

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, PRINCIPAL BENCH,
NEW DELHI

Company Appeal(AT) (Insolvency) No. 648 of 2022

[Arising out of order dated 23.05.2022 passed by the Adjudicating Authority, National Company Law Tribunal, Allahabad Bench, Prayagraj in CP(IB) No. 05/ALD/2020]

IN THE MATTER OF:

**Apurva Prasad
Erstwhile Director of Corporate Debtor,
Anindya Infratech Pvt. Ltd.
38C/28, A.N.Jha Marg, George Town,
Allahabad,
Uttar Pradesh – 211002.**

...Appellant

Versus

**1. Sanghvi Movers Ltd.
The Operational Creditor
Sy.No. 92, Tathawade
Taluka Mushi, Pune,
Maharasthra.**

...Respondent No. 1

**2. Anindya Infratech Pvt. Ltd.,
The Corporate Debtor,
Through Interim Resolution Professional,
38C/28, Hamilton Road, George Town, Allahabad
Uttar Pradesh – 211002.**

...Respondent No. 2

Present:

**For Appellant : Mr. Devvrat, Mr. Anup Kumar, Mr. Gaurav Singh,
Advocates.**

**For Respondents : Mr. Shikhil Suri, Komal Gupta, Madhu Suri, Ms.
Jyoti Suri, Ms. Nikita Thapar, Ms. Mahima Aggarwal,
Advocates for R-1.**

J U D G M E N T

[Per: Barun Mitra, Member (Technical)]

The present appeal, filed under Section 61 of the Insolvency and Bankruptcy Code, 2016 (**'IBC'** in short) by the Appellant arises out of order dated 23.05.2022 (hereinafter referred to as 'Impugned Order') passed by the Adjudicating Authority (National Company Law Tribunal, Allahabad Bench, Prayagraj) in C.P.(IB) No. 05/ALD/2020. By the Impugned Order, the Adjudicating Authority admitted the Section 9 application under IBC filed by the Operational Creditor and initiated Corporate Insolvency Resolution Process (**'CIRP'** in short) against the Corporate Debtor with immediate effect. Aggrieved by this impugned order, the present appeal has been preferred by the Corporate Debtor.

2. The brief facts of the case which are necessary to be noted for deciding the appeal are as follows: -

- Sanghvi Movers Ltd., Operational Creditor and Respondent No. 1 in the present case entered into an agreement with Anindya Infratech Pvt Ltd, the Corporate Debtor for supply of cranes on hire basis for construction of concrete structures of Indian Railway pursuant to which two Work Orders were issued.

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- The First Work Order was dated 17.10.2015 for which invoices were raised by Operational Creditor between the April, 2016 and June, 2016. This Work Order was completed by the Operational Creditor and all the invoices were cleared by the Corporate Debtor. Thus, admittedly, by both the Operational Creditor and the Corporate Debtor, all liabilities towards Work Order dated 17.10.2015 stood discharged. There is no dispute between the Operational Creditor and Corporate Debtor regarding this Work Order.
- The Second Work Order at pages 80-85 of the Appeal Paper Book (**'APB'** in short) was entered on 01.10.2016 between the two parties alongwith mobilisation advance of Rs. 5 lakhs only paid by the Corporate Debtor in terms of clause B (9) of the Work Order. Another important feature of the Work Order as per Clause-14 of General Terms and Conditions was that any delay in payment beyond 30 days, however not exceeding 60 days, was to attract interest @ 18% p.a. for the delayed period beyond 60 days from the date of submission of invoice.
- The first Demand Notice was issued by Operational Creditor/Respondent No. 1 on 04.07.2018 followed by a second Demand Notice on 21.01.2019 claiming unpaid operational debt of principal sum amounting Rs 19.95 lakhs and Rs 11.53 lakhs respectively alongwith interest. The erstwhile

Director of Corporate Debtor/Appellant has denied receipt of both the Demand Notices.

- As the operational debt remained unpaid inspite of the Demand Notice, the Operational Creditor/Respondent No. 1 filed a Section 9 petition on 18.11.2019 before the Adjudicating Authority claiming a sum of Rs 19.95 lakhs from the Corporate Debtor consisting of principal sum of Rs 11.53 lakhs and interest of Rs. 5.85 lakhs at the rate of 24% per annum.
- The Adjudicating Authority vide impugned order dated 23.05.2022 came to the conclusion that there being an outstanding operational debt of more than the threshold limit of Rupees one lakh due from the Corporate Debtor at the time of filing the Section 9 petition and the Corporate Debtor having defaulted in making payment of the debt due and further in the absence of any pre-existing dispute relating to the said debt, admitted the Section 9 application filed by Respondent No. 1 and ordered initiation of CIRP.
- Aggrieved by the above order of the Adjudicating Authority, the erstwhile Director of the Corporate Debtor/Appellant has preferred this Appeal praying for setting aside the impugned order.

