NATIONAL COMPANY LAW APPELLATE TRIBUNAL. PRINCIPAL BENCH,

NEW DELHI

Comp. App. (AT) (Ins) No. 96 of 2023 & I.A. No. 383, 386, 387 of 2023
IN THE MATTER OF:

Rajesh Kumar Pandey **...Appellant**

Versus

KK Steels & Anr.

...Respondents

Present:

For Appellant : Mr. Alok Jagga, Eshna Kumar, Shubham Jaiswal, A.P.S. Madan, Advocates

For Respondent : Mr. Abhishek Anand, Mr. Karan Kohli, Advocates for R1
Mr. Tanveer Oberoi, Adv. for R2

O R D E R

Per: Justice Rakesh Kumar Jain: (Oral)

03.11.2023: This appeal is directed against the order dated 11.01.2023 passed by the Adjudicating Authority (National Company Law Tribunal, Chandigarh Bench, Chandigarh) by which an application bearing C.P. (IB) 410/CHD/PB/2019 filed by the Respondent (Operational Creditor) under Section 9 of the Insolvency and Bankruptcy Code, 2016 (in short 'Code') for the resolution of an amount of Rs. 55,37,841/- has been admitted.

2. In brief, the Operational Creditor is engaged in the business of trading in steel and scrap of steel products whereas the Corporate Debtor use scrap as raw material. There were regular transactions between the parties in regard to the supply of scrap. However, the Respondent issued a demand notice dated 08.04.2019, in terms of Section 8 of the Code, demanding a sum of Rs. 55,37,841/- on account of non-payment of the goods. As per the Appellant, the demand notice was never received and consequently, reply could not be filed to it.

3. Be that as it may, the Respondent then filed an application under Section 9 of the Code on the prescribed proforma alleging that the default is continuing of the payment of the goods supplied.

4. The case set up by the Respondent on the basis of various invoices starting from 12.04.2018 to 16.07.2018. Reply to the application was filed by the Appellant herein and rejoinder was also filed by the Respondent herein. The Appellant contested the application in terms of provision of Section 8(2)(a) of the Code and pressed as many as four emails dated 30.06.2018, 21.07.2018, 17.08.2018 and 31.03.2019 to contend that all the emails are prior to the issuance of the notice under Section 8 of the Code dated 08.04.2019 in which the Appellant had made a complaint to the Respondent about the poor quality of the scrap and has even gone to the extent that because of the poor quality the furnace of the Appellant got punctured. The Adjudicating Authority admitted the application of the Respondent, inter alia, on the ground that the Appellant had taken the advantage of Form 27C of the Income Tax Act of the material received and continued its relations of purchase of the scrap despite the defect having been pointed out in the earlier emails. The Adjudicating Authority also observed that the Appellant has failed to bring on record the evidence regarding return of defective goods and that debit note allegedly of an amount of Rs.58,65,585/- was ever communicated to the Respondent as a counter claim.

5. Aggrieved against the aforesaid decision of the Adjudicating Authority, the present appeal has been filed.

6. Counsel for the Appellant has first challenged the finding recorded in Para 10 of the impugned order which read thus “the Corporate Debtor has

taken the benefit of Form 27C under the Income Tax Act as well as of the input Tax Credit of goods and services tax paid by the Petitioner on the said goods. Keeping in view of the above facts, especially the appropriation of the Tax benefit by the Corporate Debtor, we hold that there is a categorical acknowledgement and admission of debt by the Corporate Debtor. Also, after making the declarations under the statutory Form 27C, the Corporate Debtor cannot subsequently claim that the goods were defective and hence, not consumed in manufacturing activities". In this regard, he has relied upon a decision of this Court rendered in the case of Oyster Steel & Iron Pvt. Ltd. Vs. Brilliant Metals Pvt. Ltd. CA (AT) (Ins) No. 1089 of 2020. It has been held in this case that:

