

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 1221 of 2019

(Arising out of Order dated 8th November, 2019 passed by the Adjudicating Authority (National Company Law Tribunal), Kolkata Bench, Kolkata in CP(IB) No. 30/KB/2019)

IN THE MATTER OF:

India Power Corporation Limited

....Appellant

Versus

M/s. Dynamic Cables Limited & Anr.

.....Respondents

Present:

For Appellant:

Mr. Abhijeet Sinha, Mr. Arijit Mazumdar, Ms. Akansha Kaushik and Mr. Aditya Shukla, Advocates.

For Respondents:

**Mr. Aditya Vijay and Mr. Narendra Singh Bhati, Advocates for R-1.
Mr. Raghavendra M. Bajaj and Mr. Aguish Aditya, Advocates for IRP.**

J U D G E M E N T

BANSI LAL BHAT, J.

Respondent- 'M/s. Dynamic Cables Limited' ('Operational Creditor') 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 seeking initiation of 'Corporate Insolvency Resolution

Process' against 'M/s. India Power Corporation (Bodhgaya) Limited'- ('Corporate Debtor') alleging default of operational debt amounting to Rs. 2,32,46,235/-. The application came to be admitted in terms of the impugned order dated 8th November, 2019 with consequential orders of slapping Moratorium on the 'Corporate Debtor' and appointment of Ms. Savita Agarwal as 'Interim Resolution Professional'. Aggrieved thereof 'India Power Corporation Limited' (Appellant) has filed the instant appeal assailing the impugned order of admission primarily on the ground of pre-existence of dispute, stated to have been erroneously dismissed by the Adjudicating Authority as an afterthought and a spurious defence.

2. Adverting to the factual matrix relevant for determining the issue raised in this appeal, be it seen that the 'Operational Creditor' claims to have supplied cables to the 'Corporate Debtor' against the purchase orders in pursuance whereof goods were supplied in December 2017, January 2018 and May, 2018. It was stated that certain goods were taken back by the 'Operational Creditor' at the request of the 'Corporate Debtor'. However, some payment remained outstanding leading to issue of Demand Notice by the 'Operational Creditor' under Section 8 of the 'I&B Code' on 18th November, 2018. The same was replied to by the 'Corporate Debtor' on 27th November, 2018. Before the Adjudicating Authority, the 'Operational Creditor', apart from other documents, relied upon email dated 27th August, 2018 received from the 'Corporate

Debtor' admitting the liability and informing the 'Operational Creditor' that a definite payment plan would be provided shortly. However, in reply to the notice of demand, 'Corporate Debtor' raised a dispute. The 'Corporate Debtor' appears to have relied upon letter dated 14th May, 2018 in regard to existence of dispute. It also relied upon email dated 19th July, 2018 asking the 'Operational Creditor' to take back the cables supplied by it which were lifted by the 'Operational Creditor', thus leaving no claim unpaid. On consideration of the respective stands taken by the parties, the Adjudicating Authority found that the goods taken back by the 'Operational Creditor' were the goods supplied pursuant to Letter of Award dated 9th April, 2018 while the value of goods supplied in respect of one purchase order remained unpaid. The Adjudicating Authority has referred to a subsequent development in the nature of a letter dated 27th August, 2018 emanating from the 'Corporate Debtor' on 27th August, 2018 which is subsequent to lifting of goods on 20th August, 2018 wherein the 'Corporate Debtor' has requested the 'Operational Creditor' to wait for the payment plan. The Adjudicating Authority noted that in none of the emails and WhatsApp messages, exchanged between the parties, the liability has been disputed and it is for the first time on 2nd November, 2019 in reply to email of 'Operational Creditor' of July, 2019 that the claim has been disputed. Having regard to this factual position, the Adjudicating Authority dismissed the issue raised by the 'Corporate Debtor' with regard to pre-existing dispute as an afterthought.

3. The narrow issue for consideration is whether there was a pre-existing dispute, as raised by the 'Corporate Debtor', that would not warrant passing of the impugned order of admission of application under Section 9.

