NATIONAL COMPANY LAW APPELLATE TRIBUNAL
AT CHENNAI

(APPELLATE JURISDICTION)
TA (AT) No.205/2021
(Company Appeal (AT) (Ins) No.1228/2019)
(IA No.3570/2019)

In the matter of:

M/s Posco International Corporation
(Formerly known as Posco Daewoo Corporation)
Having its principal office at
165, Convensia-daero Yeonsu-gu
Incheon, 21998, Korea **… Appellant**

V

M/s Mohana Cotton Ginning Private Limited
A company incorporated under the Companies Act, 1956
Having its registered office at
D.No.3-153, Garapadu (Post)
Vatticherukuru (Mandal),
Guntur District, Krishna
Andhra Pradesh - 522017 **... Respondent**

Present :

For Appellant : Mr. Kartikeya Jaiswal, Advocate
For Ms. Anusha Peri, Advocate

For Respondent : No Appearance

JUDGMENT
(Hybrid Mode)

[Per: Justice Sharad Kumar Sharma, Member (Judicial)]

The Appellant, is an applicant to the proceedings under Section 9 of I&B Code, which stood rejected by the impugned order dated 11.09.2019, as it was passed by the Learned NCLT, Amaravati Bench, in TCP(IB) No.50/9/AMR/2019 (CP(IB) No.285/9/HDB/2018).

2. The Respondent was noticed. They had put an appearance, and initially they had contested the proceedings, but ever since 19.02.2025, none have appeared for the Respondent. Even today, despite of repeated calls, none appears for the Respondent. Hence we have got no other option except to proceed to hear the Company Appeal itself on its merits.

3. Brief facts, which could be culled out from the records of the Company Appeal are that, the Appellant is an international trading company, and it executed a contract with the Respondent for supply of 300 Metric Tonnes of Indian raw cotton Grade SLM, valued at a invoice value of USD 453,177.57 to M/s. Ada Fios in Portugal and consequent to it, executed an international shipment contract on 16.12.2016, with the Respondent.

4. The Appellant contends that, during the execution of the contract, disputes arose between the parties pertaining to the quality of 291 Metric Tonnes of goods supplied by the Respondent and consequently, the parties agreed to settle the controversy in which the Respondent was to pay an amount of USD 74,342 to the Appellant.

5. Its upon the aforesaid settlement, the appellant on 30.06.2017, raised a debit note in the name of the Respondent, the Corporate Debtor for USD 74,342, which was acknowledged by the Corporate Debtor / Respondent vide its

correspondence of 28.07.2017, admitting their liability. The relevant portion of the said e-mail by the Respondent is extracter hereunder:-

> *Sir we need to wait till we get the permission. Or else just check with your management if you are able to remit the amount from your side and in the due course mohana as committed with remit funds to you upon the approval obtainment. As we are not closing our relation I believe.*

6. The Appellant contends that this communication of 28.07.2017, made by the Respondent, will amount to be an acknowledgment of the amount due to be paid and a tacit acceptance of the debt payable by it.

7. Subsequent to this, the Appellant, in order to fully and finally settle the dispute and to record the terms on which the said amount of USD 74,342 was to be paid by the Respondent, entered into a settlement agreement, bearing Reference No. **PDCMOHANA20170901** with the Respondent on 01.09.2017. As per this settlement agreement, the Respondent had undertaken to pay the said amount to the Appellant by 20.09.2017, failing which it was liable to pay the default interest at the rate of 15% per annum, till the actual date of payment. The said terms are recorded in Clause I (1) & (2) of the settlement agreement.

8. It's the email communication of 28.07.2017 and the settlement agreement dated 01.09.2017, which has been taken by the Appellant as to be the basis for institution of the proceedings under Section 9 of the I&B Code, before the Learned Adjudicating Authority, because of the fact that, the last cut-off date for remittance of the amount under the settlement that, was fixed for 20.09.2017,

had lapsed, and still the Respondent, who was to pay the amount as per the terms of the settlement agreement, did not pay the amount.

9. Despite the assurance made from time to time by the Respondent to pay the amount, the Respondent continued to default in payment of the same, which had necessitated the Appellant to issue two notices on 03.11.2017 and on 07.11.2017, calling upon the Respondent to pay the said amount which the Appellant claimed as unpaid operational debt. The aforesaid two notices remained un-responded by the Respondent, which the Appellant claims to be an acknowledgement of debt because the Respondent did not contest the notices and that it will also amount to be an admission of liability by the Respondent.

