

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI**  
**Company Appeal (AT)(Insolvency) No. 661 of 2019**

[Arising out of order dated 3<sup>rd</sup> May, 2019 passed by the Adjudicating Authority, National Company Law Tribunal, Kolkata Bench, Kolkata in CP(IB) No. 802/KB/2018]

**IN THE MATTER OF:**

**Anjani Gases,**

Room No. 26, 249/B, G.T. Road,  
Liluah,  
Howrah- 711204

.. **Appellant**

Vs.

**B.P. Projects Pvt. Ltd.**

S3, 352/(140) G.T. Road,  
Baidyabati,  
Hooghly  
WB- 712 222

.. **Respondent**

**Present:**

**For Appellant:**

**Mr. Anirudh Wadha, Mr. Keshav Gulati,  
Mr. P. Surya Teja and Shri Rohit Sharma,  
Advocates**

**For Respondents:**

**Mr. Jishnu Saha, Sr. Advocate along with  
Mr. Praveen Kapoor, Advocate**

**J U D G M E N T**

**(29<sup>th</sup> January, 2020)**

**KANTHI NARAHARI, MEMBER(T)**

The Appeal is against the order passed by the Adjudicating Authority (National Company Law Tribunal) Kolkata Bench, Kolkata rejecting the Application filed by the Appellant under Section 9 of Insolvency and Bankruptcy Code, 2016 (in short **IBC**).

2. The Appellant filed the Application before the Adjudicating Authority invoking Section 9 of IBC in the capacity as Operational Creditor for initiation of Corporate Insolvency Resolution Process (in short **CIRP**) of the Corporate Debtor, namely B.P. Projects Pvt. Ltd. Respondent herein. Since the Corporate Debtor allegedly committed default in paying the operational debt of Rs. 1,45,74,133/-. The Adjudicating Authority rejected the Application on the ground of existence of serious dispute pending between the Appellant and the Respondent and further holding that the same is required proper adjudication.

3. From the perusal of the Application filed before the Adjudicating Authority in requisite Form-5 at Part-4 (page -72 Vol. I) in particulars of the Operational Debt, the amount of debt shown as Rs. 1,10,23,431.38. The cause of the debt shown as the transaction between the Appellant and the Respondent. The contention of the Appellant is that they supplied Natural Oxygen Cylinder, Carbon Dioxide Cylinders and LPG Gas Cylinders against the Purchase Order received by the Appellant from the Corporate Debtor. However, the amount claimed to be defaulted was Rs. 1,45,75,133.33 which includes 12% interest per annum.

4. Learned Counsel for the Appellant contended that the Appellant had earlier issued two Demand Notices on 17.06.2016 and 13.07.2016 on account of non-payment of outstanding dues,

however, no reply received from Respondent/Corporate Debtor. It is submitted that the Respondent defaulted in the payment of invoices that were raised from June, 2014 in spite of follow up. The Appellant served notice under Section 8 of IBC dated 31.03.2018 demanding Rs. 1,10,23,431.38 and Rs. 35,50,701.95 totalling to Rs. 1,45,74,133.33. Learned Counsel for the Appellant submitted that the Appellant received reply dated 13.04.2018 to this notice. However, in their reply, the Respondent stated that there is no debt payable by the Corporate Debtor as alleged in their Notice.

5. Having not received the debt due and payable by the Respondent-Corporate Debtor, the Appellant was constrained to file the Application as stated supra before the learned Adjudicating Authority. It is submitted that the Appellant and Respondent having a business relationship since the year 2005 wherein the Appellant supplied gas cylinders to the Respondent on a routinely basis and the payment was made by the Respondent in cycled basis.

6. While the Respondent stopped making payment to the Appellant since the year 2014 and large amount stood due from the Respondent and the Appellant stopped the supply of gas cylinders to the Respondent. It is stated that the supply of gas cylinder to the Respondent is an important requirement in their business and the Respondent met the Appellant around May, 2014 and convinced them to continue the supply of gas and assured the Appellant with respect to the payments. It is stated that the Respondent was paying

the bills in cyclic way until 20.10.2016 and the Appellant continued to deliver the Gas cylinders to the Respondent. It is stated that the bills raised on and after June 2014, the Respondent defaulted in payment of the bills raised for supply of gas cylinders and the bills remained unpaid in spite of several follow up by the Appellant.

7. The Respondent has filed Reply Affidavit to this Appeal. Learned Counsel for the Respondent submitted that they have replied to the notice issued by the Appellant vide their reply dated 13.04.2018 whereby they have categorically stated that there is no debt due and payable by the Respondent. However, in their reply dated 13.04.2018 at paragraphs 4 & 5 (page 62, Vol. I) to the Demand Notice they have further stated:

...

