NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) Insolvency No. 780 of 2019

[Arising out of Order dated 11.06.2019 passed by the Adjudicating Authority (National Company Law Tribunal) New Delhi, Court No. IV in Company Petition No. IB-1209/ND/2018]

IN THE MATTER OF:

M/s Embee Software Pvt. Ltd. .....Appellant

Vs.

M/s Solicon Pvt. Ltd. ......Respondent

Present :

For Appellants: Mr. Lzafeer Ahmad, Advocate

For Respondent: Mr. Anshuman Bahadur, Advocate for Mr. Sahil Mullick, Advocates.

J U D G M E N T

VENUGOPAL M. J.

Heard the Learned Counsel for the Appellant / Applicant and the Learned Counsel for the Respondent.

2. According to the Appellant / Applicant, the instant Company Appeal (AT) Insolvency No. 780 of 2019 has been filed with a delay of 15 days beyond the period as enunciated u/s 61(2) of the Insolvency & Bankruptcy Code, 2016. It is the specific plea of the Appellant that the impugned order was pronounced by the Adjudicating Authority ('National Company Law Tribunal'), New Delhi, Court No. IV

on 11th June, 2019 in Company Petition No. (IB)-1209(ND)/2018 and the copy of the said order was uploaded only on 15th June, 2019, which was immediately communicated by the Learned Counsel for the Appellant to the Appellant's office and its officials.

3. After detailed deliberations, the Appellant's officials sought legal advice on available remedies and later the Appellant had applied for certified copy of the impugned order on 17th June, 2019, which was prepared on 25th June, 2019. Due to the intervention of summer vacation and on account of bereavement in the family of the Learned counsel for the Appellant, the copy of the impugned order was collected in July, 2019. In this process, the delay in preferring the present Appeal has occurred, which is neither an intentional nor a wilful one. The Applicant / Appellant has prayed for the condonation of delay of 15 days in preferring the present appeal.

4. Taking into consideration the fact that the Applicant / Appellant has come out with the reasons in the Interlocutory Application that due to intervention of summer vacation and bereavement in the family of its Learned Counsel that the copy of the impugned order was collected in July, 2019 and after indulging in internal deliberations it took some time to approach this Tribunal, after the prescribed period of 30 days u/s 61(2) of the 'I&B' Code for filing of an Appeal had lapsed and that apart the present Appeal having been filed within the period of 15 days as prescribed under the Proviso to Section 61(2) of 'I&B Code'; this Appellate Tribunal by taking a lenient, liberal, meaningful and purposeful view and also after being successfully

satisfied with the reasons ascribed for the delay in question, allows the Interlocutory Application without costs, in furtherance of substantial cause of justice.

5. The Appellant / 'Operational Creditor'/ Applicant has focussed the present Company Appeal (AT) Insolvency No. 780 of 2019 as an 'affected' person in respect of the impugned order dated 11th June, 2019 passed by the Adjudicating Authority ('National Company Law Tribunal') New Delhi, Court No. IV in dismissing the application filed u/s 9 of the 'I&B' Code read with Rule 6 of 'I&B' Code (application to Adjudicating Authority Rules, 2016).

6. The Adjudicating Authority by means of the Impugned order dated 11th June, 2019 at para 21 and 22 had observed as under: -

> *"21 Nowhere in the application any document has been produced to support that the alleged Purchase Order has been executed between the Operational Creditor and the Corporate Debtor. The Corporate Debtor has placed various correspondences regarding the liability of SRS Group of Companies as per the terms of Commercial Proposal, Agreements and Purchase Orders on record. The claim made by the applicant is untenable without any supportive evidence reflecting the liability of the Corporate*

Debtor as per the terms of alleged Purchase Order.

22. Further the Hon'ble Supreme of India in ***Mobilox Innovations Private vs. Kirusa Software Private Limited*** has observed that-

"The adjudicating authority, when examining an application under Section 9 of the Act will have to determine:

(i) Whether there is an "operational debt" as defined exceeding Rs. 1 lakh? (See Section 4 of the Act)

(ii) *Whether the documentary evidence furnished with the application shows that the aforesaid debt is due and payable and has not yet been paid? And*

(iii) *Whether there is existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before the receipt of the demand notice of*

the unpaid operational debt in relation to such dispute?

If any one of the aforesaid conditions is lacking, the application would have to be rejected.

Apart from the above, the adjudicating authority must follow the mandate of Section 9, as outlined above, and in particular the mandate of Section 9(5) of the Act, and admit or reject the application, as the case may be, depending upon the factors mentioned in Section 9(5) of the Act."

