NATIONAL COMPANY LAW APPELLATE TRIBUNAL
CHENNAI BENCH

Company Appeal (AT) (CH) (Ins) No. 19 of 2022

[Arising out of Order dated 16th November, 2021 passed by the Adjudicating Authority / National Company Law Tribunal, Hyderabad Bench-I, Hyderabad in CP (IB) No. 525/9/HDB/2019]

IN THE MATTER OF:

Mr. Palaparty Abhishek
Suspended Director of M/s Abhirama Steels Ltd.
Regd. Office #102, Sahithi Arcade
Beside Police Station
S.R. Nagar, Hyderabad, T.S. ...Appellant

Versus

1. **Binjusaria Ispat Pvt. Ltd.**
   Represented by its Director
   Sri Sumeeth Kedia, S/o Vinod Kedia
   Sy. No. 133/A Teegapur Village, Kothur IDA
   Mahaboobnagar District, T.S. ...Respondent No.1

2. **Mr. Maruti Venkata Subba Rao Poluri**
   Interim Resolution Professional of
   M/s Abhirama Steels Ltd.
   Flat No. 301, Chapa's Prashanthi Niketan
   Street No.4, H.No. 1-10-17,
   Ashok Nagar, Hyderabad – 500020 ...Respondent No.2

Present:

For Appellant	:	**Mr. Virender Ganda, Senior Counsel** **For Mr. Bhaskar, Advocate**
For Respondent	:	**Mr. Avinash Krishnan Ravi, Advocate – R1**

J U D G M E N T
(Virtual Mode)

KANTHI NARAHARI, MEMBER (TECHNICAL)

Preamble:

The Present Appeal is filed against the Order dated 16.11.2021 passed by the Adjudicating Authority (National Company Law Tribunal, Hyderabad

Bench-I, Hyderabad) in CP (IB) No. 525/9/HDB/2019, whereby the Adjudicating Authority admitted the application filed by the first Respondent herein and imposed moratorium.

Brief Facts:

Appellant's Submissions:

2. Shri Virender Ganda Learned Counsel appeared for the Appellant submitted that the Appellant is aggrieved by the order passed by the Adjudicating Authority dated 16.11.2021 in admitting the application filed by the first Respondent herein is erroneous in law and on facts.

3. The Learned Senior Counsel submitted that the first Respondent herein claims debt from the Corporate Debtor and alleges default on the basis of an oral purchase order of the Corporate Debtor for purchase of mild steel billets. The Respondent raised invoices for supply of such goods which were sold and delivered to the Corporate Debtor. On the basis of invoices raised by the first Respondent, dues have been paid by the Corporate Debtor, except in case where the goods of inferior quality and the Corporate Debtor duly informed the Respondent about the quality of the goods and sought to rectify the same. The claims of the Respondent is clearly time barred and the petition under IBC is not maintainable being time barred and on the ground of pre-existence of dispute namely pending civil suits on the alleged claims.

4. The Learned Senior Counsel further submitted that the Respondent promised to take back the inferior quality material but even after repeated requests and reminder the Respondent did not comply with the same and

never claimed the amounts as they were aware of the inferior quality of supply. However, to the dismay of the Corporate Debtor the Respondent started demanding payment for the invoices raised during the year, 2015-2016 to the tune of Rs.1,77,15,636/-. The Respondent called the Appellant to their office to negotiate for settlement and with a good intention to settle the issue, the Appellant went to the Respondent's office. However, to the dismay of the Appellant, a pre-drafted MoU dated 13.02.2016 was given to the Appellant and was made to sign under coercion. The Appellant was made to agree and sign the terms and conditions of the MoU under such circumstances. The Respondent also obtained blank cheques from the Appellant and presented the same before the bank for honouring. On being not honoured of the cheques, the Respondent had filed Criminal Complaint in CC No. 88 of 2016 on the file of Vth Special Judge, Erramanzil, Hyderabad against the Corporate Debtor.

5. The Respondent also claims to have filed a Company Petition in CP No. 186 of 2016 under Sections 433, 434 and 439 of the Companies Act, 1956 on the file of the Hon'ble High Court at Hyderabad seeking to wind up the Corporate Debtor. The Corporate Debtor also filed a Suit in O.S. No. 487 of 2016 on the file of Additional Chief Judge, City Civil Court at Hyderabad against the Respondent seeking for damages for a sum of Rs.57,50,785/- on the ground that the Respondent failed to accept the fault in supplying the defective material. The Respondent had also filed another suit against the Corporate Debtor under a Commercial Court Act in COS No.245 of 2017 on

the file of XXIV Additional Chief Judge, City Civil Judge, Hyderabad for recovery of a sum of Rs.2,28,44,310/-.

