

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 566 of 2020

(Arising out of Impugned Order dated 18th February, 2020 passed by the Adjudicating Authority/National Company Law Tribunal, Guwahati Bench, in Company Petition No (IB) No.36/GB/2019)

IN THE MATTER OF:

**M/s. Shruti Impex
A proprietary concern
Having its office at H. No.11-6-465,
Nampally Market,
Hyderabad, represented by its
Propretrix, Smt. Kavita Harish Raney** ... **Appellant**

Versus

**M/s. N.R. Commercials Pvt. Ltd.
Having its Regd. Office at
Alankar Building,
T.R. Phookan Road, Fancy Bazar,
Guwahati, Assam-781001** ... **Respondent**

Present:

**For Appellant: Mr. Akshat Singh and Mr. Bhanu Gupta,
Advocates**

**For Respondents: Mr. Kamal Agarwal and Mr. Saurabh Surana,
Advocates**

JUDGMENT
(Through virtual mode)
(Date: 20.10.2020)

{Per: Dr. Alok Srivastava, Member(T)}

This appeal has been filed under Section 61(1) of the Insolvency and Bankruptcy Code, 2016 (IBC) by the Ld. National Company Law Tribunal, Guwahati Bench (hereinafter called the Adjudicating Authority). The Adjudicating Authority has dismissed the application filed by M/s. Shruti Impex under Section 9 of the IBC on the ground that a dispute existed between the Appellant-Operational Creditor Ms. Shruti Impex and the Respondent - Corporate Debtor M/s. N.R. Commercials Pvt. Ltd.

2. The facts of the case in brief according to Appellant are that-

- I. It supplied polymer granules as operational creditor to the corporate debtor on verbal orders against 14 different invoices starting from 24.8.2015 to 21.11.2016 and thereby made supplies to the corporate debtor amounting to Rs.2,40,95,981 (Rupees two crore forty lakh ninety five thousand nine hundred and eighty one only). It is claimed that the corporate debtor paid a total amount of Rs.24,51,080 through cheque nos. 33702 and 33705 dated 13.9.2015 and 10.11.2015 respectively and through RTG dated 23.12.2015 towards 3 invoices No.02/Sep/15 dated 12.9.2015, invoice no. 1/Oct/15 dated 9.10.2015 and invoice No. 01/Dec/15 dated 20.12.2015.

II. The Appellant sent a statement of ledger account along with notice through Registered Post A.D dated 7.5.2018, but received no response to this communication from the corporate debtor.

III. Thereafter the Appellant(Operational Creditor) sent a demand notice in Form 3 as specified under Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 dated 08.07.2019 wherein it showed amount due as Rs.3,24,31,116/-(Principal amount Rs.219,95,981 + Interest calculated @ 18% per annum is Rs.1,04,35,135/-), The operational creditor is a proprietary concern represented by its proprietor Mrs. Kavita Harish Raney having its Regd. Office at Hyderabad and is engaged in the business of importing and trading of polymer granules. The corporate debtor is a Private Limited Company having its Regd. Office in Hyderabad and is engaged in the business of manufacture of PET Preforms and Blowing of PET bottles.

3. The Operational Creditor has mentioned in Item 6 of Form 3 that it had agreed to deliver the material as per oral contract with the Corporate Debtor and the Corporate Debtor has received the delivery of the material, but it has paid only an amount of Rs.21,00,000 out of total amount due of Rs.2,40,95,981/-.

4. On receipt of the demand notice, the corporate debtor N.R. Commercials Private Limited replied through letter dated 18th July, 2019 denying existence of any business relationship between him and the operational creditor. It has also denied existence of any

claim and unpaid operational debt and labelled as figments of operational creditor's imagination. He has also denied existence of any operational debt and hence any default and maintained that the claim of operational creditor is based on false and fabricated documents in the absence of supply of any material by the operational creditor to the corporate debtor.

5. The Corporate Debtor in his reply to the demand notice has also stated that in case of supply of material to any purchaser, there would be a trail in the forms and returns filed before the statutory authorities including VAT returns and remittances of output taxes. This apart, the delivery of material is by way of a valid way bills, transporters documentations. A valid purchase order issued by the Corporate Debtor through their authorized signatory having the power to issue the same precede these documents. He also called upon the operational creditor to substantiate her claim by furnishing these details and details of cheques and RTG mentioned in the demand notice.

6. The operational creditor thereafter filed an application on 25.9.2019 in Form 5 under Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 under Section 9 of the IBC as operational creditor in initiation of Corporate Resolution Process (hereinafter called CIRP) in respect of M/s. N.R. Commercials Private Limited. The cause was heard by NCLT, Guwahati bench as CP(IB) No. 36/GB/2019 and order was passed by the Adjudicating Authority on 18.2.2020. The application under Section 9 of IBC as the operational creditor prima facie failed to prove her case. This order has been impugned by the operational creditor in this present appeal before Hon'ble NCLAT.