As per the reply filed by the Corporate Debtor, it can be inferred and concluded that there is no establishment of 'Operational debt' against the Corporate Debtor and the same is disputed by the Corporate Debtor and falls well within the definition of 'Dispute' as per Section 5(6) which is reproduced below:

> *"Dispute" includes a suit or arbitration proceedings relating to – (a) the existence of the amount of debt; (b) the quality of goods or service; or (c) the breach of a representation or warranty."*

and ultimately came to the conclusion that there was no establishment of 'Operational Debt' against the 'Corporate Debtor' which comes within the definition of 'Dispute' as per Section 5(6) of 'I&B' Code and dismissed the application.

7. The Learned Counsel for the Appellant submits that the Appellant being an authorised re-seller of Microsoft (India) Pvt. Ltd. for supply of Microsoft Licenced programme had submitted a proposal to the Respondent on 23.12.2015 in regard to the "Microsoft Licenced Programme" and that on 30.12.2015, a 'Purchase Order' was sent by the Respondent through e-mail to the Appellant.

8. The Learned Counsel for the Appellant brings to the notice of this Appellate Tribunal that the Purchase Order was issued by one 'SRS Real Infrastructure Ltd.' to the Appellant, appointing the Respondent as party on whom invoices would be raised by the Appellant. Also, it is represented on behalf of the Appellant that on 30.12.2015 the Microsoft licences were activated and a three year 'Microsoft Enterprise Agreement' was executed on 01.01.2016.

9. The Learned Counsel for the Appellant proceeds to point out that as per the terms of agreement and understanding among the parties, the Appellant would

supply Microsoft licenced programmes on a three-year licence to SRS Group of Companies and that the invoice would be raised on an 'Annual Basis' on the Respondent, by the Appellant and in fact the Respondent was required to make payments to the Appellant within the period specified in the invoice. Therefore, the plea is taken on behalf of the Appellant that the Respondent by its conduct had accepted its Liability to make payment by virtue of having invoices issued in its name and making payments in regard to the service provided by the Appellant 'SRS Group'.

10. The Learned Counsel for the Appellant contends that from the year 2016-2018 the Appellant had supplied Microsoft programmes to SRS Group of Companies and raised invoices on the Respondent based on the agreement, understanding instructions of the Respondent and the details of the same are as under:-

S.No.	Date	Invoice No.	Total Amount (in Rupees)
1.	21.01.2016	DS11516-60647	4003866.00
2.	19.01.2017	DS11617-60790	4020619.00
3.	17.01.2018	DGS11718-60464	3953609.00

In reality, the said invoices were acknowledged and accepted by the Respondent without any protest, dissent or demur.

11. The Learned Counsel for the Appellant submits that the Respondent made payments including the delay interest towards the Appellant's Invoice Nos. DS11516-60647 dated 21.01.2016 and DS11617-60790 dated 19.01.2017 respectively without any protest. However, the Appellant in the year 2018 had supplied the Microsoft License Programme which was accepted by the end-customer. Moreover, the Appellant raised the Invoice No. DGS11718-60464 dated 17.01.2018 for a sum of Rs. 39,53,609/- on the Respondent which received, acknowledged and accepted without any protest and the said invoices was raised after confirmation of GSTIN No. by the Respondent through e-mail dated 11.01.2018.

12. The grievance of the Appellant is that the Respondent was required to make 50% of the advance payment and the balance 50% was to be paid within 30 days neither of which paid so far (had not paid the same). Apart from that, the Respondent had stopped payments for the reasons best known to it and resultantly a sum of Rs. 39,53,609/- remained unpaid as per invoice dated 17.01.2018.

13. The Learned Counsel for the Appellant emphatically contends that the Respondent and the Appellant had spoken telephonically in regard to payment schedule on 12.02.2018 and that the Respondent had exchanged the existence of 'Debt' and its inability to provide a time line for payment as per e-mail dated 23.03.2018. Further, the aforesaid e.mail clearly showed the 'admission' liability of the Respondent to make payments to the Appellant and the Respondent had

delayed the payment for no good reason, notwithstanding the fact, that the Appellant had made a request in this regard.

14. The Learned Counsel for the Appellant submits that the Respondent intentionally began to avoid the calls and also not responded to the e-mails of the Appellant, which resulted in the Appellant to issue a Demand Notice dated 08.05.2018 as per Form 3 of IBC Regulations, on the Respondent, claiming an outstanding sum of Rs. 39,53,609/- together with interest @ 24% per annum. The Respondent through its Learned Counsel sent a Reply dated 17.05.2018 to the Appellant and in the said Reply the existence or the sum of unpaid 'Operational Debt' was not disputed.

