

NATIONAL COMPANY LAW APPELLATE TRIBUNAL AT CHENNAI
(APPELLATE JURISDICTION)

Company Appeal (AT) (CH) (INS) No. 136 of 2021
(Under Section 61 of the Insolvency and Bankruptcy Code, 2016)
(Arising out of the Order dated 24.02.2021 in CP (IB) No.119/BB/2020
passed by the Adjudicating Authority, (National Company Law Tribunal,
Bengaluru Bench)

In the matter of:

M/s. Dyanamic Engineers Limited
Having its registered office at
106, Delhi Chambers, 3439,
Delhi Gate, New Delhi – 110002.

...Appellant

V

1.M/s. Muhlenbau Equipments Private Limited
Having its registered office at
C-1, Casa Lavella, 85, Lavella Road,
Bangalore, Karnataka – 560001.

2.The National Company Law Tribunal
Raheja Towers, Vittal Mallya Rd.
KG Halli, D’Souza Layout,
Ashok Nagar, Bengaluru, KA – 560001.

...Respondent

Present:

For Appellant : Mr. Rakesh Mohan Sharma,
(Practising Company Secretary)

Coram : Mr. Justice M. Venugopal Member (J)
Mr. Kanthi Narahari Member (T)

JUDGMENT

(VIRTUAL MODE)

Per: Kanthi Narahari Member (T)

(1) The present Appeal arises against the Order of the Adjudicating Authority dated 24.02.2021 passed in CP (IB) No. 119/BB/2020 whereby the Adjudicating Authority disposed of the Application filed by the Appellant herein under Section 9 of the IBC Code, 2016 (Insolvency and Bankruptcy Code, 2016).

(2) Aggrieved by the said Order the present Appeal is filed by the Appellant challenging the Order of the Adjudicating Authority on the ground that the Application filed by the Appellant/Operational Creditor should have been allowed and admitted as there is no pre-existing dispute in respect of the claim made by the Operational Creditor. The Application filed by the Appellant was complete and defect free.

Brief Facts :-

(3) Shri. Rakesh Mohan Sharma (PCS) appearing for the Appellant submitted the brief facts.

(4) He submitted that the Appellant received the 'Purchase Order' dated 11.03.2016 from the Respondent for supply and commissioning of automation and

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control systems, PDB for wheat Silo storage unit at Bengaluru amounting to Rs. 33,00,000/- plus taxes. The Appellant supplied goods and raised 2 invoices both dated 09.12.2016 aggregating to Rs. 37,86,750/-. The Respondent accepted the supplies and invoices without any issue or demur but made only part payment of Rs. 18,06,779/-. The Appellant received initial advance amount of Rs. 6,60,000/- along with 'Purchase Order'. Further the Respondent made Rs. 5,00,000/- against the outstanding due and promised to clear the remaining balance shortly but failed to do so.

(5) Having not received the full payment of the invoices, the Appellant issued a 'Demand Notice' dated 13.11.2019 in Form 3 u/s Section 8 of the Insolvency and Bankruptcy Code, 2016. However, no reply received by the Respondent. The 'Demand Notice' has been served on the Respondent. Having no other alternate, the Appellant filed an Application under Section 9 of the I & B Code, 2016 for initiating 'Corporate Insolvency Resolution Process', before the Hon'ble Adjudicating Authority (NCLT Bengaluru Bench).

(6) As per the directions of the Adjudicating Authority, the Appellant served 'Notices' on the Respondent in accordance with law. Further the Appellant filed an 'Affidavit' dated 19.02.2021 evidencing the 'Service of Notice' to the Respondent.

(7) While so, the Respondent vide mail dated 03.11.2020 threatened the Appellant to withdraw the case in order to get the Form-C.

(8) Having effected 'Service of Notice' on the Respondent and having acknowledged the receipt of 'Notices' with regard to the filing of Application under Section 9, the Respondent willfully did not appear before the Hon'ble Adjudicating Authority and the Hon'ble Adjudicating Authority instead of admitting the Application by initiating 'Corporate Insolvency Resolution Process' disposed of the Application with a direction to the Respondent to settle the claim of the Appellant as promised within a period of 3 months from the date of receipt of copy of the Order.