7. A reply was filed by the respondent on the appeal on which a rejoinder was submitted by the Appellant. The respondent also filed written submission in support of their case. These documents have been considered by us along with oral statements advanced by both the parties.

8. The Adjudicating Authority has considered the pleadings of both sides and the documents submitted by them, which include copies of invoices relied upon by the operational creditor and the bank statement of operational creditor's account pertaining to the period 23.7.2015 to 30.10.2015 issued by the Central Bank of India and the Ledger Account Statement of the Appellant in order to corroborate the supplies made to the corporate debtor and the payment made thereon by the corporate debtor to operational creditor. The Adjudicating Authority has also looked at the application under section 9 of the IBC and the invoices mentioned therein to examine the question of limitation of the application.

9. The Adjudicating Authority has found many discrepancies in the documents submitted by the operational creditor in support of her contention and in the light of complete denial by the corporate debtor. As regards limitations, it is found that only one invoice dated 21.11.2016 for the amount of Rs.16,76,194 is within limitation as the petition was filed on 27.9.2019, which is within three years from the date of invoice.

10. In view of the complete denial by the corporate debtor and the discrepancies found in various documents submitted by the operational creditor, Adjudicating Authority has inferred that the operational creditor has not been able to, prima facie, prove her case and therefore, dismiss the application filed under Section 9 of IBC. It has, however, not precluded the operational creditor from

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initiating recovery proceedings before the appropriate legal firm, provided she can establish her case.

11. We perused the appeal memo and the reply submitted both by the parties alongwith their written submissions. We also considered the detailed oral arguments advanced by both the parties in hearings.

12. The Demand Notice given to the Corporate Debtor by the Operational Creditor dated 08.07.2019 contains details of the supplies of polymer granules and transactions ostensibly made between the Operational Creditor and the Corporate Debtor. The amount of debt shown at S.No. 1 of the Demand Notice is Rs. 3,24,31,116/- which includes the principal amount and the interest thereon. Out of the fourteen transactions listed at S.No. 2 (iv) in the Demand Notice only one transaction pertaining to Invoice dated 21.11.2016 falls within three years previous to the date of filing of the application under section 9 of the IBC i.e. 25.09.2019. This transaction is said to be for Rs. 16,76,194/- which is more than the threshold of the amount of Rs. 1,00,000/- which is necessary for validity of the application. The remaining thirteen transactions relate to dates more than three years before the date of filing of application and hence they will not be in limitation as required in IBC.

13. Notwithstanding the validity or otherwise of the amount of default and the issue of limitation, we first examine the reply of the corporate debtor dated 18.07.2019 to infer whether a relationship between the two parties of 'Operational Creditor' and 'Corporate Debtor' exists.

14. The Demand Notice sent by the Appellant to the Respondent contains no details of purchase orders given by the Respondent and mentions that the purchase orders were all given verbally and the contracts were oral. The reply of the respondent to the demand notice flatly denies existence of any buyer-seller relationship between the two parties. It has denied placing any orders for supply of materials with the Appellant and also denied making any payments for the said fictitious supplies. He has gone to the extent of claiming that the claim of operational debt is based on false and fabricated documents and stated that the supply of any material to any purchaser leaves a trail in forms and returns filed before the statutory authorities including VAT returns and remittances of output taxes. There should be valid way bills, and transporters' documents. In the absence of such supporting and corroborating documents and also any valid purchase order signed by the authorized signatory of the respondent the entire claim of the appellant is only false, fabricated and made with the *malafide* intention of harassing and blackmailing the respondent. He has called upon the appellant to produce any supporting documents to support her claim before the Adjudicating Authority.

15. In the face of such denial by the respondent the appellant has submitted fourteen invoices viz. dated 24.08.2015, 08.09.2015, 12.09.2015, 09.10.2015, 20.12.2015, 31.12.2015, 16.01.2016, 28.01.2016, 03.05.2016, 04.05.2016, 28.05.2016, 26.06.2016, 08.07.2016 and 21.11.2016. No other document has been submitted by the appellant to corroborate the existence of these supplies by way of purchase orders, e-way bills, tax invoices and their remittance receipts. It is noted by the Hon'ble Adjudicating Authority that all the invoices contain just a stamp of N.R. Commercials Pvt. Ltd. stating "Stocks Received". There are no

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signatures above the stamp and no clear identification of the person receiving the supplies has been mentioned neither any evidence of transportation of the said supplies. The appellant has failed to establish a seller-buyer relationship between her and the respondent and hence no relationship of corporate debtor and operational creditor could be proved by the appellant.

