

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 707 of 2020

[Arising out of order dated 05.05.2020 in CP/1456/IB/2018 passed by
National Company Law Tribunal, Division Bench, Chennai]

IN THE MATTER OF:

Solenis Chemicals India Pvt. Ltd.

CIN No. U24240PN2014PTC156471

Registered Address

5A, 5th Floor, Vasundhara Space,
Nagras Road S. No. 167/1 and 168/1,
Aundh Pune, Pune
Maharashtra-411007.

.....Appellant
(Operational Creditor)

Versus

Arjun Pulp and Paper (India) Private Limited

CIN No. U21020TN2007PTC064172

Registered Address

Survey No. 23, 101, Thandalam Group
Velanthangal Village, Irungattukotai
Sriperumbudur Kancheepuram
Tamil nadu-602105

.....Respondent
(Corporate Debtor)

Present: -

For Appellant: Mr. Kamal Ahuja and Ms. Sanchita Bhardwaj,
Advocates.

For Respondent: Mr. Rohan Rajasekaran and Mr. Kartik Malhotra,
Advocates.

J U D G M E N T

Justice Anant Bijay Singh;

This appeal has been preferred by ‘Solenis Chemicals India Pvt. Ltd.’ Appellant /Operational Creditor, against the impugned order dated 05.05.2020 in CP/1456/IB/2018 passed by Adjudicating Authority, National Company Law Tribunal, Division Bench, Chennai whereby and where under, the Adjudicating Authority has dismissed the Application under Section 9 of the Insolvency and Bankruptcy Code, 2016 **(in short IBC)**.

2. The facts giving rise to the instant Appeal is as under:

i) The Appellant / Operational Creditor –‘Solenis Chemicals India Pvt. Ltd.’ has supplied chemicals and other materials to fulfil their requirements on day to day basis to the Respondent / Corporate Debtor-‘ Arjun Pulp and Paper (India) Private Limited’ under which various invoices Invoice no. 0139 dated 12-05-2015 for Rs. 1,45,931/-, Invoice no. 0326 dated 09-06-2015 for Rs. 4,18,837.50/-, invoice no. 0401 dated 24.06.2015 for Rs. 1514700.00/-, invoice No. 0671 dated 13.08.2015 for Rs. 1220687.55/-, invoice no. 0951 dated 29.09.2015 for Rs. 1342024.20/-, invoice no. 0824/16-17 dated 01.08.2016 for Rs. 186,640.88/- invoice no. 1098/16-17 dated 20.09.2016 for Rs. 170059.50/- invoice no. 1099/16-17 dated 20.08.2016 for Rs. 395302.28/- invoice no. 1233/16-17 dated 30.09.2016 for Rs. 288068.40/- invoice no. 1268/16-17 dated 07.10.2016 for Rs. 192045.60/- invoice no. 1601/16-17 dated 23.11.2016 for Rs. 480114.00/- were raised as per the terms and conditions contained in the said invoices.

- ii) The Operational Creditor has claimed an amount of Rs. 63,54,412/- which is due and payable by Corporate Debtor along with interest at 24% per annum from the date of acknowledgment i.e. 07.11.2017 till the date of realization.
- iii) The Corporate Debtor sent a Legal Notice (Notice of Dispute) on 01.08.2018 after that it was assured that the outstanding amount will be paid within a month but no outstanding debt was paid.
- iv) The Appellant / Operational Creditor raised demand notice under Section 8 of the IBC again on 05.09.2018 which was delivered on 15.09.2018.
- v) The Respondent / Corporate Debtor sent a reply on 17.09.2018 to the aforesaid demand notice wherein at paragraph 3 categorically mentioned that the material worth Rs. 17,12,649/- were returned vide Tax Invoice No. RM-RTN-001 dated 06.02.2017, owing to the quality issue and the same were duly received and acknowledged by the Operational Creditor, so dispute was raised.