(9) The Learned PCS submitted that the Hon'ble Adjudicating Authority ought to have admitted the Application, however the same was disposed of with the above direction. Even after disposing of the Application, the Appellant served the copy of the Order on the Respondent. However, there is no response from the Respondent nor paid the dues to the Appellant. In view of the reasons as stated above, the Learned PCS prayed this Bench to allow the Appeal by setting aside the 'Impugned Order' and directing the Adjudicating Authority to admit the Application.

Appraisal :-

(10) Heard the Learned PCS for the Appellant. This Bench by Order dated 06.08.2021 directed the Appellant to send Notice through 'Speed Post' returnable by 02.09.2021. Further, the Appellant was directed to serve Notice through e-mail also. In compliance of the direction of this 'Tribunal' dated 06.08.2021, the Appellant/ Learned PCS filed an 'Affidavit of Service' vide Diary No. 431 dated 01.09.2021.

(11) In the 'Affidavit of Service' at Para 5, it is stated that the Notice has been sent by 'Speed Post' to both the addresses of the Respondent along with covering letter namely

1. M/s Muhlenbau Equipments Private Limited,

Muhlenbau#267, Ist Cross, IV Phase,

KIADB, Peenya Industrial Area,

Bangalore - 560 058.

2. M/s Muhlenbau Equipments Private Limited,

C-1, Casa Lavella, 85, Lavella Road,

Bangalore, Karnataka – 560001.

(12) Further at Para 6 of the 'Affidavit of Service', it is stated that the Appellant had sent Notice along with the Order of this 'Tribunal' dated 06.08.2021 on e-mail id namely viz. muhlenba@gmail.com.

(13) The Appellant also provided the landline number and the mobile number of the Respondent. Along with the 'Affidavit of Service' the postal receipts are also enclosed evidencing the Notice sent by 'Speed Post'. Further the Appellant enclosed a Letter/Notice addressed to the Respondent along with the Order of this 'Tribunal' dated 06.08.2021. The Appellant also provided the 'Service of Notice' through e-mail. This 'Tribunal' satisfied the effect of 'Service of Notice' and compliance of the Order of this 'Tribunal' dated 06.08.2021. Having effected 'Service of Notice' on the Respondent, the Respondent failed to appear before this 'Tribunal' on the date notified in the Order dated 06.08.2021 i.e., 02.09.2021 either in person or through its representatives, this 'Tribunal' proceeded to hear the matter.

(14) From the perusal of documents filed along with this Appeal, the Respondent issued 'Purchase Order' to the Appellant. The Appellant also issued invoices to the Respondent claiming the amount. Further the Appellant vide e-mail dated 06.06.2019 in Annexure 5 at page 54 of the Appeal Paper Book(s), wherein it is stated that the Appellant supplied material for Rs. 33,00,000/- plus duties and taxes against the invoices dated 09.12.2016. The value of both the invoices is Rs. 37,86,750/-. It is stated in the e-mail that as against Rs. 34,56,750/-, it is stated that the Appellant received Rs. 29,66,773/- and still Rs. 4,89,997/- are due against supply and Rs. 3,30,000/- are due against commissioning. It is stated that the total due pending is Rs. 8,19,977/- and requested to release the said payment immediately. The Appellant

in 'Demand Notice' claimed an amount of Rs. 12,96,427/- including the principal amount of Rs. 8,19,977/- as claimed vide e-mail dated 06.06.2019. The Respondent had not replied to the 'Demand Notice'. Having not received the payment as due, the Appellant filed the Application before the Adjudicating Authority in the month of December 2019. 'Service of Notices' also effected on the Respondent however there is no response even after filing the Application before the Adjudicating Authority. While so, the Respondent vide e-mail dated 03.11.2020 addressed to the Appellant wherein it is stated as under :- (enclosed as Annexure 9 at page 88).

