

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Comp. App. (AT) (Ins) No. 53 of 2024

&

I.A. No. 168 of 2024

IN THE MATTER OF:

Drive India Enterprise Solutions Ltd.

...Appellant(s)

Versus

BGM Telecommunications Pvt. Ltd.

...Respondent(s)

Present:

For Appellant : Mr. Jitender Chaudhary, Ms. Shilpa Chohan, Ms. Pankhuri Nehra, Advocates.

For Respondents : Ms. Ruchi Kohli, Sr. Advocate, Ms. Sonakshi Dhiman, Ms. Aakriti Mathur, Ms. Srishti Mishra, Advocates.

With

Comp. App. (AT) (Ins) No. 112 of 2024

&

I.A. No. 358 of 2024

IN THE MATTER OF:

BGM Telecommunications Pvt. Ltd.

...Appellant(s)

Versus

Drive India Enterprise Solutions Ltd.

...Respondent(s)

Present:

For Appellant : Ms. Ruchi Kohli, Sr. Advocate, Ms. Sonakshi Dhiman, Ms. Aakriti Mathur, Ms. Srishti Mishra, Advocates.

For Respondents : Mr. Jitender Chaudhary, Ms. Shilpa Chohan, Ms. Pankhuri Nehra, Advocates.

O R D E R
(Hybrid Mode)

29.05.2025: This order shall dispose of two appeals bearing CA (AT) (Ins) No. 53 of 2024 titled as “Drive India Enterprise Solutions Ltd. vs. BGM Telecommunications Pvt. Ltd.” (hereinafter referred to as the first appeal) and CA (AT) (Ins) No. 112 of 2024 titled as “BGM Telecommunications Pvt. Ltd. vs. Drive India Enterprise Solutions Ltd.” (hereinafter referred to as the second appeal).

2. The first appeal is filed by the Operational Creditor, being aggrieved against the impugned order dated 18.10.2023 by which the application filed under Section 9 of the IBC, 2016 has been dismissed only on the ground that earlier two applications filed by the same operational creditor against different Corporate Debtors were dismissed by two different Benches of the same Tribunal.

3. The second appeal is filed by the Corporate Debtor against the same impugned order dated 18.10.2023 by which IA No. 5725 of 2021 filed by the Corporate Debtor seeking an order of initiation of punitive proceedings against the Operational Creditor has been dismissed only on the ground that the main petition bearing CP (IB) 998 (ND) 2020) filed by the Operational Creditor (appellant in the first appeal) has been dismissed.

4. As a matter of fact, the appellant in both the appeals have challenged the impugned order, inter alia on the ground that the impugned order is non-speaking.

5. Shorn of unnecessary details, in the first appeal, the appellant has filed the application under Section 9 for the resolution of an amount of Rs. 35, 57, 89, 682/- which includes the Principal amount of Rs. 23,19,42,081/- and interest of Rs. 13,69,05,456/- which is calculated @ 18% p.a., alleged to have been unpaid from the period between August 2017 and August 2020.

6. Case of the operational creditor for resolution of the aforesaid amount is that the parties had entered into a High Sea Sale Agreement (HSS Agreement) as per which the Operational Creditor had delivered telecommunication devices of Semi Knocked Down (SKD) state and batteries to the Corporate Debtor. According to the appellant, under the HSS Agreement, SKDs were sold to the CD or its authorized entities at high sea under the said agreement.

7. The grievance of the appellant in the first appeal is that the Tribunal, without going into the merits of the case of the appellant, has dismissed the same only on the ground that earlier also the same appellant had filed an application under Section 9 against M/s Essline Engineers and Consultants Pvt. Ltd. bearing IB-932(ND)2020 which was dismissed by the Tribunal (NCLT, New Delhi Bench-II) vide order dated 15.11.2021 and another application filed by the appellant under Section 9 against M/s BTM Exports Ltd. bearing IB-933/(ND)/2020 was dismissed by the same Tribunal (Court No. VI) on 14.09.2023. In this regard, the following findings have been recorded by the Tribunal *"It has come to our notice that in a similar case arising out of a similar High Sea Sale Agreements, Bench –II as*

well as Bench –VI of this Adjudicating Authority have dismissed Section 9 Applications as has been observed in Para 1(iii) and Para 1(iv) (Supra). We, therefore, are of the considered view that the present application filed under Section 9 is covered by the said orders passed by Bench- II and Bench –VI and therefore dismissed”.

8. The application filed by the appellant in the second appeal bearing IA No. 5725/2021 was under Section 65 read with Section 76 of the Code read with Rule 11 of the NCLT Rules, 2016 for punishing the OC (the appellant herein in the first appeal) for fraudulent and malicious initiation of proceedings under Section 9 of the Code and deliberate non-disclosure of Pre-existing dispute between the Operational Creditor and the Corporate Debtor.

9. The contention of the Ld. Counsel for the appellant in this case is that the said application has been dismissed without passing any specific order. The said application has been dismissed by the Tribunal only on the ground that since the application filed under Section 9 by the appellant (first appeal) bearing IB- 998(ND)/2020 has been dismissed therefore, the same was disposed of.

10. We have heard Counsel for the parties and perused the available record with their able assistance and found that the approach of Tribunal in dismissing the application bearing IB- 998(ND)/2020 as well as the application IA-5725 of 2021 is not in accordance with law.

11. The Tribunal has not deliberated upon the facts given in IB- 998(ND)/2020 and the evidence and has simply relied upon earlier decisions

dated 15.11.2021 and 14.09.2023 which are against different CD's which has no nexus with the facts of the present case because in the case decided on 15.11.2021, the Tribunal has noticed that there was communications between the parties dated 23.04.2018, 04.10.2018 and 24.10.2018, relied upon by the Corporate Debtor, which were prior to the issuance of demand notice dated 11.12.2019 in which the Corporate Debtor had raised a dispute about quantum of debt due and payable by the Corporate Debtor, therefore, there was an issue of pre-existing dispute.

12. In the case decided on 14.09.2023, the court has noticed the contention of the corporate debtor that there are communications of fraud and forgery made by the Corporate Debtor but the Tribunal has held that it is not expected to ascertain the veracity of documents produced and dismissed the application.

13. In our considered opinion, for the purposes of holding that there is a similarity in the case setup by the appellant in the first appeal with the two cases decided on 15.11.2021 and 14.09.2023, it was incumbent upon the Tribunal to have referred to the facts of all the three cases in detail.

14. Secondly, the application filed under Section 9 has to be decided on its own facts because the court has to find out as to whether the defence taken by the corporate debtor is sufficient for the purpose of dismissal of the application or the same is only moonshine defence.

15. In view of the aforesaid peculiar facts and circumstances, the impugned order in both the appeals is set aside and the matter is remanded back to the Tribunal with a direction to decide the lis between the parties

afresh by passing a speaking order. The parties shall appear before the Tribunal on **21.07.2025**.

16. It is made clear to the Counsel for the parties as well as to the Tribunal that while setting aside the impugned order and remanding the matter to the Tribunal we have not entered upon the merits of the case and all the issues are kept open. IA's if any, pending are hereby closed. No costs.

[Justice Rakesh Kumar Jain]
Member (Judicial)

[Naresh Salecha]
Member (Technical)

[Indevar Pandey]
Member (Technical)

sr/rr