NATIONAL COMPANY LAW APPELLATE TRIBUNAL PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 827 of 2021

THE MATTER OF:

POWER2SME PRIVATE LIMITED
AD-13, BASEMENT (LGF),
TAGORE GARDEN,
NEW DELHI - 110027
ALSO AT:
POWER2SME PRIVATE LIMITED
PLOT NO. 88, UDYOG VIHAR PHASE IV,
GURUGRAM, HARYANA – 122015 ...APPELLANT

VERSUS

PSR AQUA AND ENGINEERS PRIVATE LIMITED
HAVING REGISTERED OFFICE AT: 1589,
MADARSA ROAD, KASHMIRI GATE,
DELHI – 110006 ...RESPONDENT

Present:

For Appellant: Mr. Pankaj Bhagat, Advocate.
For Respondent: Ms. Minakshi Jyoti, Advocate.

J U D G M E N T

(Date: 22.03.2022)

[Per.: Dr. Alok Srivastava, Member (Technical)]

This Appeal has been filed by the Appellant under Section 61 of the Insolvency and Bankruptcy Code, 2016 (in short 'IBC') assailing the order dated 03.03.2021 (in short 'Impugned Order') passed by the Adjudicating Authority (National Company Law Tribunal, New Delhi) in CP IB No. 248 of 2020, whereby the Adjudicating Authority has rejected application under section 9 of IBC filed by the operational creditor on the ground of pre-existing dispute between the parties.

2. In brief, the facts of the case are that the Appellant and Respondent companies shared a business relationship and the Appellant used to supply certain goods whenever demanded by the Respondent. The Appellant raised the invoices and debit notes from time to time for such supplies but certain debit notes and invoices are due and pending for payment despite several assurances by the Respondent regarding their payment.

3. The Appellant has further stated that the outstanding dues of the Appellant Company is Rs. 32,08,640/- which includes Rs. 22,75,120 towards the principal amount and Rs. 9,33,520 towards interest and further interest of Rs. 76,270 accrued for the period of 16.06.2019 upto 19.09.2019 against invoices and debit notes raised by the Appellant and which are included in the section 9 application. It is his claim that despite several reminders/requests demanding payment the dues were not paid in full. As part of payment the Respondent issued a cheque bearing No. 886600 for Rs. 15,00,000 /- and gave it to the Appellant aa payment of goods received but when the Appellant presented the above-mentioned cheque to the concerned bank for encashment, the same was dishonoured vide a return memo dated 15.01.2019 with the remark "payment stopped by drawer". Thereafter, the Appellant issued a statutory demand notice under Section 8 of the IBC on 18.06.2019 through its authorised representative which was duly received by the Respondent on 25.06.2019. The Respondent neither replied to this

demand notice nor made any payment for pending invoices/debit notes and the Appellant was thus constrained to file an application under Section 9 of the IBC bearing CP (IB) No. 248 of 2020 before the Adjudicating Authority. In this application the impugned order dated 03.03.2021 came to be passed by the Adjudicating Authority and the Appellant has filed this Appeal aggrieved by the said impugned order.

4. We heard the arguments advanced by the Ld. Counsels for the parties and also perused the record.

5. In his arguments the Ld. Counsel for Appellant has submitted that certain goods could not be supplied by the Appellant/Operational Creditor to the Respondent/Corporate Debtor in time for no fault of the Appellant, due to which the Respondent had to purchase goods/materials from the open market at higher prices regarding which the Appellant has already accepted debit notes issued by the Respondent/Corporate Debtor and therefore it should not be taken as 'pre-existing dispute'. He has submitted that the Respondent has on multiple occasions admitted debt of an amount of Rs. 11.25 lacs which is more than the threshold debt of Rs. 1 lakh, hence the existence of debt as required in the section 9 application is admitted. The Ld. Counsel for the Appellant has further submitted that two cheques of Rs. 5,00,000 and Rs. 5,25,119 totalling Rs. 10,25,119 were prepared by the Respondent towards the payment by the Appellant's dues (referred para 10 at Pg. 185 of the Appeal Paperbook) and this amount of Rs. 10,25,119 is included in the invoices of a total amount of Rs. 22,75,120 which is mentioned in the Section 9 application (refer Part IV of Section 9 Application at Pg. 136 of the Appeal Paperbook). He contends that the Respondent has admitted an amount of Rs. 10.25 lacs as due to the Appellant vide email dated 03.07.2018 (attached at Pg. 165 of the Appeal

Paperbook) and also by another email dated 25.10.2018 (attached at Pg. 169 of Appeal Paperbook) and therefore, the existence of debt of an amount more than the threshold amount of Rs. 1 lakh is established. He has also referred to the minutes of meeting held with Allied Strips Ltd. which had to supply materials/goods for onward supply to the Respondent to show that the delay in supply of goods was due to Allied Strips Ltd. and, therefore, the Appellant is not responsible for any delay in supply of goods and materials to the Respondent.

