

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Ins) No. 525 of 2020

[Arising out of Order dated 18th November, 2019 passed by National Company Law Tribunal, Kolkata Bench, Kolkata in C.P. (IB) No. 993/KB/2019]

IN THE MATTER OF:

Switching AVO Electro Power Ltd.

Having its registered office at:

**230 S. N. Roy Road, Kolkata,
West Bengal – 700038.**

**...Appellant
(Operational Creditor).**

Versus

Ambient Computronics Pvt. Ltd.

Having its registered office at:

**38, AN Path North, SK Puri, Boring Road,
Patna, Bihar – 800013.**

**...Respondent
(Corporate Debtor).**

Present:

For Appellant: Mr. Abhay K. Das, Advocate.

**For Respondent: Mr. Kumar Sumit and Mr. Chirag Gupta,
Advocates for R-1.**

**ORAL JUDGMENT
(Virtual Mode)**

1. Heard Mr. A.K. Das, Advocate for the Appellant/Operational Creditor and Mr. Kumar Sumit, Advocate for Respondent/Corporate Debtor. The Operational Creditor – Switching AVO Electro Power Ltd. filed application under Section 9 of Insolvency and Bankruptcy Code, 2016 (IBC In Short) before the Adjudicating Authority (National Company Law Tribunal, Kolkata Bench, Kolkata in Company Petition (IB) No. 993/KB/2019). The Appellant claimed that the Appellant is in

business of supply of UPS Power Storage Equipment and in ordinary course of business the Operational Creditor supplied UPS Power Storage to the Corporate Debtor. The Corporate Debtor made default in making payment of the balance of amount of Rs. 21,07,916/-. Counsel for the Appellant claims that as the amount was outstanding, Demand Notice under section 8 of I & B Code, 2016, copy of which is at page 67 was sent on 10th April, 2018. The document of e-mail as at page 185 shows that the Corporate Debtor received the Notice on 24th April, 2018 and the Corporate Debtor had sent Reply, copy of which is at page 82. The Reply is dated 30th April, 2018. The Respondent claimed internal disputes with one other director of the Corporate Debtor namely Mr. Sudhir Kumar. Respondent claimed in Reply that the Corporate Debtor (which is based in Kolkata) the supply was not in the knowledge of the head office and that their own branch which is at Varanasi had failed to submit books of accounts for periodic compilation, reconciliation and observation. The Corporate Debtor informed the Operational Creditor in Reply to bear with the Corporate Debtor to know about lapse and conspiracy behind raised situation between the two reputed companies. The Corporate Debtor informed that they need sufficient time for confirmation of the transaction purchase, sale, payment and receipt.

2. The Learned Counsel for the Appellant is pointing out that after sending such reply dated 30th April, 2018 with e-mail dated 02nd May, 2018 (Page 185) the Corporate Debtor did not enter into any correspondence or contact with the Operational Creditor and ultimately the Appellant filed Application under Section 9 of I & B Code, 2016 at 30th May, 2018, copy of which is at page 43. The Learned *Company Appeal (AT) (Ins) No. 525 of 2020*

Counsel referred to Ledger Account of the Operational Creditor which is at page 66 and submits that between the Operational Creditor and the Corporate Debtor there had been business of Rs. 8,30,45,885 /- out of which Rs. 8,09,37,969/- had already been paid. However, the Corporate Debtor defaulted in payment of outstanding bill of Rs. 21,07,916/- in spite of demands. It is argued that Bank Statement copy of which is at Page 72 shows that the Corporate Debtor had from time to time made various payments including payment against the invoice, copy of which is at page 84 of the Appeal Paper Book and the e-way bill is at Page 85. The Learned Counsel submits that there was no dispute raised by the Corporate Debtor before Section 8 Notice was sent and even the Reply to Section 8 Notice stated that they would verify but in spite of that, no follow up & no payment was made. The Learned Counsel submitted that the Adjudicating Authority erred in going into the defence that the Corporate Debtor – Company had internal disputes with one of the directors and that such defence put up by the Corporate Debtor could be looked into to refuse to admit the Application under Section 9 of I & B Code, 2016.

