

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 592 of 2020

[Arising out of Order dated 03.06.2020 passed by the National Company Law Tribunal, Ahmedabad Bench, Ahmedabad in C.P. (IB) 227/NCLT/AHM/2018].

IN THE MATTER OF:

**Rajendra Bhai Panchal
Ex-Director and Shareholder
R/o – 7, Ashok Vatika Society, Gorwa,
Vadodara,
Gujarat – 390016.**

...Appellant

Versus

**M/s Jay Manak Steels
Through its Sole Proprietor
Having its Office at:
Near Zenith School, Godi Road, Pratap Nagar
Vadodara – 390004.**

.....Respondent No. 1

**Shri Shalabh Kumar Daga
Insolvency Resolution Professional
M/s Yogi Infrastructures Private Limited
405, Atlantis Enclave, Opposite Maruti Row House,
Gurukul,
Ahmedabad – 380052.**

.....Respondent No. 2

Present:

For Appellant: Ms. Pallavi Pratap, Mr. Swarnendu Chatterjee, Advocates

**For Respondent: Mr. Mukund P. Unny, Advocate for R-1
Mr. R.S. Lakshman, Advocate for R-2**

J U D G M E N T

Venugopal M. J

Introduction

The Appellant (Ex-Director & Shareholder of 2nd Respondent / 'Corporate Debtor' has projected the instant Company Appeal being dissatisfied with the order dated 03.06.2020 passed by the 'Adjudicating Authority' [National Company Law Tribunal, Ahmedabad Bench, Ahmedabad in C.P. (IB) 227/9/NCLT/AHM/2018] who had admitted the application filed by the 1st Respondent / Petitioner / 'Operational Creditor.

2. The 'Adjudicating Authority' while passing the impugned order dated 03.06.2020 at paragraph 18 to 20 had observed the following: -

“18. A careful perusal of the reply filed by the respondent shows that it has not denied the procuring of the material/steel goods (i.e. MS Angle) from the petitioner and which were properly delivered to and have been utilised by the Corporate Debtor. The Corporate Debtor did not produce any document to show that it raised some objection in respect of lower

quality of goods supplied to it or on price / rate of material supplied. Contrary to this, the petitioner made such declaration about the tax invoices wherein, TDS is stated to have been deducted on the invoices raised by the petitioner. It is also a matter of record that the Corporate Debtor has made a part payment and amount of Rs. 17,74,977/-. Thus, there is remaining balance of Rs. 9,42,841/- as on 22.09.2017. The Petitioner, by filing rebuttal document has refuted the allegation of the Corporate Debtor in respect of low quality of goods and defective material and produced copies of communication through email / WhatsApp screenshot for perusal of this Court along with its rebuttal documents which shows that there was certain communication/correspondence entered between the Petitioner and the Corporate Debtor for making enquiry about the supply

of material to be procured (i.e. M.S. steel angle) from the petitioner company the same was duly delivered to the Respondent / Corporate Debtor. Thereafter, the Petitioner demanded for making payment of the supplied goods. The Respondent through its representative (Director) Mr. Rajubhai Panchal merely responded by making such comment / remark in WhatsApp screen "I will call you later". Thus, on being frequently requested by the Petitioner, the Corporate Debtor made only such evasive reply that he would make call to the Petitioner later and but never whispered or complained about low quality of material or defective goods supplied nor categorically disputed about the rate / price of the goods supplied but made attempt to avoid the payment. Thus, it seems to be a moon shine defense which resulted in sending of statutory demand notice dated 06.04.2018 to the corporate debtor by the

petitioner which was also not replied by the corporate debtor nor any payment was made by the corporate debtor to the petitioner. Hence, the present IB petition.

19. *By taking into consideration of above narrated facts and circumstances of the present case, we find that the corporate debtor is having outstanding debt liability towards payment of materials were supplied to it and utilized by it for a sum of Rs. 9,42,841/- such amount is obviously is more than of one lakh, hence, such attracts triggering of the Corporate Insolvency Resolution Process ("CIRP" in short), in respect of the corporate debtor.*

20. *That apart, the corporate debtor did not deny specifically and categorically about its loan liability for making payment nor paid the balance payment nor refused goods supplied, but utilized the same. Therefore, the corporate debtor is liable to make payment of the aforesaid amount,*

wherein, the corporate debtor has failed.

Thus, the default of outstanding dues has

been occurred.”

and consequently, admitted the application by appointing Mr. Shalabh Kumar Daga as an ‘Interim Resolution Professional’ and issued necessary consequential directions.

