NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 17 of 2020

[Arising out of Impugned Order dated 19th November 2019 passed by the Hon'ble National Company Law Tribunal, New Delhi Bench-VI in CP (IB)-1078(ND)/2019]

IN THE MATTER OF:

Sangeeta Goel
176, Ashok Enclave Part-III
Sector-35, Faridabad
Haryana **...Appellant**

Versus

Roidec India Chemicals Private Limited
737/22 Joshi Road Karol Bagh
Delhi – 110005 **...Respondent**

Present:

For Appellant : Mr Nakul Mohta and Ms Shubhangi Rathore, Advocates

For Respondent : None

J U D G M E N T

[Per; V. P. Singh, Member (T)]

This Appeal emanates from the order dated 19th November 2019 passed by the Adjudicating Authority/National Company Law Tribunal, New Delhi Bench-VI in CP (IB)-1078(ND)/2019 in the case of Sangeeta Goel Vs. Roidec India Chemicals Private Limited, whereby the Adjudicating Authority has rejected the Application filed by the Operational Creditor under Section 9 of the Insolvency and Bankruptcy Code 2016 (in short '**I&B Code**'). Parties are represented by their original status of the petition for the sake of convenience.

2. The brief facts as stated in the petition are as follows:

The Operational Creditor filed an Application under Section 9 of the Insolvency and Bankruptcy Code 2016 against the Corporate Debtor Roidec India Chemicals Private Limited for the alleged default on the part of the Respondent-Corporate Debtor in clearing the outstanding amount of Rs.63,29,169/- (Rupees sixty-three lacs twenty-nine thousand and one hundred sixty-nine only) towards the services rendered by the Applicant. The total outstanding dues Rs.63,29,169/- pertain to services provided to the Corporate Debtor from 09th September 2013 to 03rd January 2017. The amounts fell due after the Respondent received the invoices.

3. The Applicant contends that despite invoices were raised from time to time; the Respondent did not make the payment of the outstanding debt.

4. It is contended that the Appellant and Respondent were maintaining a mutual account in respect of the invoices raised by the Operational Creditor. The Respondent/Corporate Debtor vide his e-mail dated 10th March 2017 has admitted the debt by acknowledging the debt in its ledger account, showing the outstanding debt of Rs.53,83,299/-, after deducting TDS, i.e. total gross operational debt of Rs.59,81,443.33 owed to the Appellant. That despite acknowledgement of debt, the Respondent corporate debtor failed to make payment to the Appellant.

5. After that, the Applicant issued a demand notice in Form 4, on 28th March 2019. The Respondent vide e-mail dated 22nd March 2019 sent a

reply to the demand notice. Respondent further submitted the second reply to the demand notice on 17th April 2019 alleging a pre-existing dispute.

6. The Learned Adjudicating Authority rejected the Application filed under Section 9 of the Insolvency and Bankruptcy Code 2016 mainly on the ground of pre-existing dispute and for non-compliance of Section 9(3)(b) of the Code. An appeal has been filed primarily on the ground that the Adjudicating Authority rejected the petition on the ground of a pre-existing dispute between the parties, before the receipt of the demand notice of the unpaid operational debt. The Adjudicating Authority has further failed to consider that the compliance under Section 9(3)(b) is not mandatory.

7. Heard the arguments of the Learned Counsel for the parties and perused the records.

8. It appears that the Adjudicating Authority has rejected the Application filed under Section 9 of the Code on the ground of pre-existing dispute between the parties and further on the ground that the Applicant failed to comply the statutory provision of Section 9(3)(b) of the Code.

9. Admittedly, demand notice in Form-4 is issued on 20th March 2019. The said notice was delivered on 23rd March 2019, which is evident from the tracking report of the post office. It is also on record that in reply to the demand notice issued on 20th March 2019, the response sent through an e-mail dated 22nd March 2019 at 2:07 PM wherein it is stated that:

"I just read your mail and would like to bring to your knowledge that your clients M/s Sim and San were requested several times by me to have a joint meeting with Mr. Anumod Sharma who is also director in the Company and had originally appointed the patent firm to resolve the pending issue as there lot of delays by your client which led to cancellation/rejections of patents filed in several countries, Lots of issue were pending to be discussed rather for a meeting I'm surprised to receive your notice after several months of no communication from your client directly to me, I'm travelling out of India till 31st March the formal reply to your notice will be sent thereafter by the legal team, Meanwhile this reply was to brief you,