3. The Learned Counsel for the Respondent is submitting that if the tax invoice as at Page 84 is perused and the invoice number is seen and the address of the consignee is kept in view which had address at Varanasi, the e-way bill which shows the name of the Corporate Debtor, the address given is of Bhullanpur at Marhauli in Uttar Pradesh and thus it is argued that the goods were never supplied to the Corporate Debtor and this has been rightly accepted by the Adjudicating Authority if the impugned order is perused and Paragraph 8 *Company Appeal (AT) (Ins) No. 525 of 2020*

of the impugned order is considered. The Learned Counsel submits that the Corporate Debtor had never received these goods and the Learned Counsel pointed out Reply which was filed before the Adjudicating Authority, copy of which is at page 108 and referred to ground U that there was no agreement between the Operational Creditor and the alleged Corporate Debtor and that no security has been obtained by the Operational Creditor. It is argued that there was corrupt practices adopted by Operational Creditor and said Mr. Sudhir Kumar who was one of the directors of the Corporate Debtor. The Learned Counsel argued that the Company already has a dispute pending with the said Director Mr. Sudhir Kumar in Ld. NCLT. It is also stated that the screenshot at Annexure A-7 which is at page 48 of the Rejoinder does not show that actually GST was paid. It is argued that even if it is paid, there is procedure to get refund of the same. It is also argued that the Corporate Debtor is authorized dealer of Exide and the Appellant was competitor and thus false case was filed and the Adjudicating Authority has rightly dismissed the Application under Section 9.

4. We have gone through the Judgment of the Adjudicating Authority. The Adjudicating Authority took note of the internal disputes between the Directors, which particulars were placed before the Adjudicating Authority. The Adjudicating Authority in Paragraph 8 of the Impugned Order went on to analyze the documents filed by the Appellant and observed that the invoice relied on, did not show the delivery address of the Corporate Debtor which was a registered address of the Company and was at Patna in Bihar. It is further observed as under:

“It is significant to note here that the said invoice refers to delivery of goods at Varanasi. Where as the registered office of the corporate debtor is at Patna. Moreover the registered branch office at Varanasi was shifted to Lucknow as per the registration certificate dated 14.12.2017. (Copy of registration certificate is at page 90 of the Reply). So also it is evident that a complaint was lodged to the ROC Patna alleging financial inaccuracy and revenue collection etc. as to the affairs of the corporate debtor company. (Notice of ROC dated 31.1.2018). In the said circumstances it cannot be hold that there is delivery of goods to the corporate debtor as alleged. Non production of proof of delivery of goods for which claim is made in this application and invoices is fatal in the nature of this case.

No explanation is forthcoming form the side of the Operational Creditor as to non production of the invoices proving the delivery of goods to the corporate debtor to its registered address. The Operational Creditor has got the burden to prove that the amount claimed is due to the Operational Creditor upon delivery of goods as alleged in the Application.”

Making such observations, the Adjudicating Authority referred to the format which was submitted and concluded that there were no such pleadings and also observed that there was no supporting evidence to prove that Corporate Debtor had placed orders for purchasing the goods referred to in the invoices. For such and other reason, the Application came to be rejected.

5. Having heard the Learned Counsel for both sides, we find that defence apparently shows that the Corporate Debtor had some disputes with one of the
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Directors and made allegations against the said director. The Appellant has filed copy of the Bank Statements which is at Page 72 and in ordinary course of business, there are various entries in the Bank Statement which show payments from the Corporate Debtor. The Reply sent by the Corporate Debtor copy of which is at Page 82 may be reproduced. The Corporate Debtor in response to Section 8 Notice replied:

“Dear Sir,

In reference to your notice we would like to inform you that negotiation of said business transaction and payment terms & conditions, payment reminders & follow ups are not in head office information.