Summation Of Facts

3. According to the Appellant, the ‘Corporate Debtor’ (M/s. Yogi Infrastructure Pvt. Ltd.) entered into a works contract dated 20.09.2016 (work order No. 2487084) with ‘Indian Oil Corporation’. The job was to construct a Compound Wall and GI Chain link fencing around the ‘Gujarat Refinery Township’ and the period of work was from 21.05.2017 to 30.06.2017. The total bill submitted for the work is around INR 1.56 Crore.

4. The First Respondent / ‘Operational Creditor’ (a Sole Proprietorship Concern) used to supply MS Angle to the ‘Corporate Debtor’. The primary use of this MS Angle was for executing this Works Contract / Work Order with ‘Indian Oil Corporation’ for ‘Gujarat Refinery’. The total sum of money outstanding as per the version of the First Respondent / ‘Operational Creditor’ was INR 27,17,818 out of which INR 17,74,977 was paid and only INR 9,42,841 being the balance sum to be paid since 22.09.2017.

5. It is the case of the Appellant that the 'Demand Notice' under Form 3 and 4 dated 06.04.2018 was duly served and that the total amount of 'Debt' mentioned therein was INR 18,63,840. However, in the Application before the 'Adjudicating Authority' the total sum was mentioned as INR 27,17,818 and the discrepancy in the amount leads to the conclusion that post payment of INR 17,74,977 only a sum of 88,863 was left, which is less than the threshold limit of INR Rs. one Lakh.

6. The stand of the Appellant is that the amount in default as specified in the Demand Notice is to be in consonance with the Application filed and the 'invoices' sent. In the present case, if the total sum is taken to be INR 18,63,840 and the balance sum paid is taken as INR 17,74,977, then the sum in default cannot be what is being claimed i.e. INR 9.42 Lakhs and it will be INR 88,863. Therefore, because of the default in 'Demand Notice' which ought to have been noticed by the 'Adjudicating Authority', the impugned order is to be set aside.

7. The 'Corporate Debtor' before the 'Adjudicating Authority' in its reply had mentioned that low quality and defective material was supplied by the First Respondent / 'Operational Creditor'/Applicant and that for the proper quality material payment was made by it. Further, in the e.mail dated 14.10.2017 written by the 'Corporate Debtor' to 'Indian Oil Corporation' to release payment as the 'Corporate Debtor' was in financial difficulty and the commitment given to other suppliers with respect to payment shall be in default, makes it quite evident that the payments were remitted despite all difficulty and now, the First

Respondent / 'Operational Creditor' inspite of failing to disclose the discrepancy in the net amount as described in the 'Demand Notice' and the 'application' before the Learned 'Adjudicating Authority' had falsely projected that the amount due is INR 9.42 Lakhs.

8. That the messages on 'WHATSAPP' (Electronic Record) were taken to be conclusive in nature and the reply the 'Corporate Debtor' to the effect that it shall reply later, was taken against it, by the 'Adjudicating Authority' as an admission of 'default' which is against the **Judgement of the Hon'ble Supreme Court in 'Ambalal Sarabhai Enterprise' V. 'KS Infraspace LLP Ltd. and Ors.'** (reported in 2020 SCC online SC 1). In fact, in the said judgement it was made clear that the clarity on '*WhatsApp Chats*' and the evidentiary value can only be ascertained in the course of their trial by the Court in the process of examination and cross-examination and not otherwise. Besides this, the procedure before the 'Adjudicating Authority' is summary in character and it does not conduct '*Trial*'. Also, that these '*WhatsApp Chats*' were without placing on record the certificate under Section 65B of the Indian Evidence Act, 1872 (mandatory for placing electronic evidence on record).

Appellant's Contentions

9. The Learned Counsel for the Appellant submits that the 'Adjudicating Authority' had failed to consider the fact that the material defect in the 'Demand Notice' is fatal to the facts of the present case. Also, that the defense of the

defective goods was brushed aside and that the impugned order is without jurisdiction.

10. The Learned Counsel for the Appellant contends that the impugned order runs *contra* to the judgement of this **Appellate Tribunal dated 24.02.2020 in Company Appeal (AT) (Insolvency) No. 1354 of 2019 in the matter of ‘Neeraj Jain’ V. ‘Cloudwalker Streaming Technologies Private Ltd.’** wherein it was held that the amount in default as specified in the ‘Demand Notice’ must be in consonance with the ‘Application’ filed and the invoices sent but, in this case there is a serious discrepancy and a fatal error in the total amount of ‘Debt’ between the ‘Demand Notice’ and the application filed under Section 9 of the ‘I&B’ Code.

11. It is represented on behalf of the Appellant that if the amount due, if taken to be the sum as mentioned in the ‘Demand Notice’, then, the sum remains to be paid to the First Respondent / ‘Operational Creditor’ is less than Rs. one Lakh and as such, the ‘*Insolvency*’ could not have been triggered.

