

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 39 of 2020

(Arising out of Order dated 19th December, 2019 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi, (Court No. IV) in Company Petition No. IB-1177/ND/2019)

IN THE MATTER OF:

Raj Kumar Garg & Anr.

....Appellants

Versus

Health Care At Home India Pvt. Ltd. & Anr.

.....Respondents

Present:

For Appellants:

Mr. Sandeep P. Agarwal, Senior Advocate with Mr. Rupesh Tyagi, Advocate.

For Respondents:

**Mr. Joy Basu, Senior Advocate with Ms. Petal Chandhok, Mr. Rahul Kumar and Ms. Kanak Bose, Advocates.
Mr. Sabhay Choudhary, Advocate for R-2.**

J U D G E M E N T

BANSI LAL BHAT, J.

Appellants herein are the members of the suspended Board of Directors as also the Shareholders of 'M/s. Satyam Drugs Pvt. Ltd.' (Respondent No.2/ 'Corporate Debtor'). They are aggrieved of the impugned order dated 19th December, 2019 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi (Court No. IV) in Company Petition No. IB-1177/ND/2019 whereby and whereunder the

Adjudicating Authority has admitted the Company Petition filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "I&B Code") filed by 'M/s. Health Care At Home India Pvt. Ltd.' (Respondent No.1/ 'Operational creditor') for initiation of 'Corporate insolvency Resolution Process' of the 'Corporate Debtor'. The impugned order has been assailed merely on the ground of pre-existing dispute with regard to some invoices qua supply of goods though transactions in respect whereof invoices have been raised by the 'Operational Creditor' have not been entirely disputed.

2. The factual matrix of the case needs to be noticed briefly for identification of the contentious issue and its impact on triggering of 'Corporate Insolvency Resolution Process' at the hands of the 'Operational Creditor'. The 'Operational Creditor' is engaged in the business of providing para-medical staff/ attendants/ technicians to patients besides carrying on business of providing medical supplies like medicines and medical equipments etc. and having business relations with the 'Corporate Debtor' since June, 2017. The 'Corporate Debtor' placed Purchase Order with the 'Operational Creditor' for procuring medical supplies and invoices came to be raised by the 'Operational Creditor' qua delivery of such products to the 'Corporate Debtor'. According to the 'Operational Creditor', the 'Corporate Debtor' made part payment of a few invoices but failed to clear the outstanding amount. According to the 'Operational Creditor', the 'Corporate Debtor'

never raised any dispute qua the delivery of medical supplies and made part payment towards discharge of the operational debt. Details of the invoices raised and the payments made through cheques have been recorded at Para 4 of the impugned order. However, the cheques were dishonoured as claimed by the 'Operational Creditor' which led to filing of complaint cases under Section 138 of the Negotiable Instruments Act, 1881 stated to be pending for determination before Ld. Metropolitan Magistrate. Since the payment was not forthcoming, 'Operational Creditor' claimed to have served a Demand Notice dated 25th February, 2019 under Section 8 of the 'I&B Code' upon the 'Corporate Debtor'. The Notice was subsequently withdrawn as according to the 'Operational Creditor' some inadvertent errors crept therein. This was followed by a fresh Demand Notice sent on 16th April, 2019 claiming a payment of Rs.2,02,07,685.96/- together with interest at the rate 18% per annum within 10 days from receipt of the Notice. The 'Corporate Debtor' responded to the Notice claiming that an amount of Rs.1,97,06,210/- was outstanding dues recoverable from the 'Operational Creditor' by the 'Corporate Debtor' on account of the reverse sales made by the 'Corporate Debtor' and since an amount of Rs.2,24,15,101/- as outstanding dues was payable by the 'Corporate Debtor' to the 'Operational Creditor' on account of purchases made by the 'Corporate Debtor' from the 'Operational Creditor', after adjusting the recoverable dues on account of reverse sales only an amount of Rs.27,08,891/- was payable by the 'Corporate Debtor' and the

