

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI****Company Appeal (AT) (Insolvency) No. 97 of 2017****IN THE MATTER OF:****Achenbach Buschhutzen GmbH & Co.****...Appellant****Vs****Arcotech Limited****...Respondent****Present:****For Appellant:****Mr. Vivek Sibal, Mr. Yash Patel, Ms. Pooja M. Saigal, Ms. Khyati Sharma and Mr. Rahul Sharma, Advocates.****For Respondent:****Mr. Arun Kathpalia, Senior Advocate with Ms. Sonia Dube, Mr. S. Chakraborty, Ms. Harshita Verma, Mr. Ramesh Singh and Mr. A.T. Patra, Advocates.****J U D G M E N T****SUDHANSU JYOTI MUKHOPADHAYA, J.**

The Appellant preferred application under Section 9 of the Insolvency and Bankruptcy Code, 2016 ('I&B Code' for short) for initiation of the 'Corporate Insolvency Resolution Process' against the Respondent- 'Arcotech Limited'- ('Corporate Debtor'). The Adjudicating Authority (National Company Law Tribunal), Chandigarh Bench, Chandigarh, dismissed the appeal there being a notice of dispute raised by the Respondent and on account of defect as detailed in the impugned judgment.

2. The matter was initially heard by this Appellate Tribunal and by order dated 31<sup>st</sup> July, 2017, this Appellate Tribunal dismissed the appeal on some other ground. This Appellate Tribunal held that foreign Bank of which 'record of default' has been produced is not recognised in terms of provisions of the 'I&B Code' and the Bank having no office in India nor any account with any of the Bank or 'Financial Institution' do not come within the meaning of 'Financial Institution'. Such judgment was delivered on the basis of a decision of this Appellate Tribunal in ***“Macquarie Bank Limited Vs. Uttam Galva Metallics Limited- Company Appeal (AT) (Insolvency) No. 96 of 2017”*** decided on 17<sup>th</sup> July, 2017.

3. The aforesaid judgment in ***“Macquarie Bank Limited (Supra)”*** was reversed by the Hon'ble Supreme Court on the basis of decision in ***“Macquarie Bank Ltd. vs. Shilpi Cable Technologies Ltd.”*** reported in AIR 2018 SC 498.

4. The Appellant also challenged the earlier judgment of this Appellate Tribunal dated 31<sup>st</sup> July, 2017 before the Hon'ble Supreme Court in Civil Appeal No. 23504 of 2017. The Hon'ble Supreme Court by its judgment dated 16<sup>th</sup> May, 2018, set aside the order dated 31<sup>st</sup> July, 2017, in view of the findings in ***“Macquarie Bank Ltd. vs. Shilpi Cable Technologies Ltd.”*** and remitted the matter to this Appellate Tribunal for deciding the appeal on merit.

5. Learned counsel appearing on behalf of the Appellant submitted that there was no pre-existence of dispute and, therefore, the Adjudicating Authority wrongly rejected application preferred by the Appellant under Section 9 of the 'I&B Code'.

6. It was submitted that by reply dated 28<sup>th</sup> March, 2017, the 'Corporate Debtor' for the first time raised dispute relating to delivery of goods in question when admittedly the goods have been delivered to the 'Corporate Debtor' one year ago which the 'Corporate Debtor' received without any demur or protest.

7. On the other hand, according to learned counsel for the 'Corporate Debtor', there is pre-existence of dispute as evident from the enclosures attached with the record.

8. From the record, we find that the parties reached agreement with regard to supply of hot mill with electrical panel and switch cabinets, part of which were dispatched on 27<sup>th</sup> June, 2016. In reply to Appellant claims, much prior to promulgation of the 'I&B Code', one Mr. Amit Sharma on behalf of the 'Corporate Debtor' by e-mail dated 27<sup>th</sup> June, 2016 thereby asked the Appellant not to dispatch the goods for the reasons mentioned therein, which reads as follows:

**Amit Sharma : Arcotech**

**From:** Amit Sharma : Arcotech <amsharma@arcotech.in>  
**Sent:** Monday, June 27, 2016 11:58 AM  
**To:** 'Medina, Gerardo'  
**Cc:** 'Barten, André'; 'Wilbers, Rolf'; 'Rigau, Juan'; 'Hey, Jörg-Michael'; 'aks@arcotech.in'; 'rs@arcotech.in'; 'Axel.Barten@achenbach.de'; himanshu@hi-techi.com  
**Subject:** RE: Outstanding payment: sale and purchase agreement signed on 23.12.2014

Dear Mr. Medina,

We are surprised to receive your trailing email wherein you have mentioned that electrical panel and switch cabinets are being dispatched on Monday, 27<sup>th</sup> June.

At the outset, we wish to reaffirm our commitment to purchase the hot mill and to make the payment for the same. You would appreciate to note that both Arcotech and Achenbach had been working on this project since last 3 years on mutual collaboration basis but the project is getting delayed due to one reason or the other. Although we have received in-principal approval from BKB Bank however, some of our apprehensions were yet to be resolved. Accordingly, we have not been able to discuss and put on record our plans for this project including investment and terms and conditions of the financial arrangements with our bankers as per our agreement with them. Further, you had provided the advance payment guarantee from Hermes instead of a commercial bank which is not acceptable as per RBI regulations. We had returned the original guarantee to you with a request to furnish the one from commercial bank. We had apprised Mr. Wilbers about all these issues and therefore, we had asked for another 2 months' extension to make the payment for hot mill.

Nonetheless, if there were any issues at your end to accede to our request, the same could have been informed to us. But any such hasty decision to dispatch of electrical panels and switch cabinets would immediately result into unnecessary and avoidable expense of more than Euro 1 Mn on account of custom duty and clearance charges. This action may also jeopardize the entire project.