10. Thereafter, the Respondent had issued two Emails on 07.12.2017 to the Appellant, in which too the Respondent had acknowledged the existence of a debt and had assured to remit the amount at the earliest, by stating that, they were anticipating for certain approvals, and upon the completion of the necessary formalities, they would be making the payment of 73,000 USD plus amend charges. This communication of 07.12.2017, would yet again amount to be an admission by the Respondent of their liability, as would be apparent from its contents which are extracted here under:

> *We are only liable to Portugal claim and Phungphu claims. We will and shall not allow to remit the balance payments as stated by you. If you threaten us about sharing the internal business issue to organisations you mentioned we also need*

> *to look for legal angle against PDC damages done to us along with breach of general agreement.*
>
> *We once again inform that we are waiting for certain approvals and we shall do the payment of 73000+ Amend charges. If you want to cut the string and let it loose its completely upto your state. We are already facing issues in pakistan market due to that Rehan Shoukat and your way of handled things and we shall also go in the same way with Posco to canvas what you have done to us.*

11. When there was no positive action by the Respondent to remit the amount, the Appellant sent a legal notice on 22.01.2018, demanding payment of various amounts including the unpaid operational debt of USD 74,342 in respect of ADA FIOS contract. In the said legal notice, stating that certain payments / claims came to be admitted to be due to the clients, namely ADA FIOS, PHUNGPHU and CA Textile Mills on account of issues pertaining to the quality of cotton and weight of the cotton supplied and that the said amounts are due and payable by the Respondent, the Appellant demanded payment of a total amount of USD 128,845.48 plus interest calculated at 15% per annum on the unpaid debt of USD 74,342 up to the date of payment. Vide the said legal notice, the Appellant intimated about its intention to initiate the available legal proceedings, including the initiation of the CIRP, or as well as the arbitration proceedings against the Respondent, if the demanded amount is not paid within 7 days of the receipt of the said notice.

12. Since the Respondent did not respond to aforesaid legal notice and did not make the payment as demanded, the Appellant proceeded to issue a demand notice under Section 8 of the Code on 12.02.2018, giving the detailed narration of the debt due to be paid, being USD 74,342 and the details of transactions leading to the debt and the date of default, along with the copies of shipment contract, settlement agreement and the debit note executed by the Appellant. The Respondent instead of satisfying the demand raised in the demand notice under Section 8 of the Code, replied to the said demand notice vide its letter dated 22.02.2018 stating that even though it has entered into the settlement agreement dated 01.09.2017 and has agreed to pay USD 74,342 to the Appellant, it is not liable to pay any amount because the Appellant has breached the terms of the Purchase Agreement dated 10.10.2016 by contacting its buyers directly and soliciting business from them, thereby causing loss to the Respondent and hence the Appellant, instead, is liable to pay an amount of USD 22,005 to the Respondent, after adjusting the unpaid debt of USD 74,342/-.

13. Under these circumstances, the Appellant states that it was constrained to file the Company Petition, being CP(IB)/285/9/HDB/2018, on 04.04.2018 praying for initiation of CIRP as against the Corporate Debtor / Respondent for a debt of 74,342 USD, which became payable by the Corporate Debtor, to the Appellant in terms of the settlement agreement, and which was defaulted on 20.09.2017.

14. Notices were issued on 06.07.2018 on the proceedings under Section 9 of I&B Code, in which the Respondent filed their reply on 19.07.2018 making vague assertions pertaining to the sustainability of the proceedings, on the ground that, there happens to be a pre-existing dispute, which, the Appellant contends, were raised for the first time without establishing the same. Pleadings were exchanged and written submissions were preferred by the parties.

15. It is at a belated stage of the Section 9 proceedings, that certain additional documents were served on the Appellant by the Respondent, through a memo dated 11.09.2018, and the same was filed before Learned NCLT only on 27.11.2018 after several specific orders by Learned NCLT and that too, unsupported by an affidavit. The said affidavit was later on supplied in December 2018. After the exchange of pleadings, the application under Section 9 of the Code was rejected by the impugned order dated 11.09.2019 passed by the Tribunal. Hence the Company Appeal.