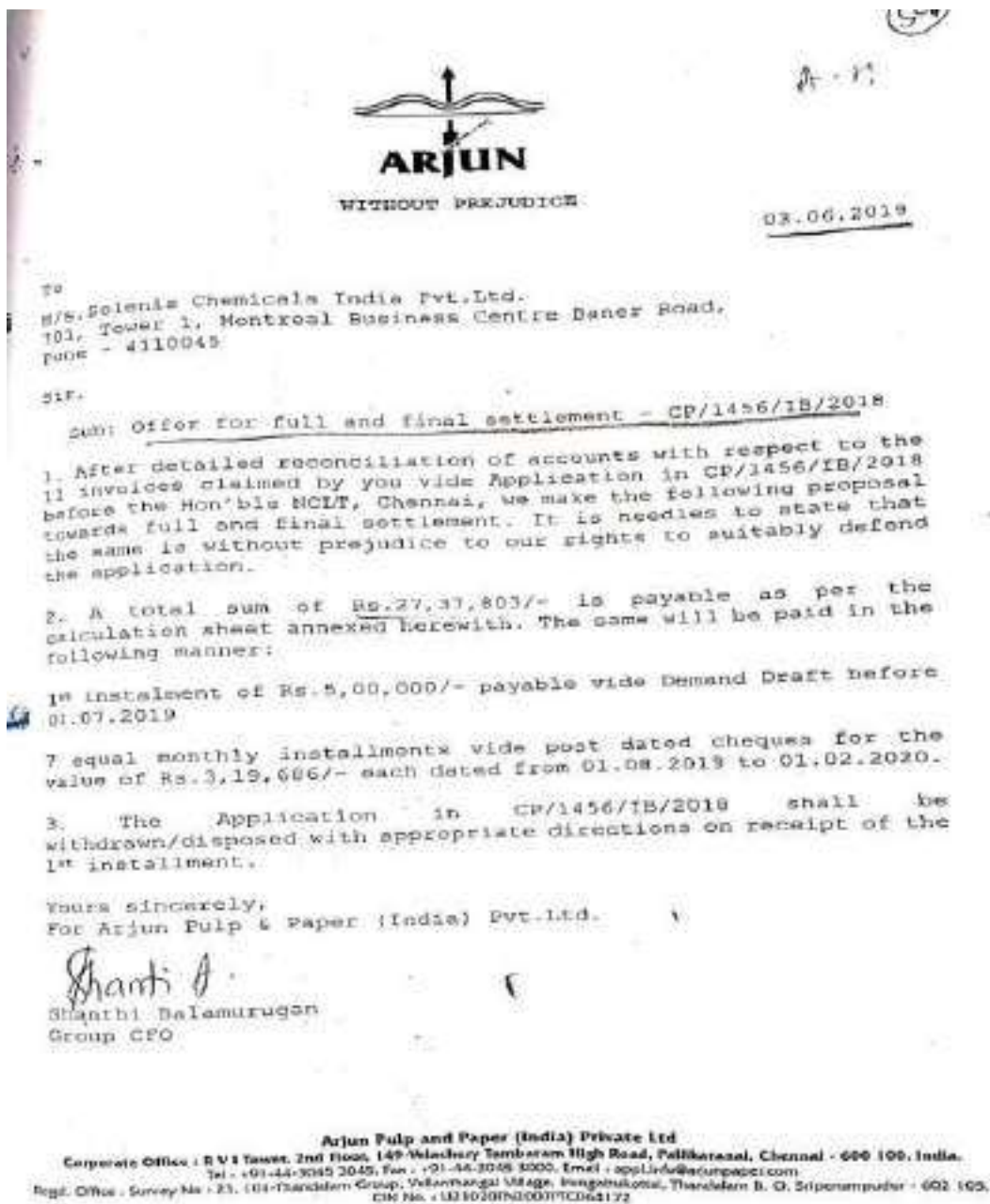
3. The Adjudicating Authority after hearing both the parties passed the impugned order which is at page 53 to 66 of the Appeal Paper Book wherein para 18 is as under:

“Thus, from the evidence placed on records, we are of the considered view there exists a ‘dispute’ between the parties before the issuance of the Demand Notice itself and the contentions raised by Corporate Debtor is a plausible contention which requires further investigation.”

Submissions on behalf of the Appellant

4. The Learned Counsel for the Appellant / Operational Creditor during the course of argument and his Written Submissions have submitted that the

amounts admitted by the Respondent / Corporate Debtor firstly before the Hon'ble NCLT, Chennai Bench, vide settlement offer dated 03.06.2019 for an amount of Rs. 27,37,803/- at page 502 to 554 of the Appeal Paper Book is the letter dated 03.06.2019 written by Shanthi Balamurugan, Group CFO address to M/s Solenis Chemicals India Pvt. Ltd.- Appellant / Operational Creditor caption 'offer for full and final settlement – CP/1456/IB/2018' which is as under:



5. Learned Counsel for the Appellant also relied on the report of the Official Liquidator (at page 684 to 693 of the Appeal Paper Book Vol.-II) in CP/1456/IB/2018 in a proceeding before the NCLT, Chennai Bench between the 'Appellant- M/s Solenis Chemicals India Pvt. Ltd. V/s M/s Arjun Pulp & Paper Private Limited- Respondent'.

