

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 517 of 2020

(Arising out of Impugned Order dated 27th May, 2020 passed by the Adjudicating Authority/National Company Law Tribunal, Delhi Bench, in Company petition No (IB) No. 1717 (ND) / 2019)

IN THE MATTER OF:

**Rajesh Mahajan
Son of Shri Satish Kumar
Resident of 299, Second Floor,
Bhera Enclave, Paschim Vihar,
New Delhi - 1100087**

... Appellant

Versus

- 1. Park Network Pvt. Ltd.,
Having its registered office at
406/56, Eros Apartment,
Building 56, Nehru Place, New Delhi – 110019.**
- 2. M/s. PP Telecell Marketing Pvt. Ltd.,
Through Interim Resolution Professional,
Mr. Ajay Goyal,
Having its registered office at
12/401, Sunder Vihar, Outer Ring Road,
Paschim Vihar, New Delhi 110087.**
- 3. Mr. Ajay Goyal, Interim Resolution Professional of
M/s. PP Telecell Marketing Pvt. Ltd.
Having its office at 49, DDA Site No. 1
Near Rajender Nagar, New Delhi-110060.**

... Respondents

Present:

**For Appellant: Mr. Praveen Kumar Aggarwal, Advocate
For Respondents: Mr. Ajay Goyal and Mr. Tushar Thareja, Advocates**

JUDGMENT

(Through Virtual Mode)

(Dated 14.09.2020)

{Per: Dr. Alok Srivastava, Member(T)}

This appeal emanates from an order dated 27.5.2020 (hereinafter called Impugned Order) of the National Company Law Tribunal, Delhi, Bench V vide which Adjudicating Authority has admitted an application under Section 9 of Insolvency & Bankruptcy Code, 2016 (hereinafter called IBC, 2016) filed by M/s. Park Network Pvt. Ltd. The appeal has been filed by Rajesh Mahajan, who is a suspended Director of the Corporate Debtor M/s. PP Telecell Marketing Pvt. Ltd. M/s. Park Network Pvt. Ltd. is Respondent No.1 in the appeal and M/s. PP Telecell Marketing Pvt. Ltd., the Corporate Debtor (which is now under CIRP) is Respondent No.2 through Mr. Ajay Goyal, Interim Resolution Professional.

2. The brief facts of the case are that M/s. PP Telecell Marketing Pvt. Ltd. having CIN No. U64202DL2002PTC117795 is in the business of trading and was the authorized distributor of M/s. Syntech (HK) Technology Limited, manufacturer of mobile phone with the brand Gionee in India. In the year 2012, M/s. PP Telecell Marketing Pvt. Ltd. entered into a International Distributor Agreement with Syntech (HK) Technology Ltd. for distribution of Gionee mobile phones and accessories for three years from 2012. The agreement was renewed in 2015 after expiry of the first agreement. M/s. Park Network Pvt. Ltd.

having CIN No. U74899DL1995PTC65654 was appointed as sub-distributor as per Sub-Distribution Agreement (here in after called SDA) dated 15.4.2015 on the terms and conditions contained therein by the Corporate Debtor M/s. PP Telecell Marketing Pvt. Ltd. for sale of mobile phones and accessories and related services.

3. Respondent No.1 used to buy mobile handsets and mobile accessories from the Corporate Debtor M/s. PP Telecell Marketing Pvt. Ltd. as per the SDA, and various transactions were made between the Corporate Debtor (Respondent No.2) and Respondent No.1 during the period April, 2015 to August, 2018. On closure of Indian operations by Syntech (HK) Technology Ltd., Respondent No.2 company sent an e-mail dated 03.01.2019 to Respondent No. 1 attaching a claim summary and their intention to settle Respondent No. 1's accounts by billing of A1 Lite Handsets. The process for repayment was thus initiated. In the second e-mail dated 07.01.2019 an amount of Rs.20,02,872/- was shown as due to be paid to Respondent No. 1 This due amount was intimated to the Appellant vide e-mail dated 05.01.2019 by the Corporate Debtor alongwith the statement of Ledger Account.

4. In view of default in payment of the above mentioned amount, Respondent No.1 issued a demand notice dated 2/5/2019 in Form 4, as is required under Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 read with Section 8 of the IBC Code, 2016.

The Respondent No.1 has also claimed an interest @ 8% p.a. from the date of default .

5. The Corporate Debtor replied to the above mentioned notice vide letter dated 21.5.2019 mentioning dispute regarding the payment.

