NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 204 of 2019

[Arising out of order dated 12th February, 2019 passed by the Adjudicating Authority (National Company Law Tribunal), Hyderabad Bench, Hyderabad in CP (IB) No. 423/9/HBD/2018]

IN THE MATTER OF:

P. Vijay Kumar,
S/o. P. Narasimha Raju,
R/o Villa No. 27, Sunny Isles
Gated Community , Rushikonda,
Near IT Park, Vishakhapatnam – 530 045.

....Appellant

Vs

1. M/s Priya Trading Company,
Represented by its Partner
Sri Shyam Sunder Agarwal,
#50-92-32/1,
Shankaramattam Road,
Shantipuram
Vishakhapatnam – 530 016.

2. M/s Veda Biofuel Limited,
With registered office at:
#50-50-15/12, Seethammadhara,
Visakhapatnam – 530 013.
Represented by Interim Resolution Professional.

3. Mr. Gonugunta Murali,
H. No. 16-11-19/4, G-1,
Sri Laxmi Nilayam,
Saleem Nagar Colony, Malakpet,
Hyderabad – 500 036.

....Respondents

Present:

For Appellant: Mr. S.K. Sahijpal, Ms. Raakhi Sahijpal, Ms. Manisha Saini and Ms. Mihika Gupta, Advocates.

For Respondent: Mr. Sangram Patnaik and Mr. K. K. Patra, Advocates for Respondent No. 1 and 2.

Mr. Gonugunta Murali, Interim Resolution Professional, Respondent No. 3.

J U D G M E N T

BANSI LAL BHAT, J.

An application under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as 'I&B Code') filed by Respondent No. 1 herein 'M/s Priya Trading Company' (hereinafter referred to as 'Operational Creditor') for initiation of Corporate Insolvency Resolution Process against Respondent No. 2 – 'M/s Veda Biofuel Limited' (hereinafter referred to as 'Corporate Debtor') came to be admitted at the hands of the Adjudicating Authority (National Company Law Tribunal), Hyderabad Bench, Hyderabad by virtue of order dated 12th February, 2019 and certain directions including imposition of moratorium in regard to the assets of 'Corporate Debtor' and appointment of Respondent No. 3 as 'Interim Resolution Professional' came to be passed. Aggrieved thereof 'Shri P. Vijay Kumar', claiming to be the erstwhile Chairman and Managing Director as also a shareholder of the 'Corporate Debtor' holding more than 45% of the total shareholding, has preferred the instant appeal assailing the impugned order on the ground that there was no privity of contract between the 'Operational Creditor' and the 'Corporate Debtor' and that Insolvency Resolution Process could not be triggered in wake of a pre-existing dispute interse the parties to the proceedings before the Adjudicating Authority.

2. An 'Operational Creditor' may initiate Corporate Insolvency Resolution Process against the 'Corporate Debtor' having committed a default in respect of 'operational debt' in the manner provided under Section 9 of the I&B Code. However, prior to filing of an application in the prescribed form before the Adjudicating Authority, the 'Operational Creditor' is required to deliver a demand notice of unpaid operational debt together with the copy of invoices demanding payment of the defaulted amount to the 'Corporate Debtor' in terms of Section 8 (1) of the I&B Code and the 'Corporate Debtor' is, within ten day of the receipt of the demand notice, required to respond by either bringing to the notice of 'Operational Creditor' existence of a dispute, if any, or record of the pendency of a suit or arbitration proceedings filed prior to receipt of demand notice or 'Corporate Debtor' may respond by bringing to the notice of 'Operational Creditor' the evidence qua payment of operational debt claimed to be unpaid through electronic transfer from bank account of 'Corporate Debtor' or encashment of a cheque issued by the 'Corporate Debtor' in the name of 'Operational Creditor'. It is only after expiry of ten days from the delivery of demand notice and in the event of non-receipt of the payment or notice of dispute from the 'Corporate Debtor' that the 'Operational Creditor' can file application under Section 9 to trigger Corporate Insolvency Resolution Process. This legal position, emanating from the combined reading of Sections 8 and 9 of the I&B Code has been dealt with by the Hon'ble Apex Court in *"**Mobilox Innovations (P) Ltd. v. Kirusa Software (P) Ltd.,*** (2018) 1 SCC 353". The Hon'ble Apex Court observed:-

*"**51.** It is clear, therefore, that once the operational creditor has filed an application, which is otherwise complete, the adjudicating authority must reject the application under Section 9(5)(2)(d) if notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility. It is clear that such notice must bring to the notice of the operational creditor the "existence" of a dispute or the fact that a suit or arbitration proceeding relating to a dispute is pending between the parties. Therefore, all that the adjudicating authority is to see at this stage is whether there is a plausible contention which requires further investigation and that the "dispute" is not a patently feeble legal argument or an assertion of fact unsupported by evidence. It is important to separate the grain from the chaff and to reject a spurious defence which is mere bluster. However, in doing so, the Court does not need to be satisfied that the defence is likely to succeed. The Court does not at this stage examine the merits of the dispute except to the extent indicated above. So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application."*

3. It is in the backdrop of aforestated legal proposition that the contentions raised in the instant appeal are required to be appreciated. Before noticing the rival contentions and the arguments advanced on behalf of the parties it is apt to notice the factual matrix culminating in passing of the impugned order. We accordingly proceed to notice the facts briefly.

