NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Ins.) No. 1088 of 2022

[Arising out of order dated 20.07.2022 passed by the Adjudicating Authority, National Company Law Tribunal, Ahmedabad Bench in CP (IB) No. 251/9/NCLT/AHM/2019]

IN THE MATTER OF:

Shah Paper Mills Limited,
209, 2nd Floor, ML Spaces,
Dashratlal Joshi Road,
Vile Parle (W),
Mumbai – 400 056

And factory at
Plot No. 5202, 3rd Phase GIDC,
Vapi – 396195, Gujarat **...Appellant**

Versus

M/s Shree Rama Newsprint & Paper Limited,
Village: Barbodhan,
Taluka: Olpad, District: Surat,
Gujarat **...Respondent**

Present:

For Appellant	**:**	**Mr. Shivek Trehan, Mr. R. Singh and Ms. Shagun Chopra, Advocates**
For Respondent	**:**	**Mr. Joseph Pookkatt, Mr. Vaibhav Dwivedi and Mr. Dhawesh Pahija, Advocates**

J U D G M E N T

[Per: Barun Mitra, Member (Technical)]

The present appeal filed under Section 61 of Insolvency and Bankruptcy Code 2016 (**'IBC'** in short) by the Appellant arises out of the Order dated 20.07.2022 (hereinafter referred to as **'Impugned Order'**) passed by the Adjudicating Authority (National Company Law Tribunal, Ahmedabad, Division Bench Court-I) in CP(IB) No.251/9/NCLT/AHM/2019. By the Impugned Order, the Adjudicating Authority dismissed the application filed under Section 9 of the IBC by the Operational Creditor for initiation of Corporate Insolvency Resolution Process (**'CIRP'** in short) against the Corporate Debtor. Aggrieved by this impugned order the present appeal has been preferred.

2. Making his submissions, the Learned Counsel for the Appellant stated that M/s Shah Paper Mills Limited, Operational Creditor/Appellant had business relationship with M/s Shree Rama Newsprint and Paper Limited, Corporate Debtor/Respondent for supply of packing wrappers. The Corporate Debtor/Respondent issued purchase orders to the Appellant for supply of the goods against which invoices were raised by the Appellant. It was further stated that the Corporate Debtor made payments "on account basis" system on "first in first out" basis. Thus, payments received from the Corporate Debtor was adjusted by the Appellant towards preceding transactions and a running account of the Corporate Debtor was maintained in their book of accounts.

3. On the salient terms and conditions to be followed in respect of their business transactions, it was further submitted that both parties had agreed that in case of goods supplied by the Operational Creditor was rejected by the Corporate Debtor, a debit note would be raised by the Corporate Debtor and the rejected material would be returned to the Operational Creditor. It was also agreed that the Operational Creditor would adjust the value of any waste paper purchased from the Corporate Debtor.

4. The last invoice for goods supplied was sent by the Operational Creditor to the Corporate Debtor on 29.07.2016. The Learned Counsel for the Appellant asserted that the invoice dated 29.07.2016 was followed up with several reminders to the Corporate Debtor to clear the outstanding dues including a reminder on 14.04.2017 seeking payment of Rs. 70,76,730/- as the amount outstanding and payable by the Corporate Debtor as placed at page 32 of Appeal Paper Book (**'APB'** in short)]. It was emphatically pointed out by the Learned Counsel for the Appellant that the Corporate Debtor in their reply on 15.04.2017 clearly admitted the liability to pay Rs. 37,33,552/- as placed at page 33 of APB.

