

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL, PRINCIPAL BENCH,
NEW DELHI**

Company Appeal(AT)(Insolvency)No. 869 of 2020

IN THE MATTER OF:

Mahesh Hardware & Pipes Pvt. Ltd.

Having Its Registered Office at Plot No. 167/2

No. 16/02, R.V. Road, Mavalli,

Bengaluru – 560004

Karnataka.

...Appellant

Vs

Jains & Alliance Palm Ventures Pvt. Ltd.

Having its Registered Office at Plot No. 85,

R.V. Road, Mavalli,

Bengaluru – 560004

Karnataka

...Respondent

Present:

For Appellant: Ms. Ramya and Ms. Ishani Banerjee, Advocates

**For Respondent: Mr. K.V. Jagdishvaran and Mr. G. Indira,
Advocates for Respondent**

J U D G M E N T

Jarat Kumar Jain: J.

The Appellant “Mahesh Hardware & Pipes Pvt. Ltd.” filed this Appeal against the order dated 19.06.2020 passed by the Adjudicating Authority (National Company Law Tribunal, Bengaluru Bench) in CP(IB) No. 08/BB/2020, whereby rejected the Appellant’s Application filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 (IBC).

2. Brief facts of this case are that the Mahesh Hardware & Pipes Pvt. Ltd. (Operational Creditor) (Appellant) involved in the field of supplying Supreme Plumber Pipe Products. “Jains & Alliance Palm Ventures Pvt. Ltd.” (Corporate Debtor) had placed several purchase orders with the Operational Creditor for supplying of Supreme Plumber Pipe Products since 2015. The parties continued to have a normal business relationship with each other till 2017. The Corporate Debtor failed to pay some of the invoices sent by the Operational Creditor for goods already supplied. The total amount due and payable by the Corporate Debtor to the Operational Creditor is Rs. 12,75,316/- which includes Rs. 9,15.107/- as principal amount and Rs. 3,60,209/- as interest at the rate of 15 % per annum from 15.07.2017 to the date of default i.e. 19.06.2019. The Corporate Debtor neither disputed the quality of the products supplied nor the invoices that the principal amount of Rs. 9,15.107/- is due and payable to the Operational Creditor. The Corporate Debtor keep assuring the Operational Creditor that the payment will be done, however, the Corporate Debtor failed to make the payment, therefore, the Operational Creditor issued a demand notice under Section 8 (1) of the IBC on 19.06.2019 demanding payment of Rs. 12,75,316/-. The Corporate Debtor replied to the demand notice vide email dated 15.07.2019 enclosing a letter stating that the Corporate Debtor has asked its procurement and accounts department to verify the authenticity of the bills sent by the Operational Creditor and assured that it would release payments for the genuine bills, if the same had not been made so far. The Corporate Debtor has not made any payment, therefore, the Operational Creditor has

filed Application under Section 9 of the IBC for initiating Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor.

3. The Corporate Debtor resisted the Application on the ground that the Corporate Debtor has paid a sum of Rs. 1,37,296/- on 26.04.2018 and a sum of Rs. 1,23,298/- on 03.08.2018 total amount of Rs. 2,60,594/- which has not been adjusted by the Operational Creditor and there is some dispute regarding the authenticity of some invoices. In support the Corporate Debtor has filed Bank Account Statement for a period of 01.04.2018 to 29.04.2019. In view of the same, the Corporate Debtor has not paid some of the invoices and keep the same pending to verify the authenticity of the said invoices.

4. Ld. Adjudicating Authority after hearing Ld. Counsels for the parties held that the Bank Statement of the Corporate Debtor shows that the payment of Rs. 2,60,594/- have been made which has been suppressed by the Operational Creditor. There is a pre-existing dispute in regard to unpaid invoices and the Application under Section 9 of the IBC is filed to recover the debt amount whereas it is a settled law that the IBC proceedings cannot be used for recovery of debt. The Corporate Debtor is running a business employing several employees cannot be pushed into Insolvency as that will be against the objective of the IBC. It observed that impact of the present financial distress caused by the global novel corona virus pandemic cannot be ignored. Major decisions have been taken to protect the industries from its effects. It is also observed that on 24.03.2020 the Legislature increased the minimum threshold of default from the Rs. 1 Lacs to 1 Cr. so that the IBC is not used merely for recovery of debt. With these observations, Ld.