6. It is submitted that the Ministry of Corporate Affairs issued the Notification dated 07.12.2016 whereby in Clause 5, it is stated that "***transfer of pending proceedings of winding up matters on the grounds other than inability to pay debts".*** According to the said notification all pending petitions with regard to winding up under Clause (e) of Section 433 of the Companies Act, 1956 shall be transferred to the Bench of Tribunals established under sub-Section (4) of Section 419 of the Companies Act, 2013, exercising territorial jurisdiction and such petitions shall be treated as Applications under Sections 7, 8 or 9 of the Code, as the case may be dealt with in accordance with Part-II of the I&B Code, 2016. The proviso states that the Petitioner shall submit all information other than information forming part of the records transferred in accordance with Rule 7 required for admission of the Petition under Sections 7, 8 or 9 of the Code within 60 days from the date of the Notification (07.12.2016) failing which the petition shall abate.

7. It is submitted that the Respondent failed to file the application within a period of 60 days from the date of transfer of the CP No. 186 of 2016 pending before the Hon'ble High Court at Hyderabad which got transferred on 07.06.2018 to NCLT, Hyderabad Bench-I. It is submitted that the Respondent filed I.A. No. 79 of 2021 under Section 60(5) of the IBC, 2016 seeking to receive

additional documents. The Respondent brought new documents and alleges notice issued under Form-3 dated 13.03.2019 which was sent by the Respondent to Corporate Debtor and a reply dated 22.03.2019 was issued by the Corporate Debtor to the said demand notice. However, the reply of the Corporate Debtor dated 22.03.2019 was not filed by the Respondent and claims that the same was misplaced in the file. The Appellant clearly stated that the notice which was sent is not in order and no documents were annexed along with the notice as stipulated in Section 8 of the IBC. The Corporate Debtor informed about the pre-existing disputes since various suits are pending between the parties.

8. The Learned Senior Counsel relying upon judgment of the Hon'ble Supreme Court in Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software Pvt. Ltd. in which it was held that notice under Section 8 of the IBC is a mandatory provision and the requirement should be complied with prior to filing an Application under Section 9 of the Code without which application is liable to be dismissed. The Learned Senior Counsel further submitted that the Corporate Debtor never accepted the debt claimed by the Respondent and repeatedly contended that the MoU dated 13.02.2016 and blank cheques were obtained from the Corporate Debtor under coercion to use it against the Corporate Debtor later. Hence, the impugned order admitting the application filed by the Respondent is erroneous and the same is liable to be set aside. In view of the reasons as stated above the Learned Senior Counsel prayed this Bench to allow the Appeal by setting aside the impugned order.

<u>Respondent's Submissions</u>:

9. Per contra Mr. Avinash Krishnan Ravi, Learned Counsel appeared for the Respondent No.1 denied the averments made by the Appellant and submitted the facts as under:

10. It is submitted that the debt owed by the Corporate Debtor arising out of the Memorandum of Understanding (MoU) dated 13.02.2016, which was entered mutually between the Corporate Debtor and the Respondent No.1. As per the MoU the Corporate Debtor agreed to repay the amount of Rs.1,77,15,636/- by 29.02.2016. However, the Corporate Debtor failed to adhere to the terms of MoU. Further, the Corporate Debtor issued cheques, however, on presentation the said cheques were dishonoured. It is to state that the Appellant/Corporate Debtor never had the intention to clear of the debt. After dishonour of the cheques, the Respondent forced to initiate proceedings under Section 138 of the N.I. Act, 1881 bearing CC No. 88 of 2016 which is still pending.

11. The Learned Counsel submitted that there is no pre-existing of disputes as contended by the Appellant and the allegations made thereto are baseless. The Appellant raised the said issue after receipt of demand notice under Form-3. The Learned Counsel contended that the Appellant/Corporate Debtor now raises frivolous issue of existence of disputes when the Application under Section 9 of IBC was filed before the Hon'ble Adjudicating Authority. Therefore, the disputes raised are mere bluster and a spurious dispute raised

to ward off the responsibility of repayment of debt as claimed by the Respondent.

