NATIONAL COMPANY LAW TRIBUNAL
AMARAVATI BENCH
(Video Conference)

PRESENT: JUSTICE TELAPROLU RAJANI – MEMBER JUDICIAL
ATTENDANCE-CUM-ORDER SHEET OF THE HEARING HELD ON 29.09.2022 AT 10.30 AM

TC/CP. Nos.	CA/IA No.	Section/ Rule	Name of Parties
CP(IB) No.52/9/AMR/2021		9 of IBC	Gayatri Sea Foods and Feeds pvt Ltd Vs Apex Aqua Agencies Pvt Ltd

Counsel for Petitioner(s):

Name of the Counsel(s)	Designation	E-mail & Telephone No.	Signature

Counsel for Respondent(s):

Name of the Counsel(s)	Designation	E-mail & Telephone No.	Signature

ORDER

CP(IB) No.52/9/AMR/2021 is dismissed, vide separate orders.

SD/-
JUSTICE TELAPROLU RAJANI
MEMBER JUDICIAL

NATIONAL COMPANY LAW TRIBUNAL
AMARAVATI BENCH AT MANGALAGIRI
*** *** ***

CP (IB) No. 52/9/AMR/2021

In the matter of a Petition under Section 9 of the Insolvency and Bankruptcy Code, 2016 Read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016
AND

In the matter of
M/s. APEX AQUA AGENCIES PRIVATE LIMITED

Between:

M/s.Gayatri Sea Foods and Feeds Private Limited,
Flat No.203, 6-3-1099/1/2/3, Bhavyas Varun Sargam,
Behind Katriya Hotel, Rajbhavan Road,
Somajiguda, Hyderabad - 500068.

...Operational Creditor

AND

Apex Aqua Agencies (India) Private Limited,
Door No.9-164/4/37, 508, MM Paradise,
Near Astalakshmi Temple, Kommadi,
Vishakhapatnam, AP - 530048

...Corporate Debtor

Date of Order: 29.09.2022

CORAM:

Justice TelaproluRajani, Member Judicial.

Appearance:

For Operational Creditor : Mr. G.Sethu Rama Rao, Advocate.

For Corporate Debtor : Ms. Prabha Prasad & Mr.V.S.R.Avadhani Advocates.

ORDER

1. This application is filed by M/s.Gayatri Sea Foods and Feeds Private Limited, Operational Creditor (herein after referred to as OC) against M/s.Apex Aqua Agencies (India) Private Limited, Corporate Debtor (hereinafter referred to as CD) seeking for initiation of Corporate Insolvency Resolution Process (CIRP) against the CD due to default committed by the CD in discharging the debt which is due to the OC.

2. The Application is based on the following facts:

   i). The OC is also undergoing CIRP by virtue of order of this Tribunal dated 13.01.2021. It was involved in carrying on the business of establishment and manufacture of modern cold storage and deep-freezing plant.

   ii). The OC has supplied the feed material as evidenced by various invoices, to the CD. Despite several reminders, the CD failed to pay the a mounts due. Hence, the COC of the OC resolved to direct the Resolution Professional (RP) to file this Company Petition.

   iii). A demand notice was issued on 16.07.2021. The CD did not reply and did not dispute the debt. Hence, this Application.

3. The CD filed counter contending that the Form 3 notice alleged to have been issued on 16.07.2021 was not served on the responsible officer or employee of the CD since the management of the CD was changed in the course of time by replacing the old members on the Board from time to time. The present management has acquired the Company of the CD, by purchasing it and obtained audit report of the profit, loss, inventory of books of accounts and prepared balance sheet with the help of a qualified Chartered Accountant which are maintained in the regular course of business.

4. The provisional balance sheet for the period 01.04.2021 to 31.05.2021 of the CD shows that as on 31.05.2021, the liabilities both the sundry creditors and Statutory Liabilities are together to an extent of Rs.3,15,94,568/-. On the basis of the said balance sheet, the present management acquired the equity shares of the CD in terms of share purchase agreement. Some of the members on Board resigned, a Board was reconstituted with Mr.Vatsavi Venkata Subramanyam Varma and Mrs.Geetha Durga Bhavani Gandreddy. They were appointed as Addl. Directors of the Board. Later Mr. Vatsavi Venkata Subramanyam Varma came to be the sole owner. They shifted the registered office of the CD from Visakhapatnam to Vijayawada w.e.f. 03.08.2021. The same was brought to the notice of the Ministry of Corporate Affairs (MCA) and Form INC-22 was filed by the new management.