6. In this proceeding NCLT, Chennai Bench on 12-06-2019 directed the Official Liquidator to appoint a Chartered Accountant to reconcile the accounts for 11 Invoices as stated in page no 14 of the typed set filed along with the petition.

7. In compliance with the aforesaid order, the Official Liquidator appointed M/s Ravi & Raghu, Chartered Accountants, one of the firm of Chartered Accountants from the panel maintained by his office to reconcile the said 11 Invoices.

8. In the report of Official Liquidator where it is mentioned that at page 686 of the Appeal Paper Book Vol.-II reads as under:

“While going through the purchase order copies submitted by the Corporate Debtor, there is a clause which says that 100% advance payment along with material in respect of invoices Nos:1098/16-17, 1233/16-17, 1268/16-17 and 1601/16-17 and 50% advance along with materials in respect of invoice Nos:824/16-17 and 1099/16-17 and the corresponding transactions in the bank statement were also found. However, the Corporate Debtor could not provide any other material evidence/confirmation from the Operational Creditor that the said payment of Rs. 17,30,000/- pertains to the above said invoices only when there was old outstanding dues pending for payment to the operational

creditor. Further the claim of the Corporate Debtor that Rs. 10,00,000/- were also paid against remaining invoices were not supported by any invoices.

In the absence of concrete evidence from the Corporate Debtor, the appropriation of payment of Rs. 27,30,000/- to Operational Creditor needs to be decided on legal metis.

Dispute with regard to Debit note raised by the Corporate Debtor against the Operational Creditor.

The Corporate Debtor submitted a Debit Note for Rs. 8,20,283/- dated 17.07.2017 raised on Operational Creditor and claimed that the sum of Rs. 4,98,016/- out of the debit note related to the 11 invoices and the same has been adjusted against the dues payable.”

9. Learned Counsel for the Appellant further submitted that in view of the summary proceeding before the NCLT, Chennai Bench ought to have considered the self-admission of Respondent and admit the Application of the Operational Creditor in view of Judgment of the Hon’ble Supreme Court of India reported in **2018 (1) 407 ‘M/s Innoventive Industries Ltd. V. ICICI Bank’** wherein under para 27 it observed as under:

“27. For the meaning of “debt”, we have to go to Section 3(11), which in turn tells us that a debt means a liability of obligation in respect of a “claim” and for the meaning of “claim”, we have to go back to Section 3(6) which defines “claim” to mean a right to payment even if it is disputed. The Code gets triggered the moment default is of rupees one lakh or more.”

10. It is further submitted that the Adjudicating Authority failed to consider this aspect of the Judgment of the Hon’ble Supreme Court in correct

prospective manner and dismissed the Application under Section 9 of the IBC filed by the Appellant / Operational Creditor.

11. It was further submitted that the Account confirmations by the Respondent / Corporate Debtor was done much prior to issuance of demand notice which is records as follows:

“i. The confirmation letter of respondent dated 25.10.2017 along with ledgers of appellant, executed much before the issue of demand notice, are filed as annexure S with Application as under Section 9 are annexed at pages 149 to 157 of the Appeal Paper Book.

ii) The Respondent / Corporate Debtor confirmed debt vide email dated 20-11-2017 for Rs. 55.51 lacs, which was presented before Hon’ble NCLT, Chennai Bench, in Application under Section 9 of the IBC annexed as annexure U at page 158 to 163 of the Appeal Paper Book.

iii) The Group CFO also confirmed debt for Rs. 63.37 vide email dated 16-01-2018, annexed at page No. 351 of the Appeal Paper Book.

iv) As per the ledger / account confirmation as communicated in email dated 11.01.2018 by the Appellant, we have shown 11 invoices as outstanding and the same running ledger was never denied and disputed anywhere in the pleadings. The Ledger was filed as reply to report of Ld. Official Liquidator and is annexed at page no. 356 to 362 of the Appeal Paper Book.”

The above mentioned account confirmations, clearly establishes the debt and the default made by the Corporate Debtor / Respondent.

12. It is further submitted that in view of the judgment of Hon’ble Supreme Court of India reported in **2018 (1) SCC 353 ‘Mobilox Innovations Private Ltd. Vs Kirusa Software private Ltd.’**

“What is important is that the existence of the dispute and/or the suit or arbitration proceeding must be pre-existing – i.e. it must exist before the receipt of the demand notice or invoice, as the case may be.”

33. xxx.....Mere a dispute giving a colour of genuine dispute or illusory, raised for the first time while replying to the notice under Section 8 cannot be a tool to reject an application under Section 9 if the operational creditor otherwise satisfies the adjudicating authority that there is a debt and there is a default on the part of the corporate debtor.”