6. The Ld. Counsel for the Appellant has also urged in arguments that the Respondent has given no reply to specific assertions made by the Appellant regarding forging and fabrication of documents (refer to Pg. 14 of Respondent's Reply to the Appeal) and he has himself relied on unreliable and inauthentic documents to establish his claim (refer to Pg. 172 of the Appeal Paperbook) wherein an FIR made on the Online FIR website has been averred as proof of FIR filed for loss of cheques and actually Online FIR is just a website not related to the police department in India and as such the said FIR is not a legitimate FIR filed before the Indian Police.

7. In reply, the Ld. Counsel for the Respondent has argued that nine invoices have been included in the section 9 application in Part –IV and they have to be considered in totality for deciding on the existence of debt and they cannot be bifurcated to leave out disputed invoices and only consider the remaining invoices for establishing the operational debt. She has referred to the impugned order in paragraphs 2, 3 & 4 (at Pgs. 51-56 of Appeal Paperbook) to contend that the facts regarding non-supply of 84 tons of raw material as also debit notes raised for an amount of Rs. 12.5 lakhs for adjustment regarding the extra price paid by the corporate debtor for purchasing

raw materials from open market were submitted before the Adjudicating Authority which showed clearly that the dispute existed much before sending of the demand notice by the Appellant. She has also urged that there is a running account of the Operational Creditor with the Corporate Debtor which is evidenced by the cheque for Rs. 15 lakhs given by the Respondent/Corporate Debtor, and which was accepted by the Operational Creditor without raising any issue.

8. The Ld. Counsel for Respondent has further referred to emails dated 19.02.2018 and 26.02.2018 (both emails attached at Pg. No. 59 of the Respondent's Reply) to argue that the Corporate Debtor had brought the fact of non-supply of materials by the Operational Creditor and that since no supply was received from the Operational Creditor it led to loss of production and raising of debit notes by the Corporate Debtor. The Ld. Counsel for Respondent/Corporate Debtor has thus argued that through these emails it is quite clear that there was no supply received in time from the Operational Creditor/Appellant which resulted in loss of production at the Corporate Debtor's plant resulting in purchase by the Corporate Debtor from the open market which resulted in issue of debit notes by the Corporate Debtor which was not accepted by the Operational Creditor.

9. The Ld. Counsel for the Appellant in rejoinder has referred to the debit notes (attached at Pg. No. 55 to 58 of the Appeal Paper Book) which are dated 18.02.2018 to claim that these debit notes were issued by the Corporate Debtor which were eventually accepted by the Operational Creditor. He has claimed that the cheque no. 886620 was not tendered towards the payment of alleged operational debt but was given by the Corporate Debtor for payment of the

balance amount after deducting the amount of debit notes from total outstanding amount.

10. A perusal of the paragraph 6 of the impugned order makes it clear that the Adjudicating Authority has considered the email communications between the Operational Creditor and the Corporate Debtor starting from 28.02.2018 till 26.09.2018 to infer that the there was a pre-existing dispute regarding the delay in timely supply of materials/goods which resulted in issuing of the debit notes and thus the quantum of operational debt. Paragraph 6 of the impugned order is as follows:-

> *"6. On perusal of Application as well as the documents enclosed, the email communications between the operational creditor and the Corporate Debtor clearly establishes the fact that there was pre-existing dispute between both the parties. The email communication trail starting from date 28.02.2018, 03.07.2018, 05.07.2018 till 26.09.2018 between the Operational Creditor and the Corporate Debtor substantiate the fact that there was delay in supply of material to the Corporate Debtor due to which the Corporate Debtor was forced to purchase the goods at a higher price from the other sellers. The fact that a meeting was called upon on dated 16.02.2018 to address the issues relating to delay in supply and debit notes being issued by the corporate Debtor substantiate the fact that there was a pre-existing dispute between the parties prior to the issuance of demand notice."*

11. Then again, the following is recorded in paragraph 8 of the impugned order:-

"8. From the aforesaid decision, it is clear that the dispute must exist before the receipt of demand notice. Be that as it may, on appraisal of the arguments advanced by the Ld. Counsels, it emerges that there were disputes existing prior to the issuance of the Demand Notice. The email communication trail starting from date 28.02.2018, 03.07.2018, 05.07.2018 till 26.09.2018 between the Operational Creditor and the Corporate Debtor substantiate the fact that there was delay in supply of material, the same was duly acknowledged by the Operational Creditor in the email communications."