5. There is no debt due to the OC from the CD as per the account of the CD, which is handed over to the present management by the earlier Board. As per the Ledger Account, a sum of Rs.18,68,579/- is payable by the CD to the OC. Last entry of payment is 24.09.2020 for Rs.25,000/-. The Ledger copy filed by the OC shows that the said amount was entered in the credit column which supports the contention of the CD. Subsequent to that there is no payment at all.

6. Last entry of purchase from the OC as per the ledger is on 26.07.2020 for Rs.16,36,354/-. There are no purchases thereafter. The entries thereafter are concocted. On comparison of the ledger account of the OC with the ledger account of the CD, there are certain matches in both the accounts which shows that the other entries are clearly manipulated. The invoices filed along with the Petition are fake and are not supported by any purchase orders. They do not contain any acknowledgment by the OC/CD. No delivery challans are fled to support the sale and delivery of goods.

7. There is absolutely no material placed to show that there is a debt, existing as on today, much less an operational debt. In the domain of Sale of Goods, in the absence of contract, incorporating material terms of any contract for sale of goods, the terms of purchase order will constitute the contract. In the present case OC failed to produce any purchase orders. The CD has made all the payments except Rs.18,68,579/- as it was to be adjusted against the damaged

goods. The same was informed to the OC on several occasions. Inspite of it the OC preferred this present Petition. There is a pre-existing dispute regarding quality and quantity of the goods supplied by the OC. Hence the present Company Petition is not maintainable.

8. Rejoinder was filed by the Operational Creditor, which is captioned as Rejoinder/Written submissions, contending that the material supplied to the Corporate Debtor is evidenced by the ledger balances. The Corporate Debtor did not rebut the same either in his counter nor did he file any material. The invoices would establish the supply of material. The track report of the postal department shows the endorsement as the item delivery confirmed on 20.07.2021. The copy of the track record is filed before the Tribunal. Even though the notice was served on 20.07.2021, inadvertently a typographical error occurred in the application as 16.07.2021. Hence, the date of service of the notice need to be considered as 20.07.2021 as evidenced by the track report of the postal department and the date of 10 days expires on 30.07.2021 which is mistakenly typed as 26.07.2021. However, the application is filed on 01.09.2021 after lapse of more than ten days. The other circumstances raised by the CD does not merit any consideration hence, the Company Petition needs to be admitted.

9. Heard the arguments of both the Counsel and perused the written submissions filed on either side. The important contentions that are

raised on behalf of the Corporate Debtor are that notice in Form-3 as mandated by Section 8 is not served and hence, the application is liable to be dismissed *in limine*. The observations of this Tribunal in the order dated 14.03.2022 setting aside the *ex-parte* order against the Corporate Debtor would support the contention of the Corporate Debtor. Secondly no material documents are placed on record except invoices which are blank in all material aspects and no acknowledgement is there with regard to the supply of the goods to the Corporate Debtor. The claim amount is disputed. The due amount is only Rs.18,68,579/- which is liable to be adjusted against damaged goods. The Counsel for the Operational Creditor contends that the track record shows the due service of notice in Form-3 and the invoices amply evidence the supply of goods and they are supported by the ledger account of the Operational Creditor and the balance sheets. Hence, the debt due is what is claimed in this application and not as stated by the Corporate Debtor.

10. Based on the above the following points can be framed for consideration:

    i. Whether Form-3 notice was duly served on the Corporate Debtor.

ii. Whether the Operational Creditor could prove the debt and whether the same is acknowledged by the Corporate Debtor.

iii. To what result.

Point No. I:

In the first instance the Corporate Debtor was set *ex-parte* and an application was moved by the Corporate Debtor for setting aside the *ex-parte* order and the same was allowed by virtue of the order dated 14.03.2022. Observing that the notice was booked on 17.07.2021 and not on 16.07.2021 and was delivered on 27.07.2021 but not on 20.07.2021 as mentioned in the counter and the notice sent by the Tribunal on 22.11.2021 is after the Applicant has shifted his office to Vijayawada and Form No.INC 22 shows that the office was shifted to Vijayawada on 03.08.2021 itself this Tribunal allowed the application filed seeking to set aside the *ex-parte* order. Now the Counsel for the Corporate Debtor, by relying on the observations made by this Court contends that Form-3 notice was not served and hence, the application is liable to be dismissed *in limine*. In answer to the said contentions, the Counsel for the Operational Creditor submits that it was only due to typographical mistakes that the dates were mentioned wrongly in the application but the track record shows that the notice was served on 20.07.2021. Even according to the Counsel for the