15. The Learned Counsel for the Appellant puts forth an argument that on an erroneous view of the matter, the Learned Adjudicating Authority ('National Company Law Tribunal') New Delhi Court No. IV had dismissed the application filed by the Appellant / Applicant on the basis that there was no supportive evidence reflecting the liability of the Respondent and that there was no 'Operational Debt', which needs to be set aside in the interest of justice.

16. It is the submission of the Learned Counsel for Respondent that the Respondent is a 'Disclosed Agent' on behalf of the 'SRS Group of Companies', which fact was well within the Appellant's knowledge and that there exists a Principal – Agent relationship between the Respondent and SRS as per Section 230 of the Indian Contract Act, 1872.

17. The Learned Counsel for the Respondent takes a stand that there was a 'Tripartite Agreement' between Microsoft Corporation (India) Pvt. Ltd. as the Service Provider, the Appellant as the re-seller of Microsoft Corporation (India) Pvt. Ltd. and SRS group of Companies as their customer and in short, the Respondent was only a 'Collecting Agent' on behalf of SRS Group of Companies and there was no agreement between the Respondent and the Appellant.

18. The Learned Counsel for the Respondent points out that an 'Agreement' in the nature of Purchase Order was raised by SRS to the Appellant and the Respondent was neither a 'Beneficiary' nor the 'Recipient' of any service from the Appellant.

19. The Learned Counsel for Respondent refers to Clause 4 and 6 of the Purchase Order dated 30.12.2015 which runs as under:-

> *"(4) Payment Terms: 16 Lac advance along with Purchase Order in favour of M/s Solicon Pvt. Ltd. and rest within 30 days from the date of PO. Payment to be made by Solicon to Embee Software Pvt. Ltd. Embee Software Pvt. Ltd. to bill to Solicon Pvt. Ltd."*
>
> *(6) Delivery At : IT Office, SRS Tower, Faridabad"*

20. Added further, it is the contention of the Learned Counsel for the Respondent that the arrangement in view of the aforesaid Purchase Order dated

30.12.2015 was valid only for a period of one year i.e. 2016 and no Purchase Order was ever delivered or provided to the Respondent by the Appellant. Viewed in this perspective, the Respondent pleads that it cannot be held liable to pay any amount.

21. The Learned Counsel for the Respondent contends that the Respondent through the e-mail dated 23.03.2018 had intimated to the Appellant that the payments were not received from the customer SRS and that the initiation of dispute relates back to the year August, 2016 and hence, it was unable to forward the payment to the Appellant.

22. The Learned Counsel for the Respondent comes out with a legal plea that the Appellant's claim does not fall within the ambit of the definition of 'Operational Debt' u/s 5(21) of the 'I&B' Code, 2016 as the same is neither against any goods purchased by the 'Corporate Debtor' nor is against any service availed by the 'Corporate Debtor'. Besides this, the 'Purchase order' relied upon by the Appellant was not addressed in favour of the Respondent.

23. The Learned Counsel for the Respondent submits that in the application, the Appellant / Applicant had not shown SRS as a proper and necessary party with a view to prove the nexus of 'Debt' payable, if any.

24. The Learned Counsel for the Respondent contends that in the application filed by the Appellant before the Adjudicating Authority no evidence was produced

to support that the purported Purchase Order had created any liability on the part of Respondent / 'Corporate Debtor in the payment of any dues.

25. By way of Reply, the Learned Counsel for the Appellant submits that the *'alleged principal'* is merely a licencee of the software programme and that all the liability and obligation to make payments was assumed by the 'Corporate Debtor' which is evidenced by the fact that the proposal was submitted to the Respondent / 'Corporate Debtor' and that the invoices were raised only on the 'Corporate Debtor'. Furthermore, in the e-mail dated 23.03.2018 addressed by the Respondent / 'Corporate Debtor' to the 'Operational Creditor', the Respondent refers to the alleged 'principal' as its customer. Also in terms of liability to make payment in an agreement for the benefit of third party does not establish a Principal-Agent relationship.

26. The Appellant had issued a Demand Notice dated 08.05.2018 to the Respondent demanding a payment of the unpaid 'Operational Debt' from the Respondent and that a total amount of Rs. 42,00,574 was claimed as on 07.05.2018 (principal amount) Rs, 39,53,609.00 and interest sum of Rs. 2,46,965.16/-. The Respondent had sent a reply to the Appellant on 17.05.2018 through its advocate stating that there was no commercial or business relationship between the Appellant and itself. Further in the said reply it was stated that the Respondent was not a 'Beneficiary' nor a 'Recipient' of any service from the Appellant that the Respondent was only a 'Collecting Agent' acting as an Agent for SRS, to receive payments from SRS and disburse the same.