Your total of this supply is not in knowledge of head office/ other promoter Director, Mr. Sudhir Kumar one of the Director of the Company, only uses the name of the company without involving company work, bank transaction etc and personally use the business activity with his fraudulent work and company head office is not aware the matter.

Our branch is failed to submit books of accounts for periodic compilation, reconciliation & observation.

A very important thing is that Mr. Anand Singh was very much aware about malpractices of our authorized director for branch operation & was informed by Mr. R.U. Siddiqui one of director of the company that he should do no further transaction with that branch & recover his outstanding if any.

Mr. Sudhir Kumar & Mr. Anand Singh are close friends of childhood because fathers of both of them were DLW Varanasi employees & they stayed together in campus of DLW Varanasi.

If you need immediate recovery of your balance amount, please go through use of instrument received against credit (BG/LC/PDC) otherwise Mr. Anand Singh had supplied material on his own relationship guarantee then he deposit from his & his friend's a/c.

Right now head office does not know about anything of this transaction but we are very sure your staff Mr. Anand Singh & Mr. Sudhir Kumar know that where they have sold that consignment & received payment in which account.

Please bear with us and try to know about lapses & conspiracy behind raised situation between two reputed companies.

Because the address used for communication is different, on the invoice buyer/consignee Ambient Computronics Pvt. Ltd.-Lucknow & address is of Varanasi GST No. is of Varanasi all these things are also very confusing.

Please verify billing address through GST No. & understand whole manipulation of this transaction.

The whole case is individually manipulated & motivated.

Therefore we need sufficient time for confirmation of this transaction purchase, sale, payment & receipt.”

6. Thus, the stand taken by the Corporate Debtor shows that the branch office of Corporate Debtor had not communicated with the head office and they

wanted to verify and confirm the transactions. The internal disputes of the directors would not be relevant for throwing out of the Application under Section 9 of I & B Code, 2016. In any case, that was not a dispute which was raised or communicated to the Operational Creditor any time before Notice under Section 8 was sent. In the facts of the matter, we find that the Adjudicating Authority erred in approaching the Application under Section 9 and the form submitted in a manner as if a plaint was being examined or it was some suit. Considering the format and particulars required to be given in the format, if the Application is complete, it is required to be admitted unless the Corporate Debtor shows Pre-Existing Dispute. Here the dispute raised was that there was no dealing between the Corporate Debtor and the Operational Creditor; that there was no agreement. However, the same Corporate Debtor had in reply referred to its dispute with the branch office and stated that they wanted to verify the transaction. The Bank Statement of the Operational Creditor shows that there were various payments and more than Rs. 3 crores are stated to have been paid from the outstanding dues and for a small amount of Rs. 21,07,916/- the Operational Creditor has been required to move the Adjudicating Authority. Counsel for Appellant pointed out Rejoinder Affidavit & Invoice with Annexure A-6 to submit that the Invoice dated 21.10.2017 has stamp and signature of receipt by Varanasi Office of Corporate Debtor. It is stated that the E-way Bill can have address where goods are required to be delivered. It does not matter till the Invoice is Acknowledged. We find substance in the Submissions for Appellant.

7. For the above reasons, we allow Appeal and set aside the Impugned Order passed by NCLT, Kolkata Bench, Kolkata. We remit back the matter to the Adjudicating Authority. On receipt of copy of this Judgment, the Adjudicating Authority is requested to admit the Application under Section 9 of IBC and pass further orders as required to be passed under the provisions of I & B Code, 2016. Such order may be passed by the Adjudicating Authority unless the Corporate Debtor settles with the Operational Creditor before Order is passed. The Parties to appear before the Adjudicating Authority on 09.11.2020.

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

[Justice Anant Bijay Singh]
Member (Judicial)

New Delhi,
15th October, 2020.
Basant B./md.