

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) (INS) No.268 of 2018

[Arising out of Order dated 02.05.2018 passed by National Company Law Tribunal, Mumbai Bench in C.P. No.1479/I&BC/2017]

IN THE MATTER OF:

J.B. Tiwari
S/o Dr. Tarkeshwar Tiwari,
R/o B/3704, D.B. Woods,
Gokuldham, Goregaon (East),
Mumbai – 400063

...Appellant
(M.D. of Respondent No.2 – Corporate Debtor)

Versus

1. Biostadt India Limited
602-A, 6th Floor, A Wing,
Poonam Chambers,
Dr. A B Road, Worli,
Mumbai – 400018

...Respondent No.1
(Original Applicant – Operational Creditor)

2. Sonachi Industries Limited
Through Sh. Syamal Baran Bhattacharya
(Interim Resolution Professional)
A-38, 2nd Floor, Raj Industrial Complex,
Military Road, Off-Marol Maroshi Road,
Andheri (East),
Mumbai – 400063

...Respondent No.2
(Original Respondent – Corporate Debtor)

For Appellant: Shri Anando Mukherjee, Advocate

For Respondents: Shri Samir Tandon, Advocate (Respondent No.1)

J U D G E M E N T
(30th November, 2018)

A.I.S. Cheema, J. :

1. The Appellant is Managing Director of Respondent No.2 - Sonachi Industries Limited, the Corporate Debtor against whom Respondent No.1 – Biostadt India Limited, the Operational Creditor filed Application – C.P. 1479/I&BC/2017 under Section 8 read with Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereafter referred as ‘Code’) and which has been admitted by the National Company Law Tribunal, Mumbai Bench (‘NCLT’, in short) acting as Adjudicating Authority under the Code, on 2nd May, 2018 and Moratorium Order has been passed with other directions.

2. The Appellant has filed this Appeal being aggrieved by the admission of the Application.

3. The main ground raised by the Appellant is that the Orders passed by the Adjudicating Authority were ex-parte and the Adjudicating Authority itself, through its Registry did not serve Notice on the Corporate Debtor and violated principles of Natural Justice and thus the Order deserves to be set aside.

4. The Appeal states that between the two Companies, there was agreement regarding supply of material. The Corporate Debtor had placed purchase orders with the Operational Creditor. The Operational

Creditor had raised invoices, which have been referred in the Appeal. According to the Appellant, the material supplied did not meet the quality standard and the same was reported to the Operational Creditor over telephone. The Appeal refers to the payments made and it is stated in para – XVIII as under:-

“(XVIII) That it is also stated that the Corporate Debtor is a solvent company and ready and willing to clear its debt so far as the undisputed amount of Rs.1,14,41,776.61/- is concerned. Had notice been issued, the said fact would have been brought to the notice of the Ld. Adjudicating Authority. In fact, the Appellant is still in talks with the Respondent No.1 and want to maintain good professional relation and further clear the debt.”

5. The Appeal accepts that the Operational Creditor had sent legal Notice dated 22.06.2016 and 19.09.2016 (copies of which have been filed by the Respondent No.1 with Diary No.6743). It is also accepted that the Operational Creditor had sent legal Notice dated 06.06.2017 (copy of which is at Page – 68 of the Appeal). According to the Appellant, the Appellant had been informed by the Operational Creditor regarding amounts of Rs.1,14,41,776.61 paise remaining outstanding on the invoices issued. According to the Appellant, he had met Mr. Suresh Nair - the representative of Respondent No.1 and discussed the matter as the Appellant expected reduction in outstanding considering that materials supplied were of low quality. According to the Appellant, an e-mail was

sent on 25.04.2016 to the Operational Creditors seeking additional time to clear pending bills as the company was facing financial stress.

6. The Counsel for Operational Creditor has pointed out copies of e-mails sent by the Appellant, which are at Annexures B-10 and B-12, on 22.07.2016 to submit that by these e-mails, the Appellant accepted that the outstanding amounts would be cleared but no dispute regarding quality of the goods supplied was raised and thus no dispute had been raised.

