

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

Company Appeal (AT) (Insolvency) No. 85 of 2021

[Arising out of order dated 2nd November, 2020 passed by the Adjudicating Authority (National Company Law Tribunal) Ahmedabad Bench in CP (IB) No. 808/9/NCLT/AHM/2019]

IN THE MATTER OF:

Tijaria Polypipes Limited.

Through its Authorized Signatory
Mr. Vikas Jain Tijaria
Having Office at
SP-1-2316, RIICO Industrial Area,
Ramchandrapura (Sitapura Extn.)
Jaipur RJ 302022.

...Appellant

Versus

Kevadiya Construction Pvt. Ltd.

Through its Authorized Signatory
Having Office at
1, Suketu Complex, Second Floor,
Near Aastha Buglows, New India Colony Road,
Nikol, Ahmedabad 382350.
(erstwhile registered office)

FF-406, Abhishree Complex,
Opp. Om Tower, Satellite Road,
Ambawadi, Ahmedabad GJ 380015
(Present registered office)

...Respondent

Present:

For Appellant: Mr. Anurag Kalavatiya, Advocate.

For Respondent: Mr. Arpit Singhvi and Ms. Ranu Purohit, Advocates.

J U D G M E N T

DR. ASHOK KUMAR MISHRA, TECHNICAL MEMBER

This Appeal has been filed under Section 61 of the Insolvency and Bankruptcy Code, 2016 ('IBC' for short) challenging the impugned order dated 2nd November, 2020 passed by the Adjudicating Authority (National Company Law Tribunal) Ahmedabad Bench in CP (IB) No. 808/9/NCLT/AHM/2019 dismissing the petition filed by the Operational Creditor under Section 9 of the IBC. Adjudicating Authority has dismissed the petition particularly on the ground of dispute regarding quality of the goods supplied by the Appellant. The other ground is that the consignment number given in the track report and in the postal receipt does not match, thereby reflecting the non-service of notice under Section 8 of IBC and there are other grounds also for dismissal of the Application.

2. The brief profile of the case is as under:

The Appellant is engaged in the business of manufacturing of various plastic products like HDPE, PVC pipes, ducts, tubes, etc. and they are supplying it to the customers across the country.

The Respondent issued Purchase Order dated 9th March, 2018 to the Appellant for purchase of goods and also made an advance payment on 29th

March, 2018 of an amount of Rs.9,65,554/- pursuant to which the Appellant supplied goods to the Respondent. The Appellant supplied total value of goods worth Rs.91,57,699/- to the Corporate Debtor. However, upon delivery of the entire goods, the Respondent wrote an email dated 24th May, 2018 to the Appellant raising certain objections in respect of quality of goods supplied by the Appellant and Appellant immediately took action to lift/ take back some defective goods from the site of the Respondent and upon taking back such goods issued seven credit notes equivalent to the value of goods taken back i.e. Rs.47,51,473/- and a balance amount after adjusting advance of Rs.34,40,672/- remained due from the Corporate Debtor. Since the Respondent failed in making the payment of balance outstanding dues of the Appellant, the Appellant issued demand notice under Section 8 of the IBC dated 27th June, 2019 demanding a payment of Rs.41,21,405/- which included principal outstanding as stated above of Rs.34,40,672/- and balance being interest. The same demand notice was sent to the Registered Office of the Respondent through Speed Post. In spite of demand notice, they did not get back the payment and hence filed the petition before Adjudicating Authority.

3. The Learned Counsel for Appellant has submitted that they have attached the acknowledgement due slip of postal authorities along with tracking record. They made all attempts to prove that there is no difference in the consignment given in the track report and in the postal receipt. He has also submitted that through email in October, 2018 they have communicated to the Respondent that

they will lift some requisite materials which they have done and still they are not getting the balance payment. Hence, they have no other alternative but to approach the Adjudicating Authority. The Adjudicating Authority has dismissed the petition in an arbitrary manner by holding that a dispute exists between the parties before issuance of demand notice dated 27th June, 2019 regarding quality of the goods supplied by the Appellant as Operational Creditor to the Respondent as Corporate Debtor.

4. The Learned Counsel for the Respondent has submitted that the Purchase Order dated 9th March, 2018 for supply of Pipes has clearly mentioned the description of the Pipes in the said purchase order. The Purchase Order contains binding terms and conditions accepted by both the parties and hence binding on both the parties in accordance with the provisions of law. They have also submitted that all the materials supplied by the Appellant as per Page 90 (in the Appeal Paper Book) through email they have communicated that entire material is defective and has raised quality issue vide email of October 13, 2018 and Respondents responded as below:

“Dear Sir,

As per given below mail, this is to request you to kindly share with us your store location from where we lift the complete material.

Kindly provide us complete address along with contact person name and contact details so that we can arrange the transportation accordingly.”

Even the same was communicated by the Appellant that they will lift the complete material and ask the Respondent to provide contact person and contact details so that they can organize transportation accordingly. Instead of lifting of complete material they have lifted partially the material and has provided the credit notes. They have not lifted the complete materials and are accordingly demanding the balance payments even for those unlifted defective materials.

5. The Respondent has also submitted that they have not received the demand notice and accordingly has not responded for the same. They also stated that they have provided track report without providing the Post Office Receipt.

6. We have carefully considered the submissions of the parties and have gone through the records. An analysis of the same reveals that the Appellant itself has accepted and agreed to lift the complete material being defective and has failed to lift the material which is of no use to the Corporate Debtor. However, the Appellant is pressurizing using the provisions of IBC to recover the money forcefully as IBC immediately changes the management of the Company.

7. It is also very much clear that they have not filed the Postal Receipt before this Tribunal which proves the fact that there is some mismatch between Consignment Number given in the Track Report and Postal Receipt. Hence, the

finding of Adjudicating Authority is correct. It is also proved from the email that the Appellant has accepted the fact that the material is defective and substandard and failed to lift the complete material.

8. The requisite conditions necessary to trigger the Corporate Insolvency Resolution Process under Section 9 of the IBC are:

- a) Existence of a debt due and its default by the corporate debtor.
- b) Delivery of demand notice of an unpaid and undisputed debt.
- c) There is no payment of the unpaid and undisputed debt within the period of 10 days of receipt of demand notice.
- d) There is no pre-existing dispute.

9. In the present case the delivery of demand notice itself is a grey area and Adjudicating Authority has rightly held so. In addition to that there is also a pre-existing dispute.

10. Furthermore, this is the case of chasing of payments under the pressure of IBC. Hon'ble Supreme Court in *Civil Appeal No. 9597 of 2018, "Transmission Corporation of Andhra Pradesh Limited vs. Equipment Conductors and Cables Limited"* vide Para 15 has already held that IBC is not intended to be a substitute to a recovery forum and also laid down that whenever there is existence of real dispute, the IBC provisions cannot be invoked.

11. In view of this, we do not find any infirmity in the order. The Appeal deserves to be dismissed and is dismissed and no order as to costs.

[Justice Ashok Bhushan]
Chairperson

[Justice Jarat Kumar Jain]
Member (Judicial)

[Dr. Ashok Kumar Mishra]
Member (Technical)

Date: 17th November, 2021
New Delhi.

Archana.