6. The Appellant and Respondents were given opportunity to present their case through replies and rejoinder and advance oral arguments before the Adjudicating Authority. In short, the Adjudicating Authority's findings are that the Operational Creditor M/s. Park Network Pvt. Ltd. was appointed as the sub-distributor by M/s. PP Telecell Marketing Pvt. Ltd. through the SDA dated 15.4.2015, wherein the Operational Creditor was given sub-distribution rights for sale of products indicated at Annexure 'A' enclosed with the SDA. The price and payment terms were that 'Sub Distributor shall purchase product from the Distributor according to the price list applicable and terms of sale in effect for product made available to the Sub Distributor on the date of bill. Distributor may adjust the prices of the products from time to time upon reasonable prior written notice to Sub Distributor'.

7. As Distributor's obligations, the following was included in the SDA:-

"5(G) The Company/Distributor will introduce schemes from time to time to boost sales of the products.

(H) Any liability arising out of non service ability, delayed or unsatisfactory

serviceability or performance of the products will be borne by the Distributor.”

8. The Operational Creditor was receiving all the benefits in relation to the products covered in the Sub Distribution Agreement from the Corporate Debtor M/s. PP Telecell Marketing Pvt. Ltd. These benefits were originally given by M/s. Syntech (HK) Technology Limited from time to time.

9. Consequent to the closing of Indian operations, M/s. Syntech (HK) Technology Limited were in the process of making full and final settlement with its partners. E-mail message dated 5.1.2019 gives details of claims under various schemes, as received by the Operational Creditor and proposal to settlement all claims at 50% by way of billing of Gionee Brand mobile handsets. In brief, this e-mail provides the following break-up of claims approved and those pending approval:-

1. Total pending claim amount:-	Rs.
13,49,770.00	

2. Previous pending claim amount in Ledger:-	<u>Rs.</u>
<u>6,53,102.00</u>	

Total Amount Payable by PP Telecell Marketing Pvt.Ltd. :-**Rs.**

20,02,872.00

10. A settlement offer was made by M/s. Syntech (HK) Technology Limited through the Corporate Debtor to settle all claims of the Operational Creditor at Rs.10,28,475/- through billing of 105 Hand Sets (A-1 Model) @ Rs.9800/- per set. This offer was not accepted or responded to by the Operational Creditor. As a result of non-acceptance of this offer by the Operational Creditor, Corporate Debtor rejected all the previously passed claims for Rs,6,53,102/- in its books and shared updated statement of account vide e-mail dated 12.2.2019 in this regard. The Operational Creditor has claimed before the Appellate Authority that vide e-mail dated 7.1.2019, the Corporate Debtor has admitted a debt/liability of Rs.20,02,872/- and also attached the ledger account of the Appellant maintained by the Corporate Debtor.

11. The arguments of both the parties were heard in appeal. The Learned Counsel for the Appellant has advanced the argument that the Operational Creditor was sub distributor with a valid sub-distribution agreement with the Corporate Debtor, and the alleged payable amount communicated vide e-mail dated 5.1.2019 is basically not a operational debt. He has placed reliance on the judgment dated 14.08.2020 of the Hon'ble NCLAT in **Sushil Ansal vs. Ashok Tripathi & Ors**, He has also argued that the liability accrues only for sale and supply of goods/services under the Section 9 of IBC and not for the purchase of goods, even if the goods/services received were defective.

12. The Learned Counsel for Appellant has also pointed out to certain defects and infirmities in application submitted by Operational Creditor under Section 9 of IBC 2016 stating that details of transactions, date of default and invoices to establish operational debt were not stated in the demand notice. The appellant has placed reliance of the decision of NCLAT in **Neeraj Jain (Director of Flipkart India Pvt. Ltd.) vs. Cloudwalker Streaming Technologies Private Limited**. He has also cited the case of Privy Council in **Nazir Ahmed v. King Emperor** {63 1A 372(1936)} and **Ramco Systems vz. Spiceject Ltd.** (2019 SCC Online 354 NCLAT), where the Hon'ble Tribunal has held,

“...in the absence of specific evidence relating to invoices forwarded by the Appellant and there being a doubt, we hold that the Adjudicating Authority has rightly refused to entertain application under Section 9 which requires strict proof of debt and default.”

He has argued that the admission of debt must be unequivocal, unconditional and clear, which is not so in the present case and the claim of operational debt on account of sales return is not tenable. The appellant has also referred to the judgment of Apex Court in **Mobilox Innovations (P) Ltd. V. Kirusa Software (P) Ltd.** (2018) 1 SCC 353 to claim that the Adjudicating Authority has to reject the application, if a dispute truly exists in fact and is not spurious, hypothetical or illusory.

