

25<sup>th</sup> May, 2021

# LIMITATIONS ON POWER OF ADJUDICATING AUTHORITY WHILE ADJUDICATING APPLICATION U/S 9 OF THE IBC - SODEXO CASE

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## 1. Introduction

1.1 **Section 9(5) of the Insolvency and Bankruptcy Code, 2016 (IBC)**, deals with the power of the adjudicating authority (i.e., National Company Law Tribunal/ NCLT) to admit the application and communication of such decision to the operational creditor and the corporate debtor within fourteen days from the receipt of the application.

## 2. Defined Powers u/s 9 of IBC

2.1 The NCLT has only two options, either to admit the application or to reject the same and there is no third option to the Adjudicating Authority under law.

2.2 In case if there is no pre-existing disputes under Section 8(2) of the Code that deals with 'Insolvency proceedings by operational creditor' that arose between the corporate debtor and/ or if, in case any suit or arbitration proceedings are pending against the Corporate Debtor who has committed a default, or there is an alternative remedy available, based on these mere facts the NCLT cannot refuse to admit the application.

2.3 The IBC cannot be used as a debt recovery mode and the Code does not provides any dispute adjudication/ resolution mechanism between the parties.

## 3. Over-riding effect of Section 238 of the Code

3.1 The marginal notes to Section 238 of the IBC provide that "Provisions of this Code to override other laws", meaning thereby that the non-obstante clause of the Code provides an overriding effect to the Code over any other laws.

3.2 Hence, this provision would not admit of the alternative remedy being a disabling provision for Operational Creditor to seek resolution of a dispute regarding the operational debt

claimed against the Corporate Debtor by triggering the Corporate Insolvency Resolution Process.

## 4. Sodexo India Services Pvt. Ltd. v. Chemizol Additives Pvt. Ltd., Comp. App. (AT) (Insolvency) No. 1094 of 2020

### *Brief facts of the case*

4.1 M/s Sodexo Food Solutions India Pvt. Ltd., an Operational Creditor entered into an agreement dated 14.12.2014 with the corporate-debtor for providing catering and canteen services for one year.

4.2 The agreement provided that the corporate debtor shall pay to the operational creditor, timely and in case of default, the corporate debtor shall be liable to pay Rs. 5, 45,000 along with interest @ 8% p.a.

4.3 No dispute ever with regard to the services.

4.4 However, from April 2018 onwards the corporate debtor defaulted in making payments, despite reminders.

4.5 On not receiving any reply to the notice sent by operational creditor, it approached NCLT against the corporate debtor under section 9 of the Code.

## 5. Decision of the NCLT

5.1 The NCLT held that before initiation of CIRP against the corporate debtor, it must satisfy that the debt in question should be undisputed. Mere acceptance of debt by the corporate debtor doesn't give the right to the operational creditor to initiate proceedings against it.

5.2 The NCLT also took into account the fact that the corporate debtor being a solvent company, the initiation of CIRP against it would not solve any purpose.

5.3 NCLT further observed that it has power to refer the matter pending before it, to Mediation and Conciliation, u/s 442 of the Companies Act, 2013.

5.4 The NCLT held that the party should exhaust the alternate remedy available to it and then approach the NCLT. Hence, NCLT directed the operational creditor to invoke the arbitration clause and refer the dispute to the arbitrator.

5.5 The NCLT disposed of the application wherein it observed that parties should make requisite endeavors for resolution regarding the outstanding debt; otherwise, the appellant would be at liberty to invoke the arbitration clause contained in the Agreement.

## 6. Issue

6.1 On Appeal by the Operational Creditor before the NCLAT, the issue which arise for adjudication was as to whether the NCLT's power under Section 9 of the Code is limited to reject or admit the petition/ application?

## 7. Decision & Observations of the NCLAT

7.1 Immaterial as to whether Corporate debtor solvent or not.

7.2 It held that the Code does not grant power to NCLT to conduct a rambling inquiry into the aspect of solvency or insolvency of the Corporate Debtor except to the extent of the Financial Creditors or the Operational Creditors, who sought to trigger of Corporate Insolvency Resolution Process.

7.3 The NCLT had ignored the fact that corporate debtor have committed default and it had failed to pay the debt to the operational creditor.

7.4 The Appellate Tribunal allowed the appeal and directed the NCLT to pass an order of admission and initiation of CIRP against the corporate debtor.

