

NATIONAL COMPANY LAW APPELLATE TRIBUNAL NEW DELHI

Company Appeal (AT) (Insolvency) No. 656 of 2020

[Arising out of Order dated 13.03.2020 passed by the Adjudicating Authority (National Company Law Tribunal), Indore Bench at Ahmedabad in CP (IB) 374/9/NCLT/AHM/2018]

IN THE MATTER OF:

**Anshul Vashistha
Shareholder & Director of
M/s.Saturn Prefab India Pvt. Ltd
S/o Shri Prashant Vashistha,
Aged : 36 years,
Add: Plot No. 727 – 728, Sector – 3,
Industrial Area,
Pithampur, Dist. Dhar**

...Appellant

Versus

**1.M/s. Jayhind Steel Traders
2, Stadium House, OPP Municipal
Swimming Pool, Near Stadium Six
Road, Navrangpura,
Ahmadabad – 380 009**

...Respondent No.1

**2.M/s.Saturn Prefab India Pvt. Ltd
Through Insolvency Resolution Professional
Dr. Shri G.K.Saraswat
727-728, Sector – 3, Industrial Area,
Pithampur, Dist. Dhar**

...Respondent No.2

Present:

For Appellant : Mr. Vijayesh Atre, Advocate.

**For Respondents: Mr. Manoj Swarup Sr. Advocate with Mr. Anil.K.Sharma,
Advocate for R-1. Dr. G K Saraswat, Advocate for RP. Mr. Rahul Parasarampuria,
Advocate for R-2.**

J U D G M E N T

DR. ASHOK KUMAR MISHRA, TECHNICAL MEMBER

1. The Appeal has been filed by Mr. Anshul Vashistha, who is the Director of the Suspended Board of Directors of the Corporate Debtor- M/s. Saturn Prefab India Pvt. Ltd., (Respondent No.2) under Section 61 of the 'Insolvency and Bankruptcy Code, 2016' (for short 'Code') against the impugned order dated 13.03.2020 passed by 'Adjudicating Authority' ('National Company law Tribunal, Indore Bench at Ahmedabad') in CP (IB) No. 374 /9/NCLT/AHM/ 2018. The Operational Creditor is M/s. Jayhind Steel Traders (Respondent No.1).
2. The Adjudicating Authority has initiated 'Corporate Insolvency Resolution Process' (for short 'CIRP') against the Corporate Debtor in accordance with the relevant provisions of the Code and has appointed Mr. Gopal Krishana Saraswat, 'Interim Resolution Professional' with a direction to follow the provisions of Section 13, 14 and other relevant provisions of the Code.
3. Initiation of CIRP is based on the following findings:-
 - a) Existence of operational debt is above Rs. One Lac;
 - b) Debt is due;
 - c) Default has occurred on 30.11.2016;
 - d) Petition has been filed within the limitation period as the date of default is 30.11.2016 and the petition has been filed on 11.07.2018.
 - e) Existence of any dispute, prior to the notice issued by the Operational Creditor is not found.(Para 17 of the impugned order dated 13.03.2020).

- f) Defaulted amount is Rs. 1,81,61,422.00 as per respective invoices enclosed with the Petition.
 - g) Date of invoice is between April 2016 to March 2018.
 - h) Date of first default is 30.11.2016.
4. The Corporate Debtor/Respondent No.2 is engaged in the business of manufacturing of pre-fabricated shed, industrial roofing sheet, pre-engineering building etc., for which it requires various material produced by the Respondent at various sites.
5. The Operational Creditor/Respondent No.1 is engaged in the business of supply of Angel, Channel, TMP, GP/CR/GC Sheet.
6. The Respondent No.1 used to supply material to Respondent No.2 for completing its various projects at various sites and it was a normal business practice to seek delivery of required material at project site itself. It was also usual practice between the parties to ask its clients to make direct payment to the Respondent No.1 suppliers.
7. The Appellant has made following submissions:
- a. Pre-existing dispute:-