3 November 2020 at 16:00

From: muhlenba [<mailto:muhlenba@gmail.com>]

Sent: Tuesday, November 3, 2020 3:47 PM

To: SUPRIYA TIWARI <sales@depl.biz>

Cc: SRIKAKULAMRAMAPRASAD<muhlenbau@gmail.com>,<corporate@depl.biz>;<commercial@depl.biz>

Subject: Re: Urgent request for releasing Pending form C

3 Nov 2020

Dear Madam,

It has been clear from Mr. Gandhi that the work has not been completed to our satisfaction.

Hence we shall issue the C form to you when u withdraw the case and give us a credit note for the same.

Once you have this cleared we shall send you the C form immediately.

On Tue, 3 Nov 2020 at 14:06, SUPRIYA TIWARI <sales@depl.biz> wrote:

Gentle Remainder Mail

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Dear Sir,

Waiting for your valuable response.

An early action is requested sir.

Thanks & Regards,

SUPRIYA TIWARI

(15) From the above e-mail, the Respondent stated that the work has not been completed to its satisfaction and stated that the Form C shall be issued when the Appellant withdraw the case and give them a credit note for the same. From the above e-mail it is crystal clear that the Respondent is having the knowledge of filing of the Application before the Adjudicating Authority and also having the knowledge of issuance of 'Demand Notice'. It appears that the Respondent intend to run away from the liability which they owe to the Appellant stating that unless the Appellant withdraw the case, the Form C shall not be issued. This 'Tribunal' taking into cognizance of the said fact that the Respondent willfully avoided the payment of its liability and intend to raise an unsuccessful dispute after filing the Application before the Adjudicating Authority by the Appellant.

(16) This 'Tribunal' is of the firm opinion that the payment of due to the Appellant is a 'Operational Debt' within the meaning of Section 5(21) of the I & B Code, 2016 and also committed default which attracts the definition of sub-section 12

of Section 3 of the I & B Code, 2016, which defines “**default**” means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not (paid) by the debtor or the corporate debtor, as the case may be;

(17) Having established the case by the Appellant before the Adjudicating Authority, the Adjudicating Authority ought not to have directed the Respondent to settle the claim of the Petitioner within a period of 3 months from the date of receipt of the copy of the Order. Further, the Learned Adjudicating Authority observed that the Application filed by the Appellant/Applicant is with an intention to recover an alleged balance amount, which is against the object of Code, and the settled position of the law. This Tribunal is of the view that the said finding is patently illegal and unreasonable. Further, the Learned Adjudicating Authority in the Impugned Order observed that the Respondent has paid part payments with an assurance to clear the balance in short time. The said observation is also illegal without application of mind. It is a settled Law that when a debt and default is proved, the Adjudicating Authority has to admit the Application and initiate ‘Corporate Insolvency Resolution Process’ against the Corporate Debtor otherwise it is complete. However, the Learned Adjudicating Authority having noticed that there is a debt and default, passed the Impugned Order which is non-application of mind and accordingly this ‘Tribunal’ is of the view that it is patently illegal and cannot with-stand to the scrutiny of law. The Respondent failed to establish the existence of dispute prior to issuance of ‘Demand Notice’. Moreover,

having received the ‘Notices’, namely the ‘Demand Notice’, the Application filed before the Adjudicating Authority and the Appeal filed before this ‘Tribunal’ the Respondent deliberately did not appear, in our view, this highly amounts to disrespect attitude towards the ‘Tribunals’.

Findings :-

(18) This ‘Tribunal’ comes to a conclusion that it is a fit case to be admitted by the Adjudicating Authority. Accordingly, we set aside the ‘Impugned Order’ dated 24.02.2021 and direct the Adjudicating Authority to admit the Application and initiate ‘Corporate Insolvency Resolution Process’ within 15 days from the receipt of copy of this Order. The ‘Registry’ of this ‘Tribunal’ is directed to send the copy of this ‘Order’ to the Registrar/Deputy Registrar, National Company Law Tribunal, Bengaluru Bench, Bengaluru for the information to the Learned Members of the Bengaluru Bench. With the aforesaid directions, the **‘Appeal is Allowed’**. No Orders as to costs.

[Justice M. Venugopal]
Member (Judicial)

[Kanthi Narahari]
Member (Technical)

Chennai
07.09.2021
GS