*“4. That you have supplied Annexure-A (from the period 15.06.2014 to 31.05.2016), Annexure-B (from the period 15.06.2014 to 31.05.2016), Annexure –E (from the period 1<sup>st</sup> December 2010 to 31<sup>st</sup> December, whereas the Annexures C, D and F are not supplied.*

*5. That the transactions between M/s Anjani Gas and M/s B.P. Projects Pvt. Ltd. were going on before 2005. Hence without the complete set of documents i.e. copies of invoices, complete ledger of account (from the period 2204 to 2018), and the copies*

*of Annexures C, D and F, it is not possible to give appropriate reply to this letter at this stage”*

8. Learned Counsel for the Respondent submitted that in so far as the payment of Rs. 1,10,23,431.38 is concerned, the Respondent had paid Rs. 86,30,000/- and excess amount of Rs. 5,56,889/- during the period of June, 2014 to October, 2016 and the same is not adjusted by the Appellant. However, the Appellant lodged FIR against the Directors of the Respondent Company under Sections 120-B, 406, 420 and 506 of IPC on 07.09.2016 for the act of cheating and not paying the amount of Rs. 1,10,23,403.63 to the Appellant. He submitted that there is serious dispute between the Appellant and Respondent. As stated supra, the Respondent had paid the amount of Rs. 86,30,000/-.

9. Heard learned Counsel appearing for the respective parties. Perused the pleadings and documents filed in their support. The main issue for consideration is whether there is existence of pre-existing dispute between the Appellant and the Respondent. Learned Adjudicating Authority dealt the above issue and concluded that there is serious dispute between the Appellant and the Respondent and for the said reason the Application has been rejected. It is an admitted fact that the Section 8 Notice was issued by the Appellant to the Corporate Debtor/Respondent demanding the debt on 31.03.2018. However, the Appellant lodged the FIR on 07.09.2016 against the Directors of the Respondent under Sections

120-B, 406, 420 and 506 of IPC which offences are serious in nature and the Appellant specifically mentioned the same amount i.e., Rs. 1,10,23,403.63 as claimed in the Application and Demand Notice. In the Demand Notice and Section 9 Application, the Appellant claimed the principal amount of Rs. Rs. 1,10,23,431.38 which is the same amount the Appellant is claiming from the Respondent-Corporate Debtor. However, as per the complaint of the Appellant, the contents of the FIR clearly states that due to the acts of the accused person, the Informant (Appellant) sustained wrongful loss of Rs. 1,10,23,403.63 and the accused persons i.e. Directors of Respondent Company wrongfully gained Rs. 1,10,23,403.63.

10. It is seen that the Appellant filed the above complaint specifically alleging cheating the Appellant by not paying the due amount towards supply of Oxygen Cylinders, Carbon dioxide Cylinders and LPG Cylinders. The Respondent filed quashing proceeding of the alleged FIR before Hon'ble High Court of Calcutta, Kolkata. The Hon'ble High Court, vide order dated 17.01.2017 in C.R.R. No. 130/2017 (Page- 1193- Vol. VI) stayed the proceeding of FIR dated 07.09.2016 for a period of six weeks or until further orders whichever is earlier. Thus disputes had arisen.

11. Learned Counsel for the Appellant vehemently contended that the Appellant had claimed holding charges i.e. rental charges. The Adjudicating Authority had dealt with the issue at paragraph-9 of the impugned order and was of the view that holding or the rental

charges or the delivery charges are concerned, there is no separate written contract entered into between the parties and observed that the invoices did not show that the Operational Creditor was entitled to claim such holding charges. However, we are not going into those issues. It is very clear that the IBC is a summary procedure fully time bound as specified in the Act. The Adjudicating Authority cannot go into the serious disputes which require adducing of evidence. The Hon'ble Supreme Court in "**Mobilox Innovations Private Limited vs. Kirusa Software Private Limited**" reported in (2018) 1 SCC 353 at paragraphs 33 and 51 held:

*"33. The scheme under Sections 8 and 9 of the Code, appears to be that an operational creditor, as defined, may, on the occurrence of a default (i.e. on non-payment of a debt, any part whereof has become due and payable and has not been repaid), deliver a demand notice of such unpaid operational debt or deliver the copy of an invoice demanding payment of such amount to the corporate debtor in the form set out in Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 read with Form 3 or 4, as the case may be [Section 8(1)]. **Within a period of 10 days of the receipt of such demand notice or copy of invoice, the corporate debtor must bring to the***

***notice of the operational creditor the existence of a dispute and/or the record of the pendency of a suit or arbitration proceeding filed before the receipt of such notice or invoice in relation to such dispute [Section 8(2)(a)]. What is important is that the existence of the dispute and/or the suit or arbitration proceeding must be pre-existing i.e. it must exist before the receipt of the demand notice or invoice, as the case may be. ....”***

“51. .... 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.” ....