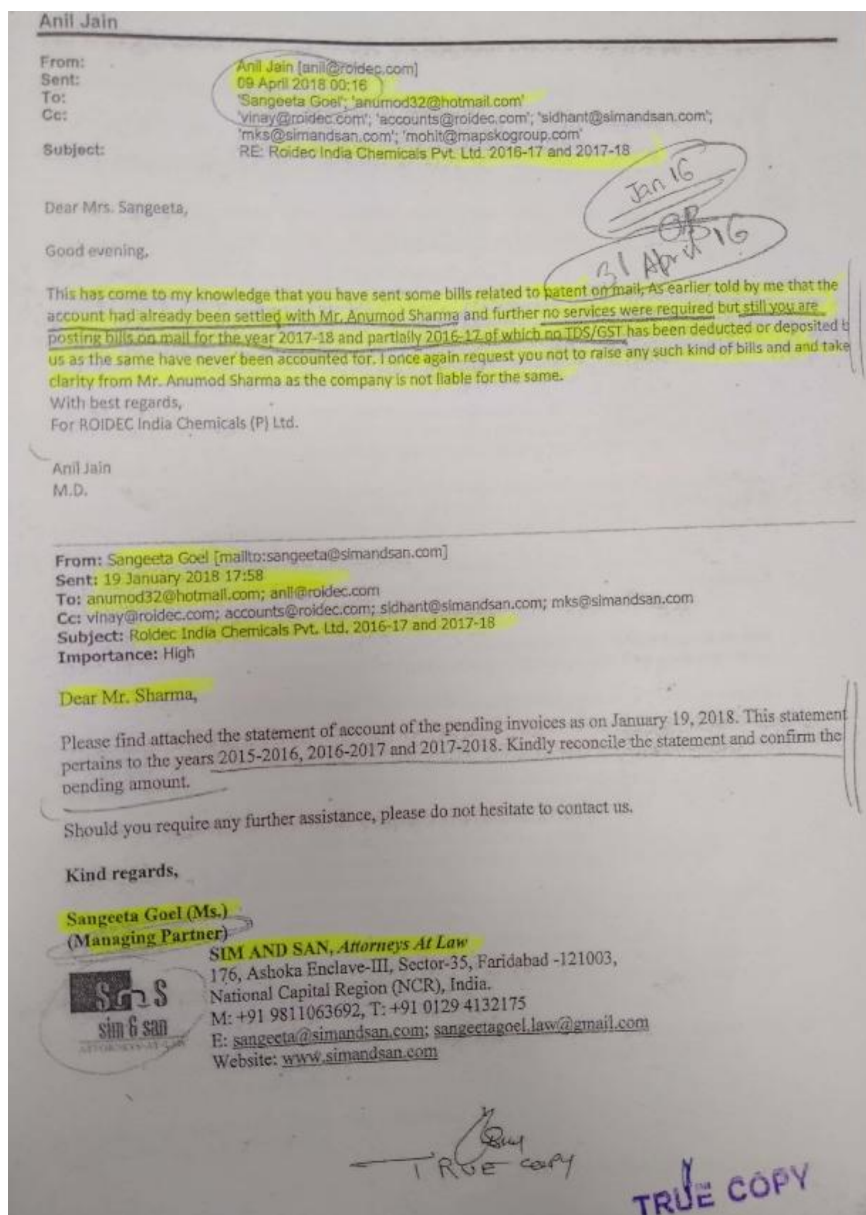
With best regards,

Anil Jain"

It is further to point out that in reply to the demand notice issued on 17th April 2019, the Operational Creditor sent an e-mail wherein it is stated that:

> *"We are in receipt of a document purported to be a notice under rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2019, wherein an amount of Rs.63,29,169/- is stated to be in default by us.*
>
> *Along with the notice, certain documents have been sent to us. In your notice you state that the amount claimed in your notice "is in default as reflected in the invoice attached to this notice". Unfortunately, neither from your notice nor from the documents sent therewith, it is unclear as how this amount of Rs.63,29,169/- adds up..........."*

10. It is pertinent to mention that the demand notice against the Corporate Debtor was issued on 20th March 2019, which was delivered on the Corporate Debtor on 23rd March 2019. The Learned Counsel for the Corporate Debtor submitted that before issuance of demand notice there was a pre-existing dispute which is evident from the e-mail correspondence dated 19th January 2018 and 09th April 2018. The scanned copy of e-mail dated 19th January 2018 and 09th April 2018 is as under:



