

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI**Company Appeal (AT) (Insolvency) No. 327 of 2018****(Arising out of Order dated 24th April, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), Principal Bench, New Delhi in Company Petition No. (IB)- 94(PB)/2018]****IN THE MATTER OF:****Sudhir Sales & Services Ltd. ...Appellant****Vs.****D-Art Furniture Systems Pvt. Ltd. ...Respondent****Present: For Appellant: - Mr. S.N. Jha, Senior Advocate with Mr. Manish Kumar, Mr. Nakul Jain and Mr. Anant Kini, Advocates.****For Respondent: - Mr. Sumesh Dhawan, Ms. Geetika Sharma and Ms. Tannya Baranwal, Advocates.****J U D G M E N T****SUDHANSU JYOTI MUKHOPADHAYA, J.**

The Appellant- 'Sudhir Sales & Services Ltd.'- ('Operational Creditor') filed application under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "I&B Code") for initiation of 'Corporate Insolvency Resolution Process' against Respondent- 'D-Art Furniture Systems Pvt Ltd.'- ('Corporate Debtor'). The Adjudicating Authority (National Company Law Tribunal), Principal

Bench, New Delhi, by impugned order dated 24th April, 2018 rejected the application on the ground of existence of dispute giving rise to the present appeal.

2. Learned Senior Counsel appearing on behalf of the Appellant- ('Operational Creditor') submitted that there is no dispute in existence and the Adjudicating Authority wrongly noticed one or other communication which are unrelated or does not disclose any dispute.

3. Reliance has also been placed on letter dated 13th November, 2013 written by the Respondent- ('Corporate Debtor') on which the Adjudicating Authority relied upon to hold that there is an existence of dispute.

4. On the other hand, according to learned counsel for the Respondent- ('Corporate Debtor'), there is an existence of dispute which is apparent from letter dated 13th November, 2013. This apart, the Respondent- ('Corporate Debtor') has also questioned the quality of material supplied by the Appellant- ('Operational Creditor').

5. The brief fact of the case is that a "Contract for- Gen set on Turnkey Contract on Rental- including supply, installation, maintenance, removal for Commonwealth Games 2010, Delhi" was reached between the 'Corporate Debtor'- 'D-Art Furniture Systems Pvt Ltd.' with 'Operational

Creditor'- 'M/s. Sudhir Sales & Services Ltd.'. The price, as stated in the bill of quantity is Rs. 1,62,49,360.00 (One Crore Sixty-Two Lakh Forty-Nine Thousand Three Hundred Sixty Only) inclusive of all taxes but exclusive of service tax as applicable (present rate is 10.3%). Details of 'BOQ for Sudhir Gensets' were shown therein showing relevant amount against each and other DG Sets which is part of Form-5 i.e. application under Section 9 of the 'I&B Code'.

6. The total contract value agreed between the parties was subsequently enhanced to Rs. 1,93,20,620/- (One Crore Ninety-Three Lakh Twenty Thousand Six Hundred Twenty Only) on 2nd September, 2010 by increasing supply from 45 to 58 numbers of DG sets along with accessories.

7. According to the Appellant, as against total invoices raised for an amount of Rs. 2,89,41,684/- (Rupees Two Crore Eighty-Nine Lakhs Forty-One Thousand Six Hundred Eighty-Four only), credit notes worth Rs. 28,65,776/- (Rupees Twenty-Eight Lakhs Sixty-Five Thousand Seven Hundred Seventy-Six only) were received, as such the net value of the invoice raised came down to a figure of Rs. 2,60,75,908/- (Rupees Two Crore Sixty Lakhs Seventy-Five Thousand Nine Hundred Eight Only). The 'Corporate Debtor' had made payment of Rs. 1,99,05,742/- (Rupees One Crore Ninety-Nine Lakhs Five Thousand Seven Hundred Forty-Two Only) leaving a balance amount of Rs. 61,70,161/- (Rupees Sixty-One Lakh

Seventy Thousand One Hundred Sixty-One Only) to be paid to the 'Operational Creditor', which included an amount of Rs. 5,32,262/- (Rupees Five Lakh Thirty-Two Thousand Two Hundred Sixty-Two Only) against TDS deductions. The Respondent- ('Corporate Debtor') has subsequently deposited the said TDS amount as such there remains an amount of Rs. 56,37,899/- due and payable towards principal. In support of the contention true copy of the ledger account maintained by the Appellant- ('Operational Creditor') has also been placed on record.