4. The 'Operational Creditor' supplied broken rice and coal to the 'Corporate Debtor' in pursuance of 'Raw Material Supply Agreement' dated 9th April, 2018 (hereinafter referred to as 'Agreement'). Invoices were raised by it upon the 'Corporate Debtor' for supply of such materials. According to 'Operational Creditor', the 'Corporate Debtor' failed to pay the amount of pending invoices of the 'Operational Creditor' even after deduction of shortages. Further according to the 'Operational Creditor', the coal and broken rice (for short 'raw material') supplied and delivered to the 'Corporate Debtor' was as per specifications and the 'Corporate Debtor', at the time of delivery of raw material did not raise any objection in regard to the quality thereof while the amount was deducted as regards shortages in the quantity of raw material and same was reflected in the ledger account of the 'Corporate Debtor'. According to 'Operational Creditor', an amount of Rs.4,80,65,149/- (Principal amount of Rs.3,31,37,601 and interest of Rs.6,62,752/- from 8th June, 2018 to 5th July, 2018 for supply of broken rice and Principal amount of Rs.1,39,85,095/- and interest amounting to Rs.2,79,701/- from 2nd June, 2018 to 2nd July, 2018 for supply of coal) was due and payable by the 'Corporate Debtor' towards invoices raised by the

'Operational Creditor' for the delivery of raw material during 2018-2019. The 'Operational Creditor' issued demand notice dated 5th July, 2018 supported by the copies of invoices demanding payment of outstanding dues which was replied to by the 'Corporate Debtor' on 14th July, 2018 wherein the liability was denied on the ground that there was no privity of contract between the 'Operational Creditor' and the 'Corporate Debtor' for supply of raw material to the latter and the raw material had been supplied by the 'Operational Creditor' through Arun Agrawal and Annapurna Agrawal in terms of Agreement dated 9th April, 2018. The 'Corporate Debtor' further stated in the reply of the notice that the 'Operational Creditor' had no locus standi to initiate proceedings under I&B Code. However, the 'Corporate Debtor' admitted its liability to pay an amount of Rs.2,96,54,219/- to be paid to Arun Agrawal and Annapurna Agrawal after clearing all interse disputes. In the counter filed before the Adjudicating Authority in reply to the application of 'Operational Creditor' under Section 9 of I&B Code also the 'Corporate Debtor' took the same pleas and reiterated the grounds that there was no privity of contract between the 'Operational Creditor' and the 'Corporate Debtor'. On consideration of the rival contentions, the Adjudicating Authority passed the impugned order admitting the application under Section 9 of the I&B Code with the consequential directions of slapping of moratorium on the 'Corporate Debtor' and appointment of Interim Resolution Professional.

5. Learned counsel for the Appellant submits that 'Priya Trading Company' is not a party to Raw Material Supply Agreement and the 'Corporate Debtor' has raised a dispute in reply to the Demand Notice. Therefore, 'Priya Trading Company' claiming to be the 'Operational Creditor' was not eligible to trigger Corporate Insolvency Resolution Process. Per contra it is argued by learned counsel for the Operational Creditor that the facts in regard to the material particulars as regards liability arising out of supply of raw material by 'Operational Creditor' to the 'Corporate Debtor' are not at all disputed by the 'Corporate Debtor'. Besides, there is admission of the fact that Arun Agrawal and Annapurna Agrawal are carrying on business under the name and style of 'Priya Trading Company' and had supplied the raw material to the 'Corporate Debtor' in respect of which 'Operational Creditor' raised invoices and claimed outstanding amount as specified in the Demand Notice, liability in regard to the same being an admitted fact.

