

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOCHI BENCH, KERALA**

IBA/38/KOB/2020

(Under Section 9 (6) of Insolvency and Bankruptcy Code 2016)

Order delivered on 18th day of March, 2021

Coram:

Hon'ble Shri Ashok Kumar Borah, Member (Judicial)

In the matter of

M/s Kripa Cashew Exports
Represented by its Sole Proprietor
Jackson J S/o Jose Samuel,
Residing at Jose Bhavanam, Anayadi PO
Kollam, having office at Mynagappally PO
Kollam, Kerala-690519, Applicant/Operational Creditor

Vs.

M/s Royals International Trade and Allied
Products Pvt. Ltd. Royal Junction,
Anchal PO, Kollam (District)-691306
Represented by its Managing Director
Kunjumon S/o Thankachan, Door No.
AP IX/1033, Royal Complex Building
Anchal.
.....Respondent/Corporate Debtor

Parties/Counsel present (through video conferencing)

For the Operational Creditor : Shri Johnson Gomez, Advocate
For the Corporate Debtor : Shri Nebil Nizar, Advocate

ORDER

This is an application filed on 03.11.2020 under Section 9 of Insolvency & Bankruptcy Code, 2016 (hereinafter as 'I&B Code') read with Rule 6 of the

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Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (hereinafter referred to as Rules) by the applicant **M/s. Kripa Cashew Exports** (hereinafter referred to as 'Operational Creditor') to initiate Corporate Insolvency Resolution Process (CIRP) against **M/s. Royals International Trade and Allied Products Pvt. Ltd.** (hereinafter referred to as 'Corporate Debtor/Respondent').

Submissions of the Operational Creditor

2. The applicant is a sister concern of M/s. Thankam Cashew factory. As part of the contract between M/s. Thankam Cashew factory and the Corporate Debtor for the purchase of Raw Cashew Nuts Crop, 2017 the purchase money had to be paid in advance. Since M/s. Thankam Cashew Factory was not having the required funds to make immediate payment to the Corporate Debtor, an amount of ₹1,15,00,000.- (Rupees One Crore Fifteen Lakhs Only) has been paid to the Corporate Debtor from the account of M/s.Kripa Cashew Exports.

3. Further it is stated that on making supply order, the Corporate Debtor failed to supply the quantity as per agreed terms, the Corporate Debtor supplied short quantity of 268.139 MT valued at ₹4,10,22,661 (Rupees Four Crores Ten Lakhs Twenty-Two Thousands Six hundred and Sixty-One Only) and the Corporate Debtor issued **Cheque No.10055499** dated 30.10.2017 for an amount of Rupees 1,16,96,603 (Rupees One Crore Sixteen Lakhs Ninety-Six Thousand Six Hundred and Three Only) to M/s. Kripa Cashew Exports, However, on presentation, the cheque was returned due to insufficient funds.

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4. As no payments were received from the Corporate Debtor towards the dues, applicant issued a Demand Notice dated 30.09.2020 under Section 8 of the Insolvency and Bankruptcy Code, 2016 (under Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016). The Corporate Debtor has neither denied the debt nor shown the existence of any dispute prior to the receipt of Statutory Notice in Form -3, of the I&B Code, 2016. It is, therefore, clear that the Corporate Debtor is unable to discharge its lawful debts/liabilities.

Submissions of the Corporate Debtor

5. The Corporate Debtor filed their counter and submitted that the applicant does not have any contractual obligation with the Corporate Debtor. The High Sea Trade Contract dated 31.05.2017 reveals that the Contract is between the Corporate Debtor and M/s. Thankam Cashew Factory. Therefore, a stranger to a contract cannot sue before a court of law as decided in the case of *Dunlop Pneumatic Tyre Co. Ltd V. Selfridge & Co. Ltd [1915 AC847]*. In this connection they have cited the decision of *Mobilox Innovations Private Limited V. Kirusa Softwaere Private Limited [2018 (1) SCC353]*. The Contract dated 31.05.2019, took place between M/s. Thankam Cashew Factory and the Corporate Debtor. The Applicant herein is a stranger to that Contract.

6. Further the Corporate Debtor relied on the decision in Mobilox [supra] and stated that the document submitted under which the Operational Debt has become

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due is Cheque No.10055498 dated 30.10.2017. In fact, the cheque was issued in the name of M/s. Thankam Cashew Factory and not in the name of the Applicant herein.