> "11. It is the case of the Appellant that the Corporate Debtor had issued Form C to the Operational Creditor on 18.05.2016 certifying the purchases by detailing the bill numbers, dates of transactions and value of goods and that these are identical to the record maintained by the Operational Creditor in its ledger thus establishing operational debt. It is the contention of the Appellant that the very fact that the Form C was issued shows that the contracted amount of goods has been delivered. The Learned Counsel for the Appellant relying on the judgment of the Hon'ble High Court of Delhi in Chemical Systems Technologies (India) Pvt. Ltd. Vs. Simbhaoli Sugar Mills Ltd., 2013 SCC Online DEL 416 submitted that issue of Form C is acknowledgment of having purchased the goods of value thereof. The Learned Counsel for the Appellant also stated that the Corporate Debtor was required to clear debts within 120 days of the sale transactions in terms of an oral agreement and that the Corporate Debtor was liable to pay interest on late payment @ 18% per annum from the date of sale transaction which was mentioned on the invoices issued.
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> 12. The Learned Counsel for the Respondent countered the submission of the Appellant and stated that issuance of Form C/TDS is akin to statutory compliance and does not fall under the category of acknowledgment of liability. At best, it is a proof of receipt of invoices. The Learned Counsel for the Respondent further contended that the Operational Creditor had not produced any statement of account or balance sheet of the Corporate Debtor

> where the amount alleged to be claimed by the Operational Creditor is shown as admitted or acknowledged as debt in favour of the Operational Creditor. The claim is based upon mere surmises without any concrete evidence. It was also contended that the Section 9 application was not maintainable as the alleged invoices were never acknowledged by the Corporate Debtor and were generated by the Operational Creditor.
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> 13. We are of the considered view that there is sufficient weight in the stand taken by the Corporate Debtor that merely on the basis of TDS, no operational debt liability can be fastened on the Corporate Debtor. Moreover, such an assumption would fail to take into account disputes, if any, raised with regard to adjustment of prices or quality of goods or delay in delivery of goods.

7. He has then referred to other findings recorded by the Adjudicating Authority which is recorded in Para 12 of the impugned order which read as under:-

> "The subsequent bills of purchase by the CD raise a reasonable question against the claim of the CD as despite the so-called poor quality of scrap supplied by the Petitioner-OC, the Respondent – CD continued to place the demand orders for the same goods from the OC."

8. In this regard, he has drawn our attention to the ledger which is also refereed to Para 11 of the impugned order. It is contended that there have been transactions between the parties at short intervals on account of need of the Appellant for the raw material (scrap) and by that time the goods supplied by the Respondent could not have been deciphered to be of poor quality as it required time to find out as to whether the said goods still scrap (involving lead, sica element). He has also argued that even if it is presumed that the Appellant has been continuing even after the complaint was made of the inferior quality of goods supplied, it could not be made the basis for admitting the application against the Appellant treating it to be case of estoppel. In this regard, he has referred to two decisions of this Court first in

the case of Eastern Electrodes & Koke Pvt. Ltd. Vs. Bhaskar Sharachi Alloys Limited, CA (AT) (Ins) No. 931 of 2019 in which following observations have been made:-

> "5. The Adjudicating Authority has referred to this e-mail as well as an email dated 10.10.2014 (page 196) to hold that there were disputes raised with regard to the quality to CD. The Argument of the learned counsel for the Appellant is that even though the CD was raising issue of quality, still it went on placing orders for urgent supplies. According to the learned counsel, for such reason, the dispute raised should have been ignored.
> 6. We have gone through judgment of the Adjudicating Authority and considering the emails pointed out, it does appear that there were issues raised regarding quality but the CD appears to have been in urgency on 08.10.2014 as stock was running out and placed order for ECA paste (pg. 190). That by itself does not mean that the dispute regarding quality was not there or it was given up which required the parties to settle the matter between them."

9. And second decision in the case of XYKNO Capital Services Pvt. Ltd. Vs. Rattan India Power Limited, CA (AT) (Ins) No. 913 of 2022 in which following observations have been made:-

> "4. The Appellant was engaged for consultancy services and by letter dated 18.02.2015, which is a detailed letter, Corporate Debtor has informed the Operational Creditor regarding the poor performance of the consultancy service and loss of company business. The letter is a details letter where different items/instances were mentioned and the letter further clearly states that whole process of consultancy was managed in a very chaotic manner with poor end result. Submission of the Appellant that payment was never denied and contract continued even after letter dated 18.02.2015 also does not negate the dispute between the parties, since poor quality of service was explained by Corporate Debtor by letter dated 18.02.2015, hence, the dispute was very much there from the said date at least. Section 9 application was also objected by the Respondent and reply was filed raising dispute and refuting the claim of the Appellant. The Adjudicating Authority had come to the conclusion that there being pre-existing dispute application deserves rejection. The disputes pertaining to contractual issues are not to be resolved in Section 9

> proceedings. Present is not a case where there is undisputed debt for which insolvency can be asked by the Appellant to be initiated. We are of the view that no error has been committed by the Adjudicating Authority in rejecting Section 9 application, there being a preexisting dispute. There is no merit in the Appeal. Appeal is dismissed."