Adjudicating Authority has rejected the Operational Creditor's Application filed under Section 9 of the IBC.

5. Being Aggrieved by this order, the Appellant (Operational Creditor) has filed this Appeal.

6 Ld. Counsel appearing on behalf of the Appellant (Operational Creditor) submits that Ld. Adjudicating Authority has rejected the Application on following grounds:

(i) The Operational Creditor did not account for amount of a sum of Rs. 2,60,594/- remitted by the Corporate Debtor.

(ii) The Corporate Debtor has raised the dispute regarding authenticity of some of the invoices.

(iii) No case has been made out that the Corporate Debtor is unable to pay its debt.

(iv) The Operational Creditor has attempted to use the provisions of IBC as a recovery forum.

7. Ld. Counsel for the Operational Creditor submits that it is incorrect that the Operational Creditor has not adjusted the amount of Rs. 1,37,296/- and 1,83,298/-and in support of argument drawn our attention towards the ledger entries filed by the Operational Creditor A-7 pg. 131 of the Appeal Paper Book. The total amount received from the Corporate Debtor have been reflected in the Operational Creditor's ledger account. Thus, Ld. Adjudicating Authority erroneously held that the Operational Creditor has not adjusted the amount of Rs. 2,60,594/- which is paid by the Corporate Debtor and

after adjustment of the aforesaid principal amount, Rs. 9,15,107/- is due and payable.

8. Ld. Counsel for the Operational Creditor submitted that on 19.06.2019 the Operational Creditor has served a demand notice under Section 8(1) of the IBC on Corporate Debtor. On 15.07.2019 the Corporate Debtor has sent a vague reply to the demand notice that they have to verify the authenticity of some of bills, and if any payment is pending from their end, they will release the payment for the genuine bills. Hon'ble Supreme Court in the case of Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software Pvt. Ltd. (2018) 1 SCC 353 held that "what is important is that the existence of the dispute and/or the suit or arbitration proceedings must be pre-existing i.e. it must exist before the receipt of the demand notice or invoice, as the case may be. Admittedly, there is nothing on record which can prove that a dispute exists between the parties before issuance of demand notice. Ld. Adjudicating authority ought to have rejected the weak feeble contentions of the corporate debtor and admitted the application.

9. Ld. Counsel for the Operational Creditor further submitted that Hon'ble Supreme Court in the case of Innovative Industries Vs. ICICI Bank Ltd. (2018) 1 SCC 407 observed that "the scheme of the code is to ensure that when a default takes place, in the sense that a debt becomes due and is not paid, the Insolvency Resolution Process begins. The Code get triggered the moment default is of Rs. 1 lacs or more."

10. Ld. Counsel for the Operational Creditor also draw our attention towards the Judgment of this Appellate Tribunal in the case of Monotrone

Leasing (P.) Ltd. Vs. PM cold Storage (P.) Ltd. 2020 SCC Online NCLAT 581 in which it is held that “a presumption cannot be drawn merely on the basis that a company, being solvent, cannot commit any default. As observed in financial and economic parlance, the inability to pay-off debts and committing default are two different aspects which are required to be adjudged on equally different parameters. Inability to pay debt has no relevance for admitting or rejecting an Application for initiation of CIRP under the IBC.” Therefore, it is submitted that the only requirement is to prove that the debt and default over and above Rs. 1 Lacs exists and then the Insolvency process gets triggered. The number of employees employed by the Corporate Debtor is irrelevant.

11. Ld. Counsel for the Appellant (Operational Creditor) submits that the notification dated 24.03.2020 increasing the threshold from Rs. 1 Lacs to 1 Cr. is not attracted to the present case as the Corporate Debtor has committed default on 15.07.2017 and the Application under Section 9 of the IBC is filed on 04.11.2019. The Ld. Adjudicating Authority is in disregard of the settled principles of law and has resulted in complete injustice to the Operational Creditor. Thus, the impugned order is not sustainable in law and is liable to be set aside.