8. The grievance of the Appellant- ('Operational Creditor') is that despite successful completion of the contract by 'Operational Creditor' to the satisfaction of the Respondent- ('Corporate Debtor'), the outstanding amount was not paid. It is stated that Respondent- ('Corporate Debtor') vide communication dated 13th November, 2013 while acknowledging the amount payable, assured the applicant that the payment shall be made very soon. The Appellant- ('Operational Creditor') in his last visit in January 2016, made it clear to the Respondent- ('Corporate Debtor') that in case payment is not received by 31st March 2016, the Appellant ('Operational Creditor') will proceed against the Respondent- ('Corporate Debtor') as per law.

9. Further case of the Appellant- ('Operational Creditor') is that while nothing was heard from the Respondent- ('Corporate Debtor'), the Appellant- ('Operational Creditor') was constrained to send statutory

notice dated 13th April, 2016 under Sections 433 (e) and 434 (1) (a) of the Companies Act, 1956. Thereafter, petition under Sections 433 and 434 of the Companies Act, 1956 for winding-up of the Respondent Company was filed before the Hon'ble High Court of Delhi.

10. In the meantime, the 'I&B Code' came into force and the matter got transferred from the Hon'ble High Court to the National Company Law Tribunal vide its order dated 15th February, 2017. Subsequently, on 27th November, 2017 the petition was withdrawn with liberty to file a fresh application under Section 9 of the 'I&B Code'. Thereafter, a demand notice dated 20th December 2017 under Section 8 of the 'I&B Code' was issued. Nevertheless, since the outstanding amount was not paid the present application under Section 9 of the 'I&B Code' was preferred on 24th January 2018 for initiation of 'Corporate Insolvency Resolution Process' against the Respondent- ('Corporate Debtor').

11. The Respondent- ('Corporate Debtor') filed reply before the Adjudicating Authority on 26th February, 2018 mainly with the contention that there is a pre-existing dispute between the parties which was communicated to the Appellant-('Operational Creditor') in the reply of Respondent- ('Corporate Debtor') dated 09th September, 2017 and 9th November, 2017.

12. It was further argued that excess payment was made to the Respondent- ('Corporate Debtor') which was intimated by letter dated 13th November, 2013 to the Appellant- ('Operational Creditor') that the same need to be reconciled.

13. It was further submitted that the dispute was brought to the notice of the Appellant- ('Operational Creditor') by the Respondent's ('Corporate Debtor') by its reply dated 9th September, 2017 under Section 8(2) of the 'I&B Code'.

14. We have heard learned counsel for the parties and perused the records.

15. In ***"Innoventive Industries Ltd. v. ICICI Bank and Anr.— (2018) 1 SCC 407"***, the Hon'ble Supreme Court noticed the Scheme of Sections 7, 8 & 9 and observed:

"29. The scheme of Section 7 stands in contrast with the scheme under Section 8 where an operational creditor is, on the occurrence of a default, to first deliver a demand notice of the unpaid debt to the operational debtor in the manner provided in Section 8(1) of the Code. Under Section 8(2), the corporate debtor can, within a period of 10

days of receipt of the demand notice or copy of the invoice mentioned in sub-section (1), bring to the notice of the operational creditor the existence of a dispute or the record of the pendency of a suit or arbitration proceedings, which is pre-existing—i.e. before such notice or invoice was received by the corporate debtor. The moment there is existence of such a dispute, the operational creditor gets out of the clutches of the Code.”

