

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 1083 of 2019

(Arising out of order dated 23-08-2019 in Company Application (IB)-183/ND/2019 passed by National Company Law Tribunal, New Delhi, Bench- II)

IN THE MATTER OF:

M/s Jitendra Impex Private Limited

A Company incorporated and registered under the provisions of the Companies Act, 1956 having its Reg. Office at 908/102, Maharaja Agrasen Market, Chawri Bazar, Delhi-110006. Through its Authorized Signatory/Director Mr. Vishal Jain.

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

Versus

Compack Enterprise India Private Limited

A Company incorporated and registered under the provisions of the Companies Act, 1956 having its Reg. Office at B-71, GT Karnal Road Industrial Area, New Delhi- 110033. Through its Authorized Signatory

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

For Appellant: Mr. Arihant Jain, Mr. Siddhart Gupta, Mr. Srijal Sinha, Mr. Krishnendu Dutta, Mr. Shashwat Tripathi and Mr. Shubhankar Sen, Advocates

For Respondent: Mr. Rajesh Banati and Mr. Ashish Sareen, Advocates.

J U D G M E N T

(10th August, 2020)

Justice A.B. Singh,

The Appeal has been filed against the order dated 23rd August, 2019 passed by the Ld. Adjudicating Authority, National Company Law Tribunal, New Delhi, Bench-II, whereby the petition under Section 9 of the Insolvency

and Bankruptcy Code, 2016 filed by Appellant was dismissed by Ld. Adjudicating Authority holding that the Applicant due to its inconsistent conduct has been unable to establish that the amount being claimed by it was owed by the Respondent and that the Respondent has defaulted in the payment.

2. Facts of the case is as under:-

i) The Appellant is a Company incorporated and registered under the provisions of the Companies Act, 1956 is an inter-alia engaged in the business of wholesale trading/distributorship of paper and paper board for various paper mills such as Khanna Paper Mills Ltd., Century Textiles & Industries Ltd., Sidarth Papers Ltd., etc. around Delhi and Northern India.

ii) That the Appellant has been dealing with the Respondent since the financial year 2013-14 on a regular basis and has been supplying paper and paper board to the Respondent based on written/verbal orders received from the Respondent from time to time.

iii) Since the Respondent was regularly transacting with the Appellant, the Appellant as concession and as a matter of trust, was supplying goods to the Respondent on a credit of 30 (Thirty) days.

iv) The Appellant was maintaining a running Account in respect of business dealings with the Respondent and against which random payments had been made by the Respondent from time to time.

v) The amounts thus, randomly paid by the Respondent were settled against the outstanding invoices by the Appellant as per FIFO (first in first out) rule.

vi) That till November 2017, the Respondent was making random intermittent payments, which were sufficiently setting off the total outstanding invoice amounts as per FIFO rule, however, starting from mid-November, the Respondent started making miniscule, irregular and disproportionate payments to the Appellant against total outstanding invoice amounts.

vii) That the Appellant states that in the Financial Year 2017-2018, the Appellant had made total sale of Rs. 7,89,06,382/- (Rupees Seven Crore Eighty-Nine Lakh Six Thousand Three Hundred and Eighty-Two only) to the Respondent and after factoring into all the payments received from the Respondent, the total outstanding amount due and payable to the Appellant as on 31.03.2018 / 01.04.2018 was Rs. 2,39,80,892/- (Rupees two Crore Thirty-Nine Lakh Eighty Thousand Eight Hundred and Ninety-Two only) which is reflected in the Statement of Accounts of the Respondent, maintained by the Appellant for the Financial Year 2017-2018.

viii) That the Appellant further states that the period from 01.04.2018 till 28.12.2018 (financial year 2018-2019) the Appellant had made a total sale of Rs. 2,03,52,062/- (Rupees Two Crore Three Lakh Fifty-Two Thousand Sixty-Two only) to the Respondent. As against the said sum of Rs. 2,03,52,062/- i.e. total sale value, the Respondent before the Ld. Adjudicating Authority had

admitted a sum of Rs. 1,97,75,383/- and disputed the balance sum of Rs. 5,76,679/-.

3. That the Respondent has filed the Reply before the Ld. Adjudicating Authority on 15.02.2019 and also Reply filed before this Appellate Tribunal have taken stand that the Appellant has been manipulating the bills as well as the accounts statement with the intention to show the alleged outstanding amount against the Respondent, it further states that as under.

