

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 314 of 2017

[Arising out of Order dated 11th October, 2017 passed by the Adjudicating Authority (National Company Law Tribunal), Kolkata Bench in Company Petition No. C.P.(I.B.)No.301/KB/2017)

IN THE MATTER OF:

Shaw Traders

12/A Nalta Naba Mahajati Road,
Dumdum Cantonment,
Kolkata – 700028.

...Appellant

Vs

Balaji Paper & Newsprint Pvt. Ltd.,

23, Brabourne Road,
Kolkata – 700001.

....Respondent

Present:

For Appellant: Mr. Shiv Shankar Banerjee, Advocate.

For Respondent: Mr. Anuj Singh, Mr. Mangaljit Mukherjee and Ms. Debarpita Basu Mukherjee, Advocates.

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

The Appellant filed application under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as 'I&B Code') before the Adjudicating Authority (National Company Law Tribunal), Kolkata Bench, Kolkata, which by impugned order dated 11th October, 2017 dismissed the application on following grounds:-

- (i) the demand notice under Section 8(1) was issued by an advocate;
and
- (ii) there is an existence of dispute.

2. The plea taken by the Respondent (Corporate Debtor) with regard to existence of dispute has been noticed by the Adjudicating Authority, which reads as follows:-

“9. The second and main contention of the respondent is that since the respondent already raised a dispute as against the claim of the applicant and issued reply notice raising the dispute already pending in between the applicant and the respondent the instant application is not maintainable. The learned Counsel for the respondent highlighting Annexure G reply notice as well

as Annexure A to Annexure D and Annexure F submits that respondent already raised dispute as against the claim of the applicant from 15.04.2013 onwards and that applicant by suppressing the dispute raised by the respondent filed the application. According to him respondent being raised a dispute in reply to the demand notice it would be sufficient to attract sub clause (d) of clause (ii) of sub section (5) of Section 9 of I&B code and therefore this application is liable to be rejected.”

3. The Adjudicating Authority framed its opinion on the basis of submission, which reads as follows:-

“10. A careful screening of the above referred notices issued by the respondent produced along with the reply affidavit proves undoubtedly that respondent challenged the quality of the waste paper supplied to the respondent long before the issuance of demand notice. All the notices seen received by the proprietor Shri M. Shaw. It is good to quote the challenge raised by the respondent in one among the notices issued by the respondent to the applicant on 15.04.2013, it read as follows:-

“We regret to inform you that despite our repeated request regarding quality of waste paper you have continued supplies mixed with lots of dust

particles, lifeless, antique, very old waste paper. You are requested to go through the “RAW Materials Quality Analysis report” given against each consignment and issue credit notes in our favour accordingly.”

*(Annexure – A at page 14 in the reply affidavit). In the reply notice issued by the respondent on 23.03.2017 (Annexure G) also very same challenge was raised by the respondent against the supply of the goods received by the respondent. Annexure **E** is the copy of the notice issued by the applicant under section 271 of the Companies Act, 2013 demanding Rs.131,20,165/- with interest @ of 18% to the respondent on 12.01.2017. Annexure **F** is the reply issued by the respondent to the applicant contending that respondent is not able to utilize the waste paper because the paper supplied was unusable waste paper. The contention of the respondent that a dispute in regards the claim of the applicant was raised long before the issuance of demand notice is therefore stand proved in this case.”*

4. Learned counsel appearing on behalf of the Appellant referred to Part V of the Form 5, which is the application under Section 9 where reference of invoices have been enclosed. It was submitted that those invoices which were raised are of subsequent period, i.e. after 15th April, 2013 and therefore

evidence of so called dispute brought into notice by letter dated 15th April, 2013 cannot be relied upon to reject an application under Section 9.

5. The Respondent (Corporate Debtor) has taken plea, as was taken before the Adjudicating Authority that a quality report of raw material of 2015 suggested substandard quality of goods.

6. Learned counsel appearing on behalf of the Appellants referred to invoices raised after 15th April, 2013, the date when earlier letter of dispute was raised with regard to earlier supply and submitted that there is no dispute with regard to invoices raised between 16th April, 2013 to 25th November, 2015 (at page 99 to 205) which are not covered by letter dated 15th April, 2013. It is further submitted that there is no quality report available on record for the goods supplied during 16th April, 2013 to 8th May, 2014, nor any such report has been brought on record.

7. Raw Material Quality Analysis Report dated 17th May, 2015 (page 321), 13th August, 2015 (page 326), etc. are on record. In majority of the reports the material quality has been shown as 'normal'. For example – Reports dated 17th May, 2015, 12th August, 2015, 15th August, 2015 (two reports), 16th August, 2015, 19th August, 2015, etc. are normal. The two reports dated 12th August, 2015 (page 326) and 15th August, 2015 (page 332) reads as follows:-

Date 12/08/2015

LALI PAPER & NEWSPRINT PVT. LTD.

Manikpara, Jhargram, Paschim Medinipur - 721512 (W.B.)