## 8. Conclusion

The decision of the NCLAT is in the right perspective and intention of the Code:-

8.1 Mere existence of an alternative remedy that includes an arbitration clause should not disable any person including the operational creditor, to take steps as are available to it under the Code.

8.2 The solvency of the Corporate Debtor is of no consequence in the application fled under section 9 of the Code. Mere existence of default by the Corporate Debtor is enough to initiate CIRP process, as have been expressly the intention of the drafters of the Code.

8.3 Rightly, if NCLT is allowed to conduct inquiry into solvency and in-solvency of the Corporate Debtor on case to case basis, the same not only lead to anomaly but also in defeating the very purpose of the Code, i.e. putting companies into CIRP process that are unable to pay its debts.

8.4 Moreover, the existence or non-existence of Arbitration and/or alternative remedy cannot be a ground to reject the application u/s 9 of the Code, since if the same is accepted, every operational creditor always have the remedy under common law for filing of civil suits, even if there is no arbitration agreement.

8.5 The Adjudicating Authority has only two options, either to admit Application or to reject the same. No third option or course is postulated by law.

### References:

1. <https://ibbi.gov.in/uploads/order/a94698d2d349edbe3d2001c65c15e503.pdf>
2. <https://ibclaw.in/sodexo-india-services-pvt-ltd-vs-chemizol-additives-pvt-ltd-nclat-new-delhi/>
3. Referred to the judgment copy of NCLT and NCLAT

A copy of the judgment of NCLT is annexed hereto at page **3 to 15**.

A copy of the judgment of NCLAT is annexed hereto at page **16 to 18**.

**NATIONAL COMPANY LAW TRIBUNAL  
BENGALURU BENCH**

ATTENDANCE CUM ORDER SHEET OF THE HEARING OF NATIONAL COMPANY LAW TRIBUNAL,  
BENGALURU BENCH, BENGALURU, HELD ON 08.06.2020

**THROUGH VIDEO CONFERENCING**

**CAUSE LIST**

PRESENT: 1. Hon'ble Member (J), Shri Rajeswara Rao Vittanala  
2. Hon'ble Member (T), Shri Ashutosh Chandra

CP/CA No.	Purpose	Sec	Name of Petitioner	Petitioner Advocate	Name of Respondent	Respondent Advocate
CP (IB) No. 35/BB/2020	For orders	Sec 9 of I&B code 2016	M/s Sodexo Food Solutions India Pvt. Ltd	George philip	M/s Chemizol Additives Pvt Ltd.	

ADVOCATE FOR PETITIONER/s:

Mr. George Philip

ADVOCATE FOR RESPONDENT/s: \_\_\_\_\_

ORDER

CP (IB) No. 35 of 2020 is disposed of vide separate order. with direction.

  
MEMBER (T)

  
MEMBER (J)

**IN THE NATIONAL COMPANY LAW TRIBUNAL  
BENGALURU BENCH**

C.P. (IB) No.35/BB/2020  
U/s 9 of the IBC, 2016  
R/w Rule 6 of I&B (AAA) Rules, 2016

**Between:**

M/s. Sodexo Food Solutions India Private Limited,  
1<sup>st</sup> Floor, Gemstar Commercial Complex,  
Ramchandra Lane Extension,  
Kanchpada, Malad (West),  
Mumbai – 400 064. - Petitioner/Operational Creditor

**And**

M/s. Chemizol Additives Pvt Limited,  
Plot No.19, E & F, Bidadi  
Industrial Area, 2<sup>nd</sup> Phase,  
Sector -1, Talakuppa Village,  
BidadiHobli, Ramanagara District  
Bangalore - 562109. - Respondent/Corporate Debtor

**Date of Order: 8<sup>th</sup> June, 2020**

**Coram:** 1. Hon'ble Shri Rajeswara Rao Vittanala, Member (Judicial)  
2. Hon'ble Shri Ashutosh Chandra, Member (Technical)

**Parties/Counsels Present (through Video Conference):**


For the Applicant : Mr. George Philip

For the Respondent : Amrita Ghosh

**ORDER**

**Per:** Rajeswara Rao Vittanala, Member (J)

1. C.P.(IB) No.35/BB/2020 is filed by M/s. Sodexo Food Solutions India Private Limited (hereinafter referred to as 'Applicant/Operational Creditor') U/s 9 of the IBC, 2016, R/w Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, by inter alia seeking to initiate Corporate Insolvency Resolution Process in respect of M/s. Chemizol Additives Private Limited (hereinafter referred to as 'Respondent/Corporate

  
Page 1 of 12

Debtor') on the ground that it has committed default for a total amount of Rs.27,46,473/- (Rupees Twenty Seven Lakhs Forty Six Thousand Four Hundred and Seventy Three only) as on 02<sup>nd</sup> April, 2019.