12. The Learned Counsel for the Appellant comes out with a plea that the amount specified in the default notice i.e. the statutory notice is the trigger point and if the amount described therein is faulty and subsequently, the First Respondent / ‘Operational Creditor’ seeks to correct the defect and increase the sum of default, it is a clear case of ‘after thought’ and the same cannot be permitted. Also that, the notice on the basis of Section 8 of the ‘I&B’ Code, from

the beginning of proceedings, in the present case are bad in Law and hence, the amount in question is totally unclear and further that the 'Adjudicating Authority' had exceeded its jurisdiction to grant leave to correct the amount which cannot be done after the issuance of notice under Section 8 of the Code. In short, it is the contention of the Appellant that the 'proceedings' before the 'Adjudicating Authority' were vitiated on the grounds of *'illegality'* and *'perversity'*.

13. The Learned Counsel for the Appellant takes a plea that in regard to a document relating to *'quality of goods'* (ABSTRACT SHEET RA BILL 4th) (vide page 49 of the Appeal Paper Book Dy. Nos. 33882 and 20401 dated 25.06.2020) in respect of the contractor *'M/S Yogi Infrastructure Pvt. Ltd.'* the said document, goes to the heart of the matter in deciding the point of the case, which can be raised during the final stage of 'Appeal' and this Tribunal is empowered to take this document on record. Apart from this, the **Hon'ble Supreme Court in the decision 'Shehla Burney V. 'Syed Ali Mossa Raza' (2011) 6 SCC at page 529** allowed a new plea, which was raised for the first time, going to the route of the matter, for consideration of which no further investigation into facts was necessary and it was based on the admitted records of the case and the provisions of the Civil Procedure Code.

14. The Learned Counsel for the Appellant points out that the 'Adjudicating Authority' had wrongly relied upon the *'WhatsApp Chat'* for reaching a logical conclusion which ought not to have been done as per procedure established for

rendering electronic evidence as per judgement of **Hon'ble Supreme Court dated 14.07.2020 in CA Nos. 20825 of 2017 in the matter of 'Arjun Panditrao Kotkar' V. 'State of Maharashtra and Ors.'**

15. The Learned Counsel for the Appellant contends that the Appellant in the present Appeal has filed IA 2375 of 2020(as an Applicant) seeking permission from this Tribunal to place on record (i) True copy of the order dated 22.09.2020 passed by this Tribunal in Company Appeal (AT)(Ins.) 592/2020 (ii) True copy of the order dated 06.01.2020 passed by the National Company Law Tribunal, Ahmedabad Bench, Ahmedabad in C.P. (IB) 227/NCLT/AHM/2018 (iii) True copy of the Work Order dated 20.09.2016 and the total bills submitted to 'Indian Oil Corporation' for the 'Contract' (iv) True copy of the e.mail dated 01.10.2017 and 14.10.2017 (v) True Copy of the e.mail dated 22.08.2020 (vi) True copy of the e.mail dated 16.07.2020 (vii) True copy of the letter dated 17.04.2017 (viii) True translated copy of the notice dated 02.04.2019 issued by VUDA regarding sealing of the premise (ix) True translated copy of the FIR dated 09.08.2020 on the file of Police Station Jawahar Nagar, Vadodara (x) Proof of service of additional affidavit and these additional documents came to the knowledge of the Appellant after passing of the impugned order by the 'Adjudicating Authority' and that the Appellant was precluded from filing the same before the 'Adjudicating Authority'.

16. Further, the Appellant / Applicant was genuinely unable to file the aforesaid documents before the 'Adjudicating Authority' to show that there was

a 'pre-existing dispute' in regard to the quality of steel materials supplied and in the interest of justice, the additional documents in question ought to be received by this Tribunal in the present Appeal. Added further, the documents in issue goes against the admission of 'Corporate Insolvency Resolution Process' and the civil death of the 'Corporate Debtor'.

1st Respondent Submissions

17. The default mentioned in the 'Demand Notice' is Rs. 9,42,841/-. The default mentioned in the application u/s 9 of the Code is also Rs. 9,42,841/-. In respect of the sales made by the 1st Respondent for a total sum of Rs. 27,17,818/- during the Financial Year, 2016-2017 and Financial Year, 2017-2018, only a sum of Rs. 17,74,977/- was received from the 'Corporate Debtor'. Therefore, the amount of Rs. 9,42,841/- fell as default sum.

18. The sales made on 21.03.2017 were for a sum of Rs. 8,53,978/-. But the payments for the said sales were received in advance on 18.03.2017 itself and the said amount was Rs. 8,89,350/-. Further, a sum of Rs. 35,372/- was lying in credit and was carried forward to the financial year viz. 2017-2018. During the Financial Year, 2017-2018 there were four sales for a sum of Rs. 18,63,840/- from the side of 1st Respondent to the 'Corporate Debtor' on 02.05.2017, 19.05.2017, 24.07.2017 and 15.09.2017 respectively but only a sum of Rs. 8,85,627/- was paid in total by the 'Corporate Debtor' in the Financial Year

2017-2018 and these payments were received on 07.06.2017, 13.06.2017 and 11.09.2017.

