any prejudice to the right of the Applicant to pursue such other remedies as may be available in accordance with law.