16. The Learned Counsel for the Appellant has submitted that, the very basis taken by the Learned Tribunal for dismissing the application under Section 9 of the Code, particularly in relation to the settlement agreement dated 01.09.2017, is that there was certain dispute between the parties, regarding the quality of goods, supplied in between 15.03.2017 and 13.04.2017 in relation to one of the purchase agreement of 10.10.2016, and that the said dispute should have been addressed by invoking arbitration proceedings as was agreed between the parties instead of invoking jurisdiction of NCLT, that non-payment of an

unpaid operational debt is a private dispute and it does not merit proceedings under Section 9 of IBC, that the Appellant, not having supplied any goods or services to the Respondent, does not fall within the definition of an 'Operational Creditor' and there were pre-existing disputes which will not permit admission of the Section 9 application. He has further contended that after exchange of the pleadings, the Learned Tribunal had proceeded to formulate the following issues:

> *i) Whether the petition is maintainable?*
>
> *ii) Whether the respondent owed USD 74,342 as corporate debt to the petitioner?*
>
> *iii) Whether the respondent defaulted in payment of such debt?*
>
> *iv) Whether the respondent after receipt of the demand notice, brought to the notice of the petitioner the pre-existence of a dispute?*
>
> *v) Whether the petition needs to be admitted?*

and had erroneously proceeded to conclude that the Section 9 application is not maintainable on account of pre-existing dispute.

17. We would be more concerned as regards to the finding recorded, on issue no. 1 & 4, which has been derived by the Learned Tribunal as to be the reason for rejecting the application under Section 9 of the Code. The Learned Counsel for the Appellant has argued that, in all international shipment contracts, invariably a clause is provided for settlement of disputes through an arbitration mode and therefore a clause for arbitration was provided in the present contracts between the parties, that mere existence of such clause in these agreements, will

not preclude a creditor's remedy under the Code and as long as there is a debt of more than Rs. 1 Lakh and there is a default and the threshold requirement is met, the Appellant is entitled to seek initiation of CIRP. He has contended that Learned NCLT wrongly took a view that since the settlement agreement of 01.09.2017 showed the existence of certain disputes with regards to the quality of the goods, the matter has to be settled through arbitration route and not through the provisions of the Code because the said dispute stood settled in form of an agreement to pay USD 74,342/- and it has been acknowledged by the Respondent from time to time, without disputing its quantum and payability.

18. The Appellant has further contended that, Learned NCLT has erred in holding that initiation of CIRP is for benefit of all creditors and not for the benefit of the Appellant alone as the dispute on hand is in personam and as per the ratio laid down by Hon'ble Apex Court in B002 Allen and Hamilton Inc. Vs. SBI Home Finance Limited & Ors (2011) 5 SCC 532, such disputes are to be settled through arbitration route as provided in the agreements and not through adjudication under the Code. He has submitted that Learned NCLT erred in holding that the Appellant was required to produce evidence that the Respondent owed payment to other creditors which is not envisaged under the Code.

19. The Respondent has submitted to contrary that he has given a notice of dispute through his reply to the demand notice, that he had agreed to pay the amount as per the settlement agreement and had countersigned the debit note in view of continuing business relations and that cannot be taken as admission of

liability, that he has raised the dispute in which the Appellant is liable to pay damages and substantiated the same by placing relevant documents which has to be addressed through arbitration and hence the Section 9 petition is not maintainable.

20. Learned Tribunal has taken the view in the impugned order that, since the notice under Section 8 of the Code, was somehow touching the question of quality of goods supplied and of a failure to honour the terms of the agreement, it is a pre-existing dispute which has to be addressed through the arbitral clause, provided in the agreements and the matter could not have been agitated under Section 9 of the Code. Learned Tribunal further held while deciding the issue no. 1 & 4, that the reply to the demand notice of 12.02.2018 has been given by the Respondent on 22.02.2018, that is, within the stipulated 10 days period and in the said reply, the Respondent has brought to the notice of the Appellant, the existence of the dispute concerning non-adherence to the terms of the contract / purchase agreement, as well as, subsequent shipment agreement of 16.12.2016, and the said fact establishes existence of a pre-existing dispute, which was subsisting prior to the issuance of the demand notice on 12.02.2018, and hence the Section 9 petition is not maintainable.