19. The default amount is shown as under: -

Financial Year	Sale Invoice No.	Sale Invoice Date	Sales Invoice Amount	Payment Received Date	Payment Received Amount
FY2016-17				18.03.2017	889350
	1692	21.03.2017	418522		
	1687	21.03.2017	435456		
FY2016-17					
Total			853978		889350
FY2017-18					
	151	02.05.2017	25361		
	213	19.05.2017	845638		
				07.06.2017	400000
				07.06.2017	400000
				13.06.2017	35627
	124	24.07.2017	859796		
				11.09.2017	50000
	469	15.09.2017	133045		
FY2017-18					
Total			1863840		885627
Grand Total			2717818		1774977
Net balance (Default Amount)					942841

20. The aforesaid table clearly exhibits that the sum in default is Rs. 9,42,841/- and it is the same amount that was specified in the demand notice as well as in the Application before the 'Adjudicating Authority' filed under Section 9 of the Code. Besides this, the account was a 'running account' and that total sales will have to be taken into consideration while accounting for the

total payments received. All the six sales invoices were sent along with the 'Demand Notice' and the requirement was complied with.

21. The 'Adjudicating Authority' had only taken a cursory look into the WhatsApp communication to hold that there was no objection taken in regard to the quality of goods and that the mere presentation of screenshots of '*WhatsApp Communication*' by the First Respondent could not be faulted with.

22. The 'Corporate Debtor' had neglected the 'Demand Notice' dated 06.04.2018 of the First Respondent / 'Operational Creditor' and in fact, the Appellant and the 'Corporate Debtor' were called upon to pay the default amount mentioned in the Form 3 as per Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules 2016. Indeed, the 'Corporate Debtor' had neglected the notice of the First Respondent / 'Operational Creditor' and also not raised objections to the said notice. Only after numerous instances of neglect from the 'Corporate Debtor', an application was filed before the 'Adjudicating Authority' by the First Respondent. Also, before the 'Adjudicating Authority', no objections were taken in regard to the '*quality of products*' supplied by the First Respondent.

23. At the time of admission hearing of the Appeal on 22.07.2020 the Bill submitted by the 'Corporate Debtor' was mentioned in page 49 of the Appeal Paper Book wherein purportedly, the client of the 'Corporate Debtor' had made

certain remarks and these remarks are not to be brought before this Tribunal to show that the Appellant had raised objection to the 'Invoices'.

24. The Learned Counsel for the First Respondent refers to the decision of **Hon'ble Supreme Court in the matter of 'MobiloX Innovations Pvt. Ltd.' V. 'Kirusa Software Pvt. Ltd.' (2018) 1 SCC at page 353** wherein it is observed as follows: -

“33. The scheme under Sections 8 and 9 of the Code, appears to be that an operational creditor, as defined, may, on the occurrence of a default (i.e. on non-payment of a debt, any part whereof has become due and payable and has not been repaid), deliver a demand notice of such unpaid operational debt or deliver the copy of an invoice demanding payment of such amount to the corporate debtor in the form set out in Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 read with Form 3 or 4, as the case may be [Section 8(1)]. Within a period of 10 days of the receipt of such demand notice or

copy of invoice, the corporate debtor must bring to the notice of the operational creditor the existence of a dispute and/or the record of the pendency of a suit or arbitration proceeding filed before the receipt of such notice or invoice in relation to such dispute [Section 8(2)(a)]. 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.”

25. The Learned Counsel for the First Respondent adverts to the decision of Hon’ble Supreme Court in **‘Macquarie Bank Ltd.’ V. ‘Shilpi Cable Technologies Ltd., reported in (2018) 2 SCC page 674** wherein it is observed as follows:-

“13. The first thing to be noticed on a conjoint reading of Sections 8 and 9 of the Code, as explained in Mobilox Innovations (P) Ltd. V. Kirusa Software (P) Ltd. [Mobilox Innovations (P) Ltd. v. Kirusa Software(P)

Ltd., (2018 1 SCC 353: (2018) 1 SCC (Civ) 311] decided on 21.09.2017, at paras 33 to 36, is that Section 9(1) contains the conditions precedent for triggering the Code in so far as an operational creditor is concerned. The requisite elements necessary to trigger the Code are:

(i) Occurrence of a default;

(ii) Delivery of a demand notice of an unpaid operational debt or invoice demanding payment of the amount involved; and

(iii) the fact that the operational creditor has not received payment from the corporate debtor within a period of 10 days of receipt of the demand notice or copy of invoice demanding payment, or received a reply from the corporate debtor which does not indicate the existence of a pre-existing dispute or repayment of the unpaid operational debt.”