12. Per contra, Ld. Counsel appearing for the Respondent (Corporate Debtor) submitted that the Corporate Debtor has raised a dispute that some of the invoices have been manipulated by the Operational Creditor. Therefore, the Corporate Debtor has not paid the amount and kept the same pending for verifying the authenticity of the said invoices. The Corporate

Debtor has already paid a sum of Rs. 1,37,296 on 26.04.2018 and a sum of Rs. 1,83,298 on 03.08.2018 and in support produced the Bank Statements. The Operational Creditor has not come with clean hands and has suppressed the aforementioned payments and malafidely claiming that a sum of Rs. 9,15,107/- is due and payable to the Operational Creditor. There is bonafide dispute with regard to claim made by the Operational Creditor even prior to filing of the Application under Section 7 of the IBC. Hon'ble Supreme court in the case of Mobilox Innovations Pvt. Ltd (Supra) has very categorically held that the IBC is not intending to be a substitute for recovery forum and cannot be used to jeopardize the Corporate Debtor financially by pushing to Insolvency and if there is dispute regarding the debt then the Application has to be rejected and also placed reliance on the Judgment of Hon'ble Supreme Court in the case of Transmission Corporation of Andhra Pradesh Limited Vs. Equipment Conduction and Cables Limited reported in (2019) 12 SCC 697.

13. It is submitted that Hon'ble Supreme Court in Kishan Vs. Vijay Nirman Company Pvt. Ltd. reported in (2018) 17 SCC 662 held that for entertaining the Application there must be undisputed debt and if there is bonafide dispute regarding debt then Application under Section 9 of the IBC cannot be entertained. The Corporate debtor raised a bonafide dispute therefore, Ld. AA has rightly dismissed the Application. There is no merits in this Appeal. Therefore, the Appeal may be dismissed.

14. After hearing Ld. Counsels for the parties, we have gone through record.

15. The following issues arose in this Appeal for our consideration: -

- (i) Whether the Operational Creditor has not adjusted the amount of Rs. 2,60,594 remitted by the Corporate Debtor?
- (ii) Whether there is a pre-existing dispute?
- (iii) Whether the Operational Creditor has attempted to use the provisions of IBC as a recovery forum?

Issue No. (i)

Whether the Operational Creditor has not adjusted the amount of Rs. 2,60,594 remitted by the Corporate Debtor?

16. The Operational Creditor has filed the ledger account maintained for Corporate Debtor since 01.04.2018 to 31.03.2020 Annexure A-7 Pg. 131 of Appeal Paper Book and in this ledger account it is shown that on 02.06.2018 City Bank Account BL No. 267034 Cheque No. 000956 dated 02.06.2018 amount a sum of Rs. 1,37,296/- is credited. Thereafter, on 13.08.2018 City Bank Accounts Cheque No. 001085 dated 03.08.2018 a sum of Rs. 1,23,298/- has been credited in the account of the Corporate Debtor and after getting this amount on 17.08.2018 there was a debit balance of Rs. 9,15,108/-in the Corporate Debtor's Account. The credit entries are matching with the bank account statement (R-1 at Pg. 155 – 156 Appeal Paper Book) filed by the Corporate Debtor which is at Pg. 155 to 156. Thus, we find no ground to hold that Rs. 2,60,594 remitted by the Corporate Debtor has not been adjusted by the Operational Creditor. Ld. Adjudicating Authority has erroneously given a finding that the Operational Creditor has suppressed these two payments.

Issue No. (ii)**Whether there is any pre-existing dispute?**

17. The Corporate Debtor was served with demand notice under Section 8(1) of the IBC on 28.06.2019 Acknowledgment is at Pg. 133 of the Appeal Paper Book. As per Section 8(2) of the IBC the Corporate Debtor was required to reply within a period of 10 days of receipt of the demand notice i.e. till 08.07.2019. However, the Corporate Debtor has replied to the notice on 15.07.2019, and in reply the Corporate Debtor has not raised any dispute with regard to the existence of the amount of debt, quality of goods or breach of representation or warranty. We would like to reproduced the relevant portion of the reply which is as under: -

(A-9 at Pg. 141 Appeal Paper Book)

“We observe that some of the bills are genuine and with respect to the materials actually supplied to us. The same have been acknowledged by us. However, we also find that some of the bills do not appear authentic and they also do not correlate to our record and receipts of supplies. Under such circumstances, we have asked our procurement and accounts department to verify the authenticity of the bills sent by you to us and if there is any payment pending from our end. We wish to inform you that as soon as the said process is over, we will release the payment for genuine bills raised by you, if the same has not been made us thus, far.”