The Operational Creditor vide email dated 05.02.2018 has sent an email to the Corporate Debtor asking for payment of outstanding bills and has even asked for PDC Cheque for all bills. The Respondent No.1/Corporate Debtor has responded to the same on 29.03.2018 to the Operational Creditor *“Your ledger is not matching with our ledger and TC also not came with the vehicle. Those invoices are not showing PO No. will not be accepted by our accounts. Rejected materials are by UT testing still they are in our site. Please check and revert.”*

The Appellant has also submitted that the outstanding amount of Rs.1,81,61,422/- is incorrect. Although reflected in the impugned order both at para 5 and 16.1. They have alleged that the Adjudicating Authority itself has given details of bills at para 4 of the order. Total 25 bills and the amount is Rs.1,73,94,065.00. Similarly, in Para 6 of the impugned order the figure stated is Rs.1,56,25,154.00 which is the outstanding due as per demand notice in Form No.3 given by Operational Creditor on 13.06.2018 which was served to the Corporate Debtor on 20.06.2018. It is not in dispute that the Operational Creditor was maintaining a Running Account for the goods supplied to the Corporate Debtor from time to time.

- b. As per the Form-5- Application by Operational Creditor to initiate CIRP under the Code, the Operational Creditor has reflected in Part -IV the total amount of Debt as Rs.1,56,25,154/-. Part-IV is also reflecting the total amount of Rs.1,81,61,422/- for Debt due for the period of April 2016 to March 2018, which includes the principal amount of invoice and interest as per Part -IV, clause -2 amount claimed to be in default and the date on which the default occurred here the amount is Rs.1,81,61,422/- and the date on which default occurred is silent.
- c. The Appellant has also submitted that a group firm of the Respondent No.2 Company viz. "Saturn Infra" has purchased material for Rs. 14,90,678/- only as against which the Respondent No.1 has received payment of Rs. 42,00,000/- through Canara bank Account No.3353201000167, thereby leaving a credit balance of Rs.27,09,322/- in favour of the Respondent No.2 company. It is also stated by the Appellant that once client of the Respondent No.2 company M/s. Bhagwati Constructions, has admittedly

made a direct payment of Rs. 23,34,617/- to the Respondent No.1 for which its advocate Mr. Hiren K.Dudhiya has also issued legal notice dated 11th Sept. 2018. The Appellant has also submitted a list claimed to be fabricated and false invoices raised by Operational Creditor. The Appellant has provided a list of 27 invoices with dates amount to Rs.1,04,19,944/.

- d. It is also stated by the Appellant that the date of default is “imaginary or hypothetical”. They have also alleged that the statutory notice of demand as per section 8 (1) of the Code was defective as they were not accompanying copy of the invoices.
8. The Operational Creditor/Respondent No.1 has submitted that the Appellant was purchasing steel material from November, 2016 to October, 2017 in the M/s. Saturn Pre Fab India Pvt. Ltd. (Respondent No.2) and in the name of Saturn Fabricator and has alleged that the Corporate Debtor has not produced the ledger of M/s. Saturn Pre Fab India Pvt. Ltd (Respondent No.2) and provided the ledger of Saturn Fabricator (Saturn Infra).
9. The Respondent No.1 has also alleged that the 27 invoices what the Appellant is alleging as fabricated are based on purchase order/telephone calls/transport bills etc. They have also submitted that out of the 27 invoices as per para 14 of the counter affidavit dated 11.08.2020, there are 7 invoices which are disputed and value of which is approx. 30 lacs they have received payment of Rs.28 lacs as per para 15 of the same counter affidavit. The operational creditor vide para 21 of the counter affidavit dated 11.08.2020 has alleged outstanding payment of Rs.1, 28,15,725/- as on 26.06.2017. They have also submitted that repeatedly they are asking for release of payments. They are also alleging that material supplied to western railway was rejected by them as alleged by corporate debtor

as still they have not been provided with rejection letter and hence there is no pre-existing dispute. In order to substantiate its claim, the operational creditor has given reference to its GST Return and also submitted that the corporate debtor has purchased total material of steel worth Rs.2,54,32,783/- in the name of Respondent No.2 and against that they have received a payment of Rs. 69,07,629/- as also of Rs.29,00,000/- received from Saturn Fabricators (Saturn Infra) total an amount of Rs.98,07,629/- para 29 of the Counter Affidavit. During the course of hearing, the Respondent No.1 has submitted that there is no pre-existing dispute and the amounts are due.