10. As regards, the Civil Suit having been filed, it is submitted that the said suit was filed on 06.05.2019 only for an amount of Rs. 3,27,743/-which was sought to be recovered by the Appellant after the debit note was raised. The Adjudicating Authority has recorded that even this suit was dismissed for non-prosecution but the Appellant has submitted that an application was filed for restoration which was allowed on 03.03.2023 and thus suit is now pending. He has submitted that emails starting from 30.06.2018 registers displeasure of the Appellant about the quality of supplied goods of the Respondent and hence warning was given but in the subsequent emails the dispute was raised about the poor quality. In the end, he has submitted that the Adjudicating Authority has committed an error in not appreciating these facts in right perspective, therefore, it is argued that the appeal may be allowed and the order may be set aside.

11. In reply, Counsel appearing on behalf of the Respondent has submitted that there is no error in the impugned order which calls for any interference by this Court. However, Counsel for the Respondent has been candid enough in admitting the fact that the findings recorded in respect of benefit having been obtained by the Appellant on account of Form 27C under the Income Tax Act is incorrect in view of law laid down by this court in the case of Oyster Steel & Iron Pvt. Ltd. (Supra). He has, however, submitted that there was no dispute raised by the Appellant and all the four emails dated 30.06.2018,

21.07.2018, 17.08.2018 and 31.03.2019 are not in existence and submitted that this point was also raised before the Adjudicating Authority but it is not denied by him that the Adjudicating Authority has not recorded any finding about the existence/non-existence of these emails and has rather referred to these emails in the impugned order. He has then drawn our attention to the debit note dated 31.03.2019 and submitted that debit note was not the part of ledger account which is supplied to the Respondent and is available at pg. 216 of the paper book, therefore, it is submitted that this debit note is concocted.

12. As regards the civil suit, it is submitted that the civil suit has been filed only for sum of Rs. 3,27,743/-. Had there been a debit note existing at that time then the civil suit should have been filed in regard to that amount also, therefore, this belies the theory of the debit note propounded by the Appellant. Counsel for the Respondent has not cited any judgments in support of his contention.

13. We have heard Counsel for the parties and perused the record with their able assistance.

14. The primary issue in this case is about the fact as to whether there is pre-existing dispute between the parties in respect of their transactions arising out of the various invoices about which we have referred to in the earlier part of this order. We have perused all the four emails i.e. 30.06.2018, 21.07.2018, 17.08.2018 and 31.03.2019 from which we have gathered that the Appellant has been raising the dispute with the Respondent after short intervals about the poor quality of the goods supplied to it. This is also a fact that the dispute was raised prior to the issuance of the demand notice dated

08.04.2019 and is thus not an afterthought. The theory propounded by the Appellant about the debit note, for the time being, may not be looked into because the Respondent has come to the Court for the purpose of admission of this application on the ground that the amount claimed by the Respondent is not being paid by the Appellant about which the Appellant has raised a dispute consistently about the poor quality of the goods supplied which itself is sufficient to decline the prayer made in the application. The Adjudicating Authority has committed a patent error in admitting the application under the impression that the Appellant had taken the advantage of Form 27C of the Income Tax Act which is not the correct position of law in view of the decision of this Court in the case of Oyster Steel & Iron Pvt. Ltd. (Supra) and that the thought process of Adjudicating Authority that since there has been subsequent orders placed by the Appellant before the Respondent for the purpose of supply of goods despite the poor quality of goods earlier, the decision rendered by this Court in the case of Eastern Electrodes & Koke Pvt. Ltd. (Supra) would be sufficient to demolish the said finding.

15. Thus, in view of the aforesaid discussion and looking from any angle, we are satisfied that the impugned order is patently erroneous and therefore, while allowing this appeal the impugned order is hereby set aside. No costs.

[Mr. Justice Rakesh Kumar Jain]
Member (Judicial)

[Mr. Ajai Das Mehrotra]
Member (Technical)

Sheetal/Ravi