4. Further that in this connection reference is made to letter dated 13.09.2018 wherein the Appellant mentioned 166 bills amounting to Rs. 3,52,07,252.62/- and requested the Respondent to issue certificate that the Respondent has neither purchased these goods nor claimed CENVAT of Rs. 19,63,390.19/- against these 166 bills.

5. On enquiry the Applicant admitted that these 166 bills of Khanna Paper Mills Ltd. were raised at the request of the Applicant and without the knowledge of the Respondent.

6. The Respondent objected to the same but the Appellant informed that in future this would not be repeated. Thereafter, the Respondent vide letter dated 14.09.2018 replied to the said letter dated 13.09.2018.

7. That the Respondent submitted that the Appellant has not filed their statement of accounts from the financial year 2013-14, 2014-15, 2015-16 and 2016-17 but has only filed alleged statement of accounts for the year 2017-18 and 2018-19 the Appellant filed statement of accounts stating from the

Financial Year 2013-14, the same would disentitle the Application under Section 9 of the 'IBC', has been made out.

8. That the Respondent submitted that the Appellant completely concealed the fact that the Appellant also issued credit notes in the financial years 2013-14, 2014-15, 2015-16, 2016-17 and 2017-18 to the Respondent towards special quantity discount on the basis of letters dated 28.12.2013 and 16.04.2016. Therefore, it does not lie in mouth of the Applicant to say that there is no agreement between the Appellant and the Respondent where the Appellant agreed to grant the Respondent special quantity discount.

9. The Ld. Adjudicating Authority after hearing the parties passed the following order as under:-

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"5. After a perusal of the pleadings and the accounts filed by the parties it is concluded that both the parties have consistently approbated and reprobated throughout the proceedings. While the Applicant in its pleadings and in the accounts filed has shown that a balance of Rs. 1,64,98,604/- was due from the Respondent to the Applicant at the end of FY 2016-2017, the Applicant in a letter dated 25.08.2017 addressed to the accountants of the Respondent has stated that the balance receivable from the Respondent as on 31.03.2017 was Rs. 72,71,010. The Respondent on the other hand, in the e-mail dated 17.05.2018 has admitted that as on 30.04.2018 the amount due from the Respondent to the Applicant was Rs. 2,34,10,945/- but the ledger filed by the Respondent shows that as on 30.04.2018 the balance payable by Respondent to the Applicant was Rs. 92,33,736/-. The opportunity given by

the Tribunal to the parties to reconcile their accounts has also not lead to any fruitful results.

6. The Applicant due to its inconsistent conduct has been unable to establish that the amount being claimed by it was owed by the Respondent and that the Respondent has defaulted in the payment of the claimed amount. Thus, this application is dismissed with no costs.”

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10. Learned counsel for the Appellant in Memo of Appeal filed under Section 61 of the 'IBC' and also the Written Argument filed on their behalf on 04.03.2020 referred to e-mail dated 08.10.2016 page 473 Vol.- III, this e-mail sent to the Respondent in statement of account till 30.09.2016 and the Respondent on the same dated vide e-mail responded stating 'Ok' thereby confirming the closing balance till 30.09.2016. Pertinently, the same e-mail dated 08.10.2016 was sent by the Respondent from the e-mail ID being compactindia@gmail.com. This e-mail ID is also the registered as the official e-mail ID of the Respondent with the Ministry of Corporate Affairs. The Respondent has not denied sending this e-mail nor has the Respondent denied the aforesaid e-mail ID as its e-mail ID.

11. Learned counsel for the Appellant submits that the e-mail dated 20.01.2018 at page 685 Vol.- IV of the Appeal Paper Book, the Appellant sent statement of account for the period 01.11.2017 to 31.12.2017 to the Respondent, requesting the Respondent to indicate whether any correction in the statement has been found by them, but no response was received.

12. Learned counsel for the Appellant also referred to e-mail dated 12.05.2018 at page 482 Vol.- III and ledger statement at page 483-497 Vol.- III sent by the Appellant whereby confirmation of balance sum of Rs. 2,34,10,945/- outstanding as on 30.04.2018 from the Respondent after attaching the ledger/statement of accounts for the period commencing from 01.04.2017 to 30.04.2018 which states the Opening Balance as on 01.04.2017 as Rs. 1,64,98,604/-.