12. To examine the issue of non-supply of materials, it is useful to look at the contents of emails exchanged between the Operational Creditor and the Corporate Debtor. A series of emails (attached between pp. 143-145 of Appeal Paperbook) show that a purchase order was given vide email dated 04.08.2017 by the Respondent to the Operational Creditor alongwith a schedule to dispatch the materials. The rates for the materials are also stated in the email dated 04.08.2017 (attached at Pg. 143 of Appeal Paperbook) even though this email is addressed by the representative of Allied Scripts Ltd. and addressed to the representative of the Corporate Debtor. The purchase order (attached at Pg. 146 – 147 of the Appeal Paper Book) show the name of supplier as M/s Power2SME Pvt. Ltd. Similarly, the purchase order dated 25.10.2017 (attached at Pg. No. 151 of the Appeal Paper Book) also mentions the name of supplier as Power2SME Pvt. Ltd. and is issued by the Corporate Debtor 'PSR Aqua Engineers Pvt. Ltd'.

13. We find that when the dispute regarding supply of material arose there was an exchange of emails between the Corporate Debtor and the Operational Creditor (these emails are attached at Pg. 165 to

169 of the Appeal Paper Book) and the email dated 19.02.2018 (attached at Pg. 167 of Appeal paperbook) is of particular significance wherein a debit note has been sent by the Corporate Debtor to the representative of the Allied Steels Ltd. Again, in another email dated 26.02.2018 (attached at Pg. No. 166 of Appeal Paperbook) the representative of the Operational Creditor Prakhar Chauhan has stated they cannot accept the debit note issued by the Corporate Debtor as due to unavoidable circumstances in the Applied Steels Ltd. Plant they were unable to supply the pending orders with Power2SME Pvt. Ltd. implying that any delay in supply of materials was on account of Allied Strips and not their fault.

14. A perusal of emails dated 03.07.2018 sent by the Corporate Debtor to Operational Creditor/Power2SME and its reply dated 04.07.2018 sent by the Operational Creditor makes the issue of dispute between the parties quite clear. The relevant part of these emails attached at Pg. 168 of Appeal Paperbook is as follows:-

*"**Email of 2018 sent by the Corporate Debtor***

Dear Sir,

Please Find the attached debit note due to our supply fail & raw material rate increase. Because which purchase order send to you that time raw material rate was 47.0/kg but you not dispatched the material so our supply fail & heavy loss due to the raw material rate increase. Then we had purchased raw material 57.0/kg.

Now your balance as per our books 1025119 Rs.

This is request to you please collect the cheque of balance amount which is ready in our plant scan copy of cheques & Debit note already attach please check.

Note:- Please update your books as per our closing balance which is now 1025119 Rs. Because we are sending this data for Balance Sheet."

Email dated 04.07.2018 sent in reply by the Operational Creditor

"Dear Sir,

Thank you for your valuable reply but we cannot accept this debit note which is issued by you.

You are our valued customer and we always did our best to corporate you.

The ASL Situation was not purposely created by us to make trouble to our customers. This situation can be happen with any plant.

We also loose the delay payment interest day to day over overdue, which is also a financial loss to our company.

We deeply regret the inconvenience happen and request you for your cooperation as our esteemed customer.

We urge you to release our outstanding amount against our last supplies as per below statement.

Xxx xxx xxx…………….

Awaiting your valuable reply for the same.