12. The Learned Counsel further submitted that prior to filing of Section 9 Application by the Respondent, a notice demanding payment was issued under Section 434 of the Companies Act, 1956 on the Corporate Debtor on 13.04.2016 which was duly acknowledged by the Corporate Debtor and a reply was received by the Respondent on 11.05.2016. Thereafter, the Respondent filed a CP No.186 of 2016 before the Hon'ble High Court at Hyderabad for winding up of a Corporate Debtor under Sections 433, 434 and 439 of the Companies Act, 1956. However, the said Application was transferred to the Hon'ble Adjudicating Authority from the Hon'ble High Court on 07.06.2018 in view of Rule 5 of Companies (transfer of pending proceedings) Rules, 2016 vide notification dated 07.12.2016, which was further amended on 29.06.2017 w.e.f. 16.06.2017.

13. The Learned Counsel submitted that the Rule 5 of the notification dated 07.12.2016 which was referred by the Learned Senior Counsel for the Appellant, the same has been repealed and amended on 29.06.2017 w.e.f. 16.06.2017. Therefore, the said Rule 5 of the notification dated 07.12.2016 is not applicable. It is submitted that the Respondent filed Application under Section 9 of the I&B Code, 2016 before the Adjudicating Authority in the month of May, 2019. The Respondent issued a demand notice under Section 8 of the I&B Code on 13.03.2019 to which the Corporate Debtor replied on 22.03.2019. It is submitted that the debt fell due on 04.04.2016 and Section

9 Application was filed in the month of May, 2019 is within the limitation period of 3 years. Therefore, the application filed by the Respondent is not barred by limitation.

14. In view of the reasons as stated above the Learned Counsel prayed this Bench to dismiss the Appeal as it devoid of any merit.

Analysis / Appraisal:

15. Heard, the Learned Counsel appeared for the respective parties, perused the pleadings, documents and citations relied upon by them. After hearing the Learned Counsel, the point for consideration is whether the order passed by the Adjudicating Authority is in accordance with law.

16. The Adjudicating Authority admitted the application on the ground that the Corporate Debtor executed an MoU and cheques were given as part of the MoU were not honoured by the Corporate Debtor and observed that the Corporate Debtor does not make out any case with respect to the allegations that the MoU was taken under coercion. Further the Adjudicating Authority clearly held that there exists a debt on the part of the Corporate Debtor.

17. We have perused the MoU dated 13.12.2016 Annexure R-1 at page 30 of the Counter of R1 wherefrom, it is evident that the MoU executed on 13.02.2016 between the first Respondent and the Corporate Debtor and the Appellant. From Clause III of the MoU, the amount due to be paid has been mentioned as Rs.1,77,15,636/- and clearly stated that the invoices as mentioned in the said para in a tabular format yet to be paid to the first Respondent by the Appellant / Corporate Debtor. Clause 2 of the MoU it is

clearly stated that the Appellant and the Corporate Debtor who are second part of the preamble of the MoU, have agreed to repay the amount of Rs.1,77,15,636/- by 29.02.2016. At the last page of the MoU the Respondent and the Appellant and the Corporate Debtor have signed and affixed their signatures. Therefore, this Tribunal is of the view that there is no coercion as alleged by the Appellant. Moreover, there is no challenge to the MoU dated 29.02.2016 before any court of law on the basis that the said MoU attained under duress or coercion. It is not out of place to mention that the Appellant/ Corporate Debtor failed to adhere to the MoU and the cheques issued also dishonoured and there is no dispute with regard to dishonoured of cheques and pending proceedings under N.I. Act. Further, the Respondent issued a demand notice under Section 434 of the Companies Act, 1956 dated 13.04.2016 through the Advocate to the Appellant/Corporate Debtor demanding to make payment of Rs.1,77,15,636/-. It is also stated that the cheques deposited and the same have been returned unpaid with endorsement stop payment on 04.04.2016. The details of cheques, and the dates, the amounts have been given in a tabular column at para 4 of demand notice. The Appellant through its Advocate issued reply dated 11.05.2016 whereby it is stated that the alleged MoU and the issue of blank cheques were taken forcibly from the Appellants. Thereafter, the Respondent filed Company Petition before the Hon'ble High Court at Hyderabad for winding up of the Company.