[Emphasis supplied]

12. To support the existence of dispute, it is seen from the reply of the Respondent dated 13.04.2018 to the Demand Notice dated 05.04.2018 whereby the Respondent has categorically stated that there is no recoverable debt due against the Respondent as alleged in the Demand Notice dated 05.04.2018. Further, the Respondent in his Reply has stated that the Respondent had paid Rs. 86,30,000/- which is an excess amount of Rs. 5,64,889/- during



the period from June, 2014 to October, 2016 and the same is not adjusted by the Appellant.

13. In the Rejoinder filed by the Appellant simply denied and disputed that the Respondent had paid an excess amount to the tune of Rs. 5,64,889/- during the period from June, 2014 to October, 2016. Further, at page-7 of the Rejoinder of the Appellant, it is stated, “It is denied and disputed that the Respondent-Company had paid more than actual amount due to it.”

14. From the facts and records, it is emphatically clear that there is serious dispute between the parties which are prior to issuance of Demand Notice. Neither the Adjudicating Authority nor this Appellate Tribunal sitting in a summary jurisdiction can go into those issues which otherwise required regular trial. As per sub-section 5 of Section 9 of IBC,

...

“9. ...

*(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 payment 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 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 payment 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 the Adjudicating Authority, shall before rejecting an application under sub-clause (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.”*

...

[Emphasis supplied]

Sub-Section 5(ii)(d) of Section 9 refers to Notice of dispute has been received by the Operational Creditor or there is a record of dispute in the Information Utility, the Adjudicating Authority shall reject the Application. While rejecting the Application, the Adjudicating Authority also shall have to read with Section 8(2)(a) of IBC where it refers to existence of dispute and the following Section is reproduced hereunder:

...

“ 8 ...

*(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, or record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoice in relation to such dispute;”*

[Emphasis supplied]

15. From the above provision it is mandatory that the Operational Creditor on the occurrence of a default, deliver a Demand Notice of unpaid operational debt, copies of invoices demanding payment of the amount involved in the default to the Corporate Debtor in such form and manner as may be prescribed. The Corporate Debtor shall, within a period of 10 days of the receipt of the Demand Notice or copy of the invoice mentioned in Section 8(1) of IBC bringing to the notice of the Operational Creditor regarding existence of a dispute (if any) record of pendency of the suit or the arbitration proceedings filed before the receipt of such notice or the invoice in relation to such dispute. In the present case, admittedly, there are disputes between the Appellant and the Respondent which is evident from the records as stated supra. From the FIR lodged by the Appellant prior to sending of Section 8 Notice and the Respondent disputed the debt to be payable by the Respondent in their reply to the Demand Notice.

16. From the above provision of law, it is clear that the moment there is an existence of a prior dispute, the Corporate Debtor gets out of clutches of the rigors of the Court. Further the adequacy of dispute is only to be seen whether the dispute raised by the Corporate Debtor specifies as a dispute as defined under Section 5(6) of IBC.

17. In this case, the Appellant itself started dispute by filing an FIR against the Directors of the Respondent Company for cheating the Appellant for the same amount as claimed by the Appellant before the Adjudicating Authority in Section 9 Application, which is prior to the filing of the Section 9 Application. Further the Respondent- Company have categorically stated that they have paid an excess amount of Rs. 5,56,889/- apart from the amount of Rs. 86,30,000/-paid. The Appellant has disputed the said excess amount. This is itself further considered as a clear dispute between the parties prior to the issuance of Demand Notice by the Appellant. The main dispute existed between the parties is with respect to filing of FIR against the Directors of Respondent Company for the same amount which they claimed in Section 9 Application.

18. Hence in view of Section 9(5)(ii)(d) of the IBC on the ground that there is a record of dispute existence between the parties, which dispute is serious in nature.

19. Accordingly, we hold that there is pre-existing dispute between the parties which cannot be adjudicated in a summary proceeding as held by the Hon'ble Supreme Court in the matter of Mobilex (supra).

20. In view of the aforesaid reasons, we are not inclined to interfere with the order passed by the Adjudicating Authority. The Appeal is devoid of the merits and liable to be dismissed. Accordingly, the same is dismissed. No orders as to cost.

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

(Kanthi Narahari)  
Member(Technical)

(V P Singh)  
Member(Technical)

*Ahc*