16. From the aforesaid finding it will be evident that the existence of a dispute or the record of the pendency of a suit or arbitration proceedings should be pre-existing—i.e. prior to demand notice or invoice received by the ‘Corporate Debtor’. The moment there is existence of dispute, the ‘Operational Creditor’ gets out of the clutches of the ‘I&B Code’.

17. It will be also desirable to refer the decision of the Hon’ble Supreme Court in **“Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software (P) Limited- 2017 SCC OnLine SC 1154”**, wherein the Hon’ble Supreme Court held:

“40..... 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.”

18. In the present case, the Adjudicating Authority has decided the issue of pre-existence dispute on the basis of letter dated 13th November, 2013 and the reply given by the ‘Corporate Debtor’ under Section 8(2) given by the Respondent- (‘Corporate Debtor’) on 9th September, 2017. It is for the said reason we have also noticed the aforesaid two letters to decide whether there is any dispute in existence (pre-dispute).

19. The letter of the Respondent- (‘Corporate Debtor’) dated 13th November, 2013 is reproduced below:

“Dated 13.11.2013

To,

*Kind Attn: Mr. Ajay Bhutani,
M/S Sudhir Sales & Services Limited
507, International Trade Tower,
Nehru Place New Delhi - 110019.
Sub: Your Letter dated 28.09.2013*

Dear Sir,

Please refer to the statement as per your books of accounts with claim of Rs. 56,37 899/- towards providing Rental DG Sets & other related items during Common Wealth Games, New Delhi which is subject of approval reconciliation for our client M/S ESAJV D-Art India Pvt. Ltd.

As mutually agreed we shall release your outstanding as per the approval / reconciliation of our client and as soon as they get the payment form OC on this account. This is further subject to the arbitration matter with OC, which is pending before the Arbitral Tribunal. The arbitration is going on and we shall keep you updated on its status.

Thanking you,

For D-Art Furniture Systems Pvt. Ltd.”

20. From the aforesaid letter, it is clear that the Respondent- ('Corporate Debtor') has not disputed the claim made by the Appellant- ('Operational Creditor') nor raised any question relating to quality of service or material.

21. The only plea taken therein is that the outstanding amount will release as soon as the Respondent- ('Corporate Debtor') get the payment from OC on this account which is subject of approval of reconciliation of a third party i.e. 'M/s. ESAJV D-Art India Pvt. Ltd.' (not the 'Corporate Debtor'). The arbitration of which reference has been made in the impugned order is between other parties and the 'Operational Creditor' which is not a party to it. Thereby it is clear that the Respondent- ('Corporate Debtor') has not raised any dispute relating to debt nor raised any dispute relating to quality of service of goods. Pendency of any arbitral proceeding is not between the 'Operational Creditor' and the 'Corporate Debtor' but between some other parties which cannot be taken into consideration that there is pre-existing dispute between the Appellant- ('Operational Creditor') and the Respondent- ('Corporate Debtor').

22. The other letter dated 9th September, 2017 has been sent by the 'Corporate Debtor' in reply to the demand notice under Section 8(1) and is as follows:

"Dated 09.09.2017

To,

*Manish Kumar & Associates,
18, Todarmal Road, First Floor,
Bengali Market,
New Delhi - 110001.*

*Sub: Reply to the Demand Notice dated 02.09.2017
wrongly dated as 02.09.2016.*

Dear sir,

.....

4.It is stated that the alleged amount claimed by your client are hopelessly barred by limitation as the alleged amount pertains to the year 2010.

5. It is stated that the DG sets which were delivered to our Client on rental basis, were defective and not up to the mark, which was duly conveyed to your Client. Our Client had contacted your Client several times and had informed about the defective quality of the DG sets and also the nature of loss caused on that amount.

6. Without prejudice to the aforesaid, the amount claimed by your Client is not due and payable by our Client. In fact, it is a matter of record that our Client has, time and again disputed payment of the said amount.