With Regards,

Prakhar Chauhan"

15. Another email dated 25.10.2018 attached at Pg. 169 of the Appeal Paperbook shows that a meeting took place between the representative of the Corporate Debtor and the Operational Creditor. In this email a reference is made to the minutes of meeting held on 23.10.2018 wherein it is stated as follows:

> *"Reference of MOM held on 23.10.2018 below points are discussed for the resolution*
>
> *Total outstanding amount on PSR Aqua & Eng. Pvt. Ltd. is 22751120 Rs. As on 26.12.2018 total pending order is 58 Ton acco4rding to Power2SME but from outside is 84 Ton pending on Power2SME. Power2SME asked to PSR Aqua to clear total outstanding for immediate basis. Power2SME neither pick the phone nor reply and not supply the material. That's we could not supplied the material to our customers. PSR Aqua put the losses occurred due to non-supply of pending order by Power2SME which is 1250000 Rs. By raising debit note. Power2SME has denied to accept this debit note amount and offer him of Rs. ..... PSR Aqua denied the offer and gave 2nd offer of Rs. 102511979 PSR Aqua raised two PDC cheque on dated 03.07.2018.*
>
> *Please find attached excess purchase bill and last purchase order copy.*
>
> *So, i request to you pls. accept the our debit note and for further business you are welcome.*
>
> *For further communication pls. contact to me not Mr. Vipin Gupta,*

Warm Regards

Dharmendra Kumar Sinha

Mob. 9760466209

PSR Aqua & Eng. (P) Ltd.”

16. The above mentioned emails dated 03.07.2018, 04.07.2018 and 25.10.2018 all go to show that the debit notes issued by the Corporate Debtor for an amount of Rs. *1025119.75* were not accepted by the Operational Creditor and quite obviously there was a dispute which is evidenced by the emails quoted above.

17. The section 9 Application which is attached at Pg. 86 to 127 of the Appeal Paper Book shows very clearly that nine invoices mentioned earlier Judgment were all taken together as part of the operational debt owed by the Corporate Debtor to the Operational Creditor. We find force in the argument of Ld. Counsel for the Respondent that the operational debt relating to the invoices cannot be bifurcated so that only such invoices which are not disputed are considered for the admission of Section 9 application. There is quite obviously a major dispute relating to supply of eighty-four tons of raw material, regarding which there was a big delay in supplying causing disruption production schedule and also loss of money due to increase price of raw material that had to be sourced from the open market to the Corporate Debtor. Subsequent issue of two cheques dated 03.07.2018 and an earlier cheque for Rs. 15 lakhs which was dishonoured go to show that the payments were not being made invoice-wise but were being made as running account.

18. We refer to the Judgment of Hon’ble Supreme Court in the matter of **Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software Pvt.**

Ltd. [2018 1 SCC 353] wherein Hon'ble Supreme Court has held as follows:-

> *"40. 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 his stage examine the merits of the dispute except to the extent indicated above. So long as a dispute truly exists in fact and is no spurious, hypothetical or illusory, the adjudicating authority has to reject the application."*

19. Detailed examination in aforementioned paragraphs makes it clear that a dispute existed between the two parties regarding the debit note and the amount of debt and both the parties were trying to resolve it. We note that the demand notice was issued by the operational creditor on 18.06.2019 and the email communication to resolve the dispute was taking place between the Corporate Debtor and the Operational Creditor much before the issue of demand notice by the operational creditor. gave no reply and thereafter section 9 application bearing No. CP (IB) No. 248 of 2020 was filed by the Appellant/Operational Creditor for initiation of CIRP.

20. We also note that both the parties have given different reasons/versions regarding loss of cheque No. 886620 dated 24.10.2018 for Rs. 15 lacs (which was dishonoured vide memo dated 15.01.2019). Since the emails which have been reproduced in this

judgment show the existence of a real dispute that was ongoing before the demand notice was issued on 18.06.2019, we do not think there is any need to go into the veracity of claim of either of the parties about the cheque of Rs. 15 lakhs and its purported loss.

21. In view of the detailed discussion in above-mentioned paragraphs, we are of the clear view that issue of non-supply of eighty-four tons of raw material, which resulted in the Corporate Debtor raising a debit note of Rs. 12.50 lakhs which was not accepted by the Operational Creditor and became an element of dispute, is sufficient to show that there was a pre-existing dispute between the Operational Creditor and the Corporate Debtor regarding the debt and its payment. This pre-existing dispute is not illusory or a sham one created only to counter the claim of the Operational Creditor by the Corporate Debtor, but a real one. Therefore, we do not think that the Adjudicating Authority has committed any error in rejecting the section 9 application on the ground of pre-existing dispute. We, therefore, find no reason to interfere with the impugned order and accordingly dismiss the Appeal.

22. There is no order as to costs.

[Justice Ashok Bhushan]
Chairperson

[Dr. Alok Srivastava]
Member (Technical)

New Delhi
22nd March, 2022
/ SC /