7. The Appeal claims and the counsel for Appellant argued that the Notice dated 6th June, 2017 (Page – 68) had been replied by the Corporate Debtor on 08.07.2017 (copy of which is at Page – 75) and in which dispute had been raised regarding quality. We find that this Notice dated 08.07.2017 (copy of which is at Annexure – A-7 in the appeal) although the date has been put as “08.07.2017”, the postal receipt printed on the same document shows that the Notice was booked only on 20.07.2017 which is after the Annexure-A8 – Section 8 Notice dated 13.07.2017 was sent by the Operational Creditor by e-mail and speed post. Receipt of such Notice under Section 8 has not been denied. Thus, no existing dispute has been shown and the paragraph extracted (supra) from the Appeal itself shows that the amount outstanding was not disputed. At the time of arguments, learned Counsel for the Appellant tried to refer to various invoices relating to supplies to show the payments made as adjusted towards certain invoices and not the

invoices stated by the Operational Creditor. We find that this is not material as the basic amount of default of outstanding dues, i.e. Rs.1,14,41,776.61 paise and which was claimed in Notice under Section 8 and for which proceeding was filed before the Adjudicating Authority in Form – 5 invoking Section 9, is same, and even the Appeal admits that this was the outstanding amount.

8. Learned Counsel for the Appellant relied on Judgements of this Tribunal in the matter of “**M/s. Starlog Enterprises Limited Versus ICICI Bank Limited 2017**” reported in SCC OnLine NCLAT 13 and “**Mass Metals Pvt. Ltd. Versus Sunflag Iron & Steel Co. Ltd.**” reported in 2017 SCC OnLine NCLAT 504 to submit that no Notice was issued and served by Adjudicating Authority itself and thus principles of natural justice were violated. It is argued that it was necessary that Registry of the Adjudicating Authority should have served the Notice before Adjudicating Authority admitted the application under Section 9. The learned Counsel for Respondent No.1 – Operational Creditor submitted that the Operational Creditor filed the proceedings before the Adjudicating Authority and when Adjudicating Authority issued directions to the Operational Creditor to serve Notice, the Notices were served and received by the Corporate Debtor but still Corporate Debtor did not choose to come forward before the Adjudicating Authority. The list of dates of the Appeal show particulars and it has also been argued by the learned Counsel for the Appellant that as per Orders of the

Adjudicating Authority, the Corporate Debtor – Respondent No.2 was in receipt of letter dated 13.11.2017 issued by Veritas Legal, Advocates & Solicitors informing that the matter will be listed before NCLT, Mumbai Bench on 20.11.2017 and where Respondent No.2 may remain present for hearing, if so desired. The argument of the learned Counsel for Appellant is that Veritas Legal was not the filing authority of the application in NCLT and nor was it authorised by any Board Resolution to act on behalf of the Operational Creditor and thus, such Notice by Veritas Legal could not be said to be proper service of Notice. The Appellant has accepted that another e-mail was sent through one Areez Gazdar of the said Veritas Legal on 15.11.2017 to the Corporate Debtor stating that Notice of hearing is attached to the mail and physical copy of the application was being forwarded. Even in this regard, it has been argued for Appellant that it was not stated in the e-mail that it was being sent in view of the Orders of the Adjudicating Authority. Perusal of Annexure A-11, the email sent by Areez Gazdar for Veritas Legal, shows that the Appellant did receive the Notice and forwarded the same on 15.11.2017 itself to one Mr. Anil informing him to meet the Advocate and discuss and that they have to fight the case. Clearly and apparently, the Corporate Debtor and the Appellant had knowledge of the legal proceedings and also of the Notice. When the Advocate sends the Notice, it is on instructions from the client and the same cannot be ignored by saying that the Advocate should also forward authority and Resolution of the Company. From the material available, it is apparent that the

Corporate Debtor – Appellant had received Notice served by the Advocate. The grievance of the Appellant is that the Notice should have been sent by the Adjudicating Authority through its Registry as required, if the Judgements referred are perused. No doubt, it would have been appropriate if the Adjudicating Authority had also sent the Notice through its own mechanism. We have considered whether we should send back the matter for want of such procedure being followed by the Adjudicating Authority. However, we have also heard the Appellant in details to consider if the Appellant has any grounds or material because of which, if the same had been shown to the Adjudicating Authority, the result of the proceeding under Section 8 and 9 of the Code could have been different. Looking to the admitted facts in this matter and where we find that there is no dispute regarding the amount due and as we find that the Appellant is unable to demonstrate that before Section 8 Notice was issued any dispute existed, we find no propriety in sending back this matter to the NCLT. The Appellant in spite of having Notice and knowledge of the proceeding cannot sit on the hedge to take advantage of the technical requirement of Adjudicating Authority sending a Notice through its mechanism. The Appellant had sufficient Notice and still chose not to appear before the Adjudicating Authority. We do not find that remitting back the matter will serve any purpose. The application has been rightly admitted by Adjudicating Authority.

There is no merit in this Appeal and we do not find any reason to interfere with the Impugned Order.

The Appeal is rejected. No Orders as to costs.

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

[Balvinder Singh]
Member (Technical)

/rs/nn