2. Brief facts of the case, as mentioned in the Application, are as follows:

- (1) M/s. Sodexo Food Solutions India Private Limited was incorporated under the Companies Act, 1956 with CIN No. U99999MH1994PTC082543 having registered office situated at 1<sup>st</sup> Floor, Gemstar Commercial Complex, Ramchandra Lane Extension, KanchpadaMalad (West) Mumbai-400 064.
- (2) M/s. Chemizol Additives Private limited (hereinafter referred to as 'Respondent/Corporate Debtor') was incorporated on 13.09.2007, under the Companies Act, 1956 with CIN: U24240KA2007PTC043855 having its registered office at Plot No.19 E & F, Bidadi Industrial Area, 2<sup>nd</sup> Phase, Sector 1 Talakuppa Village, BidadiHobli, Ramanagar District, Bangalore - 562109. The Nominal/Authorised Share Capital of the Company is Rs.15,00,00,000/- (Rupees Fifteen Crores Only) divided into 1,50,00,000/- equity shares of Rs. 10/- each and the issued subscribed and paid up capital is Rs.12,37,31,570/- (Rupees Twelve Crores Thirty Seven Lakhs Thirty One Thousand Five Hundred and Seventy only) divided into 1,23,73,157 equity shares of Rs.10/- each.
- (3) It is stated that the Operational Creditor entered into an "Agreement for Providing Catering and Canteen Services" with the Corporate Debtor on 14.12.2015 (which is referred to as Agreement) for a period of one year from 4<sup>th</sup> January, 2016. As provided in the Agreement, further two Addendums dated 13<sup>th</sup> December, 2016 and 28<sup>th</sup> August,

2017, were executed between them by modifying certain terms and conditions of the Agreement which includes terms of agreement. In terms of the Agreement, the Operational Creditor started rendering services to the Corporate Debtor at Plot No. 19 E & F, situated at Bidadi Industrial Area, 2<sup>nd</sup> Phase, Sector-I, Talakuppe Village, BidadiHobli, Ramanagara Taluk District, 562109 from 4<sup>th</sup> January, 2016 till 31<sup>st</sup> July, 2018.

- (4) In terms of Clause 8.4 of the Agreement, Corporate Debtor shall make payment of the invoices raised by the Operational Creditor within a period of 15 days of receipt of the invoices. As per Clause 8.5, if any disagreement with regard to any additional amount over and above Rs.5,45,000/- billed by the Operational Creditor arise, the Corporate Debtor shall pay the fixed monthly amount of Rs.5,45,000/-, failing which, the Corporate Debtor is liable to pay an interest at the rate of 8% p.a. The Corporate Debtor has accepted all the invoices raised by the Operational Creditor, without any protest or demur nor disputed and never raised any dispute regarding the quality of services provided by the Operational Creditor during the validity of the Agreement or thereafter. From April 2018 onwards, the Corporate Debtor defaulted in making payments to the Operational Creditor.
- (5) Further, the Operational Creditor constantly sent reminders for payment of their outstanding dues, through emails and even followed up with the Corporate Debtor's representatives over the phone for the same. As the Corporate Debtor failed to make payment for over four months, the Operational Creditor addressed an email dated 26<sup>th</sup> July, 2018 informing the Corporate Debtor about demobilizing its services from the site on 31<sup>st</sup> July, 2018,



for non-payment of the Operational Creditor's legitimate dues. However, the Corporate Debtor replied to the said email on the same day, i.e. 26<sup>th</sup> July, 2018 promising to pay the pending amount in two instalments. First instalment by 7<sup>th</sup> August, 2018 and second instalment by 25<sup>th</sup> August 2018. Further, the Corporate Debtor also confirmed that a payment of Rs.26,65,600/- remained outstanding for the services provided by the Operational Creditor from March to June, 2018 (four months). The Corporate Debtor released an amount of Rs.6,66,191/- towards invoice dated 09.04.2018 bearing No.SIKI1819000003, on 9<sup>th</sup> August, 2018. The Corporate Debtor confirming the same, sent an email to the Operational Creditor on 10<sup>th</sup> August, 2018 wherein the Corporate Debtor assured the Operational Creditor of settling maximum outstanding amount by 27<sup>th</sup> August, 2018. The Corporate Debtor, subsequently, replied by its email dated 28.08.2018, stating that they were awaiting funds from their parent Company, and further requested to clear the outstanding payment at the earliest.

