

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

(Arising out of Order dated (03.07.2019) passed by the Adjudicating Authority (National Company Law Tribunal) New Delhi Bench in CP (IB) No.293 (ND)/2018)

Company Appeal (AT) (Insolvency) No.776 of 2019

IN THE MATTER OF:

SEITZ GmbH

Registered Office at:
Gutenbergstr 1-3
65830 Kriftel, Germany

...Appellant

Vs.

Simran Technologies Pvt. Ltd.

Registered Office at:
House No. 63, Ground floor
New Manglapuri
New Delhi South West
Delhi -110030, India

...Respondent

Present:

**For the Appellant : Mr. Swapnil Gupta and Ms. Shivambika Sinha,
Advocates.**

For the Respondent : None

J U D G M E N T

(26th November, 2019)

Dr. Ashok Kumar Mishra, Technical Member

The Appellant SEITZ GmbH has filed an appeal under Section 61(1) of the ‘Insolvency and Bankruptcy Code, 2016 (for short, ‘the I&B Code’) for setting aside the impugned order 03.07.2019 passed by the Ld. Adjudicating Authority in CP(IB) No.293 (ND)/2018 by which Appellant’s Application was dismissed.

2. The Appellant/Operational Creditor pleaded that the Respondent/Corporate Debtor has been regularly placing orders for surface acting industrial detergents for the dry-cleaning industry of various specifications with the Appellant. The Appellant

supplied which were accepted by the Respondent without any demur or protest. However, the Respondent failed to make payments towards the invoices raised by the Appellant between the period July 2014 to November, 2017 an amount of EUR 229, 020.48 (Euro Two Hundred and Twenty Nine Thousand Twenty and Forty Eight Cents) i.e INR 1,83,69,549.48 (INR One Crore, Eighty Three lakhs Sixty Nine Thousand Five hundred and Forty Nine Rupees and Forty eight Paisa), remains due and payable by the Respondent for supply of goods by the Appellant. Even the Respondent/Corporate Debtor has not released the payments in response to Demand Notice dated 31.01.2018 and thereby is in default of the operational debt. The Respondent has not raised any objection prior to receipt of the Demand Notice in regard to the quality, quantity or price of the goods.

3. The Respondent/Corporate Debtor i.e Simran Technologies Pvt. Ltd has filed reply through Mr.Sandeep Sood, Director of the alleged Corporate Debtor who is duly authorized vide Board Resolution dated 08.03.2018. The Operational Creditor and the Corporate Debtor has entered into a Confidentiality Agreement dated 20.03.2012 under which Seitz GmbH agreed to disclose all data, material, products, technology, computer programs, specifications, manuals, business plans, software, marketing plans, financial and product information to Corporate Debtor. Confidentiality Agreement dated 20.03.2012 was done in order to allow and enable Simtech to manufacture and market the sale of chemical products for dry cleaning, industrial and commercial laundry etc. Most important, this Confidentiality Agreement was in consideration of a relation between Simtech and Seitz GmbH was already in the business of manufacture and sale of chemical products for dry cleaning, industrial and commercial laundry etc., and had a large customer base in India and further this agreement allowed Seitz GmbH to enter the India market to capture and cater to the large customer base of Simtech. That Confidentiality

Agreement dated 20.03.2012 was in consideration of a relationship between Simtech and Seitz GmbH as Simtech was already in the business as stated above and thus had a large customer base in India which Seitz GmbH wanted to use its business gains and expansion of its footprints India. That keeping with the spirit and essence of the abovementioned Confidentiality Agreement dated 20.03.2012, and the understanding arrived between the parties, Seitz GmbH vide Board Resolution dated 02.08.2012 approved the formation of Seitz India. Resultantly, the understanding and the relationship between Appellant and Respondent as apparent from the Confidentiality Agreement dated 20.03.2012 and the Board Resolution dated 02.08.2012 led to the incorporation of Seitz India Pvt. Ltd., (hereinafter “Seitz India”). And thus, Seitz India was incorporated with a 50% equal shareholding of Mr.Sandeep Sood and Mr.Alexander Seitz vide shareholders agreement dated 28.03.2013. It is important to state here that Seitz India is nothing but a partnership between Mr.Sandeep Sood and Mr.Alexander Seitz. For the purpose of clarity, it is important to take note of the parties to the dispute. Seitz GmbH is incorporated under the laws of Germany and its shareholders/partners are Mr.Alexander Seitz and Alexander Runge. Simtech is a Company incorporated under the Companies Act, 1956 and Mr.Sandeep Sood is the Director and shareholder of Simtech. Mr. Sandeep Sood is also the proprietor of Lotus Imports. Mr. Sandeep Sood and Mr.Alexander Seitz are also the directors of Seitz India. That in order to grow and increase the business, assets and goodwill of Seitz India, Mr. Alexander Seitz requested Mr. Sandeep Sood to transfer and bring all its customers and sales business worth approx. Rs.6,00,00,000/- which originally belonged to Simtech. This is in addition to the amount of Rs.1,80,69,926/- due and payable to Seitz India on account of goods supplied by Simtech to Seitz India. Further, Mr. Sandeep Sood was also induced to part with an amount of approximately Rs.1,39,98,821/- to Seitz India as loan which