26. According to the Learned Counsel for the First Respondent none of the annexures mentioned in IA 2375/2020 in the present Appeal point out that there was a ‘pre-existing dispute’ with it. Continuing further, no communication was

made with the First Respondent by the Appellant to show that there was a pre-existing dispute. Except the true copy of the order dated 22.09.2020 passed by this Tribunal in Company Appeal (AT) (Insolvency) No. 592 of 2020, the true copy of the order dated 06.01.2020 passed by the 'Adjudicating Authority' National Company Law Tribunal, Ahmedabad Bench, Ahmedabad in C.P. (IB) 227/NCLT/AHM/2018, true copy of e.mail dated 01.10.2017 and 14.10.2017 and the true translated copy of the notice dated 02.04.2019 issued by VUDA regarding sealing of premises, other documents were in existence even prior to the filing of instant Appeal and apart from the true copy of the judicial orders as aforesaid all other documents are communications(including the true copy of the work order dated 20.09.2016 and the total bills submitted to the 'Indian Oil Corporation' for the contract wherein the 'Corporate Debtor'/Appellant was a party and, therefore, the Appellant / Applicant cannot take a stand that these documents were not within the knowledge or custody of it.

27. In respect of annexure A3, A4, A6 and A7 additional documents sought to be projected on behalf of the Appellant in this Appeal, the stand of the First Respondent is that the Work Order dated 20.09.2016 and the total bills given to 'Indian Oil Corporation' for the contract, the true copy of e.mail dated 01.10.2017 and 14.10.2017 and true copy of e.mail dated 16.07.2017 and the true copy of the letter dated 17.04.2017 that they do not bind it and also that none of this documents show that the dispute was raised by the Appellant with the First Respondent.

28. There is no pre-existing dispute in the instant case and it is very vital to note that no reply was issued to the demand notice of the First Respondent / 'Operational Creditor' and in reality, the '*pre-existing dispute*' ought to have been in existence when the demand notice of the 'Operational Creditor' as per Section 8(1) of the 'I&B' Code was issued by the 'Operational Creditor'. In terms of the ingredients of Section 8(2) of the 'I&B' Code, the 'Corporate Debtor' is to bring to the notice of the 'Operational Creditor' about the existence of a dispute and / or the record of the pendency of a suit or arbitration proceeding filed before the receipt of such notice or invoice in relation to such dispute within a period of ten days from the date of receipt of such demand notice or copy of invoice (vide Section 8(2)(a) of the Code)

29. The First Respondent / 'Operational Creditor' is not a party to the documents which reflect the communication between the Appellant and their customer and as such they are not helpful to the Appellant / Applicant. The Appellant / Applicant has not offered any bonafide reason as to why the documents were not produced before the 'Adjudicating Authority'. The words '*substantial cause*' mentioned in Order 41 Rule 27(b) of the Civil Procedure Code have not been demonstrated by the Appellant / Applicant through pleadings, before this Tribunal.

30. The Learned Counsel for the First Respondent refers to the ambit of Order 41 Rule 27(b) of the Civil Procedure Code, explained by the **Hon'ble Supreme**

Court in the decision ‘Mahavir Singh’ V. ‘Naresh Chandra, (2001) 1 SCC at page 309 wherein it is observed as under: -

“5.....The expression “to enable it to pronounce judgment” has been the subject of several decisions including Syed Abdul Khader v. Rami Reddy [(1979)] 2 SCC 601 : AIR 1979 SC 553] wherein it was held that when the appellate court finds itself unable to pronounce judgment owing to a lacuna or defect in the evidence as it stands, it may admit additional evidence. The ability to pronounce a judgment is to be understood as the ability to pronounce a judgment satisfactory to the mind of the court delivering it. It is only a lacuna in the evidence that will empower the court to admit additional evidence (see : Municipal Corpn. Of Greater Bombay v. LalaPancham [AIR 1965 SC 1008 : (1965) 1 SCR 542]. But a mere difficulty in coming to a

decision is not sufficient for admission of evidence under this rule. The words “or for any other substantial cause” must be read with the work “requires”, which is set out at the commencement of the provision, so that it is only where, for any other substantial cause, the appellate court requires additional evidence, that this rule would apply as noticed by the Privy Council in KessowjiIssur v. G.I.P. Rly. [ILR (1907) 31 Bom381 : 9 Bom LR 671 : (1906-07) 34 IA 115 (followed in AIR 1931 PC 143)] It is under these circumstances such a power could be exercised.”