Rejoinder Filed by the Operational Creditor

7. In the rejoinder the Applicant has stated that the contention that there is no privity of contract between Corporate Debtor and Operational Creditor cannot be accepted. The Corporate Debtor has admitted that the Operational Creditor has paid an amount of ₹ 1,15,00,000.- on 08.09.2017 as a bank transfer through Cheque no. 186867 from its account with the South Indian Bank Ltd. to the Corporate Debtor. It is also admitted that the Corporate Debtor has issued a Cheque No. 10055499 dated 30.10.2017 for an amount of ₹1,16,96,603.- (Rupees One Crore Sixteen Lakhs Ninety-Six Thousand Six Hundred and Three only) which includes the principal amount of 1,15,00,000.- (Rupees One Crore Fifteen Lakhs only) and interest@ 12% for a period of 52 days. It is also an admitted fact that the cheque issued by the Corporate Debtor to the Operational Creditor was dishonoured on 09.11.2017 for want of sufficient funds in the accounts of the Corporate Debtor. It is also an admitted fact that the cheque was issued towards value of the short-supplied quantity of 268.139 MT payable to M/s.Thankam Cashew Factory and the Operational Creditor.

8. It is further stated that the existence of locus standi on the Operational Creditor can be held to be proved by determining the questions as provided in Mobilox [supra].

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(i) Whether there is an Operational Debt as defined, exceeding 1 Crore?

The Corporate Debtor by its letter dated 19.10.2017 admits the receipt of an amount of ₹ 1,15,00,000.- from the Operational Creditor for the supply of Cashews. On account of failure to supply the same, the Corporate Debtor has issued a cheque No. 10055499 dated 30.10.2017 for an amount of ₹1,16,96,603.-. The same cheque was dishonoured due to insufficient fund, on presentation of the cheque. Hence the first condition of having an operational debt exceeding 1 crore is established.

(ii) Whether the documentary evidence furnished with the application shows that the aforesaid debt is due and payable and has not yet been paid?

The operational creditor, after the debt became due, has issued a letter on 22.2.2019 to the Corporate Debtor demanding the payment of debt for which no reply has been received from the Corporate Debtor. Certificate issued by Chartered Accountant filed along with the Application indicates that no funds have been received from the Corporate Debtor since 19.10.2007 till 17.9.2020. Hence, it is proved that the aforesaid debt is due and payable and has not yet been paid.

(iii) Whether there is existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding on the dispute filed before the receipt of the Demand Notice?

Section 5(6) of IBC which defines the term 'dispute' is reproduced herein below- "dispute includes a suit or arbitration proceedings relating to

(a) the existence of the amount of debt;

(b) the quality of goods and service

(c) the breach of a representation or warranty.

It is further submitted that there was no pre-existing dispute between the parties until the issue of demand notice to the Corporate Debtor on 30.9.2020. Any notice of

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dispute issued by the Corporate Debtor after the issuance of Demand Notice cannot be considered as a pre-existing dispute within the purview of I&B Code, 2016.

9. It is also stated that the proprietor of M/s. Thankam Cashew Factory or that of the Operational Creditor have no relationship with Mr Aneesh Babu of M/s.Vazhavila Cashews and he has no privity of contract in High Sea Sale Agreement filed along with the reply filed on behalf of Corporate Debtor. Therefore, the debt due to the Operational Creditor has no relationship whatsoever, for violation of any contract between the Corporate Debtor and any third parties.

10. It is also stated that the allegation that the Corporate Debtor denied the existence of any debt. Liability as per the provisions of the IBC vide Annexure D reply notice dated 10.10.2020 is not correct. The existence of a written contract is not a precondition to raise a claim of operational debt against a Corporate Debtor. It is an admitted case that Corporate Debtor has issued a cheque which was dishonoured due to insufficiency of fund. The Corporate Debtor has admitted that they have issued another cheque bearing no. 10055511 dated 18.5.2018 for an amount of 1,16,96,603.- (Rupees One Crore Sixteen Lakhs Ninety-Six Thousand Six Hundred and Three only) in favour of the Operational Creditor. It is pointed out that the amount indicates that the Operational Creditor has waived the interest part and the cheques were issued towards payment of entire due amount of ₹4,10,22,661.- (Rupees Four Crores Ten Lakhs Twenty-two Thousand Six Hundred and Sixty- one only) in four monthly instalments. Three