Corporate Debtor the office was shifted to Vijayawada on 03.08.2021 and the notice was delivered before 03.08.2021 which may be either on 27.07.2021 or 20.07.2021. The track record clearly shows that the item is delivered. Hence, when the office was functioning at Vishakhapatnam by 20.07.2021 and 27.07.2021 it has to be assumed that the notice was delivered. Due to the said fact not being brought to the notice of the Court during the hearing of the Interlocutory Application filed seeking to set aside the *ex-parte* order, the Tribunal relied on the dates mentioned in the application and observed as such. But considering the track record, it has to be held that the notice was duly served on the Corporate Debtor. Even in the counter, the stand taken by the Corporate Debtor is that the notice was not served on the responsible officer or employee of the Corporate Debtor since, the management of the Corporate Debtor has changed in the course of the time. It is not contended that the office was shifted by then. Hence, this point is answered by holding that Form-3 notice was duly served on the Corporate Debtor. However the same might have lost sight of the concerned due to the work of shifting the office having been going on.

<u>Point No. II:</u>

The Operational Creditor, as already observed, has been ordered into Corporate Insolvency Resolution Process (CIRP) and this application is preferred by the Resolution Professional (RP) appointed by the Tribunal. During the course of CIRP it came to the notice of the RP that a debt was due from the Corporate Debtor. Hence, this application is filed. The claim is based on certain invoices which are admittedly not accompanied by any purchase orders and are not acknowledged by the Corporate Debtor. The ledger account filed by the Corporate Debtor and the Operational Creditor does not match with regard to the cash payments allegedly made by the Corporate Debtor. The contention of the Counsel for the Corporate Debtor is that they always made payments through bank and no cash payments were made by them. Only one assumption supports the truth of the cash transactions, ie. if the cash payments are not really made, the Operational Creditor would not reflect the same in the ledger account as the same would add to the estate of the Operational Creditor and the Operational Creditor has to account for the same, which would not be to the benefit of the Operational Creditor in the given circumstances. However, merely on the basis of such assumption, unless it is proved legally, it cannot be accepted that cash payments were made by the Corporate Debtor. It remains to be a disputed question of fact which cannot be adjudicated by this Tribunal. The Counsel for the Operational Creditor contends that there was no response from the Corporate Debtor for the demands made by the Operational Creditor on 09.04.2021 and 10.05.2021 by virtue of the letters addressed to the Corporate Debtor. The reason for there being no response for the said letters, as contended by the Counsel might be due to the change of management and disturbances caused due to the change. The burden remains on the Operational Creditor to prove the debt and the default. As already observed, except the invoices and the ledger account which is not supported by any evidence with regard to the cash transactions there is no other material placed before this Tribunal. The counsel for the OC, along with the written submissions, filed balance sheets to show that the claim amount is due from the CD. The said documents are not admissible, since they are not filed in accordance with the procedure. Even assuming that they are true, there is no specific mention about the debt of the CD. It only shows receivables. As to from whom, is not mentioned. The CD also filed balance sheets. Equally solemn documents are filed by both the parties, like balance sheets and ledger copies. Hence the contentions of both the counsel cannot be accepted. Since the burden of proving the debt is on the OC, he fails due to non filing of any supporting documents to the invoices. Failure to reply to the demand notice, has an assumed reason. Moreover mere failure to reply, does not entitle the OC for the prayed reliefs.

The admitted liability is Rs.18 Lakhs and odd. The argument of the Counsel for the Corporate Debtor with regard to the said debt due is that it is below the threshold limit of Rs.1 Crore and hence, an application under IBC is not maintainable even if it is considered that the said amount is due and is defaulted. The said argument is cogent since, the threshold limit of Rs.1 Lakh is done away with by virtue of the Notification No.1205(E), dated 24-3-2020. The judgments relied upon by the Counsel for the Corporate Debtor are not taken up for discussion, as even otherwise, on the premise of the above discussions the Petition fails and is accordingly, dismissed.

Point No. III:

In the result, the CP (IB) No.52/9/AMR/2021 is dismissed.

Sd/-

JUSTICE TELAPROLU RAJANI
MEMBER JUDICIAL

Swamy Naidu