5. The Learned Counsel for the Appellant further pointed out that though the Corporate Debtor had clearly admitted outstanding liability of Rs. 37,33,552/-, it was informed over email on 27.12.2017 to the Corporate Debtor that as per their books of accounts, an amount of Rs.63,52,398/- was receivable from the Corporate Debtor and that after adjusting Rs.8,19,060/- towards purchase of waste paper, a net receivable amount of Rs.55,23,253/- was due from them. The said email also pointed out that the Corporate Debtor

had issued debit note of Rs.1,74,453/- towards rejection of paper and that the rejected lot of paper was however not sent back to the Appellant. The Appellant had, therefore, requested the Corporate Debtor to either return the rejected goods or cancel the debit note. The Learned Counsel for the Appellant also submitted that no disputes had been raised by the Corporate Debtor with regard to deficiency in supply of goods.

6. Since the outstanding dues remained unpaid, the Appellant issued a demand notice on 28.11.2018. A reply was furnished thereto by the Corporate Debtor on 11.12.2018 which was however beyond the timeline prescribed under the IBC.

7. On the contents of the reply to the Demand Notice as furnished by the Corporate Debtor, it was submitted by the Learned Counsel for the Appellant that the Corporate Debtor has taken a stand that as there was a change in the management of the company as per Share Purchase Agreement dated 21.05.2015, all invoices pertaining to the period post-change of the management have been paid in full and that there was no outstanding dues. The Learned Counsel for the Appellant strenuously contended that the Operational Creditor cannot be denied their legitimate dues simply because a new management had taken over the Respondent company. It has been further argued that the new management was liable to clear all the dues including dues for the period prior to the change of management since the new management had taken over the Respondent company with all liabilities.

8. Refuting the submissions made by the Appellant, the Learned Counsel for the Respondent has contended that the present matter is not maintainable since the Appellant at no stage crystalized the actual amount that had become due and that different amounts was claimed at different points of time as the outstanding amount. It has also been claimed that payment for all invoices raised against purchase orders between 25.07.2015 and 28.02.2017 had already been cleared and that an excess payment of Rs.82,141/- had been made by the Corporate Debtor to the Operational Creditor. The Learned Counsel for the Respondent pointed out that Adjudicating Authority in the impugned order has correctly noted that as there was a serious dispute with regard to amount payable between the parties, the parties need to approach the proper forum in this regard.

9. It was further pointed out that the Corporate Debtor in their letter dated 15.04.2017 had mentioned that an amount of Rs. 37,33,552/- was the balance amount in respect of the invoices raised before 25.07.2015 being the date on which the first invoice was raised by the Operational Creditor post change of management of the Respondent company. Further, the Operational Creditor had failed to reconcile their accounts despite the requests of the Corporate Debtor made on 22.06.2017 to produce relevant documents to show that an amount of Rs.37,33,552/- was due to the Appellant. Though this letter of 22.06.2017 was acknowledged by the Appellant, they failed to produce any document for reconciliation purposes and that this letter of 22.06.2017 has been intentionally suppressed by the Appellant.

10. We have duly considered the arguments and submissions advanced by the Learned Counsel for both the parties and perused the records carefully.

11. The issue in the present case before our consideration is whether any operational debt above the threshold limit had become due and payable to the Operational Creditor and a default in payment thereof had arisen and whether any pre-existing dispute can be deciphered.

12. A well settled legal proposition has been laid down in Para 34 of ***(2018) 1 SCC 353, Mobilox Innovations Private Limited vs. Kirusa Software Private Limited*** as to how the Adjudicating Authority has to examine an Application under Section 9. Para 34 is as follows:-

> *"34. Therefore, the adjudicating authority, when examining an application under Section 9 of the Act will have to determine:*
>
> *(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."

13. Coming to the facts of the present case on whether operational debt being due and payable has remained unpaid or not, we note that the Appellant has contended that the Corporate Debtor on 15.04.2017 has by way of an email communication unequivocally admitted that as per their books of accounts, an amount of Rs.37,33,552.10 is due to the Operational Creditor. This email emanated from one Pankaj Jaiswal, (pkjaiswal@ramanewsprint.com) of Rama Newsprint has been placed at page 33 of APB and it would be useful to reproduce the same:

> *"Dear Sir,*
>
> *As per our books of account balance of your account is Rs.37,33,552.10 cr (Shah Paper Mills Ltd)*
> *With Regards,*
> *Pankaj Jaiswal*
> *Mob.-08238056077"*

14. We also find another communication thereafter from the Operational Creditor to the Corporate Debtor dated 27.12.2017 in which the Corporate Debtor has been requested to immediately release the payment of the outstanding amount as already admitted by them in their books of accounts. The same email has also elaborately explained how a net amount of Rs.55,23,253/- is receivable from the Corporate Debtor. The said email communication is also extracted below: -

> *"Wednesday, December 27, 2017*

To,
Mr. F.R. Bohraji
Dy. General Manager (Finance & Accounts),
M/s. Shree Rama Newsprint Limited,
Village: Barbodhan, Taluka: Olpad, Dist: Surat

Sub: Your Letter dtd. 22.06.2017 regarding Accounts Reconciliation

Dear Sir,

With reference to your above letter dtd. 22.06.2017, and subsequent meetings Mr. Rajkumar Bhatt had with you on 30.12017, we would like to bring to your kind notice that as per Our Books of Account, Rs. 63,52,398 is receivable from you & Rs.8,19,060 is payable to you towards the Purchase of waste paper as on today. So Net of Rs. 55,23,253 receivable from you.

Whereas your books have shown only Rs. 37,33,552 as payable to us. Rs. 1,74,453 deduction was made by you towards the rejection of paper (But material not yet received by us). So, we request you to cancel the debit note at your end or send the material. So the amount payable to us should be Rs. 39,08,005 as per your record.

As per above, the difference between Shah Paper Mills account & Shree Rama News Print Ltd is Rs.16,15,248.

So the total amount payable to us will be Rs.39,08,005 plus Rs. 16,15,248 which was wrongly debited by you becomes an amount of Rs.55,23,253.

However you are requested to kindly release the payment of Rs.39,08,005 immediately which is as per your books of account, without any further delay.

Regarding Rs. 16,15,248, which is wrongly debited by you, we will sort out at a later stage.

Thanks & Regards,
ASHOK Z SHAH
SHAH PAPER MILLS LTD"

15. We find that the Adjudicating Authority has also taken note of the fact that the Corporate Debtor has admitted that a debt of Rs.37,33,552.10 as due and payable to the Operational Creditor. The relevant paragraph of the impugned order is reproduced below: -

"6. The Operational Creditor itself produced on record along with the rejoinder, the correspondence that has taken place between the Operational Creditor and the Corporate Debtor, prior to the issuance of the Demand Notice. More particularly, the letter from Operational Creditor to Corporate Debtor dated 14.04.2017 whereby the Operational Creditor called upon the Corporate Debtor to pay a sum of Rs.70,76,730/-. <u>The Corporate Debtor replied to the aforesaid letter vide email dated 15.04.2017 pointing out to the Operational Creditor that as per their account statement Rs.37,33,552.10 is only due and payable.</u> The Operational Creditor sent one more letter dated 27.12.2017 giving some calculations calling upon the Corporate Debtor to pay Rs.55,23,253/-."

(Emphasis supplied)

16. However, the Adjudicating Authority has further held that there was a difference of opinion between the Operational Creditor and the Corporate Debtor on the amount which was due and payable. While the Operational Creditor claimed a sum of Rs.55 lakhs and odd, the Corporate Debtor claimed that the entire due is paid including a sum of Rs.82,141/- paid in excess. The Adjudicating Authority came to this conclusion on the basis of reply filed by the Corporate Debtor to the Section 8 notice. The relevant portion of the impugned order is as under: -

"8. It appears from the above evidence on record that there is a dispute even prior to the Demand Notice about the exact amount due

and payable by the Corporate Debtor to the Operational Creditor. This Adjudicating Authority is sitting in a limited jurisdiction cannot dwell upon the issue as to whose account is accurate and correct. <u>There appears a serious dispute about the actual amount payable by the Corporate Debtor to the Operational Creditor.</u> In fact, the Corporate Debtor contends that nothing is due and payable now. The Corporate Debtor informed this fact in its reply to the notice."