6. After hearing learned counsel for the parties and wading through the record, we find that the Raw Material Supply Agreement at page 50 of the Appeal Paper Book was executed interse the 'Corporate Debtor' of the one part and Arun Agrawal and Annapurna Agrawal of the other part with regard to supply of broken rice and coal etc. required for production of ENA for a period of three months. Our attention has been invited to registered lawyer's notice dated 16th June, 2018 served by the 'Corporate Debtor' upon

Shri Arun Agrawal and Smt. Annapurna Agrawal forming Annexure-A-3 of the Appeal Paper Book at page 57 to 62, Para 3 whereof reads as under:-

> *"3. My client states that both of you are running a business under the name and style of Priya Trading and are inter-alia engaged in supply of raw materials i.e. broken rice, coal and husk."*

Service of this notice is not in dispute. In this regard it would be appropriate to refer to the reply dated 14th July, 2018 furnished by the 'Corporate Debtor' to the Demand Notice dated 5th July, 2018, wherein the 'Corporate Debtor' has, in unambiguous terms, admitted the factum of service of registered lawyer's notice dated 16th June, 2018 upon Arun Agrawal and Annapurna Agrawal. It is therefore abundantly clear that the 'Corporate Debtor' was conscious of the fact that Arun Agrawal and Annapurna Agrawal supplying raw material to it were operating under the name and style of 'Priya Trading Company'. This admission on the part of 'Corporate Debtor' stares at its face and there is no scope for taking a U-turn. The fact that 'Priya Trading Company' was the name and style under which Arun Agrawal and Annapurna Agrawal have been operating was never a fact required to be discovered or rediscovered. Both are synonyms and well within the knowledge of the 'Corporate Debtor' as also the 'Appellant'. The ground raised to offset the triggering of Corporate Insolvency Resolution Process at the instance of 'Priya Trading Company' as

'Operational Creditor' by taking plea of there being no privity of contract between the 'Operational Creditor' and the 'Corporate Debtor' falls flat and has to be dismissed as being absurd and repugnant to the admitted position in regard to the status and locus standi of the 'Operational Creditor'. Contention raised on this score is rebuffed.

7. Now coming to the issue as regards the unpaid liability in respect whereof the 'Operational Creditor' alleged default, be it seen that as per the settled law on the subject dispute in regard to the quantum of liability does not defeat triggering of the Corporate Insolvency Resolution Process so long as the amount claimed to be in default is payable in law and in fact. Default in operational debt of an amount of Rupees One Lakh or more is enough for triggering of the Corporate Insolvency Resolution Process. The stand taken by the 'Corporate Debtor' in regard to the outstanding liability is not that the debt is not an operational debt or that the same is not payable in law or in fact. In this regard, it would be appropriate to refer to admission on the part of 'Corporate Debtor' as emerging from his Reply to the Demand Notice dated 14th July, 2018, para no. 6 relevant in this regard being extracted hereinunder:-

> *"6. My client states that according to their accounts my client has to pay an amount of Rs.2,96,54,219.00 only, and that amounts to be paid to 1) Arun Agrawal, and 2) Annapurna Agrawal only, but not to you, after clearing all*

> *the disputes as mentioned in notice, dated 16-6-2018 and reply notice, dated 2-7-2018. As such the notice under Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 is invalid and untenable."*

It is manifestly clear that there is a crystal clear admission of liability of 'Corporate Debtor' to pay an amount of Rs.2,96,54,219.00 to Arun Agrawal and Annapurna Agrawal who, we have found, were admittedly operating under the Trade Name of 'Priya Trading Company'. This is notwithstanding the fact that such admission of liability to pay has been subjected to clearing of disputes as mentioned in notice dated 16th June, 2018 and reply notice dated 2nd July, 2018. Reference to such notice and reply notice would reveal that the dispute related to breach of terms of the agreement as regards generating of revenue by the 'Corporate Debtor' which according to it missed the intended target due to non-supply/ short supply of raw material. However, such dispute does not constitute a pre-existing dispute qua the amount payable in law or in fact respecting which default has been committed. The admission in the Reply to the Demand Notice dated 14th July, 2018 leaves no room for doubt that the factum of owing of an operational debt to the tune of Rs.2,96,54,219.00 arising out of supply of goods by the 'Operational Creditor' to the 'Corporate Debtor' is an acknowledged liability which has been admitted in specific and unambiguous terms. Obligation to pay such amount could not be subjected

to any dispute arising out of breach of contractual provisions qua further supply of raw materials for which the 'Corporate Debtor' could seek remedy from the appropriate forum but not withhold such payment admitted and acknowledged to be due and payable for the materials already supplied. Admittedly, the 'Corporate Debtor' did not discharge the liability in regard to the aforesaid operational debt and committed default by raising the bogey that it owed the amount in question to Arun Agrawal and Annapurna Agrawal but not to the 'Operational Creditor' as if they were distinct entities. Viewed thus, the argument advanced in regard to pre-existing dispute being devoid of merit is rejected.

8. For what has been stated hereinabove, we are of the considered opinion that the impugned order does not suffer from any legal infirmity or factual frailty. We have no doubt in our mind that this appeal is frivolous, however, we are not inclined to impose costs on that score. The appeal is accordingly dismissed. There shall be no orders as to costs.

[Justice Bansi Lal Bhat]
Member (Judicial)

[Mr. Balvinder Singh]
Member (Technical)

NEW DELHI

11th September, 2019

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