

National Company Law Appellate Tribunal, New Delhi

Company Appeal (AT) (Insolvency) No. 379 of 2020
& I.A. No. 1509 of 2020

[Arising out of Order dated 26th February, 2019 passed by National Company Law Tribunal, New Delhi Bench, Court-II in Company Petition (IB) No.1048/ND/2019]

IN THE MATTER OF:

Before NCLT

Before NCLAT

Adish Jain S/O Mohinder Jain
Shareholder of J.P. Engineers Pvt. Ltd.
3/8, IInd Floor, Asaf Ali Road
New Delhi – 110002.

Applicant/Petitioner

Appellant

Versus

1. Sumit Bansal
Insolvency Resolution Professional
Preeti Sumit Bansal and Co.
Chartered Accountants
B-11, 1st Floor,
RDC Rajnagar Court Road,
Ghaziabad, Uttar Pradesh 201002

Respondents
1 to 2

Respondent No.1

2. Worldwide Metals Private Limited
404, 4th Floor, Aditya Tower,
Laxmi Nagar, District Centre,
Vikas Marg, Delhi 110092

Respondent No. 2

For Appellant:

Mr. P. Nagesh, Advocate.

For Respondents:

Mr. Abhishek Garg, Advocate for R-1.

Mr. Ajay Kumar Vali, Advocate for R-2.

J U D G E M E N T

(10th August, 2020)

[Per; Shreesha Merla, Member (T)]

1. Challenge in this Appeal is to the Order dated 26.02.2020, passed by the Adjudicating Authority (National Company Law Tribunal, New Delhi), by which Order, the Adjudicating Authority has admitted the Section 9 Application filed by M/s. Worldwide Metals Pvt. Ltd., the Operational Creditor. Aggrieved by the said Order, the shareholder of the Corporate Debtor M/s. J.P. Engineers Pvt. Ltd., preferred this Appeal under Section 61 of the Insolvency and Bankruptcy Code, 2016.

2. Succinctly put, the facts in brief are that the Corporate Debtor was a regular buyer of Aluminium Ingots and Wire Rods and had a running account with the Operational Creditor. Appellant claims that the Principle Operational Debt claimed by the Operational Creditor pertains to purchase of Aluminium Ingots and Wire Rods for the period 06.12.2017 to 16.04.2018, for an aggregate amount of 16,18,18,265/-. While admitting the Application under Section 9, the Adjudicating Authority observed as follows:

'22. After hearing submissions of both the Parties and perusing the documents placed on record, this Bench has observed that the Corporate Debtor has not made any specific averments in its Notice of Dispute dated 05.11.2018 as regards to payment of the debt owed to the Operational Creditor to the other concerns namely, M/s Olympus Metal Private Limited, M/s Simla Holdings and M/ s Oyster Steels and Iron Pvt. Ltd. Further, on comparison of the Ledger of Operational Creditor and Corporate Debtor with the Bank Statements, it is apparent on the face of the record that the Corporate Debtor has made payments of Rs.1,95,34,823 on 21.10.2017 and Rs.1,95,79,294 on 10.11.2017 to the Operational Creditor by RTGS Bank transfer.

23. Further, the Corporate Debtor failed to produce any tri-partite agreement amongst the Operational Creditor, Corporate Debtor and its sister concerns, authorising the Corporate Debtor to make payments to other concerns. Moreover, the Debtors are Assets of the Company, which cannot be extinguished or transferred to another concern in the absence of any specific agreement or specific Board resolution to that effect in favour of the Corporate Debtor.

24. In view of the above, this Bench is of the opinion that the dispute raised by the Corporate Debtor is illusory and moonshine, which is upstretched with an intention to erase its liability and defeat the claim made by the Operational Creditor.'