13. It is further submitted that in this case there is no pre-existing dispute before issuance of demand notice between the parties, so best on this submission it was submitted that the Ld. Adjudicating Authority has misdirected both the fact and law therefore the impugned order cannot be sustained in the eye of law so, the impugned order fit to be set aside and Appeal be allowed.

Submissions on behalf of the Respondent

14. The Learned Counsel for the Respondent / Corporate Debtor during the course of argument and his Written Submissions have submitted that the Ld. Adjudicating Authority has rightly dismissed the Application under Section 9 of the IBC filed by the Appellant holding that there is pre-existing dispute prior to issuance of Demand Notice.

15. It is further submitted that the reply sent by the Respondent at page 164 of the Appeal Paper Book where it is mentioned that the dispute prior to issuance of Demand Notice, relevant Scan Pages are as under:

ROHAN RAJASEKARAN & VAISHALI. R
Advocate

By SPAD

17.09.2018

To
M/s. Solenis Chemicals India Private Limited
Office No.5A, 5th Floor, Vasundhara Space,
Sagaras Road, S.No.167/1 and 168/1,
Aundh, Pune - 411007

Sir,

Sub: NOTICE OF DISPUTE/REPLY TO YOUR NOTICE DATED 05.09.2018

Ref: 1. Notice of dispute dated 01.08.2018;
2. Your notice dated 05.09.2018.

1. Our clients, M/s. Arjun Pulp and Paper (India) Pvt.Ltd. having Registered office at Survey No.23, 101, Thandalem Group Valanthangal Village, Irungattukotai, Sriperumbudur, Rancheepuram - 602105 have placed in our hands your demand notice styled to be issued under Rule 5 of the Insolvency and Bankruptcy Code (Application to Adjudicating Authority) Rules, 2016 dated 05.09.2018 and received on 15.09.2018, with suitable instructions to reply as under.

2. That the several averments and allegations contained in your notice are denied as false, frivolous and devoid of merit. You had issued a similar demand notice dated 13.07.2018 invoking the provisions of the Insolvency and Bankruptcy Code, 2016. In reply to the same, we had put you on notice of the existence of a dispute vide notice dated 01.08.2018. Conceding to the said reply, you had rightly opted not to pursue the matter further and no application was ever filed before the Hon'ble NCLT pursuant to your notice dated 13.07.2018. After the expiry of two months, you have once again issued the



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Present notice under reply seeking to initiate corporate insolvency resolution process against our client for the same alleged debt. The notice under reply is neither maintainable in law or fact owing to the reason that when you had conceded to the previous reply and acceded to the pendency of a dispute, you are estopped from initiating proceedings claiming to arise from the same cause of action.

3. That a notice of dispute dated 01.08.2018 was issued by us, on behalf of our clients and the same was duly served on you much prior to the issuance of the notice under reply. In light of the same and on relying on the numerous precedents on the issue, it is stated that a reply to a notice prior to Section 8(1) notice disputing the debt, would constitute a valid 'existence of dispute' as per Sub section (2) (a) of Section 8 of the Insolvency and Bankruptcy Code, 2016. The notice under reply is thus unsustainable in law.

4. That vide notice of dispute dated 01.08.2018, several bonafide disputes were raised, including but not exclusive to the fact that the various payments that were made by our clients had not been given credit to, and that if the same were to be given due credit, no debt as alleged would arise. The following is an extract of the operative portion of the notice of dispute dated 01.08.2018

QUOTE:



At the outset it is stated that your claim is devoid of merit and admittedly barred by limitation in so far as several invoices mentioned

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in your notice are time barred and unenforceable in the eye of law. Further that, your demand notice suffers from suppressio veri expressio falsi since essential material facts which bring to light the pendency of pre-existent disputes have been concealed. Hence, we put you on notice of the existence of a dispute.

3. That the present notice and claim under reply have been issued without any regard for the facts since none of the amounts paid by our client, nor the debit notes issued have been given credit to. Notwithstanding the same, our client had on several occasions raised disputes regarding the quality of goods supplied. Materials worth Rs.17,12,647/- were returned by our client vide Tax Inv.No.:RM-RTN-001 dated 06.02.2017, owing to the quality issue and the same were duly received and acknowledged by you. Further, debit notes dated 30.10.2015 & 17.07.2016 for amounts of Rs.9,945/- & Rs.8,20,233/- respectively were raised and none of the above have not been given credit to in calculation of the alleged claim amount.