7. It is an admitted position that initially, the contract was for Rs. 1,62,49,360/- (Rupees One Crore Sixty Two Lakh Forty Nine Thousand Three Hundred and Sixty only) and later on the contract value was increased to Rs. 1,93,20,620/(Rupees One Crore Ninety Three Lakh Twenty Thousand Six

Hundred and Twenty only). Further, admittedly our Client had paid an amount of Rs. 2,04,42,412/- (Rupees Two Crore Four Lakhs Forty Two Thousand Four Hundred Twelve only). For the said reason, our Client was insisting for the reconciliation of the account as your Client has illegally raised separate invoices for diesel, whereas, the cost of the diesel was included in the total contract value. Your client has deliberately raised separate invoices for diesel, which, were not in terms of the contract and your assertion that there was "separate arrangement" is completely false and denied.

8. Even in 2013, our Client had raised certain disputes and had called upon your client to reconcile the Statement of account, however, your Client never came forward to reconcile the same. Even a meeting was fixed to settle the matter, but your Client in spite of settling the matter has gone to the far extent of stating that the Company has become insolvent.

.....
11. kindly treat the present Reply as a notice of "existence of dispute" within the meaning of the I & B, Code 2016

Take notice accordingly
(SUMESH DHAWAN)"

23. It is for the first time the aforesaid letter dated 9th September, 2017, the Respondent- ('Corporate Debtor') raised certain disputes relating to

DG Sets and separate invoices for diesel which was never raised earlier. No such allegation was made in the letter dated 13th November, 2013 that the Appellant- ('Operational Creditor') about the quality of DG Sets of raising separate invoices for diesel.

24. The letter dated 9th September, 2017 having issued in reply to the demand notice under Section 8(1) cannot be taken into consideration to hold that there is a pre-existence of dispute between the Appellant- ('Operational Creditor') and the Respondent- ('Corporate Debtor'). The reply dated 9th September, 2017 is an afterthought, a case made out by the Respondent- ('Corporate Debtor') to oppose the case having issued after receipt of the demand notice under Section 8(1), cannot be relied upon to reject the application under Section 9.

25. In ***"Innoventive Industries Ltd.(Supra)"***, the Hon'ble Supreme Court held that pre-existing dispute is the dispute raised before demand notice or invoices was received by the 'Corporate Debtor'. Any subsequent dispute raised while replying to the demand notice under Section 8(1) cannot be taken into consideration to hold that there is a pre-existing dispute. Therefore, the reply given by the 'Corporate Debtor' on 9th September, 2017 is to be ignored for finding out whether there is pre-existence of dispute or not.

26. In **“Mobilox Innovations Pvt. Ltd.(Supra)”**, the Hon’ble Supreme Court held that a dispute truly exists in fact and is not spurious, hypothetical or illusory. Here there is no such dispute was pre-existing apart from that a hypothetical or illusory dispute which has been raised by the ‘Corporate Debtor’ while replying to the demand notice served under Section 8(1) by the ‘Operational Creditor’.

27. In view of the aforesaid fact, we hold that there is no pre-existing dispute in the present case and the Adjudicating Authority wrongly relied on the letter dated 13th November, 2013 and letter dated 9th September, 2017 to reject the claim of the Appellant. We accordingly set aside the impugned order dated 24th April, 2018 passed by the Adjudicating Authority in Company Petition No. (IB)- 94 (PB)/ 2018 and remit the case to the Adjudicating Authority for admitting the application under Section 9 filed by the Appellant- (‘Operational Creditor’), in absence of any defect. The Respondent- (‘Corporate Debtor’) cannot raise any objection before the Adjudicating Authority for admission of the application under Section 9, having heard by this Appellate Tribunal and the issue having decided. However, the order passed in this appeal will not come in the way of the Respondent- ‘Corporate Debtor’ to settle the claim with the Appellant- (‘Operational Creditor’) before admission of the application under Section 9 of the ‘I&B Code’ in which case, the Appellant- ‘Operational Creditor’ may withdraw the application.

28. The appeal is allowed with aforesaid observations and directions. However, in the facts and circumstances of the case, there shall be no order as to cost.

(Justice S.J. Mukhopadhaya)
Chairperson

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

NEW DELHI

4th October, 2018

AR