31. The Learned Counsel for the First Respondent seeks in aid of the decision of the **Hon’ble Supreme Court ‘Union of India’ V. ‘Ibrahim Uddin’ reported in (2012) 8 SCC at page 148** wherein it is observed as under: -

“85.6. The court cannot travel beyond the pleadings as no party can lead the evidence on an issue/point not raised in the

pleadings and in case, such evidence has been adduced or a finding of fact has been recorded by the court, it is just to be ignored. Though it may be a different case where inspite of specific pleadings, a particular issue is not framed and the parties having full knowledge of the issue in controversy lead the evidence and the court records a finding on it.”

32. The comments made by ‘Indian Oil Corporation’ do not bind the First Respondent and the same cannot be put against it. The hand written note purportedly made by the Appellant’s customer is part of an internal communication between the Appellant and their customer and that the First Respondent does not have any legal relationship with the ‘Indian Oil Corporation’. Except for the e-mails annexed as A7 in IA No. 2375 of 2020, all other documents were in possession of the Appellant much earlier to the date on which the order was reserved by the ‘Adjudicating Authority’ and hence, it cannot be said that the Appellant was unable to submit the documents in question before the Authority. As such, the IA No. 2375/2020 seeking to place on record the additional documents is unsustainable in law and liable to be dismissed at the threshold.

Gist of 2nd Respondent's Status Report

33. On various occasions, the 'Resolution Professional' addressed numerous communications to the suspended management of the 'Corporate Debtor' (including the Appellant) intimating them about the initiation of 'Insolvency Resolution Process' against the 'Corporate Debtor' and seeking cooperation and information from the suspended management. As a matter of fact, individual communications through hard copy, speed post and mail were sent on 10.06.2020, 13.06.2020, 22.06.2020, 26.06.2020 and 06.07.2020 but the suspended management of the Company as well as the Appellant had failed to cooperate with the second Respondent. Till date, no information is forthcoming from the suspended management for the smooth functioning of the 'Insolvency Resolution Process'.

34. The State Bank of India, IndusInd Bank and Shree Vardhman Sahakari Bank provided the bank statements of the 'Corporate Debtor' to the second Respondent. From the four 'Operational Creditors' viz. M/s. Jay Manak Steels Pvt. Ltd., CA Vipul Shah, Mr. Mayank Shah and Mrs. Komal Vipul Shah in Form B, the claims were received by the second Respondent between 17.06.2020 and 18.06.2020. After verification of the claims, on 22.06.2020, the second Respondent had admitted the same etc. On 11.08.2020, the Employees' State Insurance Corporation sent a claim amounting to INR 2.32 Lakhs and that the second Respondent was in the process of verification of this claim and in this

regard, had sought documents from the 'Corporate Debtor' and ESIC Departments to substantiate the claim.

35. The 'Adjudicating Authority' on 26.08.2020 had directed the suspended management of the 'Corporate Debtor' to hand over without fail, all papers, documents, List of 'Assets' etc. to the 'Resolution Professional' within seven days. The certified copy of the aforesaid order dated 26.08.2020 was communicated to the former management of the 'Corporate Debtor' (including the Appellant) on 26.08.2020. Even after the lapse of seven days from the date of receipt of the said order, the former management had refused to cooperate with the second Respondent. The former management as well as the Appellant are liable for prosecution u/s 425 of the Companies Act, 2013. In fact, the erstwhile management had filed a petition before the 'Adjudicating Authority' seeking review of the order dated 26.08.2020 and the same is yet to be heard.

36. The second Respondent upon verification of the claim filed by the First Respondent had admitted a sum of INR 17,10,179/- inclusive of interest as on the date of initiation of CIRP. The financial statement and the extract of 'Books of Accounts' of the 'Corporate Debtor' as on 31.03.2019 shows an amount of INR 9,17,434/- as an outstanding one towards the First Respondent.

Evaluation

37. At the outset, it is to be pointed out that in Form 3 (see Clause (a) of sub-rule (1) of rule 5) Form of Demand Notice/Invoice Demanding Payment Under

the Insolvency and Bankruptcy Code, 2016 under the caption '*particulars of operational debt*' in S.No.1 the total amount of 'debt' is mentioned as Rs. 18,63,840/- sales account (GST – 18%) 22.09.2017. In S.No. 2, the amount claimed to be in default is described as 9,42,841/-(repayment due date 22.09.2017).