18. With the aforesaid, it is apparent that in reply to the notice Corporate Debtor has not raised any dispute. On the other hand, the Corporate Debtor assured the Operational Creditor that after verification of the invoices/bills, if there is any payment pending from their end, they will release the payment. Thereafter, Operational Creditor has sent an email dated 30.07.2019 and 25.09.2019 with a request that after lapse of considerable

time no payment has been made to them in regard to the invoices/bills. Even the Corporate Debtor has not disputed the claim. Therefore, the Operational Creditor has filed the Application under Section 9 of the IBC on 04.11.2019. It is to be noted that after sending such reply, the Corporate Debtor has never clarified that which bills are not genuine. Even in the objections filed before the Adjudicating Authority, the Corporate Debtor has not pointed out that which invoices/bills are not genuine. The Operational Creditor has filed the true copy of purchase orders along with the tax invoices (A4 at. Pg. 53-124) in reply affidavit filed by the Corporate Debtor before this Tribunal it is not challenged that these documents are not genuine.

19. Hon'ble Supreme Court, in the case of Mobilox Innovations Pvt. Ltd. (Supra) held that what is the scope of ascertaining the existence of a dispute at the time of admitting the Application, which is as follows: -

"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."

20. With the aforesaid we are of the considered view that the Corporate Debtor has failed to prove that there exists any dispute between the parties

in regard to the amount claimed by the Operational Creditor. Ld. Adjudicating Authority superficially examined the allegations and held that there is dispute between the parties. Such finding cannot be sustained.

Issue No. (iii)

Whether the Operational Creditor has attempted to use the provisions of IBC as a recovery forum?

21. We would like to refer the Judgment of Hon'ble Supreme Court in the case of K. Kishan Vs. Viajy Nirman Company Pvt. Ltd. (Civil Appeal No. 21824& 21825 of 2017) decided on 14.08.2018 held that:

“7) Our recent judgment in Mobilox Innovations (supra) throws considerable light on the issue at hand. While referring to the legislative history of the Code, this Court referred to the Legislative Guide on Insolvency Law of the United Nations Commission on International Trade Law. One of the things the Legislative Guide spoke about was whether the debt is subject to a legitimate dispute or set-off, in an amount equal to or greater than the amount of the debt. Another thing spoken of was that improper use of the insolvency process would occur in cases where a creditor uses insolvency as an inappropriate substitute for debt enforcement procedures, even though they may not be well developed. (see para 13 of the judgment)

8) The Notes on Clauses annexed to the Bill of the Insolvency Code were also referred to by this Court in para 27 of the judgment. The important sentence in these Notes on Clauses needs to be reproduced, which is done herein below: -

“This ensures that operational creditors, whose debt claims are usually smaller, are not able to put the corporate debtor into the insolvency resolution process prematurely or initiate the process for extraneous considerations.”

9) This Court also noticed that the original Bill which ultimately became the Code had the expression “bona fide dispute” contained in an inclusive definition. It is significant to note that by the time the Code was enacted the expression “bona fide” was dropped. (See para 32 of the judgment)

10) After referring to Section 8, the judgment went on to hold that what is important is that the existence of the dispute and/or a suit or arbitration proceeding must be pre-existing i.e. it must exist before the receipt of the demand notice or invoice, as the case may be.

11) The Adjudicating Authority, therefore, when examining an application under Section 9 of the Act, will have to determine the following: -

- (i) Whether there is an “operational debt” as defined exceeding Rs 1 lakh? (See Section 4 of the Act)
- (ii) Whether the documentary evidence furnished with the application shows that the aforesaid debt is due and payable and has not yet been paid? and
- (iii) Whether there is existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before the receipt of the demand notice of the unpaid operational debt in relation to such dispute? If any one of the aforesaid conditions is lacking, the application would have to be rejected. Apart from the above, the adjudicating authority must follow the mandate of Section 9, as outlined above, and in particular the mandate of Section 9(5) of the Act, and admit or reject the application, as the case may be, depending upon the factors mentioned in Section 9(5) of the Act. (Para 34).