13. Learned counsel for the Appellant referred to e-mail dated 17.05.2018 at page 498 Vol.- III, the Respondent neither objected to above said Opening Balance sums and Closing Balance sums nor objected to the statement of accounts/ledger for the period 01.04.2017 to 30.04.2018. On the contrary, in the said e-mail, the Respondent even confirmed an outstanding sum of Rs. 2,34,10,945/- as on 30.04.2018 qua the Appellant which sum apparently included the above said sum of above said Closing Balance sum for the FY 2017-2018 i.e. Rs. 2,39,80,892/-.

14. Learned counsel for the Appellant further referred to statement of account for FY 2018-19 at page 470-472 Vol.- III and Statutory notice dated 28.12.2018 at page 500-507 Vol.- III. A total sale of Rs. 2,03,52,062/- was admittedly made by the Appellant to the Respondent and a sum of Rs. 2,59,80,892/- was paid by the Respondent and a sum of Rs. 2,06,119/- was deducted on account of return of rejected goods, leaving the operational debt as the outstanding amount. In the aforesaid background, the statutory notice dated 28.12.2018 was issued by the Appellant.

15. Learned counsel for the Appellant also referred to Reply to Demand Notice at page 508-524 Vol.- III. The Respondent sent a reply to the statutory notice dated 11.01.2019, which the Respondent without indicating any pre-existing dispute and as an afterthought, without specifically pointing out, set up certain forged and fabricated credit notes purported to be issued by the Appellant. Significantly, the Respondent admitted that a sum of Rs. 22,56,833/- is due and payable to the Appellant.

16. The learned counsel for the Appellant during the course of argument and in his written submission have stated that the Ld. Adjudicating Authority clearly erred in not appreciating that the Appellant's case that the Operational Debt is due and payable is completely consistent with the statement of accounts filed by the Appellant which were never disputed / objected by the Respondent prior to receipt of statutory demand notice. On the contrary, the ledger accounts up to 30.09.2016 and 30.04.2018 have been confirmed by the Respondent vide its e-mail dated 08.10.2016 and 17.05.2018 (Ref: Para-7.9-7.10 Appeal- Vol-I). A Table reflecting the computation of the Operational Debt prepared on the basis of said confirmed statement of accounts and admitted sale made in the FY-2018-2019 and payment made by the Respondent till 28-12-2018 is as under:-

S.No.	Particulars	Amount	Admission by the Respondent/Undisputed documents
(a)	Closing Balance for the FY 2017-2018 (as on 31.03.2018)	(+) Rs. 2,39,80,892/-	Pg-493-vol-III entry against 27.03.2018 r/w Pg-498-Vol-III

			Note- confirmation in email dated 17.05.2018 @ pg-498-Vol-III of Rs. 2,34,10,945/- is as on 30.04.2018
(b)	Sales and purchase for the FY 2018-2019	(+) Rs. 2,03,52,062/-	Para-7.6-Pg-13-, Vol-I regard with Para 8, Pg. 537-541, Vol-III of Appeal
(C)	Admitted payment made by the Corporate Debtor	(-) Rs. 2,59,80,892/-	Para-9-10-Pg-563 & 564, Vol-IV Of Appeal
(d)	Sales Credit given by the Operational Creditor in the FY 2018-2019	(-) Rs. 2,06,119/- [87,325 + 66,105 +52,869/-]	Para 7.10 (VI), Pg. 16-17 Vol-I of Appeal
	Total payable (a) +(b) – (c) –(d) Rs. 1,81,45,943/- (Operational Debt)		

17. The learned counsel for the Appellant submitted by referring to the paragraph 5 of the impugned order whereby the Ld. Adjudicating Authority have recorded a finding that the Respondent in their e-mail dated 17.05.2018 has admitted that as on 30.04.2018 the amount due from the Respondent to the Appellant was Rs. 2,34,10,945/-.

18. Learned counsel for the Appellant referring to the judgment passed by the Hon'ble Supreme Court in *Macquarie Bank Limited Vs. Shilpi Cable Technologies Limited (2018 Vol.- II SCC 674)* held as under:-

“24. Even otherwise, the important condition precedent is an occurrence of a default, which can be proved, as has been stated hereinabove, by means of other documentary evidence. Take for example the case of an earlier letter written

by the corporate debtor to the operational creditor confirming that a particular operational debt is due and payable. This piece of evidence would be sufficient to demonstrate that such debt is due and that default has taken place, as may have been admitted by the corporate debtor.”

19. Learned counsel for the Appellant further relying in the aforesaid judgment submitted that the Ld. Adjudicating Authority failed to appreciate that there was no occasion for establishing the existence of the entire Operational Debt nor was it necessary to submit the proof of claims of the Operational Debt.