'Corporate Debtor' had prepared a cheque for such amount which could be collected by the 'Operational Creditor'. According to 'Operational Creditor', an amount of Rs.80,72,422/- plus interest computed upto 05th December, 2019 totalling Rs.86,24,658/- was due and payable by the 'Corporate Debtor' and since default has occurred, the 'Operational Creditor' sought initiation of 'Corporate Insolvency Resolution Process' against the 'Corporate Debtor'. The Adjudicating Authority, on consideration of the entire gamit of controversy as unfolded by the documents on record and taking note of the fact that the 'Operational Creditor' had denied reverse sales amounting to Rs.1,97,06,210/- made by the 'Corporate Debtor' found that the offer of the 'Corporate Debtor' to pay a mere sum of Rs.27,08,891/- only was designed to evade its liability in respect of the total claim put up by the 'Operational Creditor', thus culminating in passing of the impugned order.

3. Learned counsel for Appellants submits that none of the invoices bears any acknowledgment by the 'Corporate Debtor'. It is contended that 15 disputed invoices were never communicated to the 'Corporate Debtor' before issuance of Demand Notice and there was no proof of such products having been delivered. It is submitted that demand for the alleged operational debt of Rs.2,02,07,685.96/- was raised only in the second Demand Notice dated 16th April, 2019. As regards dishonour of 17 cheques for total amount of Rs.18,50,000/-, it is submitted that such cheques were dishonoured for "Stop Payment" and not for

“insufficient funds” and such cheques were not against any specific invoice. It is submitted that the ‘Corporate Debtor’ was never aware about the disputed invoices. It is further submitted that the dispute qua the disputed invoices was raised on the very first opportunity. Lastly, it is submitted that there is no default on the part of the ‘Corporate Debtor’ as admitted amount of Rs.27,08,891/- was already tendered and the ‘Corporate Debtor’ informed the ‘Operational Creditor’ through its reply to Demand Notice that the cheques in respect of such amount have been prepared and same could be collected by the ‘Operational Creditor’ from the office of the ‘Corporate Debtor’.

4. Per contra, learned counsel for the ‘Operational Creditor’ submits that the ‘Corporate Debtor’ never raised any dispute relating to supply of goods and the payment of amounts due and payable in lieu of supply of such goods. Reference is made to emails dated 09.10.2018, 11.10.2018, 17.10.2018 and 26.11.2018 to establish admission by the ‘Corporate Debtor’ qua the liability of payment of debt in favour of the ‘Operational Creditor’ before issuance of Demand Notice. Reference is also made to issuance of 17 cheques by the ‘Corporate Debtor’ in favour of the ‘Operational Creditor’ in discharge of the payable debt prior to issuance of Demand Notice. As regards withdrawal of 1st Demand Notice, it is submitted that due to certain inadvertent errors, a mistake had crept in the Demand Notice and the 1st Demand Notice was accordingly withdrawn to rectify the mistake and 2nd Demand Notice

was issued on 16.04.2019. Lastly, it is pointed out that the 'Corporate Debtor' has admitted liability in respect of operational debt to the tune of Rs.27,08,891/- and since the claim includes right to payment even if it is disputed, the debt and default established against the 'Corporate Debtor' did warrant initiation of 'Corporate Insolvency Resolution Process'.

5. Heard learned counsel for the parties and perused the record.

6. The factum of medical supplies emanating from the 'Operational Creditor' and its delivery to the 'Corporate Debtor' manifesting in raising of several invoices during the relevant period is not in controversy. The status of Respondent Nos.1 and 2 as 'Operational Creditor' and 'Corporate Debtor' respectively is also not in dispute. It is also not in issue that the claim lodged by the 'Operational Creditor' in respect of medical supplies affected to 'Corporate Debtor' falls within the ambit of 'operational debt' which was due and payable. The 'Corporate Debtor' did question the veracity of some of the invoices for the first time in reply to the Demand Notice and not before that. No evidence of any amount lying outstanding on account of reverse sales, much less a cogent and credible proof, has been placed on record by the 'Corporate Debtor' who admitted having issued cheques in favour of the 'Operational Creditor' for an amount totalling Rs.18,50,000/- which were dishonoured upon presentation by the 'Operational Creditor' for the reason; 'Stop Payment'. This is also an admitted position in the case