- (6) The Operational Creditor, vide its letter dated 12<sup>th</sup> September, 2018 requested the Corporate Debtor to make payment of the outstanding dues of Rs.25,93,350/- failing which the Operational Creditor would levy interest if the amount is not paid within 7 days. Despite duly receiving the reminder letters, the Corporate Debtor not only failed to reply to the said letters but also failed to pay the outstanding amount. Therefore, the Operational Creditor/Petitioner through its Solicitors, issued an notice dated 18.12.2018 as per Form 3 of the I & B Code, 2016 to pay a sum of Rs. 26, 79,969/- (Rupees Twenty Six Lakhs Seventy Nine thousand Nine Hundred and Sixty Nine only),



but no reply was received to the said notice. Hence the petition.

3. Heard Mr. George Philip, learned Counsel for the Applicant/Petitioner **through Video Conference**. We have carefully perused the pleadings of the Party and extant provisions of the Code and the Rules made thereunder.
4. Mr. George Philip, the Learned Counsel for the Petitioner, while reiterating various averments made in the Company petition as briefly stated supra, has further submitted that the Petitioner and the Respondent entered into service agreement for Catering and Canteen Services dated 14.12.2015 with the Respondent with effect from 4.01.2016. Subsequently, two Addendums to the main Agreements were executed on 13.12.2016 by interalia extending the main agreement by additional period of one year, again another addendum executed on 28.08.2017 extending the terms of the agreement till 30.06.2018. Therefore, the services in question are extended in accordance the terms and conditions of the agreement in question. He has pointed out the following emails, apart from other, exchanged between the Parties in respect of the issue, which are referred to as under:

*"From: [Kiran@chemizol.com](mailto:kiran@chemizol.com)(mailto:kiran@chemizol.com)*

*Sent: Friday, August 10, 2018 8.35 AM*

*To: AnbalaganRavikum ([Ravikumar.Anbalagan@sodexo.com](mailto:Ravikumar.Anbalagan@sodexo.com));*

*[mj.dadia@tianhechem.com](mailto:mj.dadia@tianhechem.com)*

*Dear Ravikumar,*

*Please be informed that yesterday we have remitted INR 666191/- in settlement of your invoice bearing No. SIKI1819000003 dated 9<sup>th</sup> April 2018. We will share the payment advice in due course of the day.*

*We sincerely regret for not settling the outstanding as committed in the trailing mail. However, we will ensure to settle maximum outstanding by week starting 27<sup>th</sup> August 2018.*

*Till then, we request you to please bear with us*





*Thanking you once again for you understanding and cooperation..*

**There was another email dated 26.07.2018 which states as follows:**

*“From : PAUL Debaprateem  
Sent: Thursday, July 26, 2018 5:21 PM  
To: [mj.dadia@tianhechem.com](mailto:mj.dadia@tianhechem.com)*

*“Dear Mr. Dadia,*

*At the onset, I thank you for acknowledging our discussion on the subject of delayed payments from your organisation. Further, we have made a note of the payment schedule provided by you, however unfortunately as discussed yesterday, unless you make payments before month end of July. We do not have cash flow to run another month of service. We will have no other option to demobilise the project on 31<sup>st</sup> July 2018, hence kindly make arrangement to release our dues before 31<sup>st</sup> July. Kindly treat this mail as an official communication from our end on the subject.*

*Thanking for you understanding and anticipating that your management will quickly take a decision to release the funds as requested,*

*Regards.  
Vice President,  
Segment director (Industries)”*

**Email dated 26.08.2018 sent by the Respondent states as follows:**

*“On 26.07.2018, at 3.07 PM, MJ Adadia ([mj.dadia@tianhechem.com](mailto:mj.dadia@tianhechem.com)) wrote:*

*Dear Mr. Debaprateem Paul,  
This has reference to the telephonic discussions we had yesterday evening on the subject.*

*We sincerely regret the non release of payment to you for the last 4 months. We very well understand the hardship being faced by you due to delay in payment from our side.*

*Based on our yesterday discussions today I have taken up the matter strongly with our parent company at Singapore and requested them to remit the required funds informed by them that they will release your*