(Emphasis supplied)

17. It is well settled that in Section 9 proceeding of IBC, the Adjudicating Authority is not to enter into final adjudication with regard to existence of disputes between the parties regarding the operational debt but what has to be looked into is whether the defence raised by the Corporate Debtor is moonshine defence or not.

18. It has been noted by the Adjudicating Authority that there is no prior dispute regarding quality of goods or material supplied. What however has been held as dispute by the Adjudicating Authority is the difference of views on the actual amount payable by the Corporate Debtor to the Operational Creditor. One reason for this difference to have cropped up is on account of express unwillingness on the part of the Corporate Debtor to clear the liability of outstanding debt for the period prior to change of management. The other reason for the difference has been attributed by the Corporate Debtor to non-reconciliation of accounts.

19. Since the Adjudicating Authority has come to the conclusion of a "serious dispute" between the Operational Creditor and Corporate Debtor on the quantum of operational debt due and payable by placing reliance on the reply of the Corporate Debtor to the Section 8 notice, it may be appropriate at this stage to peruse the said reply dated 11.12.2018 and find out if the contentions contained in the reply are plausible.

> *"11.12.2018*
>
> *Shah Paper Mills Limited*
> *Plot no 5202*
> *3rd Phase*
> *GIDC*
> *VAPI – 396195*
>
> *Dear Sir*
>
> *Subject – Demand notice – Form 3 under IBC Code 2016 dated 28.11.2018. For payment of dues – Rs 5523253*
>
> *We would like to bring to your notice that there was change in management of the company as per Share Purchase Agreement dated 21.5.2015 and you have been dealing with the company much before the change in management.* ***All the invoices [post change in management] raised by you have been paid in full and there is no outstanding.***
>
> *You have selectively attached certain invoices with your notice dated 28.11.2018 totaling to Rs.70 70 445 whereas as per annexure B the amount indicated is Rs.63 42 321 and thus somehow you have tried to derive figure of Rs.55 23 253 after considering credit invoices of Rs 8 19 068 from the so called figure of Rs 63 42 321. There is no ledger statement attached to substantiate the same.*
>
> *We had requested you to produce any document for reconciliation of account done with the company in the past vide our letter dated 22.6.2017 but instead of producing any document you keep on sending letters after letters demanding payment as stated in your notice dated 28.11.2018.* ***You have been mentioning receipt of our letter dated 22.6.2017 in all your letters but without responding to contents of the said letter dated 22.6.2017.***

> ***We would like to inform that no amount is payable to you and the amount demanded by you pertains to the period prior to change in management in 21.5.2015*** *for which no confirmation was forthcoming from you and without prejudice to the same otherwise also the amount demanded is time barred.*
>
> *Thanking you*
> *Yours faithfully,*
>
> *P K Mundra*
> *President [Finance] & Company Secretary"*

[Emphasis supplied]

20. After perusing the above reply, we find that the Adjudicating Authority has glossed over the fact that the Corporate Debtor has not controverted the outstanding liability which it had admitted on 15.04.2017. Furthermore, claiming that no amount is due and payable to the Operational Creditor, we find that the Corporate Debtor has made this statement with the caveat that only invoices, post change in management, have been paid in full. To our mind, this caveat needs to be examined to find out whether it supports the claims of there being a pre-existing dispute.

21. We are of the considered view that the stand taken by the Corporate Debtor in their reply to the Demand Notice that they are not liable for the claims of the Operational Creditor prior to change in management is not a tenable argument. Change in management is an internal matter of the Corporate Debtor in which the Operational Creditor had no role to play. Change in management of the Corporate Debtor cannot be a ground for extinguishing/wiping off the past liabilities that they owed to the Operational Creditor. Therefore, it is not open for the Corporate Debtor to contend that

they were not liable for the outstanding liability which had accrued during the period of the previous management and hold this as a ground of dispute. The untenablity of this contention is reinforced by the fact that they had already categorically acknowledged and admitted their outstanding liability in their communication dated 15.04.2017.