Anil Jain

From: Anil Jain [anil@roidec.com]
Sent: 09 April 2018 00:16
To: 'Sangeeta Goel'; 'anumod32@hotmail.com'
Cc: 'vinay@roidec.com'; 'accounts@roidec.com'; 'sidhant@simandsan.com'; 'mks@simandsan.com'; 'mohit@mapskogroup.com'
Subject: RE: Roidec India Chemicals Pvt. Ltd. 2016-17 and 2017-18

Dear Mrs. Sangeeta,

Good evening,

This has come to my knowledge that you have sent some bills related to patent on mail, As earlier told by me that the account had already been settled with Mr. Anumod Sharma and further no services were required but still you are posting bills on mail for the year 2017-18 and partially 2016-17 of which no TDS/GST has been deducted or deposited b us as the same have never been accounted for. I once again request you not to raise any such kind of bills and and take clarity from Mr. Anumod Sharma as the company is not liable for the same.
With best regards,
For ROIDEC India Chemicals (P) Ltd.

Anil Jain
M.D.

From: Sangeeta Goel [mailto:sangeeta@simandsan.com]
Sent: 19 January 2018 17:58
To: anumod32@hotmail.com; anil@roidec.com
Cc: vinay@roidec.com; accounts@roidec.com; sidhant@simandsan.com; mks@simandsan.com
Subject: Roidec India Chemicals Pvt. Ltd. 2016-17 and 2017-18
Importance: High

Dear Mr. Sharma,

Please find attached the statement of account of the pending invoices as on January 19, 2018. This statement pertains to the years 2015-2016, 2016-2017 and 2017-2018. Kindly reconcile the statement and confirm the pending amount.

Should you require any further assistance, please do not hesitate to contact us.

Kind regards,

Sangeeta Goel (Ms.)
(Managing Partner)
SIM AND SAN, ***Attorneys At Law***
176, Ashoka Enclave-III, Sector-35, Faridabad -121003,
National Capital Region (NCR), India.
M: +91 9811063692, T: +91 0129 4132175
E: sangeeta@simandsan.com; sangeetagoel.law@gmail.com
Website: www.simandsan.com

TRUE COPY

TRUE COPY

11. On perusal of e-mail correspondence dated 19th January 2018 and 09th April 2018 it is clear that the Operational Creditor has issued the statement of account of pending invoices as on January 19th2018. This statement pertains to the financial year 2015-16, 2016-17 and 2017-18. In reply to the said mail, the Corporate Debtor has submitted that the account had already been settled with Mr Anumod Sharma and further no services were required. It also transpired that the Corporate Debtor raised a question on raising the bill for the year 2017-18, partially for the year 2016-17. It is also apparent that the Corporate Debtor advised to the Operational Creditor not to raise, such kind of bills and take clarity from Mr Anumod Sharma, as the Company is not liable for the same.

12. Thus, it is clear that before issuance of demand notice there was a pre-existing dispute regarding raising of invoices for the financial year 2017-18, and partially for 2016-17, on the pretext that the Corporate Debtor had already informed that no services were required.

13. The Learned for the Operational Creditor has placed reliance on the judgment of the Hon'ble Supreme Court in *Mobilox Innovations (P) Ltd. V/s Kirusa Software (P) Ltd. reported in 2018 (1) SCC 353 wherein it has held that: -*

> *"51. It is clear, therefore, that once the operational creditor has filed an application, which is otherwise complete, the adjudicating authority must reject the Application under Section 9(5)(2)(d) if notice of dispute has been received by the operational creditor or there is a record of dispute in the*

information utility. It is clear that such notice must bring to the notice of the operational creditor the "existence" of a dispute or the fact that a suit or arbitration proceeding relating to a dispute is pending between the parties. Therefore, all that the adjudicating authority is to see at this stage is whether there is a plausible contention which requires further investigation and that the "dispute" is not a patently feeble legal argument or an assertion of fact unsupported by evidence. It is important to separate the grain from the chaff and to reject a spurious defence which is mere bluster. However, in doing so, the Court does not need to be satisfied that the defence is likely to succeed. The Court does not at this stage examine the merits of the dispute except to the extent indicated above. So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the Application.

