

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 930 of 2019

IN THE MATTER OF:

Ponneri Steel Industries

...Appellant

Versus

Gulam Mustafa Enterprises Pvt. Ltd.

...Respondent

Present:

For Appellant: Mr. Monish Panda and Mr. Mrinal Bharat Ram, Advocates

For Respondent: Mr. S.P. Singh Chawla, Mr. Shubham Bansal and Ms. Deepali Kaushik, Advocates

O R D E R

29.01.2020 Heard Learned Counsel for the Appellant in Company Appeal (AT) (Insolvency) No. 930 of 2019. The Appellant has filed this Appeal against Impugned Order dated 26th July, 2019 (Annexure A-1 (page 31) passed by the Adjudicating Authority (National Company Law Tribunal), Bengaluru Bench, Bengaluru. The Appellant – Operational Creditor had filed the Application under Section 9 of the Insolvency and Bankruptcy Code, 2016 (in short 'I.B.C'), which came to be rejected on 26th July, 2019 and thus the present Appeal.

2. The Learned Counsel for the Appellant is pointing that the Respondent – Corporate Debtor had placed purchase order on the Appellant on 17th January, 2018 (Annexure A-2) (page 45) and as per the purchase order, the Appellant supplied TMT to the Respondent at the site of Respondent as per (Annexure A-3 Colly) Invoice No.1907 (page) 47, Invoices Nos.1908 & 1909 all dated 22nd January, 2018 and the endorsements (at pages 48, 50 and 52 of the file) below Invoices show that the goods were duly received by the Officials of the Corporate Debtor on the site and stamp of “Security Material Inward” was also

put on the deliveries. The Learned Counsel states that Appellant had sent e-mail (Annexure A-4) (page 53) on 06th February, 2018 asking Corporate Debtor to clarify if there are any shortages deductable to the bills, (adding that), Appellant did not believe there will be any shortages beyond permissible Industry norms. The Corporate Debtor on same date (page 54) replied that there is no shortage in the material. The Learned Counsel states no issue was raised by Corporate Debtor. It is stated that subsequently notice under Section 8 was sent as inspite of demanding money, they did not pay. In spite of receipt of the notice, the Respondent – Corporate Debtor did not pay and thus Section 9 Application was filed. The Learned Counsel states that the Adjudicating Authority wrongly put the burden on the Appellant to show that the goods were of required quality. It is stated that on the side of Respondent – Corporate Debtor no dispute was raised that the goods were not of required quality.

3. Learned Counsel for the Respondent states that the Appellant failed to file proof of delivery of notice under Section 8 of I.B.C and thus, Application under Section 9 of the I.B.C was not complete. Learned Counsel states that the purchase order (Annexure A-2) Term 11 required the Appellant to take certificate regarding quality from the Engineer Supervisor and this was not taken and the defence of the Corporate Debtor is that goods were not of good quality and the Appellant failed to prove that the goods were of good quality. The Learned Counsel supports judgment of the Adjudicating Authority.

4. Heard Learned Counsel for both sides. When we peruse the Impugned Order, it can be seen that the Adjudicating Authority reproduced terms and conditions of the purchase order, Term 11 of which reads as under:

“11. If material supplies is of inferior quality then site engineer/supervisor has got every right to reject the material.”

5. Based on such term, The Adjudicating Authority appears to have put the burden on the Appellant, to show that the goods were of good quality. The Adjudicating Authority observes in para 15 of the impugned order as under:

“15. In view of the above facts and circumstances of the case, the Petitioner failed to substantiate the alleged outstanding amount by producing relevant documents to prove that the materials in question were supplied in required standard. Therefore, we are of the considered opinion that the Petitioner failed to establish its claim with regard to Principal amount and interest as claimed in the Petition and it is filed only to recover the alleged outstanding amount. Therefore, it is not a fit case for admission and it liable to be dismissed. However, the Petitioner is at liberty to replace the defective material, as requested by the Respondent and thereafter, the Petitioner can make claim and the Respondent should consider the same.”

6. We find that the Adjudicating Authority totally erred in its decision. Term 11 referred above gave right to site Engineer/Supervisor to reject the material if they found it to be of inferior quality. When the Appellant is showing delivery of goods and there are stamps of the “Security Material Inward” and Site Engineer/Supervisor received goods without demurrer the Adjudicating Authority could not put the burden on the Appellant to prove that goods were of good quality. It is rather, for the Corporate Debtor to show that goods received were not of required quality and that Corporate Debtor had sent e-mail or letter to the Operational Creditor that the goods which have been sent were not of the required quality, which also needs to be prior to Section 8 Notice.

7. We don't find any substance in the argument that the proof of service of Section 8 notice had not been filed and Appellant should be non-suited. The reply filed by the Corporate Debtor by way of "Objection" vide Annexure A-15 clearly shows in para 7 that the Corporate Debtor had received the notice and rather claimed that it had raised dispute with Petitioner on receipt of Notice.

8. We find that Section 9 Application was wrongly rejected by the Adjudicating Authority. No other reason is shown that the Application could not have been treated as complete. We find that Adjudicating Authority should have admitted the Application.

9. For above reasons, we set aside the impugned order. The Appeal is allowed.

10. The parties will appear before the Adjudicating Authority on 18th February, 2020. If, the Respondent – Corporate Debtor settles the claim with Appellant before the said date of 18th February, 2020, the Adjudicating Authority will pass necessary orders. Otherwise the Adjudicating Authority will admit the Application under Section 9 of I.B.C. and pass further consequential necessary orders as per provisions of I & B Code.

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

[Justice Anant Bijay Singh]
Member (Judicial)

[Kanthi Narahari]
Member (Technical)

pks/md