38. It comes to be known that an additional affidavit pursuant to an order dated 28.02.2019 passed by the 'Adjudicating Authority' was filed by the Proprietor of the First Respondent, before the said Authority whereby and whereunder it was mentioned that the defect in Part-V of Form 5 submitted by the Applicant was raised as in point no. 1 to 5 were replied as 'Not Applicable' and in point no. 8 it was replied as 'Separate Application' and because of the said defect raised, a rectified Form 5 with the additional affidavit towards rectification of defect pursuant to notice issued under Section 9(5) by the 'Adjudicating Authority' was submitted and on 14.10.2019, the 'Adjudicating Authority' had opined that there was no prejudice to the 'Corporate Debtor' in allowing the amendment by way of an additional affidavit filed by the First Respondent / 'Operational Creditor' and that the 'Corporate Debtor' may get further opportunity for filing reply if necessary amendment in the main IB Petition was permitted and accordingly the proposed amendment was allowed by granting an opportunity for filing a reply to the amended petition, if any, within ten days by serving an advance copy to the other side.

39. It is to be borne in mind that the additional affidavit dated 23.08.2019 filed before the 'Adjudicating Authority' in C.P. (IB) 227/NCLT/AHM/2018 was filed only to cure certain defects relating to part V of the Form V and the amendment was not of the character of changing the debt amount and that the same was allowed as per order dated 14.10.2019 and that the amended Form V of the petition formed part and parcel of the proceedings.

40. It is to be remembered that a mistake in a 'Demand Notice' does not necessarily mean that it is defective. If a 'Corporate Debtor' wants to question the validity of the demand it is for it to show that the prejudice was suffered by it as a result of defect.

41. If there is a mistake in the demand but the creditor is clearly owed the statutory minimum figure or more, the fact that the debt is mis stated may not automatically invalidate the demand as per decision 'Cardiff Preserved Coal & Coke Co.' V. 'Norton 36 LJ Ch 451. Further, the Court will take into account whether any injustice was caused to the 'Debtor' and even a grossly overstated statutory demand may not automatically be set aside as per decision Re a Debtor (No 490 / SD / 1991), (1992) 2 All ER 664 (ChD).

42. In the instant case, though the Appellant has come out with a plea that the amendment allowed by the 'Adjudicating Authority' was a fatal one because the 'I&B' proceedings are not like a civil suit and on that count, the action of the 'Adjudicating Authority' is beyond its jurisdiction this Tribunal pertinently points

out that the amendment in question was not in the character of varying the debt amount and very rightly the 'Adjudicating Authority' while allowing the amendment to the main petition had observed that no prejudice would be caused to the 'Corporate Debtor' by allowing the amendment in issue and, therefore, the *contra* plea taken on behalf of the Appellant is not acceded to by this Tribunal.

43. Be it noted, that in a given petition filed by the 'Operational Creditor' there is a heavy burden on the 'Corporate Debtor' to show that the dispute is a real and genuine one. Further, where a petition of the 'Operational Creditor' was opposed by the 'Corporate Debtor' on the ground that the dispute existed between the parties regarding the quality of the goods supplied but failed to raise the dispute within ten days of the receipt of '*Statutory Notice*' under Section 8 of the 'I&B' Code, it is held that the petition is maintainable.

44. If a dispute truly exists in fact and is not a hypothetical or an illusory one, then, the 'Adjudicating Authority' is to reject the Application. A defence being a mere bluster can also be rejected by an 'Adjudicating Authority'.

45. Section 8 of 'I&B' Code adopts the test to all classes of Applications that may initiate Insolvency proceedings against the 'Corporate Debtor'. An 'Operational Creditor' is to show refusal of the 'Debtor' to repay the 'debt' despite '*Statutory Notice*' issued under Section 8 of the Code.

46. It cannot be lost sight off that an unpaid 'Demand Notice' is evidence of Debtor's inability to pay its debts for the purpose of bankruptcy proceedings and

it is a just ground for a creditor to justify the filing of the petition. An 'Adjudicating Authority' is not to decide how much due is. Further, an 'Adjudicating Authority' is required to examine before admitting or rejecting an application u/s 9 of the Code as to whether the '*dispute*' raised by the 'Corporate Debtor' qualify as a '*dispute*' as defined under sub-section (6) of Section 5 and whether notice of '*dispute*' given by the 'Corporate Debtor' satisfies the conditions prescribed in sub-section (2) of Section 8 of the Code. Further, the existence of an '*undisputed sum*' is a condition precedent for initiating 'Corporate Insolvency Resolution Process'.

47. In the present case, no reply was issued to the 'Demand Notice' dated 06.04.2018 of the First Respondent / 'Operational Creditor' by the 'Corporate Debtor' and this is clearly an adverse circumstance against the Appellant, in the considered opinion of this Tribunal.