*outstanding payments. I have been informed by them that they will release your payments in 2 instalments. 1<sup>st</sup> instalment will be by August 7, 2018 and 2<sup>nd</sup> instalment by August 25, 2018. As per our record we hereby confirm an outstanding payment of Rs. 26, 65, 600.00 for the service provided by Sodeso from March to June 2018 (4 months. As mentioned balance 13, 32, 800 by August 2018.*

*We wish to place on record our sincere appreciation for your gesture and while hearted support to us in providing the uninterrupted services during the difficult time we are passing through.*

*Thanking you once again for your co-operation.*

*With Best regarding,*

*M.J. Dadia,*

*Executive Director”.*

5. When the Respondent failed to pay the outstanding amount, the Petitioner addressed the letter dated 12.09.2018 by inter-alia contending that:

*“the Catering services has been terminated on 31<sup>st</sup> July 2018 due to non-payment of dues to the Petitioner by requesting to release the outstanding amount of Rs. 25, 93,350/- (Rupees Twenty Five Lakhs ninety three thousand three hundred and fifty only). Failing which they will take legal course of action to recover the outstanding amount along with interest”.*

Again another letter dated 08.10.2018 was also addressed to the Respondent. Accordingly the Statutory demand notice dated 18.12.2018 was issued demanding the Respondent to pay the outstanding amount along with interest in respect of the 4 (four) Invoices which as follows:

Invoice	Document Date	Due Date	Invoice Amt	OS Days	Interest 8%	Invoice + Interest amt
SIKA1819000431	11.05.2018	26.05.2018	6,66,700	209	28,348	6,95,048
SIKA1819000735	08.06.2018	23.06.2018	6,66,700	181	24,257	6,90,957
SIKA1819001184	10.07.2018	25.07.2018	6,66,700	149	19,581	6,86,281
SIKA1819001366	02.08.2018	17.08.2018	5,93,250	126	14,433	6,07,683

Therefore, the Learned Counsel has strongly asserted that the Debt and default in question are not in dispute and thus urged the Adjudicating Authority to initiate CIRP in respect of the Respondent, as prayed for.

6. Though the Adjudicating Authority ordered notice to the Respondent, they have not filed any statement of objections to assist it. Therefore, we are deciding the admission of case, basing on the evidence placed on record in the Company petition, and the settled principles of law.
7. It is relevant to refer essential terms and conditions of the Agreement dated 14.12.2015, "Clause 10" deals with respect to termination of the Agreement, which reads as under:

10. Terms and Termination:

10.1 Terms : This agreement shall take effect and become binding upon the parties on the Effective Date of this agreement and shall remain in full force for a period of one (1) year or until the earlier termination or notice by either party to other party pursuant to Clause 10.2.3, that it is terminating this Agreement.

10.2 Termination:

10.2.1 Notwithstanding anything contained in this Agreement, and without prejudice to its other rights in law or equity and without any liability and judicial intervention, this Agreement may be terminated by the party not in default (the Non-Defaulting party) by giving a thirty (30) days' written notice to the party in default (the defaulting party) if any of the following events (hereinafter referred to as a n "Event of default") occurs:

- a. Either party commits a breach if this Agreement and such breach, if capable of remedy, is not remedied by the Defaulting party within the aforesaid thirty (30) days notice period
- b. Any change in control of either party. For the purpose of this sub-clause, the party in respect of which a change in control occurs will be deemed to be the Defaulting party; or
- c. If SODEXO goes into liquidation (other than a voluntary liquidation for the purposes of reconstruction and where all the rights and obligations are validly assigned) administration or receivership or ceases to carry on its business or is otherwise insolvent or unable to pay its debt on time.



10.2.2 This agreement may be terminated by the mutual written consent of the parties.

10.2.3 Either party, without cause, may terminate this Agreement by serving a written notice of (30) days to other party. Parties shall not be obliged to give reasons for such termination. Upon the expiry of the aforesaid notice period, this Agreement shall stand terminated.

10.2.4 Sodexo reserves its right to terminate this Agreement with 7 (seven) days notice, in the event of a default in payment by CAPL and payment is overdue for 15 days.

CAPL reserves its right to terminate this Agreement with (7) days notice, in the event it is found that SODEXO has grossly failed to maintain hygiene either during preparation, storing or serving food.