stands at Rs.86,05,663/-. Apart from this, Mr.Sandeep Sood has significantly invested his time, effort and resources into Seitz India for which no compensation has been given till date. It is important to state here that Mr.Sandeep Sood vide his email dated 10.12.2015 requested Mr.Alexander Seitz to consider a price mechanism for transfer of clients, business network and the entire consumable business of Simtech to Seitz India is an admitted position as apparent from the email dated 29.03.2017. In response to the said email, Mr.Alexander Seitz vide his email dated 12.04.2017 agreed to issue credit notes to Simtech in order to release all outstanding of Seitz GmbH. That in view of substantial investment being made by Simtech and Mr.Sandeep Sood towards the business of Seitz India without there being any returns towards the said investments, certain disputes and differences arose between Mr.Sandeep Sood and Mr.Alexander Seitz with respect to the business of Seitz India. In order to sort out those disputes and differences relating to the settlement of accounts *interse* of Seitz India, Seitz India and Simtech entered into a MoU dated 25.04.2017. The said MoU specifically records the following:-

- a) Transfer of stock of €98,000 to be transferred to Seitz India by Simtech.
- b) Seitz India owes €84,000 to Simtech before the stock transfer, which as on date stands at Rs.1,42,26,064.92.
- c) Simtech has an existing customer base of 84 customers in Professional Textile Care Laundry Sector and hundred other customers in Garment Export Sector.
- d) Simtech will be entitled for commission on the sales made to customers.
- e) Seitz India will take over all sales in India for the Textile Care Market.

4. Therefore, without admitting any liability it is stated by Corporate Debtor that before any amount is claimed by Seitz GmbH from Simtech, Seitz GmbH/Seitz India should first pay an amount of (i) Rs.86,05,663/- towards repayment of loan to Mr.Sandeep Sood; (ii) Rs.6,00,00,000/- as consideration for transfer of all its

customers and sales business from Simtech to Seitz India; and (iii) Rs.1,42,26,064.92 due and payable by Seitz India on account of goods supplied by Simtech, which has not happened at the behest of Seitz GmbH and Mr.Alexandar Seitz. It is reiterated that the accounts have to be settled *interse* between all the relevant stakeholders i.e (i) Simtech; (ii) Mr.Sandeep Sood; (iii) Seitz India; (iv) Seitz GmbH; and (v) Mr.Alexander Seitz. That in order to harass Simtech and to restrain Simtech and Mr.Sandeep Sood from demanding their legitimate dues, Seitz GmbH issued a demand notice dated 31.01.2018 under the Code claiming an alleged amount of Euro 229,020.48 from Simtech. The said Demand Notice has been duly replied by Simtech vide reply dated 12.02.2018 explaining that no outstanding amount is due and has elaborately explained the 'disputes' which exists between the parties/companies as stated supra.

5. In this connection, the Respondent has also filed a Suit bearing C.S No.679/2018 title 'Simran Technologies Private Limited vs. Seitz Cleaning Solutions Private Limited and Ors' before the Court of Civil Judge, Senior Division, Gurgaon, Haryana against the various parties, including the Appellant herein and also lodged a complaint against (i) Mr.Alexander Runge (ii) Mr.Alexander Seitz, Seitz GMBH, (iii) Mr.Ayush Khanijo, Seitz Cleaning Solutions Private Limited and (iv) other unknown persons for the commission of offences under Section 403/ 406/ 409/ 420/ 467/ 468/ 34 and other provisions of the Indian Penal Code, 1860, before the Commissioner of Police, Gurgaon.

6. Heard learned Counsels for the Appellant. We have carefully perused the pleadings of the parties and extant provisions of the Code and the law on the issue.