18. The Learned Counsel for the Appellant vehemently contend that as per the notification dated 07.12.2016 issued by the Ministry of Corporate Affairs, that the applications have to be filed within 60 days from the date of notification i.e. 07.12.2016 before the Tribunal (NCLT) and submitted that the Respondent failed to file the same before the NCLT within 60 days from the date of notification. However, the Learned Counsel for the Respondent submitted that the said notification dated 07.12.2016 has been amended on 29.06.2017 w.e.f. 16.06.2017. The said Rule 5 as amended is extracted as under:

> ***"5. Transfer of pending proceedings of Winding up on the ground of inability to pay debts.—***
>
> *(1) All petitions relating to winding up of a company under clause (e) of section 433 of the Act on the ground of inability to pay its debts pending before a High Court, and, where the petition has not been served on the respondent under rule 26 of the Companies (Court) Rules, 1959 shall be transferred to the Bench of the Tribunal established under sub-section (4) of section 419 of the Companies Act, 2013 exercising territorial jurisdiction to be dealt with in accordance with Part II of the Code:*
>
> *Provided that the petitioner shall submit all information, other than information forming part of the records transferred in accordance with rule 7, required for admission of the petition under sections 7, 8 or 9 of the Code, as the case may be, including details of the proposed insolvency professional to the Tribunal upto 15th day of July, 2017, failing which the petition shall stand abated:*
>
> *Provided further that any party or parties to the petitions shall, after the 15th day of July, 2017, be eligible to file fresh applications under sections 7 or 8 or 9 of the Code, as the case may be, in accordance with the provisions of the Code:*
>
> *Provided also that where a petition relating to winding up of a company is not transferred to the Tribunal under this rule and remains in the High Court and where there is another petition under clause (e) of section 433 of the Act for winding up against the same company pending as on 15th December, 2016, such other petition shall not be transferred to the Tribunal, even if the petition has not been served on the respondent."*

19. From the perusal of above amended notification, the petitioners shall submit all the information to the Tribunal up to 15th day of July, 2017 failing

which the petition shall stand abated. Further, the proviso states that any party to the petition shall after the 15th day of July, 2017 be eligible to file fresh applications under Section 7 or 8 or 9 of the Code as the case may be in accordance with the provisions of the Code.

20. It is an admitted fact that the petition has been transferred by the Hon'ble High Court itself on 07.06.2018 after which the Respondent filed Section 9 Application before the Adjudicating Authority in the month of May, 2019. The Appellant enclosed the copy of the Application as filed under Section 9 before the Adjudicating Authority as annexure to the Appeal at page 44 to 58. From the perusal of the application, it is unequivocal that the Respondent filed fresh Application before the Adjudicating Authority as per the amended notification. Hence, the stand of the Appellant that the application is not in accordance with the notification dated 07.12.2016 does not hold any merit.

21. Even prior to filing of application by the Respondent in the month of May, 2019, the Respondent issued a demand notice in Form-3 dated 13.03.2019 demanding a sum of Rs.1,77,15,636/-. In the demand notice at serial no. 6 the Respondent clearly mentioned the MoU dated 13.02.2016. The Appellant / Corporate Debtor issued a reply dated 22.03.2019 through their advocate stating that the signatures on the MoU and cheques obtained forcefully by threatening the Appellant. From the perusal of the application filed by the Respondent at Column 2 of Part-IV, the amount claimed as

Rs.1,77,15,636/- due from 04.04.2016 to 04.03.2019. At Part-V, Column 8 the Respondent mentioned the invoices raised by the Respondent/operational creditor and relied upon MoU and dishonoured of cheques and filing of C.P. No. 186 of 2016 before Hon'ble High Court. Even otherwise, for the purpose of limitation it is seen from the demand notice and from the Application filed under Section 9 by the Respondent before the Adjudicating Authority, the default shown as 04.04.2016 and the Application filed before the Adjudicating Authority in the month of May, 2019 is within the period of limitation as prescribed under law. Therefore, the application is not barred by limitation.

22. From the sequence of events, it is evident that the debt and default has been proved and the Adjudicating Authority rightly admitted the Application in accordance with law. This Tribunal does not find any illegality or infirmity in the order passed by the Adjudicating Authority. The citations relied upon by the Learned Senior Counsel for the Appellant is not applicable to the facts of present case. The Hon'ble Supreme Court in Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software Pvt. Ltd. (Civil Appeal No. 9405 of 2017) held that the Adjudicating Authority is to see that the dispute is not a patently feeble legal argument or an assertion of fact unsupported by evidence. In the present case, the Appellant had failed to produce any kind of evidence in support of their allegations with regard to coercion. Therefore, in view of the judgment of the Hon'ble Supreme Court (supra), it is reiterated that the Appellant has miserably failed to prove the allegations as made.

23. For the aforesaid reasons this Tribunal comes to a resultant conclusion that the appeal is devoid of merit on all aspects and liable to be dismissed. Accordingly, the same is dismissed. No orders as to costs.

[Justice Venugopal M.]
Member (Judicial)

[Kanthi Narahari]
Member (Technical)

08th July, 2022

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