3. Learned Counsel appearing for the Appellant contended that the Adjudicating Authority had ignored all documentary evidence with respect to 'pre-existing dispute' as the Operational Creditor failed to disclose that even before the issuance of demand notice dated 27.10.2018, to which the Corporate Debtor had given a reply on 05.11.2018, the Operational Creditor had earlier issued a notice dated 17.08.2018, claiming the same amount of Rs. 16,18,18,265/-; that the

notice was replied to by the Corporate Debtor on 28.08.2018, wherein it was specifically stated that as per mutual understanding, necessary journal entries in the books of accounts being maintained by the Corporate Debtor and in terms of the said journal entries, adjustments of payments were made and therefore no amounts were outstanding in respect of the said invoices. Learned Counsel further submitted that the Operational Creditor had acknowledged the reconciled accounts for the period 04.11.2016 to 31.03.2017 and also for the period 01.04.2017 to 31.03.2018; that, the confirmation of accounts for the period 01.04.2018 to 31.03.2019, duly signed by the Directors of the Operational Creditor and its sisters concern shows that no amount was due and payable. Learned Counsel drew our attention to the confirmatory letter exchanged between the Corporate Debtor and the Operational Creditor and their sister concerns and vehemently contended that the journal entries have also been confirmed by M/s Olympus Metal Pvt. Ltd., the sister concern of the Operational Creditor. He drew our attention to entries dated 21.10.2017 and 10.11.2017 for account of Rs. 1,95,34,823/- and Rs. 1,95,79,294/- respectively and submitted that the journal entries were also committed between M/s Simla Holdings and the Operational Creditors in the confirmation of accounts for the period 01.04.2017 to 31.03.2018. It is the case of the Appellant that M/s Oyster Steel and Iron Pvt. Ltd., another sister concern of the Operational Creditor confirmed the accounting entry in the ledger of the Corporate Debtor.

4. Per contra, Learned Counsel for the Respondent denied that any such confirmation of accounts was ever entered into with the Corporate Debtor. He submitted that none of the letters were signed by any of their Directors and that the said letters authorising adjustments/entries were forged and fabricated and drew our attention to the Rubber stamps with apparent error even in the name of Operational Creditor and signatures on these documents stating that the

signatures on the alleged authorising letter were purportedly done by clerical employees who had no authority whatsoever to sign any such documents, and pointed out an employee's record who had left service much before. Learned Counsel pointed out that the earlier Reply dated 28.08.2018 claimed settlement of Accounts as till 31.03.2018, which Operational Creditor disputes; and that, even otherwise the Notice dated 27.10.2018 raised invoices, even after 31.03.2018 which are due and outstanding and were of amount more than Rs. 1 Lakh.

At this juncture, it is relevant to examine the ratio laid down by the Hon'ble Supreme Court in **"Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software (P) Limited- 2017 1 SCC OnLine SC 353"** wherein the Hon'ble Supreme Court held that the 'existence of the dispute' must be pre-existing – i.e. it must exist before the receipt of the demand notice or invoice, as the case may be and observed:

"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."

17. In the said case, the Hon'ble Supreme Court held as to what are the facts to be examined by the Adjudicating Authority while examining an application under Section 9, which is as follows:

“34. Therefore, 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.”

18. From the aforesaid decision, it is clear that the existence of dispute must be pre-existing i.e. it must exist before the receipt of the demand notice or invoice. If it comes to the notice of the Adjudicating Authority that the ‘operational debt’ is exceeding Rs. 1 lakh and the application shows that the aforesaid debt is due and payable and has not been paid, in such case, in absence of any 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’, the application under Section 9 cannot be rejected and is required to be admitted.’

5. A perusal of the letters, journal entries relied upon by the Counsel for the Appellant show several discrepancies. One such transaction received from M/s Oyster Steel and Iron Pvt. Ltd. alleged to have been signed by one Mr. Vikas Gandhi is dated 30.04.2018, whereas the material on record evidences that the said Mr. Gandhi had already resigned on 22.01.2018 and was paid all his