Phone No. 03222-230594, 230595, Fax 230598

Raw Materials Quality Analysis Report

Date **13/08/15**

GRN No. -

Supplier: **Shaw Traders**

Challan No. **31** Date: **12/08/15**

Truck No. **WB-78/A-1232**

Raw Materials **Min. Book**

Quality Analysis of Consignment Materials :-

1	Ex. Note Book			Remarks
	Antique Copies		%	
	Dull Shade Old Copies		%	
	Records		%	
	Ledger		%	
	Book & Drawing Books		%	
	Unusable		%	
2	White Cutting			
		No.-1	%	
		No.-2	%	
		No.-3	%	
	Unusable		%	
3	Records			
			%	
			%	
	Unusable		%	old book - 80307
4	Old Books			
	Antique Copies	-	%	→ Raw material received in bags
	Covers	-	%	& bamlits.
	Unusable	- 13	%	→ Rest material Quality is poor
5	Printed Book Firma			
	Unusable		%	
6	Ledger			
	Unusable		%	
Sign. (A/T) SHAW TRADERS		Sign. (Raw Matls. In-Charge)		

mohan shaw

①
... AN

... Paper & Newsprint

BALAJI PAPER & NEWSPRINT PVT. LTD.

Manikpara, Jhargram, Paschim Medinipur - 721512 (W.B.)
Phone No. : 03222-230594, 230595, Fax : 230598

Raw Materials Quality Analysis Report

Date 16/08/15

GRN No. -

Supplier: Shaw Traders
Challan No. 34 Date 15/08/15
Truck No. WB-11A-6679
Raw Materials BOOK

Quality Analysis of Consignment Materials :-

			Remarks
Ex. Note Book			
Antique Copies		%	
Dull Shade Old Copies		%	
Records		%	
Ledger		%	
Book & Drawing Books		%	
Unusable		%	
White Cutting			
	No.1	%	
	No.2	%	
	No.3	%	
Unusable		%	
Records			
		%	
		%	
Unusable		%	old book - 15807
Old Books			
Antique Copies	-	%	→ Raw material received in bags
Covers	-	%	& bundles
Unusable	13	%	→ Rest material Quality is normal
Printed Book Firma			
Unusable		%	
Ledger			
Unusable		%	
Sign. (Authority) SHAW TRADERS			Sign. (Raw Matts. In-Charge)

8. However, only in one of the Raw Material Quality Analysis Report dated 13th August, 2015 (page 329) it is mentioned that the material received has 35% mixed, which is as follows:-

CHALLAN Laxmi Paper & Newsprint Pvt. Ltd.

LAXMI PAPER & NEWSPRINT PVT. LTD.
 Manikpara, Jhargram, Paschim Medinipur - 721512 (W.B.)
 Phone No. : 03222-230594, 230595, Fax : 230598

Raw Materials Quality Analysis Report

Date: 14/08/15 GRN No. : _____

Supplier: Shree Traders

Challan No.: 33 Date: 13/08/15

Truck No.: WB-25/E-2858

Raw Materials: White mixed

Quality Analysis of Consignment Materials :-

Ex. Note Book				Remarks
Antique Copies			%	
Dull Shade Old Copies			%	
Records			%	
Ledger			%	
Book & Drawing Books			%	
Unusable			%	
2	White Cutting			
	No.-1		%	
	No.-2		%	
	No.-3		%	
Unusable			%	
3	Records			
			%	→ Raw material received in bags
			%	Chendils
Unusable		08	%	→ 8% material received in old
4	Old Books			Book 35% mixed with mixed
Antique Copies			%	→ Rest material quality is good
Covers			%	
Unusable			%	
5	Printed Book Firma			
Unusable			%	
6	Ledger			
Unusable			%	
Sign. (Authority)		Sign. (Raw Matls. In-Charge)		

*old book - 3403
Recd - 10378*

9. From the records following fact emerges:-

- (i) So far as the invoices raised between 16th April, 2013 to 8th May, 2014, there is no quality report on the record.
- (ii) The record of dispute brought on record by the Respondent are not the subject matter of Part V of the Form 5 i.e. Section 9 application.

Therefore, we hold that there is no record of dispute in existence with regard to the invoices in question.

10. In so far as the supply made during the year 2015, there is no dispute with regard to quality of goods supplied, from May, 2015 onwards, except one or other invoice, which is not the subject matter of the claim. Therefore, we hold that there is no dispute in existence with regard to goods supplied between 16th April, 2013 to 8th May, 2014 and the majority of goods supplied during the year 2015, except for one of which report dated 13th August, 2015 enclosed, which is not subject matter. Thereby, we hold that the Appellant has made out a case for admission of application under Section 9.

11. In so far as issuance of demand notice by advocate is concerned, the case being covered by decision of the Hon'ble Supreme Court in '*Macquarie Bank Limited*' Vs '*Shilpi Cable Technologies Ltd.*' in Civil Appeals No. 15135, 15481 and 15447 of 2017 on 15th December, 2017, cannot be a ground to reject the application.

12. The Adjudicating Authority having failed to consider the aforesaid facts, we set aside the impugned order dated 11th October, 2017 passed by the Adjudicating Authority and remit the case to the Adjudicating Authority for its admission, in absence of any defect. However, it will be open to the Respondent to settle the claim with the Appellant before admission of the application by the Adjudicating Authority. The appeal is allowed with aforesaid observations and actions. However, there shall be no order as to cost.

[Justice S. J. Mukhopadhaya]
Chairperson

[Justice Bansi Lal Bhat]
Member (Judicial)

NEW DELHI

18th September, 2018

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