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cheques were issued to M/s.Thankam Cashew Factory and the cheque dates were 9.5.2018, 14.5.2018, 21.5.2018 and the cheque issued to the Operational Creditor was dated 18.5.2018. Cheque number 10055508 dated 09.5.2018 for an amount of ₹1,00,00,000 (Rupees One Crore) was presented before the Federal Bank on 24.7.2018 and the same was dishonoured. Cheque No. 10055509 dated 14.5.2018 for an amount of ₹1,00,00,000 (Rupees One Crore) was presented before the Federal bank on 24.7.2018 and the same was again dishonoured. Immediately after the dishonour of cheque nos. 10055508 and 10055509, the Corporate Debtor has requested the Operational Creditor and M/s.Thankam Cashew Factory not to present the other cheques because the continuous dishonour of cheques would affect the financial credibility of the Corporate Debtor before the bank. Hence, the cheque nos. 10055510 and 10055511 were not presented before the bank. Certificate issued by the Branch Manager, Kottarakkara dated 11.11.2020 contains a false statement. They are liable to be prosecuted for issuing such a false certificate to be produced before this Tribunal.

FINDINGS

11. This tribunal has gone through the pleadings on record and perused the submissions made by learned counsel for both sides. On a careful perusal of the documents, it is noticed that the High Sea Sale Contract dated 31.05.2017 is entered between the Corporate Debtor and M/s. Thankam Cashew Factory on 31.05.2017 but not with the Operational Creditor. Since Thankam Cashew Factory was not having the required funds, in order to pay an advance amount for the purchase of

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goods the Operational Creditor paid an amount of ₹1,15,00,000.00 [One Crore Fifteen Lakhs] to the Corporate Debtor. there is no privity of contract between the Operational Creditor and the Corporate Debtor. A stranger to a contract cannot come before a court of Law as held in the matter *Dunlop Pneumatic[supra]* and that the Applicant Operational Creditor does not come under the definition of Operational Creditor as defined under Section 5(20) of the I&B Code,2016.

12. Admittedly there was a supply shortage of 268.139MT occurred to M/s. Thankam Cashew Factory. On 19.10.2017 there was a meeting between them, based on the consensus between parties Corporate Debtor issued a letter to M/s. Thankam Cashew Factory, which reads as under:-

“To

19.10 2017

Ms Thankam Cashew Factory

Anayady Po

Soomadu North

Kollam

Dear Sir

Further to the meeting today in our office as agreed mutually, we returning the short supplied quantity (268.139 MT) amount of Rs. 4,10,22,661/-(Rupees four crore ten lakh twenty-two thousand six hundred sixty-one only) (Thankam Cashew Rs.2,93,26,058 and Kripa Cashew Exports Rs.1,16,96,603) with 12% interest as full and final settlement vide cheque No.16055498 dated 30. 10.2017 and Cheque No.10055499 dated:30.10 2017.

Kindly acknowledge the good receipt

Thanking You

Tours faithfully

For Royals International Trade and Allied Products Pvt Ltd

s/d

*Received the Cheque as full and final settlement
For Thankam Cashew Factory and Kripa Cashew Exports
Sd/- Jackson Jose”*

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13. Cheque numbers 10055498 and 10055499 were issued by the Corporate Debtor to M/s. Thankam Cashew Factory and the Applicant herein respectively. Cheque number 10055498 was issued in the name of M/s. Thankam Cashew Factory and not in the name of Petitioner. In the absence of assignment or transfer as stipulated in Section 5(20) of the I&B Code,2016 the Applicant/Operational Creditor does not have the locus standi to file this Application on behalf of M/s. Thankam Cashew Factory. The letter dated 07.05.2018 issued by the Corporate Debtor cancelling Cheques numbers 10055498 and 10055499 is as under:-

07.05.2018

*“Thankam Cashew Factory
Anayaday P.O.
Soornadu North, Kollam*

Dear Sir

As per the agreement dated 05.05.2018, we returning the short supplied quantity amount of ₹ 4,10,22,6611- against the High Sea sale Contract No. RIT/HSS/02/2017-18 dated 31.05.2017 as full and final settlement by four cheques bearing No.10055508 dated 09.05.2018 for Rs.1,00,00,0 in favour of Thankam Cashew Factory, cheque bearing No.10055509 dated 14.05.20118 Rs,1,00,00,000/- in favour of Thankam Cashew Factory, bearing No.10055510 dated 21.05.2018 Rs.93,26,058/ in favour of Thankam Cashew Factory and cheque bearing No. 10055511 dated 18.05.2018 for Rs.1,16,96,603/- in favour of Kripa Cashew Exports.