48. Before this Tribunal, a ground is taken by the Appellant that the defence of defective goods was ignored by the 'Adjudicating Authority' and that some of the e.mail communications between the Appellant and 'Indian Oil Corporation' substantiate that defective / low quality products were delivered by the First Respondent and that a letter was issued by 'Indian Oil Corporation Ltd.' dated 17.04.2017 which pointed out that non-approved materials were being used at the sight without approval of engineer-in-charge etc., it is to be pointed out that the First Respondent was not a party in respect of the communication between the Appellant and the customer and in fact Annexure A3, A4, A6 and A7 (true

copy of the order dated 20.09.2016 etc., true copy of the e.mail dated 01.10.2017, true copy of the e.mail dated 16.07.2020 and the true copy of the letter dated 17.04.2017) will not bind the First Respondent / 'Operational Creditor' and that the aforesaid documents do not anywhere indicate that the dispute was raised by the Appellant with the First Respondent. To put it precisely, substantial grounds need to be established to show that the debt is disputed as per decision **'Feldman' V. 'Nissim' (2010 EWHC 1353)**.

49. At the Appellate stage, to remove certain lacunae in a litigant's record an additional evidence is not to be permitted. Further, the placing of letters / communications as additional documents in an Appeal squarely depend upon whether the same are required to a 'Tribunal' to enable it to deliver a judgement. If the documents sought to be placed on record are absolutely unnecessary to decide the controversy between the parties are irrelevant for the issues to be decided, they cannot be permitted to be received.

50. Also, that the non-realisation of the importance of the documents due to inadvertence or lack of proper legal advice would not bring the case within the expression 'other substantial cause' under order 41 Rule 27 of the Civil Procedure Code, as per decision **'Haryana State Industrial Development Corporation' V. 'Cork Manufacturing Company' reported in AIR 2008 SC page 56**.

51. It is significantly pointed out that the true copy of the order dated 22.09.2020 in Company Appeal (AT) (Insolvency) No. 592 of 2020(A1), true copy of the order dated 06.01.2020 (A2) passed by the 'Adjudicating Authority', National Company Law Tribunal, Ahmedabad Bench, Ahmedabad in C.P. (IB) 227/7/NCLT/AHM/2018, true copy of e.mail dated 22.08.2020 and the two translated copies of the notice dated 02.04.2019 issued by 'VUDA' regarding sealing of premises (A9) are the documents that are very much available before the filing of the instant Appeal and this Tribunal permits the Appellant to place on record in this Appeal before this Tribunal the aforesaid Annexure A1 and A2 judicial orders. In so far as other documents are concerned, their communications (including the Annexure A3-true copy of the Work Order dated 20.09.2016 etc. A3 wherein the 'Corporate Debtor' / Appellant was a party and these documents viz. A3, A4, A6 and A7 in IA 2375/2020 do not bind the First Respondent as it was not a party to the same and in any event, these documents do not show that the 'dispute' was projected by the Appellant with the First Respondent / 'Operational Creditor'. In regard to the translated copy of FIR dated 09.08.2020 (Annexure A9 in IA 2375/2020) the same is allowed to be placed on record. Viewed in that perspective, this Tribunal allows IA 2375/2020 only in part as indicated *Supra*.

52. One cannot ignore a prime fact in the instant case that in the invoices raised by the First Respondent / 'Operational Creditor'/Petitioner that 'TDS' was

deducted and that a part payment of Rs. 17,74,977 was made by the 'Corporate Debtor'. As on 22.07.2019, the outstanding sum was Rs. 9,42,841/-.

51. In so far as the WhatsApp communication / remark / comment reportedly made by the Appellant through the 'Corporate Debtor' that '*I will call you later*', this was only looked into by the 'Adjudicating Authority' as one of the unfavorable circumstances against the 'Corporate Debtor' besides taking into other facts of the case into account and arrived at a conclusion that the 'Corporate Debtor' having an outstanding debt liability towards payment of materials that were supplied to it and made use of by it for a sum of Rs. 9,42,841/- and in short, there was no objection raised by the Appellant in regard to the quality of goods in the purported WhatsApp comment / remark.

53. In Law, an 'Adjudicating Authority' is safely and surely to admit the Application, if the '*debt*' is proved and the default took place, the only rider being, that the Application must be complete as per the ingredients of the Court. Before the 'Adjudicating Authority' the Application was filed on 06.04.2018. The outstanding amount was Rs. 9,42,841/- as on 22.09.2017 and hence, the Application filed was well within limitation. Suffice it for this Tribunal to point out that the impugned order passed by the 'Adjudicating Authority' in admitting the application filed by the First Respondent / 'Operational Creditor' does not suffer from any material irregularity or patent illegality in the eye of Law. Resultantly, the present Appeal fails.

In fine, the instant Appeal is dismissed. No Costs.

IA No.1546/2020 (stay application) is closed. IA No. 1547/2020 seeking exemption to file certified copy of the impugned order 03.06.2020 is closed with a direction being issued to the Appellant to furnish the certified copy of the impugned order within ten days from today.

**[Justice Venugopal. M]
Member (Judicial)**

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

NEW DELHI

20th October 2020

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