4. It is contended on behalf of the Appellant that the 'Corporate Debtor' had raised the issue of goods supplied by the 'Operational Creditor' not meeting the specifications of its franchiser SBPDCL. Reference is made to letter dated 14th May, 2018 in this regard. Appellant has also relied upon email dated 19th July, 2018 whereby the 'Corporate Debtor' had asked the 'Operational Creditor' to take back all the cables. It is submitted that the 'Operational Creditor' had lifted all the cables supplied in Gaya DF Area. It is further submitted that the 'Corporate Debtor' had in its reply to the demand notice raised the dispute by pointing out that the material supplied by the 'Operational Creditor' was of substandard quality. It is further submitted that the 'Operational Creditor' has made claims even against the materials which have been lifted by it and suppressed material facts about pre-existence of dispute. It is submitted that reconciliation of accounts was in progress to ascertain the amount payable after lifting of goods by 'Operational Creditor' but the move was pre-empted by the 'Operational Creditor' by filing the application under Section 9. It is submitted that the Adjudicating Authority could not have reached the finding in regard to the pre-existence of dispute being an afterthought. It is lastly

submitted that the Adjudicating Authority did not render any findings on the quantum of default which was approximately Rs.58,000/- only, therefore, not warranting initiation of the 'Corporate Insolvency Resolution Process'.

5. Per contra, it is submitted on behalf of the 'Operational Creditor' that the 'Operational Creditor' was never apprised of the issue of defective material and the letter dated 14th May, 2018 is forged and fabricated document with no proof of its service upon the 'Operational Creditor'. In this regard, it is noteworthy that reply to demand notice does not even make mention of such letter. Thus, the Adjudicating Authority was justified in declaring the stand taken by the 'Corporate Debtor' as an afterthought and a spurious defence. It is submitted that the 'Corporate Debtor', in its email dated 27th August, 2018 admitted and acknowledged the liability of paying the outstanding dues to 'Operational Creditor'. Even during pendency of this appeal, the 'Corporate Debtor', vide letter dated 31st December, 2019 admitted that Rs.1,74,007,75/- is due and payable to the 'Operational Creditor' as per their Books of Accounts. As regards, lifting of goods it is submitted that in response to the email of 'Corporate Debtor' dated 19th July, 2018, the 'Operational Creditor' lifted only specific quantity of goods and not all the goods supplied as the 'Corporate Debtor' had stated in its email that the unused material lying in Gaya DF Area may get damaged or stolen.

It is submitted that the goods which were lifted do not form part of the claim filed by the 'Operational Creditor'.

6. Having heard learned counsel for the parties and fathomed through the record, we find that supply of materials by 'Operational Creditor' to the 'Corporate Debtor' under the purchase order and LoA is not in controversy. It is also not in controversy that some of the goods lying unutilised in Gaya DF Area, exposed to vagaries of Nature or pilferage, were lifted back by the 'Operational Creditor' at the specific request of the 'Corporate Debtor'. The conclusion drawn by the Adjudicating Authority on the basis of material brought on record by the parties that dispute in regard to quality of goods not matching the specification of franchiser was for the first time raised by the 'Corporate Debtor' in its reply to the demand notice, justifies the conclusion that the defence raised was an afterthought and spurious. On its own showing the 'Corporate Debtor' claims to be in default though the quantum was stated to be approximately around Rs.58,000/- only, therefore, not justifying initiation of 'Corporate Insolvency Resolution Process' as it fell short of the prescribed value of Rs.1,00,000/-, which warrants triggering of 'Corporate Insolvency Resolution Process'. This plea no more holds good as the subsequent development during pendency of the 'Corporate Insolvency Resolution Process' unfolds. This is manifested in the form of a letter dated 31st December, 2019 wherein the 'Corporate Debtor' while disputing the claim of 'Operational

Creditor' in regard to amount of Rs.2,32,46,235/- as claimed in Form-5 acknowledged liability in respect of an amount of Rs.1,74,007,75/- being due and payable to the 'Operational Creditor'. Factum and validity of this letter goes un-assailed and uncontroverted on the part of 'Corporate Debtor' as also the Appellant. The amount acknowledged to be in default far exceeds the prescribed limit of Rs.1 lakh warranting triggering of 'Corporate Insolvency Resolution Process'. In this view of the matter, the issue raised in this appeal no more survives for consideration as the operational debt being due and payable stands admitted and acknowledged.

We find no merit in this appeal. The same is accordingly dismissed. No costs.

[Justice Bansi Lal Bhat]
Member (Judicial)

[V.P. Singh]
Member (Technical)

[Shreesha Merla]
Member (Technical)

NEW DELHI
22nd May, 2020
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