56. Going by the aforesaid test of "existence of a dispute", it is clear that without going into the merits of the dispute, the Appellant has raised a plausible contention requiring further investigation which is not a patently feeble legal argument or an assertion of facts unsupported by evidence. The defence is not spurious, mere bluster, plainly frivolous or vexatious. A dispute does truly exist in fact between the parties, which may or may not ultimately succeed, and the Appellate Tribunal was wholly incorrect in characterising the defence as vague, got up and motivated to evade liability."

14. The Learned Counsel for the Corporate Debtor further submitted that the e-mail sent to the Operational Creditor on 09th April 2018 is about one year before the filing of the application under Section 9 of the Code, by that the Corporate Debtor had disputed the claims of the Petitioner. The said

dispute was also brought to the notice of the Petitioner in its reply to the demand notice dated 17th April 2019. The Adjudicating Authority has also rejected the Application mainly on the ground of pre-existing dispute.

15. It is also important to point out that the Operational Creditor has not filed the affidavit in compliance of provision Section 9(3)(b) of the Code.

Section 9(3) of the Insolvency and Bankruptcy Code 2016 provides that:

The Operational Creditor ***shall****, along with the application furnish…..*

(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.*

In the instant case, the Operational Creditor has not filed an affidavit in compliance of Section 9(3)(b) of the Code. The Counsel for the Operational Creditor submitted that the Adjudicating Authority has also dismissed the Application for non-compliance of the statutory provision of Sec 9 (3)(b) of the Code. But this cannot be ground of dismissal since the Hon'ble Supreme Court has clarified in Macquarie Bank Vs. Shilpi Cable Technologies Ltd. (2018) 2 SCC 674, para 15 that such affidavit is not mandatory when the Corporate Debtor has responded to the demand notice which the Respondent had in the present case. Moreover, even if Learned Adjudicating Authority thought that Section 9(3)(b) affidavit was required, it being a curable defect, as held in Surendra Trading Company V. Juggilal Kamlapat, (2017) 16 SCC 143, the Appellant/Operational Creditor was entitled to

an opportunity to cure the defect and it could not have been a ground to dismiss the Application.

In the case of *Macquarie Bank Ltd. v. Shilpi Cable Technologies Ltd.*, (2018) 2 SCC 674: 2017 SCC OnLine SC 1493: (2018) 2 SCC (Civ) 706 at page 696 Hon'ble Supreme Court has held that:

> *"15. When we come to Section 9(3)(b), it is obvious that an affidavit to the effect that there is no notice given by the corporate debtor relating to a dispute of the unpaid operational debt can only be in a situation where the corporate debtor has not, within the period of 10 days, sent the requisite notice by way of reply to the operational creditor. In a case where such notice has, in fact, been sent in reply by the corporate debtor, obviously an affidavit to that effect cannot be given."*

Given the law laid down by Hon'ble Supreme Court in the above-mentioned case, it is clear that only in a situation where the Corporate Debtor within 10 days of the receipt of demand notice, has not sent the reply to the Operational Creditor, then only, an affidavit to that effect can be submitted in terms of Section 9(3)(b) of the Code. But in a case where such notice has been sent, in reply to the demand notice by the Corporate Debtor **'an affidavit to that effect cannot be given'.**

In the instant case, after receiving the demand notice Corporate Debtor within ten days of receipt of the demand notice raised the dispute of the unpaid operational debt. Therefore, affidavit in compliance of Section 9(3)(b) could not be submitted. Thus, it is apparent that there is no default in not providing the affidavit in compliance of Section 9(3)(b) of the Code.

16. On perusal of the record, it is crystal clear that about one year before the issuance of demand notice, the Corporate Debtor complained about the quality of service to the Operational Creditor and communicated that he has not provided services after 2015 and also informed that their services are no longer required.

17. In the circumstances, we are of considered opinion that the Adjudicating Authority/National Company Law Tribunal, New Delhi Bench has rightly rejected the Application filed under Section 9 of the Insolvency and Bankruptcy Code 2016.

18. Thus, we do not find any justification for the interference with the Impugned Order and Appeal is liable to be dismissed. Accordingly, the Appeal is dismissed. No order as to costs.

[Justice Bansi Lal Bhat]
Member (Judicial)

[Justice Venugopal M.]
Member (Judicial)

[V. P. Singh]
Member (Technical)

NEW DELHI
17th March 2020

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