7. Firstly, we would like to refer the relevant provision of Section 9 (5) of Insolvency and Bankruptcy Code, 2016 which reads as under:

“The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2) by an order-

- (i) Admit the application and communicate such decision to the Operational Creditor and the Corporate Debtor if, -*
 - (a) The application made under sub-section (2) is complete;*
 - (b) There is no repayment of the unpaid operation debt;*
 - (c) The invoice or notice for payment to the Corporate debtor has been delivered by the Operational Creditor;*
 - (d) **No notice of dispute** has been received by the Operational Creditor or there is no record of dispute in the information utility; and*
 - (e) There is no disciplinary proceeding pending against the resolution professional proposed under sub-section (4), if any.*
- (ii) Reject the application and communicate such decision to the Operational creditor and the corporate Debtor, if –*
 - (a) The application is incomplete;*
 - (b) There has been repayment of the unpaid operational debt;*
 - (c) The creditor has not delivered the invoice or notice for payment to the corporate debtor;*
 - (d) Notice of dispute has been received by the Operational creditor or there is a record of dispute in the information utility; or*
 - (e) Any disciplinary proceeding is pending against any proposed resolution professional:*

Provided that Adjudicating, Authority, shall before rejecting an application under sub-clause (a) of clause (ii) give a notice to the applicant to rectify the defect in his application within seven days of the date of receipt of such notice from the Adjudicating Authority.

8. Section 5(6) of IBC, 2016 defines “Dispute” which is inclusive and has wider perception in line with the decision of Hon’ble Supreme Court in the case of *Mobilox Innovative Pvt. Ltd. Vs. Kirusa Software Pvt. Ltd in Civil Appeal No.9405 of 2017 vide order dated 21.09.2017*, inter alia that:

“Therefore, all that the Adjudicating Authority is to see at this stage is whether there is plausible contention which required further investigation and that the ‘dispute’ is not a patently feeble legal argument or an assertion of fact unsupported by evidence. It is important to separate the grain from the chaff and to reject a spurious defence which is mere bluster. However, in doing so the Court does not need to be satisfied that the defence is likely to succeed. The Court does not at this stage examine the merits of the dispute except the extent indicated above. So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the Adjudicating Authority has to reject the application.” (emphasis given).

9. Learned Senior Counsel appearing on behalf of the Appellants submitted that the Respondent has not raised any dispute regarding quality/ quantity/ price of goods prior to receipt of the Demand Notice. However, the Respondent after receipt of the Demand Notice has raised some dispute, but the dispute is not between the Appellant/Operational Creditor and Respondent/Corporate Debtor, the dispute is in regard to Third Party. The Third Party dispute cannot come within the meaning of Section 8 & 9 R/w Section 5(6) of Insolvency and Bankruptcy Code, 2016 for the purpose, he relied upon the decision of this Tribunal in *Mr.Chetan Sharma Vs. Jai Lakshmi Solvents (P) Ltd. & Anr.*, decided on 10.05.2018 in Company Appeal (AT) (Insolvency) No.66, 67, 68, 70 of

2019 in which it is held that Third Party dispute is not in the purview of Section 5(6) of Insolvency and Bankruptcy Code, 2016.

10. In this case, the Demand Notice was issued on 31.01.2018 and it was replied on 12.02.2018, before that Respondent has raised a dispute which is evident from the correspondence by way of e-mails exchanged between the parties from 10.04.2015 to 04.01.2018 as observed in the impugned order. There is nothing on record to disprove this fact. In the case, of Mr.Chetan Sharma (supra) one Mr.Dinesh Arora, the then Managing Director of the Corporate Debtor Company committed fraud, when this fact was discovered. The Corporate Debtor Company asked him to resign and take over the liability of debts fraudulently incurred by him. In these circumstances, this Tribunal held that unilateral 'transfer' of liability does not constitute a 'dispute' within the meaning of Section 5(6) of the 'I&B Code' it has to be between the 'Corporate Debtor' and the Operational Creditor'. In the case in hand there was a pre-existing dispute between the Operational Creditor and the Corporate Debtor. Hence, this judgment is not helpful to the Appellant.

We find no merits in the Appeal and the same is accordingly dismissed. No order as to costs.

(Justice Jarat Kumar Jain)
Member (Judicial)

(Mr. Balvinder Singh)
Member (Technical)

(Dr.Ashok Kumar Mishra)
Member (Technical)