10. The IRP has issued public announcement on 18.06.2020 and has constituted Committee of Creditors (for short 'CoC') on 08.07.2020.
11. We have heard parties. It is observed that there is business relationship between the two parties and has gone into rough weather from March, 2018. It is not in dispute that both the operational creditor and the corporate debtor were maintaining Running Account.
12. It is also observed that the operational creditor is making all attempts to realize the payment and conveniently used I & B Code, 2016 for faster realization.
13. It is also observed that the present case involves the need for reconciliation between the parties and to firm up a particular amount and there is multiple date of default as the purchase order seems to have a condition that payment will be released 30 days after receipt of material (various purchase orders have different payment terms) and other conditions as given below as for example page 292 of the Appeal paper book:
 - a. Payment Terms - Payment will made 60 days after receiving the material

- b. Delivery – you will dispatch the entire ordered quantity immediately from the receipt of the order. Test certificate should be given along with commercial invoice with material.
- c. Transportation – You shall make arrangement of transportation to send the material to our site. Transportation charge is in you scope.
- d. Dispute resolution -Any dispute arising out of or in connection with this purchase order, including any question regarding its Existence validity of termination, performance under this purchase order or in case of disagreement on or non-supply of product shall be referred to sole arbitrator and finally resolved in accordance with the provision of Arbitrator and counsillation Act, 1996. The award passed by the sole arbitrator shall be final and binding to both the parties. The language of the arbitration including its proceedings and documents to be exchanged there of with sole arbitrator and between the parties shall be Hindi. The place of arbitrator shall be at Indore M.P.
- e. Governing law and jurisdiction - the contract shall be governed by and construed in accordance with the provisions of Indian laws. The courts at Indore M.P. shall have exclusive jurisdiction in all the matters relating to this purchaser order.

While purchase order at page 300 of the Appeal Paper book reflects:

- f. Payment Terms - 30 days against delivery.
- g. Delivery – You will dispatch the entire ordered quantity within immediate from the receipt of the order.

Whereas the invoice is stating the conditions as follows which is mentioned at page 175 of the Appeal Paper book:

- a. Interest will be charged @24 % per annum on all bills remaining unpaid within due time after the date of the delivery of goods.
 - b. We do not accept any responsibility for loss or damage in transit.
 - c. Any dispute arising from this consignment will be settled by Ahmedabad Jurisdiction only.
14. On going through the various submissions made by the parties, a clarity is emerging that there are multiple date of default, there is an existence of dispute on balance dues, the actual amount due needs to be reconciled and reflected.
15. The Operational Creditor is claiming that the Debt due is more than Rs. 1 lac. If, it may also be due for payment as it will be becoming the job of IRP to reconcile and get the disputed amount segregated and the claim can be counted provided the application meets the criteria of Section 8 & 9 of the Code. The Object of the Code is not recovery of money but to bring out of insolvency and maximization of value of assets of the Corporate Debtor. It is also very much clear that if there is a dispute as per relevant provisions of the Code, it is incumbent on the Adjudicating Authority to reject the petition/application as per the provisions of the Section 9 of the Code. It is also very much clear in this case that there is a dispute of the Debt and dispute resolution mechanism is also provided in the purchase order. Since the I&B Code, 2016 debars the application of the Code for recovery of money as well as if there is a dispute then also petition/application requires to be rejected.
16. The Hon'ble Supreme Court has already held in Mobilox Innovations Pvt. Ltd., Vs. Kirusa Software pvt. Ltd. [2018] 1 SCC 353, that IBC is not intended to be a substitute for recovery forum. It is also laid down that wherever there is existence of real dispute, the IBC provisions cannot be invoked.