16. The operational creditor has claimed a payment of Rs. 24,51,080/- through cheque nos. 33702 dated 30.09.2015, 33705 dated 10.11.20015 and RTGS payment dated 23.12.2015 towards three invoices all of which pertain to the year 2015. The operational creditor has not been able to show that these payments were made to the corporate debtor against the supplies since it is not clear from the bank statement of Central Bank of India as to who were the recipients of these payments. The Ledger Account Statement produced by the appellant is neither signed nor does it show with any degree of clarity whether the Corporate Debtor is the recipient of payments as claimed by the Operational Creditor. These payments, even if they are presumed to have been made to the corporate debtor pertain to invoices of the year 2015 as per the averment made by the Appellant in the Appeal Memo which clearly are not within limitation.

17. It would be useful to recapitulate the definitions of Corporate Person, Corporate Debtor, Debt, Operational Creditor, Operational Debt and the requirements under Sections 8 and 9(1) of the IBC for insolvency resolution by operational creditor for an appreciation of the status of the two parties:

“3. (7) “corporate person” means a company as defined in clause (20) of section 2 of the Companies Act, 2013 (18 of 2013), a limited liability partnership, as defined in clause (n) Company Appeal (AT) (Insolvency) No. 566 of 2020

of sub-section (1) of section 2 of the Limited Liability Partnership Act, 2009 (6 of 2009), or any other person incorporated with limited liability under any law for the time being in force but shall not include any financial service provider;

3. (8) "corporate debtor" means a corporate person who owes a debt to any person;

3. (10) "creditor" means any person to whom a debt is owed and includes a financial creditor, an operational creditor, a secured creditor, and unsecured creditor and a decree holder;

3. (11) "debt" means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt;

5. (20) "operational creditor" means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred;

5. (21) "operational debt" means a claim in respect of the provision of goods or services including employment or a debt in respect of the repayment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority;

8. (1) An operational creditor may, on the occurrence of a default, deliver a demand notice of unpaid operational debtor copy of an invoice demanding payment of the amount involved in the default to the corporate debtor in such form and manner as may be prescribed.

(2) The corporate debtor shall, within a period of ten days of the receipt of the demand notice or copy of the invoice mentioned in sub-section (1) bring to the notice of the operational creditor—

(a) existence of a dispute, if any, and record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoice in relation to such dispute;

(b) the repayment of unpaid operational debt—

(i) by sending an attested copy of the record of electronic transfer of the unpaid amount from the bank account of the corporate debtor; or

(ii) by sending an attested copy of record that the operational creditor has encashed a cheque issued by the corporate debtor.

Explanation — For the purposes of this section, a "demand notice" means a notice served by an operational creditor to the corporate debtor demanding repayment of the operational debt in respect of which the default has occurred.

9. (1) After the expiry of the period of ten days from the date of delivery of the notice or invoice demanding payment under sub-section (1) of section 8, if the operational creditor does not receive payment from the corporate debtor or notice of the dispute under sub-section (2) of section 8, the operational creditor may file an application before the Adjudicating Authority for initiating a corporate insolvency resolution process.”

18. We now consider whether the party supposedly supplying the polymer granules is an operational creditor and the amount of invoice which is within limitation is an operational debt as defined in the IBC. Section 5 (21) of the IBC defines operational debt to mean a claim in respect of the provision of goods or services including employment or a debt in respect of the repayment of dues. Quite obviously provision of goods or services is a pre-requisite for the existence of operational debt.

19. In the present appeal the corporate debtor M/s N.R. Commercials Pvt. Ltd. has not only vehemently and flatly denied giving any purchase order for the said supply of polymer granules as claimed by the operational creditor or receiving any supply from her, he has in his reply to Demand Notice challenged the operational creditor to provide proof to substantiate her claim. The only evidence that the operational creditor has produced in support of her claim are a total of fourteen invoices (out of which only one is found under limitation for the purposes of IBC) which she has not been able to corroborate through any other document such as way bill, transportation document, tax invoice or tax remittance receipts.

20. Thus the operational creditor has not been able to prove any purchase order being given by the Respondent for supply of polymer granules by her and rebut the averment and argument of corporate debtor calling the claim false and fabricated. Since the supply of goods is not established as required under Section 5(21) of the IBC, the existence of any payment towards such purchase is not established. There is most certainly a dispute regarding the existence of purchase and sale of polymer granules as claimed by the seller M/s Shruti Impex and hence the facts provided by the

Appellant in her application under section 9 of the IBC are in dispute. The Adjudicating Authority has correctly held that investigation of the supposed claim of purchase and sale of polymer granules is beyond the purview of the Adjudicating Authority.

21. In light of the aforesaid discussion, the appellant has not been able to establish that she is an operational creditor in the case and a relationship of corporate debtor and operational creditor exists between the Appellant and the Respondent as required in the IBC. Therefore, she cannot claim any relief under Section 9 of the IBC. The appellant fails in her case and the appeal is, therefore, dismissed. There is no order as costs.

(Justice Bansi Lal Bhat)
Acting Chairperson

(Dr. Alok Srivastava)
Member (Technical)

New Delhi
20th October, 2020

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