**Clause 13 deals with the Governing Law and Arbitration which reads as under:**

**13. GOVERNING LAW AND ARBITRATION**

13.1 This Agreement shall be construed in accordance with the laws of India

13.2 Any dispute, difference, controversy or claim ('Dispute') arising between the parties out of or in relation to or in connection with this Agreement, or the breach, termination, effect, validity, interpretation or application of this agreement or as to their rights, duties, liabilities hereunder, shall be settled by the parties by mutual negotiations and agreement. If, for any reasons, such dispute cannot be resolved amicably by the parties, the same shall be referred to an arbitrator by way of arbitration proceedings by a sole arbitrator, appointed by the Mutual Consent of Both the parties. The arbitration proceedings shall be held in accordance with the Arbitration and Conciliation Act, 1996, or any subsequent enactment or amendment thereto (the Arbitration Act). The venue of arbitration proceedings shall be at Bengaluru in the premises designated/chosen/suggested by the CAPL. The language of the arbitration and the award shall be English.

**Clause – 16 deals with “Force Majeure” which reads as under:**

**FORCE MAJEURE:** Notwithstanding anything to the contrary in this Agreement, neither party shall be liable by reason of failure or delay in the performance of its duties and obligations under this Agreement if such failure or delay is caused by acts of God, war,

riot, fire civil commotion, strikes, lock-outs, embargoes, any orders of governmental, quasi-governmental, or local authorities or any other similar cause beyond its control and without its fault or negligence.

8. As asserted by the Learned Counsel, the outstanding amount in question is prima facie found to be due from the Respondent. However, it is relevant to point out that the original Agreement dated 14.12.2015 was effective for a period of one year from 04.01.2016. However, the main agreement was amended vide addendum dated 13.12.2016 by extending the terms of the agreement for the additional period of one year i.e. till 30.11.2017. Again it was extended by addendum dated 28.08.2017 extending till 30.06.2018. However, the Invoices against the claim made are dated 11.05.2018, 08.06.2018, 10.07.2018 and 02.08.2018. The period of invoice covers the period from April, 2018 to July, 2018, whereas the terms of Agreement was last extended till 30.06.2018 and services were stated to have stopped from 31.07.2018 due to non-payment. However, it is asserted that once the outstanding amount is agreed by the Respondent in unequivocal terms, other issues would not be much relevant to the issue in question. It is true that the Petitioner has also filed NeSL certificate issued in accordance with provisions of Section 65B (4) of Indian Evidence Act, 1872. However, before initiation of CIRP in respect of Application/Petition filed U/s 9 of Code, the Adjudicating Authority has to be satisfied that debt in question should be un-disputed. In the instant case, the Respondent has not responded to the notice issued by the Adjudicating Authority, except mere statement that they are going to settle the issue. Therefore, the Adjudicating Authority is handicapped by the non-response of the Corporate Debtor and it cannot initiate ex parte CIRP proceedings like in Civil Suits. Moreover, we are not convinced with the assertion of the Petitioner that the Debt and Default in question are un-disputed.



9. For an aggrieved party, knocking at the doors of Judiciary would be last resort. Such party should exhaust alternative remedy available by virtue of Agreement(s) they themselves have voluntarily executed and the terms and conditions in those Agreement(s) would bind them. In the instant case, as stated supra, approaching this Adjudicating Authority is not only the remedy available for the Petitioner as per the terms of agreement. In terms of Clause 13 of the Agreement, wherein it says that any dispute, difference, controversy or claim arising between the parties out of or in relation with the agreement shall be settled by the parties by mutual negotiations and agreement and also settled by the Arbitrator appointed by the mutual consent of both the parties etc., Therefore, the Petitioner has not at all availed alternative remedy available in the Agreement, which is binding on both the parties. Since the Petitioner has relied upon the very terms and conditions of the Agreement in support of its claim, it cannot selectively choose to insist payment in terms of the agreement, without making/ invoking provisions of alternative remedy.
10. It is a settled position of law that the provisions of the Code cannot be invoked to settle the dispute(s) or to recover the alleged outstanding amount. Admittedly the Petitioner has not invoked other remedies available except the provisions of the code by issuing demand notice. The mere acceptance of the debt in question by the Respondent would not automatically entitle the Petitioner to invoke the provisions of the Code, unless the debt and default is undisputed and proved to the satisfaction of the Adjudicating Authority. As per the copy of Annual Returns for the Financial year 2017-18, filed by the Petitioner in respect of the Respondent Company, its turnover and net worth are Rs. 103,322,162 and Rs. 1,325,365,853/ respectively. Therefore, the Respondent Company prima facie appears to be solvent Company so as to resolve the issue of outstanding amount in question. The NCLT is conferred power, even

to refer the matter pending before it, to Mediation and Conciliation. U/s 442 of the Companies Act, 2013. The Adjudicating Authority, being NCLT, U/s 60(1) of the Code, can suo motto refer the matter to either Mediation and Conciliation or to Arbitration to settle the dispute. Since, this already Arbitration clause is available in the Agreement in question, the Petitioner can be permitted to invoke Arbitration clause in respect of the issue in question.