20. Learned counsel for the Appellant further relying on the Judgment of the Hon’ble Supreme Court in the Case of Mobilox Innovations Private Limited Vs. Kirusa Software Private Limited, reported in 2018 Vol.- I SCC 353 para 34 wherein the Hon’ble Supreme Court held as follows :-

“34 Therefore, the adjudicating authority, when examining an application under Section 9 of the Act will have to determine:

- i) Whether there is an “Operational Debt” as defined exceeding Rs. 1 lakh? (See Section 4 of the Act)
- ii) Whether the documentary evidence furnished with the application shows that the aforesaid debt is due and payable and has not yet been paid? and
- iii) Whether there is existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before the receipt of the demand notice of the unpaid operational debt in relation to such dispute?

If any one of the aforesaid conditions is lacking, the application would have to be rejected. Apart from the above, the adjudicating authority must follow the mandate of Section 9, as outlined above, and in particular the mandate of Section 9(5) of the Act, and admit or reject the application, as the case may be, depending upon the factors mentioned in Section 9(5) of the Act.

21. It was further submitted that in view of the finding recorded by Ld. Adjudicating Authority in para 4 of the impugned order have taken note of the fact that Operational Debt of Rs. 22,56,833/- due and payable to the Appellant by Respondent. That the Respondent has made a categorical statement admitting aforesaid due and handed over the cheque before the Tribunal which the Appellant has refused to accept the cheque. In view of the clear finding that the Ld. Adjudicating Authority dismissing the said application contrary to the law laid down by the Hon'ble Supreme Court.

22. On the other hand, learned counsel for the Respondent in his written submissions and also during the course of argument admitted the fact that after the receipt of the notice issued under Section 8 of the 'IBC' pointed that the outstanding amount is only Rs. 22,56,833/- and the Respondent is ready and willing to pay and the Appellant is instead of receiving Rs. 22,56,833/- is taking advantage only this fact has been recorded by the Ld. Adjudicating Authority.

FINDINGS

23. After hearing the parties and perusal of the record that in view of finding recorded by the Ld. Adjudicating Authority in para 4 of the impugned order

categorically statement made by the Respondent that only Rs. 22,56,833/- was due to be paid to the Appellant and he has also handed over the cheque but Appellant has refused to accept the said cheque.

- i) Admittedly, the 'Operational Debt' is exceeding Rs. 1 lakh.
- ii) The Appellant sent notice under Section 8 of the IBC to the Respondent and the Respondent have accepted and was not disputed the amount.
- iii) The Appellant have also produced documentary evidence in the support of operational debt before the Ld. Adjudicating Authority and this Appellate Tribunal.
- iv) In view of the aforesaid, admitted fact, we are of the considered view that the Ld. Adjudicating Authority committed error of record and not considered the judgment of the Hon'ble Supreme Court in Mobilox Innovations Private Limited Vs. Kirusa Software Private Limited, reported in 2018 Vol.- I SCC 353 wherein Hon'ble Supreme Court laid down the law regarding powers of Adjudicating Authority passing the order of under Section 9 of the IBC.
- v). The Ld. Adjudicating Authority failed to appreciate the documents placed on record along with Application under Section 9 of the 'IBC'.
- vi). From the record as we find that the Respondent has defaulted to pay more than Rs. 1 lakh and in absence of any pre-existing dispute and the record being complete, we hold that the Application under Section 9 preferred by the Appellant was fit to be admitted.

ORDER

24. For the aforesaid reasons, impugned order dated 23.08.2019 passed in Company Application (IB)-183/ND /2019 is hereby set aside and remit the case to the Ld. Adjudicating Authority for admitting the application under Section 9 of the 'IBC' after Notice to both the parties and further to enable the 'Corporate Debtor' to settle the matter prior to the admission.

- i) The Appeal is allowed with aforesaid observations and directions. No costs. Parties are hereby directed to appear before the Ld. Adjudicating Authority on 15th September, 2020.
- ii) Let the Registry to communicate the Judgment to the Ld. Adjudicating Authority (National Company Law Tribunal, New Delhi, Bench-II).
- iii) Copy of the Judgment be provided to the party concern as per Rule.
- iv) Copy of the Judgment will be up-loaded in the Website of this Appellate Tribunal.

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

[Justice A.B. Singh]
Member (Judicial)

[Kanthi Narahari]
Member (Technical)

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