In view of the above, we request you not to dispatch electrical panels and switch cabinets at this point in time. We shall make the payment towards hot mill within next two months upon receipt of guarantee from commercial bank.

Awaiting your favourable response at your earliest.

Regards

Amit Sharma | Chief Financial Officer



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 Email-Id ✉: [amsharma@arcotech.in](mailto:amsharma@arcotech.in) | Website 🌐: [www.arcotech.in](http://www.arcotech.in)

**From:** Medina, Gerardo [<mailto:G.Medina@achenbach.de>]  
**Sent:** Thursday, June 23, 2016 7:39 PM  
**To:** [amsharma@arcotech.in](mailto:amsharma@arcotech.in)  
**Cc:** Barten, André; Wilbers, Rolf; Rigau, Juan; Hey, Jörg-Michael; [aks@arcotech.in](mailto:aks@arcotech.in); [rs@arcotech.in](mailto:rs@arcotech.in)  
**Subject:** Outstanding payment: sale and purchase agreement signed on 23.12.2014

9. From the aforesaid e-mail dated 27<sup>th</sup> June, 2016, it is clear that the 'Corporate Debtor' intimated the Appellant that the Appellant has provided the 'advance payment guarantee from Hermes' instead of a 'commercial Bank' which is not acceptable as per the Reserve Bank of India

Regulations. In this background, the 'Corporate Debtor' returned the original guarantee to the Appellant- ('Operational Creditor') with a request to furnish the guarantee from a commercial Bank. The Appellant was informed that the 'Corporate Debtor' has apprised Mr. Wilbers about all these issues and, therefore, the 'Corporate Debtor' was asked for two months' extension to make the payment for hot mill. It was intimated that if there were any issues at end of the Appellant to accede to the demand of the 'Corporate Debtor', the same could have been informed to the 'Corporate Debtor'. It was specifically mentioned that hasty decision to dispatch off electrical panels and switch cabinets would result into unnecessary and avoidable expense of more than 1 Mn Euro on account of custom duty, and clearance charges which may jeopardize the entire project and thereby, the 'Corporate Debtor' requested the Appellant- ('Operational Creditor') not to dispatch electrical panels and switch cabinets.

10. The supply was required to be made pursuant to an agreement dated 23<sup>rd</sup> December, 2014, which was subsequently superseded by the parties by another 'supply contract agreement' entered on 9<sup>th</sup> November, 2015 with regard to entire contract. In Article 40 (Miscellaneous), the parties agreed as follows:

**"Article 40**

**MISCELLANEOUS**

xxx

xxx

xxx

### **3) Entire Contract**

*The Contract constitutes the entire Contract between the Parties hereto with respect to the material dealt with herein and supersedes any prior promises, agreements, representations, undertakings, implications or exchanged terms of delivery etc. whether made orally or in writing Contract between the Parties hereto in relation to such matters.”*

11. From the subsequent contract, we find that the earlier contract was superseded both with respect to the material dealt with and prior promises, agreements, representations, undertakings made orally or in writing contract.

12. The Appellant referred to contract dated 23<sup>rd</sup> December, 2014 in its invoices issued from time to time in the application under Section 9 (Form-5). Some invoices relate to purchase orders dated 13<sup>th</sup> May, 2014.

13. From the record we find that the Appellant issued a statutory demand notice for payment of Euro 4,472,638.99 under Sections 433 and 434 of the Companies Act, 1956.

14. Another notice was issued by the Appellant through lawyer on 5<sup>th</sup> May, 2017 for failure to adhere to the payment obligations arising under the ‘supply contract’ dated 9<sup>th</sup> November, 2015 and amended agreement dated 27<sup>th</sup> September, 2016.

15. There is another legal notice given by the Appellant on 12<sup>th</sup> April, 2017 which relates to 'supply contract' dated 9<sup>th</sup> November, 2015 and amended agreement dated 27<sup>th</sup> September, 2016.

16. By notice dated 5<sup>th</sup> May, 2017, the Appellant invoked Article 36 of the 'Supply Contract' and intimated the 'Corporate Debtor' that they will make every effort to resolve amicably such dispute or difference by mutual consultation within a period of 60 days from the date of the notice.

17. However, we find that the demand notice under Section 8(1) dated 7<sup>th</sup> February, 2017 was issued earlier, referring to the invoices issued on 13<sup>th</sup> April, 2014, 2<sup>nd</sup> June, 2015, 30<sup>th</sup> September, 2015 and 23<sup>rd</sup> June, 2016, relating to which two months' time was granted by subsequent notice dated 5<sup>th</sup> May, 2017. The application under Section 9 was filed on 31<sup>st</sup> March, 2017 i.e. much prior to the period of 60 days' time granted by notice dated on 5<sup>th</sup> May, 2017.

18. From the aforesaid fact, we find that the Respondent since 27<sup>th</sup> June, 2016 raised dispute about ineligibility of banker whose bank guarantee was given by the Appellant and which was not in accordance with the agreement. There is nothing on the record that the Appellant, thereafter, took correctional measure and communicated it to the 'Corporate Debtor'.

19. From the aforesaid facts, it appears that there is existence of dispute since 2016 and the Appellant also granted time to the Respondent 60 days by their notice dated 5<sup>th</sup> May, 2017, but application under Section 9 was

filed prior to the said period. For the reason aforesaid, no interference is called for against the impugned order. The appeal is accordingly dismissed.

No costs.

[Justice S.J. Mukhopadhaya]  
Chairperson

[Justice Bansi Lal Bhat]  
Member (Judicial)

NEW DELHI

30<sup>th</sup> November, 2018

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