11. For the aforesaid reasons and circumstances of the case, and the law on the issue, we are of considered view that the instant Company Petition can be disposed of with the directions as mentioned below, following the principle of ease of doing business.
12. In the result, **CP (IB) No. 35 of 2020** is disposed of with the following directions:

- (1) The Respondent, in the first instance, is directed to try to resolve the issue of outstanding, as it is stated to be not in dispute, failing which, the Petitioner is at liberty to invoke the Arbitration Clause No.13 as contained in the Agreement dated 14.12.2015, and in such event, the Respondent is directed to co-operate with such arbitration proceedings to resolve the issue, instead of forcing the Petitioner to invoke legal remedy again.
- (2) The Petitioner is also granted liberty to invoke appropriate remedy, as per law, in case, the Petitioner is aggrieved by proceedings to be passed in such Arbitration Proceedings. .
- (3) No order as to costs.

**ASHUTOSH CHANDRA  
MEMBER, TECHNICAL**

**RAJESWARA RAO VITTANALA  
MEMBER, JUDICIAL**

## 2021 SCC OnLine NCLAT 18

In the National Company Law Appellate Tribunal Principal<sup>±</sup>  
(BEFORE BANSI LAL BHAT, ACTING CHAIRPERSON AND ASHOK KUMAR MISHRA, MEMBER  
(TECHNICAL))

Sodexo India Services Pvt. Ltd. ... Appellant;  
*Versus*

Chemizol Additives Pvt. Ltd. ... Respondent.

Comp. App. (AT) (Insolvency) No. 1094 of 2020  
Decided on February 22, 2021

Advocates who appeared in this case:

Mr. Gaurav Mitra, Mr. Y.P. Dandiwalla, Ms. Khooshnum R. Daviervalva, Ms. Yazdi Jijina and Mr. Saswat Pattnaik, Advocates for the Appellants;

None for the Respondent.

**ORDER**

1. Despite awaiting appearance of Respondent, nobody has turned up to enter appearance on its behalf. Earlier, it was noticed in order dated 3<sup>rd</sup> February, 2021 that the Track Consignment Report confirmed delivery of notice upon Respondent and appearance of Respondent was awaited. Since, Respondent has not joined the proceedings even today, we proceed to hear the Appeal in ex-parte.

2. After hearing Mr. Gaurav Mitra, Advocate representing the Appellant and having waded through the impugned order, we notice that the Application of Appellant - Operational Creditor filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 (for short the 'I&B Code') has not been admitted or rejected by the Adjudicating Authority (National Company Law Tribunal, Bengaluru Bench), in terms of order dated 8<sup>th</sup> June, 2020 impugned in this Appeal. The Adjudicating Authority has disposed of the Application directing the Respondent - Corporate Debtor, in the first instance, to make endeavours for resolution in respect of outstanding debt, failing which the Appellant would be at liberty to invoke arbitration clause contained in Agreement dated 14<sup>th</sup> December, 2015. This finding by the Adjudicating Authority is unique and being not in conformity with the provisions embodied in Section 9(5) of the I&B code, cannot be supported. Section 9(5) of the I&B Code, 2016 is reproduced herein below:

—  
*"9(5) 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 operational 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 any 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 made under sub-section (2) 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."*

3. On a plain reading of this provision, it emerges that the Adjudicating Authority is required either to admit the Application, if the same is complete, there is no payment of the unpaid operational debt, the invoice or notice for payment has been delivered to the Corporate Debtor and no notice of dispute has been received by the Operational Creditor or there is no record of dispute in the information utility. The Adjudicating Authority may reject the Application, if the Application is incomplete or that the operational debt stands paid, or the Creditor has not delivered the invoice or notice for payment to Corporate Debtor or that the notice of dispute has been received by the Operational Creditor, or there is a record of dispute forthcoming from the information utility. It is abundantly clear that the Adjudicating Authority has only two options, either to admit Application or to reject the same. No third option or course is postulated by law.