22. From the facts of the present case and the material on record, it also appears that the Corporate Debtor has tried to take advantage of their own wrong of being lackadaisical in reconciling the accounts in spite of nearly 30 requests made by the Operational Creditor to do so. In the entire discussion by the Adjudicating Authority, we find that no notice has been taken in respect of repeated and multiple reminders sent by the Operational Creditor to the Corporate Debtor in this regard including undertaking visits to the office of the Corporate Debtor as placed at pages 49-60 of the APB and one such illustrative letter is as below: -

> *"Monday, November 12, 2018*
> *Reminder – 30*
>
> *To,*
> *M/s Shree Rama News Print Ltd.,*
> *Surat.*
>
> *Kind Attn. Mr. Manoj Khandewal/Mr. P.R. Bohra/ Mr. Pankaj Jaiswal*
>
> *Subject: Your letter dtd. 22.06.2017 regarding Reconciliation of Accounts*
>
> *Dear Sir,*
> *This is to inform you that our representative Mr. Raj Bhatt visited your office on November 30, 2017 for reconciliation of our account statement. However no one is ready to take up the issue and resolve this matter. The undersigned personally visited Mr. Manoj Khandewal on February 15, 2018 and had a long discussion on this*

matter to solve the long overdue payments and wrong deductions also. Mr. Manoj Sir informed that as per the management decision, he was ready to release the payments as per your books of accounts i.e. Rs.39,08,005 and the same to be released in monthly installments and balance amount of Rs.16,15,248 is to be write-off by us.

I have also contacted Mr. Siddharthji, in mid-March but he denied to look into Rama Newsprint Co. old Account and asked us to contact Mr. Manoj Khandelwal.

Our Books of Account shows an amount of Rs. 55,23,253 as receivable which is to be released by you out of which Rs.16,15,248 has been wrongly debited by you towards deduction which is also payable by you.

We have been sending several reminders through different methods of communication like e-mails as well as by post. In this regards we have already sent you reminders on 2.4.18, 9.4.18, 16.4.18, 23.4.18, 30.04.18, 7.5.18, 14.5.18, 21.5.18, 28.5.18, 4.06.2018, 11.6.18, 18.6.18, 25.6.18, 02.07.18, 09.07.18, 16.07.18, 23.7.18, 30.7.18, 06.08.18, 13.8.18, 3.09.18, 10.09.2018, 17.09.18, 24.09.18, 01.10.2018, 08.10.18, 15.10.18, 22.10.18, 29.10.18 & 05.11.18 respectively. *You are requested to release at least Rs.39,08,005 as per your books immediately without any further delay and for the balance amount we will try to reconcile at both ends.*

Hence we once again request you to release the payment immediately.

Thanks & Regards,

ASHOK Z SHAH
SHAH PAPER MILLS LTD. VAPI,
Cell No.:+91-9879788988"

[Emphasis supplied]

23. For reasons cited in the foregoing paragraphs, both these grounds lack merit to be treated as pre-existing dispute and appear to be clearly motivated by the Corporate Debtor to wriggle out of their obligation to clear outstanding

liabilities and therefore the defence raised is at best a moonshine defence and hence untenable.

24. In the result, we are thus of the view that ground for rejection of the Application under Section 9 of IBC was erroneous. Appeal is allowed. We set aside the Impugned Order dated 20.07.2022 and direct the Adjudicating Authority to pass an order of admission of Section 9 Application under IBC within a period of one month from the date when the copy of this order is produced and to take further steps in accordance with the law. No order as to costs.

[Justice Ashok Bhushan]
Chairperson

[Dr. Alok Srivastava]
Member (Technical)

[Barun Mitra]
Member (Technical)

Place: New Delhi
Date: 21.12.2022

PKM