27. It is to be pointed out that a mere glance of the Reply notice dated 17.05.2018 makes it placidly clear that the Respondent had in a crystalline fashion stated in the e-mail dated 23.03.2018 that payment had not come from its customer i.e. SRS nor SRS was reachable.

28. The Respondent in its Reply notice dated 17.05.2018 addressed to the Appellant had also stated that the arrangement between the Appellant and Respondent was valid only for a period of one year as the Purchase Order was only for the 1st year and more importantly, there was no Purchase Order after the said year was ever delivered, provided or given to it by SRS.

29. It is also the stand of the Respondent in the reply notice dated 17.05.2018 that the notice on the Company in Form-4 cannot be said to be a Demand Notice u/s 8(1) of the 'I&B' Code.

30. As seen from the invoice dated 17.01.2018 of the Appellant addressed to the Respondent a sum of Rs. 39,53,609/- was the amount that remained unpaid according to the Appellant. The Respondent had sent an e-mail addressed to the Appellant wherein the GSTIN Number was mentioned. It is represented on behalf of the Appellant that the e-mail correspondence dated 8.8.2016 and 5.9.2016 are not related to the Appellant.

31. It is to be borne in mind that Section 5(20) of 'I&B' Code defined 'Operational Creditor' means a person to whom the 'Operational Debt' is owed and includes any person to whom such debt has been legally assigned or

transferred. Section 5(21) of the 'I&B' Code speaks of 'Operational Debt', meaning a claim in respect of the provision or goods or service including employment or debt in respect of payment or dues assigning in law for the time being in force and payable to the Central Government, in State Government or in Local Authority. Section 5, 6 of the 'I&B' Code defines that dispute which includes a suit or arbitration proceedings relating to (a) the existence of amount of debt (b) the quality of goods or services or (c) the breach of a representation or warranty.

32. As far as the present case is concerned, the Respondent through e-mail dated 23.03.2018 had intimated the Appellant / 'Operational Creditor' that the payments were not received and that the same could not be received from SRS in as much as the customer *'was not reachable and in bad shape'* and that they had not received any payment from the customer till date. When the Respondent had disputed the debt and the same being not payable by it, because of the reason that the Purchase Order and commercial proposal was executed between the 'Operational Creditor' being a reseller of Microsoft programme and SRS group of companies and further as a collecting Agent, the Respondent in the considered opinion of this Tribunal cannot be held liable for the outstanding amount. Continuing further, the SRS before the Learned Adjudicating Authority in the application filed by the Appellant was not arrayed as one of the parties to prove the establishment of debt payable by the Respondent.

33. In the present case, the claim of the Appellant as an 'Operational Creditor' does not fit within the purview of the definition of the term of 'Operational Debt'

u/s 5(21) of the 'I&B' Code on account of the fact that it was neither against any goods purchased by the Respondent nor against any services availed by it. In the absence of any material to fasten the liability on the Respondent by virtue of the terms of the Purchase Order, which was not addressed to the Respondent the Appellant / Applicant cannot be characterised as an 'Operational Creditor' as per definition of Section 5(20) of the 'I& B Code.

34. It cannot be forgotten that the proceedings under the 'I&B' Code are not an adversary litigation and that the Adjudicating Authority is not required to determine the claim of an Applicant like a money claim in a civil suit. In fact, the initiation of 'Corporate Insolvency Resolution Process' u/s 7 or 9 is not akin to recovery proceedings. In deciding whether to admit or rejects the application either u/s 7 or 9 of the 'I&B' Code, the Adjudicating Authority is not to take into account the reasons for the Corporate Debtor's default. Moreover, the Code cannot be pressed into service as a substitute for debt enforcement procedure.

35. In the foregoing detailed discussions and also this Tribunal taking into account the vital fact that the Respondent in its Reply notice dated 17.05.2018 had disputed the claim of the Appellant and its liability to pay etc. by raising serious bonafide factual pre-existing disputes, which requires an in depth examination / investigation and the said disputes which cannot be gone into any summary proceedings under the 'I&B' Code, it is held by this Tribunal that the application filed by the Appellant as an Applicant before the Learned Adjudicating Authority is not maintainable in the eye of law. Consequently, the

appeals fail and the same is dismissed without costs. Before parting with the case, it is made clear that dismissal of application filed by the Appellant before the Adjudicating Authority will not preclude it to seek appropriate remedy before the Competent Forum for redressal of grievance of course, in accordance with law and in the manner known to law if it so desires/so advised.

[Justice Venugopal M.]
Member (Judicial)

[Kanthi Narahari]
Member (Technical)

[V.P. Singh]
Member (Technical)

New Delhi

20th December, 2019

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