The earlier letter issued dated 19.10.2017 and two cheque bearing Nos. 10055498 and 10055499 treated as cancelled.

Kindly acknowledge the good receipt.

Thanking You

Received Cheques as full and final settlement

Yours faithfully

Sd/-S/o Samuel Jose, Jackson/7.5.2018

For Royals International Trade and Allied Products Pvt Ltd

Sd/- Managing Director.”

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14. It is evident from the above that the cheques issued on the earlier dates were cancelled by the Corporate Debtor and issued another 4 cheques bearing Nos. 10055508, 10055509, 10055510 in favour of M/s. Thankam Cashew Factory and cheque bearing No. 10055511 in favour of the Applicant herein for an amount of ₹1,16,96,603/-.

15. Learned Counsel for the Corporate Debtor raised the maintainability of the application under Section 9 of the I&B Code, 2016. It is argued on behalf of the Corporate Debtor that the Operational Debt as defined in the Code in Section 5 (21) means “*a claim in respect of the provision of goods or services including employment or a debt in respect of the repayment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority.*” It is further stated that Section 3(11) of the Code provides that “*Debt*” means *a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt.*

16. In the present case, the first point which arises for consideration is whether the debt falls within the purview of Operational Debt under Section 5 (21) of the I&B Code, 2016?

17. To arrive at a decision, this Tribunal has gone through the judgement of Hon'ble National Company Law Appellate Tribunal ('NCLAT') in *Jindal Steel*

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and Power Limited v. DCM International Limited, Company Appeal (AT) (Insolvency) No. 288 of 2017, wherein the Appellate Tribunal held as under:

"Admittedly, the Appellant is a tenant of Respondent-'Corporate Debtor'. Even if it is accepted that a Memorandum of Understanding has been entered between the parties in regard to the premises in question, the Appellant being a tenant, having not made any claim in respect of the provisions of the goods or services and the debt in respect of the provisions of the goods or services and the debt in respect of the repayment of dues does not arise under any law for the time being in force payable to the Central Government or State Government, we hold that the Appellant tenant do not come within the meaning of 'Operational Creditor' as defined under sub-section (20) read with sub-section 21 of Section 5 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to 'I&B Code') for triggering Insolvency and Bankruptcy Process under Section 9 of the 'I&B Code'."

18. Thus any amount claimed as due by a person representing as 'Operational Creditor' should demonstrate firstly that the said amount in default falls within the definition of 'claim' as defined in Section 3(6). Such a claim, secondly should be capable of being treated as a 'debt' as defined under Section 3(11) of I&B Code, 2016 and finally the 'debt' should fall within the confines of Section 5(21) of I&B Code, 2016 (i.e.) it should be capable of being treated as an 'Operational Debt' and such an operational debt must be owed by the Corporate Debtor to a creditor who can then be considered as an Operational Creditor as defined under Section 5(20) of IBC, 2016.

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19. The claim of the Operational Creditor is not based on an operational debt, because no goods/services were to be rendered by the Corporate Debtor. The Operational Creditor is not relating to the goods/services including employment or the debt in respect of the repayment of the dues, but it is related to non-payment of the advance money paid to the Corporate Debtor on behalf of M/s. Thankam Cashew Factory. Therefore, the same is not covered under the definition of the “Operational Debt” as provided under Section 5(21) of the Code.

20. In the case of **Mobilox Innovations Pvt. Ltd. Versus Kirusa Software Private Limited; 2018 1 SCC 353**, it is clearly stated that the Tribunal when examining an application under Section 9 of I&B Code,2016, will have to determine:

“(i) Whether there is an “operational debt” as defined exceeding Rs 1 lakh? (See Section 4 of the Act)

(ii) Whether the documentary evidence furnished with the application shows that the aforesaid debt is due and payable and has not yet been paid?

and

(iii) Whether there is existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before the receipt of the demand notice of the unpaid operational debt in relation to such dispute? “

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In the matter under consideration, from the aforesaid discussion, this Tribunal finds that all the above conditions are not available for admission of the Application.

21. Considering the totality of the facts and the circumstances of the case and the law applicable, it is not a fit case for admission and order Corporate Insolvency Resolution Process against the Corporate Debtor. Hence **IBA/38/KOB/2020 is dismissed** without costs.

Dated the 18th day of March, 2021

Sd/-
(Ashok Kumar Borah)
Member (Judicial)