17. For better and fuller appreciation of the present subject matter in issue, it is useful for this Tribunal to make a pertinent reference to Section 8 & 9 of the Code which provides mechanism for Operational Creditor, which runs as under:

Section 8 – Insolvency Resolution by Operational Creditor:

8. (1) An operational creditor may, on the occurrence of a default, deliver a demand notice of unpaid operational debtor copy of an invoice demanding payment of the amount involved in the default to the corporate debtor in such form and manner as may be prescribed.

(2) The corporate debtor shall, within a period of ten days of the receipt of the demand notice or copy of the invoice mentioned in sub-section (1) bring to the notice of the operational creditor—

(a) existence of a dispute, if any, and record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoice in relation to such dispute;

(b) the repayment of unpaid operational debt—

(i) by sending an attested copy of the record of electronic transfer of the unpaid amount from the bank account of the corporate debtor; or

(ii) by sending an attested copy of record that the operational creditor has encashed a cheque issued by the corporate debtor.

Explanation.—For the purposes of this section, a "demand notice" means a notice served by an operational creditor to the corporate

debtor demanding repayment of the operational debt in respect of which the default has occurred.

Section 9-application for initiation of Corporate Insolvency Resolution Process by Operational Creditor:

Section 9 -. (1) After the expiry of the period of ten days from the date of delivery of the notice or invoice demanding payment under sub-section (1) of section 8, if the operational creditor does not receive payment from the corporate debtor or notice of the dispute under sub-section (2) of section 8, the operational creditor may file an application before the Adjudicating Authority for initiating a corporate insolvency resolution process.

(2) The application under sub-section (1) shall be filed in such form and manner and accompanied with such fee as may be prescribed.

(3) The operational creditor shall, along with the application furnish—

(a) a copy of the invoice demanding payment or demand notice delivered by the operational creditor to the corporate debtor;

(b) an affidavit to the effect that there is no notice given by the corporate debtor relating to a dispute of the unpaid operational debt;

(c) a copy of the certificate from the financial institutions maintaining accounts of the operational creditor confirming that there is no payment of an unpaid operational debt by the corporate debtor; and

(d) such other information as may be specified.

(4) An operational creditor initiating a corporate insolvency resolution process under this section, may propose a resolution professional to act as an interim resolution professional.

(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 subclause (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.

(6) The corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (5) of this section.

18. Since Hon'ble Apex Court has clearly laid down the mechanism to be operated by Operational Creditor in terms of Section 8 & 9 of the Code, it is very clear that the undisputed debt is *sine qua non* of initiating CIRP as also the debt should be due and payable. Since, the order of Adjudicating Authority in the present case, as enumerated above, does not meet the above criteria and hence the appeal needs to be allowed. We are not passing any comment on the merit of the dispute between the parties and the parties are free to approach appropriate forum for recovery or dispute resolution.
19. In a case of running account where accounts are yet to be reconciled and settled, an email like 05.02.2018 sent before Section 8 demand notice dated 13.06.2018 asking Operational Creditor to take back the rejected material reflect pre-existing dispute in such case Adjudicating Authority cannot sit down to settle the account and calculate the Debt dues.
20. In view of the above the appeal is allowed. We set aside the impugned order dated 13.03.2020 passed by the Adjudicating Authority ('National Company Law Tribunal, Indore bench at Ahmedabad') and consequently order passed by the

Adjudicating Authority appointing 'Interim Resolution Professional', declaring moratorium, freezing of accounts including consequential actions taken by the 'Interim Resolution Professional' like publishing in newspapers, constitution of committee of creditors etc., are declared illegal and set aside. The Corporate Debtor is released from all the rigour of law and is allowed to function independently through its Board of Directors from immediate effect. The Corporate Debtor will, in the first instance, bear CIRP costs so far incurred by IRP/RP & then entitled to recover it from Operational Creditor. No order as to costs.

[Justice A.I.S. Cheema]
Member (Judicial)

[Dr. Ashok Kumar Mishra]
Member (Technical)

30th September, 2020

New Delhi

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