13. In his arguments, the Learned Counsel for Operational Creditor (Respondent No. 1) has stated that the legal ground raised by the Appellant in the present appeal is whether Respondent 1 is an Operational Creditor or not? He has alluded to the definition of debt and creditor in Section 3 of IBC, 2016, which is as follows:-

“(10) ‘creditor’ means any person to whom a debt is owed and includes a financial creditor, an operational creditor, a secured creditor, an unsecured creditor and a decree-holder;

(11) ‘debt’ means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt.

He has also alluded to Section 5 of the IBC, 2016 which defines operational creditor and operational debt as follows:-

“(20) ‘operational creditor’ means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred;

(21) ‘operational debt’ means a claim in respect of the provision of goods or services including employment or a debt in respect of the

(payment) of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority.”

14. The Learned Counsel for Respondent No. 1 has submitted that the test which can be applied in the instant case to see whether the debt is operational or not, will be from the nature of activities performed by the Operational Creditor on behalf of the Corporate Debtor as per the sub-distribution agreement between the parties. He has mentioned that “provision of goods and services” includes not only sale of goods and services, but also sale returns. He has also argued that sub-distribution agreement, which is a bipartite agreement, imposes sole responsibility on the Corporate Debtor to settle all the claims of Respondent no. 1. In support of his argument, he has pointed to clause No. 5 of the sub-distribution agreement, which is extracted below:-

“H. Any liability arising out of non serviceability, delayed or unsatisfactory or performance of the products will be borne by the distributor.

J. The Distributor shall not responsible for any claims whatsoever, whether as per the Company Policy or written commitment by a level not lower than a Branch Manager, if such claims are not lodged with the distributor with 15 days of the claim date.”

15. Explaining the issue of sale return, the Learned Counsel for Respondent No.1 has stated that Respondent No.1 returned all the non activated handsets to Respondent No. 2, i.e. Corporate Debtor and the Corporate Debtor, after applying benefits under schemes and price reduction for the handsets sold to Respondent 1, credited the final amount to the account of the Respondent 1. He has claimed that handsets that were not activated were sale returns and the benefit of various schemes and price drops were related to the selling price of the handsets and thus the due amount was given to him by Respondent No. 2 in the form of credit notes which were verifiable through the ledger accounts. Therefore, the ledger accounts clearly show the amount owned by the Respondent 2 to respondent 1 was in regard to the services rendered as per the sub-distribution agreement and benefits etc. and are in the nature of operational debt.

16. We have perused the appeal memo, replies of the Respondents and rejoinder thereof as well as written submissions filed on behalf of the Appellant and Respondent No. 1 (operational Creditor). We have also considered oral arguments put forth by both sides and the case laws cited during the arguments and in written submissions.

17. It is a fact that sub-distribution agreement was signed between the Operational Creditor and Corporate Debtor on 15.4.2015 for supply and

distribution of mobile phones and other accessories. The clause 5 of the sub-distribution agreement mentions the obligations towards sub-distributor i.e. Operational Creditor as follows:-

“G. The company/distributor will introduce schemes from time to time to boost sales of the products.

And Clause ‘J’ of the Agreement says

J. The distributor shall not be responsible for any claim whatsoever whether as per company policy or other written commitment by levelled not lower than a branch manager, if such claims are not lodged with the distributor with 15 days of the claim.

In addition, the clause 4 of the sub-distribution agreement states as follows:-

“A. Sub Distributor shall purchase product from the Distributor according to the price list applicable and terms of sale in effect for product made available to the Sub Distributor on the date of bill. Distributor may adjust the prices of the products from time to time upon reasonable prior written notice to Sub Distributor. Distributor shall bear the cost of price drop and stocks lying with Sub Distributor and its trade partners as per a mutually accepted process.

B. Payment and Credit Terms will be as per Company policy as specified in Annexure C and as amended and intimated to you from time to time.”

18. It is clear from reading of clauses 4 and 5 of the SDA, the sub distributor purchases products from the distributor according to the price list applicable and terms of sale. The distributor has to bear the cost of price drop for stocks lying with sub distributor and its trade partners as per a mutually accepted process and the payment and credit terms have been specified in Annexure ‘C’ attached with sub distributor agreement. Thus, it is clear that the transaction for mobile handsets and accessories is between the distributor (M/s. PP Telecell Marketing Pvt. Ltd.) and the Operational Creditor (M/s. Park Network Pvt. Ltd.) and not with any other entity. No where in this agreement there is a obligation placed of the mobile handset manufacturing company M/s. Syntech (HK) Technology Limited. Therefore, M/s. PP Telecell Marketing Pvt. Ltd. is clearly the Corporate Debtor and M/s. Park Network Pvt. Ltd. Is the Operational Creditor .