21. So far, the finding recorded on issue No. 2, 3 & 5 are concerned, we are of the view that, at this stage we need not have to go into it on merits, because it is not in dispute that the amount due to be paid was an operational debt, and further it is not in dispute that the amount mentioned in the notice has fallen due

to be paid, and that the said amount was in default. As far as the status of the Appellant is concerned, Learned NCLT has held that the Appellant is not an Operational Creditor because the Appellant has never supplied any goods nor services to the Respondent and therefore the amount claimed will not fall to be within the operational debt under the Code.

22. We proceed to deal with the issues raised by the Appellant while challenging the impugned order one by one. The finding which has been recorded by the Learned Tribunal in para-10 of the impugned order about the effect of the existence of an arbitral clause, taking it as to be creating a hurdle in invocation of the proceedings under Section 9 of the Code is an absolute misinterpretation of the settled law for the reasons extended hereafter. It is not in doubt that remedy under arbitration is a remedy, which has been settled between the parties on the basis of the unanimity of thought and expression given in the shape of a arbitration clause and that is exclusively a personal arrangement by consensus, made between the two contracting parties, which are acceptable to them, the invocation of which would only be subject to satisfying the conditions under the terms of the contract. Given the fact that, the existence of an arbitration clause, as already observed by us is a private legal remedy and is not statutorily prescribed under law to be mandatorily resorted too, any arrangement for resolving of a dispute by way of an arbitration clause which is a private legal remedy, will not deprive the Appellant to invoke a statutory remedy, which is otherwise reserved to the party, under the intention of law to be availed by person,

who seeks to recover the defaulted amount, which is due to be paid. The said principle has been laid down by the Principal Bench, in **Company Appeal (AT) (Ins) No. 802/2020 Hasan Shafiq Vs. CT Technologies**, where the aforesaid ratio has been dealt with the Para 19 of the Judgment, which is extracted here under:

> *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 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.*

23. Almost a similar view was taken by the Hon'ble Apex Court, while dealing with the identical issue as to whether a statutory remedy under I&B Code can be resorted to when a private remedy of an arbitration clause, as settled between the parties is already available and has been initiated. The aforesaid issue was settled by the Hon'ble Apex Court in the matters of **Indus Biotech Pvt Ltd**

Vs. Kotak India Venture (Offshore) Fund & Ors. as reported in 2021 Vol 6 SCC Page 436. The relevant Para 27 is extracted here under:

> ***27.*** *As noted, the issue which is posed for our consideration is arising in a petition filed under Section 7 of IB Code, before it is admitted and therefore not yet an action in rem. In such application, the course to be adopted by the adjudicating authority if an application under Section 8 of the 1996 Act is filed seeking reference to arbitration is what requires consideration. The position of law that the IB Code shall override all other laws as provided under Section 238 of 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.*

24. In the aforesaid case, arbitration clause had already been invoked and even then, Hon'ble Apex Court held that it is perfectly valid to admit Section 7 application even when arbitration route has been taken, provided debt and default are established. Hence the conclusion drawn by Learned NCLT that availability of arbitration clause in a dispute between the parties, would debar the Appellant from exercising his statutory rights as protected by law, is not acceptable to us, as the remedies available to the Appellant under the statute would still be a remedy available to the Appellant to be left open for the Appellant to be resorted to, irrespective of their private settlement rights as agreed between the parties for invocation of arbitration clause. We hold that Arbitration Clause under the contract will not supersede or override or create a cloud over a statutory rights bestowed by the Code upon the Appellant. Hence, this question is answered in favour of the Appellant.

25. The second question, that falls for consideration before us is as to whether the Appellant would be falling within the ambit of an Operational Creditor, as per the definition contained under Section 5 (20) of I&B Code for the purpose of invoking Section 9 of the Code. Section 5 (20) of I&B Code is extracted here under:

> (20) operational creditor means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred;