4. In the instant case, Mr. Gaurav Mitra, Advocate representing the Appellant - Operational Creditor has, while taking us through the impugned order, invited our attention to the fact that the Adjudicating Authority has taken note of the fact that the Respondent - Corporate Debtor has not responded to the Demand Notice dated 18<sup>th</sup> December, 2018 demanding the outstanding amount in respect of the four invoices noticed in paragraph-5 of the impugned order. Mr. Mitra further invited our attention to paragraph-10 of the impugned order, where the Adjudicating Authority has observed that mere acceptance of the debt in question by the Respondent would not automatically entitle the Appellant to invoke the provisions of the Code, unless the debt and default is undisputed and proved to the satisfaction of the Adjudicating Authority. In view of this factual position, as noticed in the impugned order, the Adjudicating Authority should have, in absence of any dispute contemplated under Section 8(2) having been raised by the Respondent - Corporate Debtor as a pre-existing dispute or that the claim of Appellant - Operational Creditor had been satisfied, proceeded to admit the Application, as no dispute had been raised before it, justifying its disinclination to admit the Application. Instead, the Adjudicating Authority proceeded to make out a case for the Respondent-Corporate Debtor on the premise that the Appellant-Operational Creditor has not invoked other remedies available under law. We cannot understand as to how the availability of alternate remedy would render the debt and default disputed. In absence of pre-existing dispute having been raised by the Corporate Debtor or it being demonstrated that a suit or arbitration was pending in respect of the operational debt, in respect whereof Corporate Debtor was alleged to have committed default, the Adjudicating Authority would not be justified in drawing a conclusion in respect of there being dispute as regards debt and default merely on the strength of an Agreement relied upon by the Appellant - Operational Creditor, notwithstanding the fact that such Agreement provided for reference of a dispute arising between the parties in relation to a claim through arbitration. Even otherwise, Section 238 of the I&B Code, which has an

overriding effect over the existing laws or any other law or contract, would not admit of the alternative remedy being a disabling provision for Operational Creditor to seek resolution of a dispute in regard to operational debt claimed against the Corporate Debtor by triggering the Corporate Insolvency Resolution Process.

5. Our attention has also been invited to some observations made by the Adjudicating Authority in paragraph 10, which reads as under:—

*"10. .... Therefore, the Respondent Company prima facie appears to be solvent Company so as to resolve the issue of outstanding amount in question. The NCLT is conferred power, even to refer the matter pending before it, to Mediation and Conciliation, U/s 442 of the Companies Act, 2013. The Adjudicating Authority being NCLT, U/s 60(1) of the Code, can suo motto refer the matter to either Mediation and Conciliation or to Arbitration to settle the dispute. Since, this already Arbitration clause is available in the Agreement in question, the Petitioner can be permitted to invoke Arbitration clause in respect of the issue in question."*

6. The Adjudicating Authority appears to have made observation in regard to the Corporate Debtor being a solvent company, ignoring the fact that it was alleged to have committed default in respect of operational debt that it owed to the Appellant-Operational Creditor and which it had failed to pay, in response to admission notice served upon it by the Operational Creditor. The Adjudicating Authority was concerned with the insolvency resolution qua the operational debt, which the Corporate Debtor owed to the Operational Creditor. It was immaterial whether it was solvent or insolvent qua other creditors. The I&B Code would not permit the Adjudicating Authority to make aroving enquiry into the aspect of solvency or insolvency of the Corporate Debtor except to the extent of the Financial Creditors or the Operational Creditors, who sought triggering of Corporate Insolvency Resolution Process.

7. The Adjudicating Authority clearly landed in error by observing that the course adopted by it was warranted on the principle of ease of doing business, ignoring the fact that such course was not available to it, ease of doing business only being an objective of the legislation viz. I&B Code along with other objectives specified in the preamble, which are sought to be achieved through CIRP process.

8. For the aforesaid reasons, we are unable to persuade ourselves to go along and support the impugned order. The Appeal is allowed and impugned order is set aside. The Adjudicating Authority is directed to pass an order of admission in respect of the Application filed by the Appellant-Operational Creditor under Section 9 of the I&B Code within two weeks of communication of this order. However, the Adjudicating Authority shall be at liberty to provide an opportunity to the Respondent-Corporate Debtor to settle the claim of Appellant-Operational Creditor.

9. A copy of this order be served upon the Adjudicating Authority forthwith.

† Bench, New Delhi

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