12) In para 38, this Court cautioned:

“We have also seen that one of the objects of the Code qua operational debts is to ensure that the amount of such debts, which is usually smaller than that of financial debts, does not enable operational creditors to put the corporate debtor into the insolvency resolution process prematurely or initiate the process for extraneous considerations. It is for this reason that it is enough that a dispute exists between the parties.”

Finally, the law was summed up as follows: -

“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.”

13) Following this judgment, it becomes clear that operational creditors cannot use the Insolvency Code either prematurely or for extraneous considerations or as a substitute for debt enforcement procedures. The alarming result of an operational debt contained in an arbitral award for a small amount of say, two lakhs of rupees, cannot possibly jeopardize an otherwise solvent company worth several crores of rupees. Such a company would be well within its rights to state that it is challenging the Arbitral Award passed against it, and the mere factum of challenge would be sufficient to state that it disputes the Award. Such a case would clearly come within para 38 of Mobilox Innovations (supra), being a case of a pre-existing ongoing dispute between the parties. The Code cannot be used in terrorem to extract this sum of money of Rs. two lakhs even though it may not be finally payable as adjudication proceedings in respect thereto are still pending. We repeat that the object of the Code, at least insofar as operational creditors are concerned, is to put the insolvency process against a corporate debtor only in clear cases where a real dispute between the parties as to the debt owed does not exist.”

22. With the aforesaid Judgment it is clear 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) of the IBC, if notice of dispute has been received by the Operational Creditor or there is record of dispute in the information utility. As we have already discussed that the Corporate Debtor has failed to prove that there exists any

dispute between the parties in regard to the amount claimed by the Operational Creditor. The Corporate Debtor has not placed on record any material to infer that the Operational Creditor has filed the claim prematurely or for extraneous considerations or as a substitute for debt enforcement procedures. The Operational Creditor has claimed Rs. 12,75,316/- which is supported by the ledger entries, purchase orders, invoices, exchange of emails and demand notice. The Corporate Debtor has not filed any document in rebuttal. Thus, we are unable to convince with the Ld. Adjudicating Authority that “the Operational Creditor has attempted to use this forum as a recovery forum, and that also in respect of a disputed debt”.

23. Ld. Adjudicating Authority also held that “no case has been made out that the Corporate Debtor has become insolvent and has lost its substratum such that it is unable to pay its debts or run its business”. We would like to refer the Judgment of this Appellate Tribunal in the case of Monotrone Leasing Pvt. Ltd. (Supra) coordinate Bench of this Tribunal held that:

“We are bound to emphasize that a presumption cannot be drawn merely on the basis that a company, being solvent, cannot commit any default. As observed in financial and economic parlance, the inability to pay-off debts and committing default are two different aspects which required to be adjudged on equally different parameters. Inability to pay debt has no relevance for admitting or rejecting an Application for initiation of CIRP under the IBC”

24. With the aforesaid, we are unable to agree with the above mentioned finding of the Adjudicating Authority.

25. With the aforesaid discussion, we are of the view that Ld. Adjudicating Authority has wrongly rejected the claim on unfounded grounds. From the

record, as we find that the Corporate Debtor has defaulted to pay more than one lakh and in absence of pre-existing dispute and the record being complete, we hold that the Application under Section 9 of the IBC preferred by the Operational Creditor was fit to be admitted.

26. For the aforesaid reason, we set aside the impugned order dated 19.06.2020 and remit the case to the Adjudicating Authority for admitting the Application under Section 9 of the IBC, after notice to the Corporate Debtor to enable the Corporate Debtor to settle the matter prior to the admission.

The Appeal is allowed with the aforesaid observations and directions.

No costs.

[Justice Jarat Kumar Jain]
Member (Judicial)

(Dr. Ashok Kumar Mishra)
Member(Technical)

New Delhi
09th August, 2021
SC