4. That it is apparent from the concealment of the above disputes that you have attempted to illegally extort moneys from our client and that your conduct in attempting to unjustly enrich yourself reeks of fraud and malafides. Hence, our clients reserve their rights to initiate



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appropriate action against you either under Section 65 of the I&B Code, 2016 or under any other applicable law for the time being in force for the malicious and fraudulent initiation of proceedings against our client.

5. That the following tabulation illustrates the various payments and deductions made, materials returned and debit notes that have been issued to you as against the invoices:

Date	Amount (Rs)
19/09/2017	500,000
26/10/2017	500,000
19/09/2017	337,395
28/09/2016	480,000
22/09/2016	450,000
22/09/2016	30,000
19/09/2017	81,281
26/10/2017	473,419
26/07/2016	200,000
12/09/2016	170,000
17/09/2016	400,060
07/07/2017	820,233
27/08/2015	26,581
06/02/2017	1,712,649
31/10/2015	9,945



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16. It is further submitted that the Ld. Adjudicating authority taken note of the report by Official Liquidator, High Court of Madras dated 16.08.2019 at page 112 of the Reply after appointing an independent Chartered Accountant firm for reconciliation of accounts have dealt with dispute between the parties and have mentioned about the pre-existing dispute between the parties.

17. It is further submitted that while referring to page 219 of the Reply submitted that representatives of the Appellant namely, Mr. Michael Motcham (Area Manager) & Mr. Sunil had visited the factory (at Tirunelveli) of the Respondent and had jointly prepared a debit note for a sum of Rs. 8,20,833/- on account of price variation and had issued an email on the same day. However, the said debit note is currently disputed by the Appellant.

18. It is further submitted that the Ld. Adjudicating Authority while passing the impugned order recorded that the Application that precise documents were not filed by the Appellant to ascertain default. The said finding is based on the fact that the Appellant had unscrupulously filed pleadings and documents in parts and in utter disregard to Rule 55 of the NCLT Rules, 2016 and had altered its case at a belated stage.

19. It is further submitted that the Affidavit dated 16.05.2019 (page 288 of Appeal Paper Book Vol.-I) filed before the Ld. AA, the Appellant had altered its claim in so far as to include an alleged debt due to an independent entity, M/s Connel Bros. Company (India) Pvt. Ltd. ("Connel") that is stated to have been taken over by the Appellant vide an agreement. Neither in the statutory notice, nor in the Application filed before the Ld. Adjudicating Authority had the existence of the said agreement been disclosed or had the entity Connel

ever been mentioned. The addition of another claim was recorder by the Ld. Adjudicating Authority in its order dated 25.04.2019 (page 558 of Appeal Paper Book Vol.-II). The said alteration of the claim at such a belated stage would render the statutory notice and petition defective since no opportunity was afforded to the Respondent to suitably reply to the same.

20. It is further submitted that the Ld. Adjudicating Authority has rightly passed the impugned order and rightly recorded the finding there exists a dispute between the parties therefore, the Application filed under Section 9 of the IBC is dismissed. The order of the Ld. Adjudicating Authority is confirmed.

FINDING

21. We have perused the records of the case, considered the arguments advanced on behalf of the parties and gone through the written submissions filed on behalf of the parties.

- The Letter dated 17.09.2018 at page 164 of the Appeal Paper Book sent by Respondent through Ld. Advocate (supra) clearly shows that the dispute prior to issuance of Demand Notice.
- The representatives, Mr. Micheal & Mr. Sunil K. Deepati had visited the Respondent office on 17.07.2018 and the Respondent was informed by them that the Appellant is ready to resumption of further supply on 90 days L.C. but this fact has been concealed in the notice issuance of under Section 8 of the IBC.
- The Adjudicating Authority has also taken note of the fact that the claim of an independent entity “M/s Connel Bros. Company (India) Pvt. Ltd. (“Connel”) was also included by the Appellant in their claim. So

taking note of all these facts, we are of the considered view that there is pre-existing dispute between the parties much prior to issuance of Demand Notice under Section 8 of the IBC and there is no illegality in the order passed by the Ld. Adjudicating Authority.

- The impugned order dated 05.05.2020 in CP/1456/IB/2018 passed by Adjudicating Authority, National Company Law Tribunal, Division Bench, Chennai is hereby dismissed.

ORDER

22. Having regard to the foregoing discussion, we find no merit in this Appeal. The Appellant has failed to demonstrate that the impugned order suffers from any legal infirmity. The Appeal is dismissed. No order as to costs.

**[Justice Anant Bijay Singh]
Member (Judicial)**

**[Ms. Shreesha Merla]
Member (Technical)**

NEW DELHI

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16th March, 2021.