emoluments and therefore the submission of the Learned Counsel for the Appellant that the said sister concern M/s. Oyster Steel and Iron Pvt. Ltd. had confirmed the accounting entries in the ledger, inspires no confidence. This is apart from the fact that signatures purporting to be of Mr. Gandhi being pointed out by Appellant do not match even on bare reading of his service record. We find force in the contention of the Learned Counsel appearing for the Operational Creditor that the Articles of Association of the Company mandate the presence and signature of the Director wherever the stamp of the Company is used and he placed reliance on the ratio laid down by the Hon'ble Supreme Court, **in Kotla Venkataswamy V/s Chinta Ramamurthy, AIR MAD 579**. Additionally, the material on record shows that the ledger which the Appellant is relying upon and states that they have been signed by the Operational Creditor and M/s Oyster Steel and Iron Pvt. Ltd. are dated 01.04.2019 whereas the Operational Creditor had demanded the same debt from the Corporate Debtor in the notices dated 17.08.2018 and 27.10.2018. Further, there are no substantial reasons given as to why only the ledger of the Corporate Debtor depict these entries and the same are not reflected in the ledger of the Operational Creditor when it is the specific case of the Appellant that both sides have confirmed these accounts.

6. The submission of the Counsel for the Appellant that amounts of Rs. 1,95,79,294/- and Rs. 1,95,34,823/- dated 21.10.2017 and 10.11.2017 respectively are reflected in the journal entries in the ledgers of the sister concern M/s Olympus Metal Private Limited is unsustainable specially keeping in view the evidence on record and the specific pleading by the Operational Creditor in their Rejoinder that these amounts have been paid to them through RTGS Bank transfer. There are no substantial reasons given by the Corporate Debtor for having sent a letter authorising the transfer of the same amount in favour of a third Party, when the same amounts have admittedly been paid to the Operational

Creditor itself. Hence, we find force in the contention of the Learned Counsel appearing for Operational Creditor that these two amounts were never claimed as 'Operational debt' as they have already been paid. In the reply to the legal notice, the Corporate Debtor has specifically stated that as on 31.03.2018 all amounts have been reconciled between both the Parties, but remain silent about any subsequent transactions. Even in the reply to the demand notice dated 05.04.2018 there is no specific pleading with respect to any dispute regarding quality, quantity, price of the goods and services per se. It is significant to mention that in the statement of 'Confirmation of Accounts', relied upon by the Appellant, is dated 01.04.2019 and is for the period subsequent to 31.03.2018. This document date is subsequent to the issuance of the demand notice and there are no tenable grounds to explain the reasons for the Operational Creditor to have signed this document, specially keeping in view that the 'Confirmation of Accounts' shows 'Nil' balance. To reiterate, there is no documentary evidence filed by the Appellant to substantiate their plea that all accounts have been reconciled and signed by both the Parties except for filing these confirmatory letters which portray so many discrepancies and therefore, inspire no confidence. Both the defences raised by the Appellant's Counsel are mutually exclusive and cannot co-exist as a debt cannot be disputed and discharged at the same time. We are of the considered view that the Appellant did not raise any plausible contention requiring further investigation and the argument raised is not substantiated by any evidence. Hence, we are of the opinion that the 'dispute' does not truly exist in fact and is spurious and the principle laid by the Hon'ble Supreme Court in **Mobilox Innovations Pvt. Ltd.** (Supra) is squarely applicable to the facts of this case.

7. Therefore, we are of the view that there is no illegality or infirmity in the Order passed by the Adjudicating Authority and hence this Appeal fails and is dismissed accordingly. No order as to costs.

8. The Resolution Professional preferred IA No. 1509 of 2020. In seeking direction against the Appellants for non-adherence/contempt of Order dated 03.03.2020. Learned Counsel appearing for the Resolution Professional submitted that the Appellants have wrongfully withdrawn money and not provided any information with respect to the assets, the contact details of debtors, purchase orders, invoices, and have also not handed over the physical assets as appearing in the balance sheet as on 31.03.2019. He stated that they have not been co-operating at all and in the garb of lockdown have even stopped acknowledging the emails. Keeping in view the submission of the Learned Counsel that an Application in this regard is already pending before the Adjudicating Authority, preferred under Section 19 (2) of the IBC, 2016, regarding the non-cooperation etc. of the suspended Directors, we dispose of this Application, with liberty to Respondent No. 1 to pursue the matter with the Adjudicating Authority who will decide the same as per law.

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

[Justice Anant Bijay Singh]
Member (Judicial)

[Ms. Shreesha Merla]
Member (Technical)

HA