that seven complaint cases under Section 138 of the NI Act came to be filed by the 'Operational Creditor' against 'Corporate Debtor' for bouncing of these cheques. We are told that Special Leave Petitions arising out of such complaints are pending consideration before the Hon'ble Apex Court. Be that as it may, the fact remains that the 'Corporate Debtor' was responsible for bouncing of cheques and this fact is not disputed by the 'Corporate Debtor' who has advanced the unsubstantiated plea of stopping payment against those cheques on the basis of an understanding that those cheques would not be presented by the 'Operational Creditor' for encashment without prior approval of the 'Corporate Debtor'. There is not an iota of evidence on record even to hint that as many as seventeen cheques were issued by the 'Corporate Debtor' in favour of the 'Operational Creditor' as security and not in discharge of legally enforceable obligation arising out of the operational debt which was payable. That apart, on its own showing the 'Corporate Debtor' has admitted liability in respect of an amount of Rs.27,08,891/- being payable after adjusting the recoverable amount on account of reverse sales from the payable amount in regard to only three invoices. The fact that the 'Corporate Debtor' in response to the second Demand Notice enclosed the copy of cheque for an amount of Rs.27,08,891/- would not absolve the 'Corporate Debtor' of such liability for two reasons:-

- (a) that the previously issued 17 cheques by 'Corporate Debtor' in discharge its liability qua the invoices had bounced;

(b) that such payment was offered with the express stipulation that the same would be full and final settlement towards the 'Operational Creditor's claim.

7. The offer of payment of a part of the claim with a condition attached having the effect of 'Operational Creditor' relinquishing its claim in respect of the balance amount payable in law cannot be envisaged as a payment in compliance to statutory notice under Section 8(1) of the 'I&B Code'. Section 8 (2)(b) provides that once the 'Corporate Debtor' receives the Demand Notice, it shall within 10 days of the receipt of demand notice bring to the notice of the 'Operational Creditor' the payment of unpaid operational debt either by sending an attested copy of the record of electronic transfer of the unpaid amount from the Bank account of the 'Corporate Debtor' or by sending an attested copy of record demonstrating encashment of cheque by the 'Operational Creditor'. Section 9 of the 'I&B Code' entitles the 'Operational Creditor' to seek initiation of 'Corporate Insolvency Resolution Process' *inter alia* on the ground that the 'Operational Creditor' did not receive payment from the 'Corporate Debtor'. A combined reading of Sections 8 and 9 of the 'I&B Code' leaves no room for doubt that the payment of unpaid operational debt has to be unqualified and evidenced by electronic transfer from Bank account of the 'Corporate Debtor' to the Bank account of the

‘Operational Creditor’ and that the ‘Operational Creditor’ can initiate ‘Corporate Insolvency Resolution Process’ only if he does not receive payment from the ‘Corporate Debtor’. Admittedly, in the instant case, even the payment of the admitted part of the claim amounting to Rs.27,08,891/- has not been received by the ‘Operational Creditor’. Default being in excess of Rupees One Lac would warrant initiation of ‘Corporate Insolvency Resolution Process’ at the instance of ‘Operational Creditor’.

8. Viewed in the context of aforesaid reasons, we do not find any legal infirmity in the impugned order of admission passed by the Adjudicating Authority. The appeal lacks merit and is liable to be dismissed. We accordingly dismiss the appeal. No costs.

[Justice Bansi Lal Bhat]
Member (Judicial)

[V.P. Singh]
Member (Technical)

NEW DELHI
22nd May, 2020

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