19. The next issue is whether the debt in question is an operational debt. Insofar as this issue is concerned, it would be useful to go through the definition of operational debt in Section 3(11) and Section 5 (21) of the IBC 2016 -

“3(11) ‘debt’ means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt.

5(21) ‘operational debt’ means a claim in respect of the provision of goods or services including employment or a debt in respect of the payment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority.”

20. It is evident from the definitions cited above that ‘operational debt’ means claim in respect of provision of goods and services. In the present case, the goods and services are being provided by the distributor to the sub distributor as per clauses of the sub-distribution agreement. Insofar as the purchase of mobile handsets is concerned, clause 6(c) of the SDA mentions that the sub distributor shall place orders in writing for supply of products. Products bought against such orders will be delivered by the Distributor or lifted by the Sub Distributor within 24 hours of billing and will in no case be stored at distributor’s premises beyond this deadline. Therefore, as per clause 4(a) and clause 6(c) of the Sub Distribution Agreement, the Distributor is the seller of mobile handsets and accessories and the Sub Distributor is the purchaser of the products from the Distributor. Clause 4(a) of the Sub Distribution Agreement also makes it clear that Distributor shall bear the cost of price drop for stocks lying with Sub

Distributor and its trade partners. This amount is corroborated by the ledger account attached with e-mail sent by the Corporate Debtor on 5.1.2019, according to which the amount due to the Operational Creditor from Corporate Debtor is Rs.20,02,872/- (Rupees Twenty Lakh Two Thousand Eight Hundred and Seventy Two only). The Corporate Debtor has mentioned about a settlement offer made by M/s. Syntech (HK) Technology Limited for settlement of all claims at Rs.10,28,475/- by way of billing of 105 handsets(A-1 Model) @ Rs. 9,800/- per set. No document has been presented by the Corporate Debtor regarding the acceptance of this offer by the Operational Creditor. Hence, the debt of Rs.20,02,872/- which stands in the name of Corporate Debtor towards the Operational Creditor is inferred to be an Operational Debt. However, it is not for us to decide on the quantum of operational debt. Our concern is to see whether this debt is more than the threshold amount specified for admission of application under Section 9 of IBC, 2016.

21. The next issue is whether there was a dispute between the Corporate Debtor and Operational Creditor regarding the Operational Debt, which was raised by the Corporate Debtor after receipt of demand notice. Section 8(1) of the IBC 2016 requires the Operational Creditor to deliver a demand notice to Operational Debtor on occurrence of default in the prescribed form and manner, wherein the due date of debt has been shown as 2/5/2019. The reply to demand notice dated 2.5.2019 was sent through Advocate of the Corporate Debtor vide letter dated 21.5.2019. The letter mentions that the demand raised

by the Occupational Creditor is totally illegal as the amount demanded is not the liability of the company (M/s. PP Telecell Marketing Pvt. Ltd.), as there was no direct transaction between the parties and the amount claimed by the Operational Creditor. As has been discussed earlier in this judgment, the Sub Distribution Agreement is valid and creates a Corporate Debtor and Operational Creditor relationship between M/s. PP Telecell Marketing Pvt. Ltd. and M/s. Park Network Pvt. Ltd. Therefore, the dispute tried to be raised by M/s. PP Telecell Marketing Pvt. through his reply to the demand notice is imaginary and not as defined in Section 8(2)(a) of the IBC 2016. Thus, it is clear that the demand notice was sent on 2/5/2019 by the Operational Creditor to the Corporate Debtor and the dispute raised does not hold any ground.

22. The last point to be looked at is whether the application under Section 9 of IBC, 2016 was filed by the Operational Creditor within the time period of limitation. It is seen that the application dated 18.7.2019 was filed before the Hon'ble NCLT (Adjudicating Authority) and as per para 4 of the application, the date of default has been mentioned as 5/1/2019 and the amount of debt in default is Rs.20,02,782/-. Therefore the application was filed within limitation.

23. In the light of the detailed discussion in the above mentioned paragraphs, we find no reason to interfere with the impugned order dated 27.5.2020 of

Hon'ble NCLT, New Delhi (Adjudicating Authority) and therefore, dismiss the appeal. The appeal is thus disposed off. There is no order as to costs.

(Justice Bansi Lal Bhat)
Acting Chairperson

(V.P. Singh)
Member (Technical)

(Dr. Alok Srivastava)
Member (Technical)

New Delhi
14th September, 2020

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