26. If we read the definition of Operational Creditor, on its simpliciter reading of the language of the Operational Creditor, it simply refers to a person to whom an Operational Debt, is owed, including persons to whom such debt has been legally assigned or transferred. Thus the basic element required to be satisfied to be classified as an Operational Creditor as per Section 5 (20) of the Code, is that the debt owed to him has to be in nature of an operational debt, which is a claim arising out of provision of goods, services, employment or govt dues. Learned Tribunal held the Appellant to be 'not an Operational Creditor' on the grounds that, he didn't provide any goods and services to the Corporate Debtor. However this is absolutely contrary to the facts because as per terms of the contract and the settlement agreement, it clearly stated that the parties were engaged in the transaction of supply of raw cotton, which amounts to provision of the goods, as per Section 5 (21) of the I&B Code and therefore the amount that fell due to be paid in the course of such transaction will have to assume the character of operational debt. If we look into the settlement agreement dated 01.09.2017, the contents of the said agreement clearly state that, the basis of the claim between the parties was on account of certain disputes in relation to the goods that were supplied. In that view of the matter, and in the light of the definition given under Section 5 (21) of the Operational Debt, the amount agreed

to be paid by the Respondent which arose of supply of the goods between the parties, will have to be treated as an Operational Debt and since it was due to be paid to the Appellant, he will have the status of an Operational Creditor, which would entitle him to invoke the proceedings under Section 9 of the I&B Code. The aforesaid principle has already been settled in the matters of **Consolidated Construction Consortium Ltd Vs. Hitro Energy Solutions Pvt Ltd.** reported in **2022 Vol 7 SCC Page 164.** The relevant finding as recorded in Para 52 of the said judgment, which is extracted here under:

> ***52.*** *Similarly, in the present case, the phrase "in respect of" in Section 5(21) has to be interpreted in a broad and purposive manner in order to include all those who provide or receive operational services from the corporate debtor, which ultimately lead to an operational debt. In the present case, the appellant clearly sought an operational service from the proprietary concern when it contracted with them for the supply of light fittings. Further, when the contract was terminated but the proprietary concern nonetheless encashed the cheque for advance payment, it gave rise to an operational debt in favour of the appellant, which now remains unpaid. Hence, the appellant is an operational creditor under Section 5(20) IBC.*

27. Thus on a simpliciter reading and considering the interplay of the definition of an Operational Creditor under Section 5 (20) and Operational Debt under Section 5 (21), as framed by the legislature, it clearly intended that when it use the language "claim in respect of" , it was extending the ambit of the

intentions expressed to define an Operational Creditor and the interpretation of the same cannot be restricted to be applied.

28. Now we proceed to deal with the finding that has been recorded by the Learned Tribunal with regards to the pre-existing dispute. Learned Tribunal had held that there was a pre-existing dispute because the same was intimated to the Appellant by the Respondent in his reply to the demand notice and that the communications between the parties did establish the existence of such a dispute regarding breach of purchase agreement and the subsequent claim of damages by the Respondent and as per the ratio of **Mobilox**, pre-existing dispute is established and therefore Section 9 petition is not maintainable. However the same **Mobilox** enjoins Learned Tribunal to ensure that "the dispute as claimed is not a patently feeble legal argument or an assertion of fact unsupported by evidence". In the instant case, the bundle of communications, which had taken place inter-se between the parties, prior to the issuance of demand notice on 12.02.2018, did refer the existence of certain claims inter-se between the parties, but as a matter of fact, there is nothing brought on record by the Respondent to show that, actual dispute was ever agitated before any other adjudicatory platform for deciding it. Further, the notice of the said alleged dispute was given for the first time by the Respondent in his reply to the demand notice, apart from a stray email he had produced before Learned NCLT and therefore as per the judgement of this Appellate Tribunal in the matter of Raakesh B Kulwal Vs. Param Dairy Limited in CA (AT) (Ins) No. 1013/2025 dated 30.06.2026, dispute raised after serving of

demand notice will not qualify to be a pre-existing dispute. Given the fact that there was no dispute raised by the Respondent or even by the Appellant, which required any determination by a Court or a Tribunal or an arbitral forum, the dispute as agitated in the demand notice under Section 8 cannot be treated as a pre-existing dispute and consequentially filing of Section 9 application cannot be said to be bad in law on the ground of a pre-existing dispute. Thus the finding recorded on the same being perverse is un-acceptable by us. In that view of the matter, the impugned order is quashed, and the Company Appeal is allowed.

The Learned Tribunal is directed to admit the application under Section 9 of I&B Code and to proceed further in accordance with law, after the imposition of moratorium.

[Justice Sharad Kumar Sharma]
Member (Judicial)

[Jatindranath Swain]
Member (Technical)

27/08/2026

YS/MS/AK