3. The Learned Counsel for the Appellant advanced the argument that an application under Section 9 of the IBC is not maintainable since there are no dues or any unpaid amount remaining to be paid by the Corporate Debtor. Against the total claim of Rs. 73,74,504/- made by the Operational Creditor in the Second Work Order, the Learned Counsel for the Appellant vehemently contended that the total claim was actually only Rs. 58,73,996/- against which Rs. 60,86,376/- was already paid and hence no due was outstanding. In support of his contention, it was stated that the discrepancy between the claim made by the Operational Creditor and the payments done by the Corporate Debtor has arisen owing to the fact that three invoices of the previous work order had been erroneously included with eight invoices relating to the Second Work Order at a time when the previous work order stood closed fully by way of full and final payment. It was asserted by the Learned Counsel for the Appellant that the Respondent No. 1 had already admitted that all invoices of the First Work Order had already been cleared and there were no outstanding dues and yet he combined three previous invoices and misled the Adjudicating Authority. It was added that after making the last payment of Rs 8 lakhs on 04.08.2018, there was no balance remaining to be paid to the Respondent No. 1.

4. In addition it was pointed out that Clause 14 of the Work Order agreement entitled the Operational Creditor to stop the crane services, if outstanding invoices were not cleared within 90 days from the date of invoice, but the fact that he continued to provide service and did not stop operation shows that there was no dispute with regard to unpaid dues. It is also submitted that the cranes supplied by the Operational Creditor were defective and outdated being 40 years old and that on these objections being raised by the Corporate Debtor, replacement of cranes was assured by the Operational Creditor.

5. It has also been submitted by the Appellant that the Demand Notice under Section 8 of the IBC in terms of Rule 5 of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 mandate that the same must be served at the registered office by hand or by registered post or Speed Post with acknowledgement due or by electronic mail service. However, there is no acknowledgement of the receipt of the same by the Corporate Debtor as no attempt was made to effect proper service of the said Demand Notice.

6. Refuting the above submissions, the Learned Counsel for the Respondent No. 1 stated that the operational debt is relatable to the invoices raised against work order of 01.10.2016 for a gross amount of Rs

58.74 lakhs against which the Appellant had only paid Rs. 10 lakhs and Rs. 15 lakhs on 27.04.2017 and 28.04.2017 respectively bringing down the outstanding amount to Rs. 33.74 lakhs. Repeated reminders were sent to the Appellant to clear the outstanding dues and to reconcile discrepancies if any and the Appellant on his own admitted on 10.04.2018 that there is a net outstanding amount of Rs. 33.74 lakhs. Thereafter, the Corporate Debtor again released payments of Rs. 8 lakhs and Rs. 5 lakhs on 24.05.2018 and 28.05.2018 respectively bringing down the outstanding amount to Rs. 19.95 lakhs. It has been further added that the mobilisation advance of Rs 5 lakhs had been received in terms of the contract and has nothing to do with the unpaid operational debt.

7. As the above amount of Rs. 19.95 lakhs remained due for a protracted period, it was pointed out that the Respondent No. 1 was constrained to issue a demand notice. The first Demand Notice was issued by Operational Creditor on 04.07.2018 which led to another payment of Rs. 8 lakhs made by the Corporate Debtor on 04.08.2018 bringing down the unpaid operational debt to Rs. 11.53 lakhs. Thereafter, a second Demand Notice was sent on 21.01.2019 claiming the unpaid operational debt but no further payments followed. The Learned Counsel for the Respondent No. 1 also stated that inspite of the two demand notices having been served upon the Corporate Debtor, there was no reply to the said

notices and that the amount outstanding is Rs. 11.54 lakhs and interest amount of Rs. 5.85 lakhs calculated at the rate of 24% per annum grossing Rs. 19,95,817/-.

8. On the issue raised by the Corporate Debtor that the Operational Creditor had provided some defective cranes, it has been submitted that no communication regarding defective cranes was received from the Corporate Debtor and that they had submitted fitness certificates in respect of the cranes. Further it was denied that demand notices were not served upon the Appellant and submitted that they had provided evidence of postal receipt alongwith track consignment of Demand Notice before the Adjudicating Authority.

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

10. The short point for our consideration is whether payment to the Operational Creditor/Respondent No. 1 as per Second Work Order was due from the Corporate Debtor giving rise to an operational debt, and if so, whether a default has been committed by the Corporate Debtor/Appellant in respect of payment of such operational debt having

already become due and payable and whether the said operational debt exceeds an amount of Rs. 1 lakh and is an undisputed debt. This examination would be in line with the test which has been laid down by the Hon'ble Supreme Court in **Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software Private Limited (2018) 1 SCC 353** (hereinafter referred to as 'Mobilox') for the Adjudicating Authority while examining an application under Section 9, the relevant excerpts of which are 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 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.”

11. Let us now see whether the test laid down by **Mobilox judgment supra** of operational debt exceeding Rs. 1 lakh having become due and payable but not yet paid is applicable in the present case. From material on record as at page 148-149 of Appeal Paper Book (**'APB'** in short), we note that a communication was sent by the Operational Creditor/Respondent No. 1 to the Corporate Debtor on 06.04.2017 indicating that a sum of Rs. 32.87 lakhs was outstanding in their books of account from the Corporate Debtor. The letter also sought their confirmation on the said figure by 20.04.2017 for carrying out further reconciliation in case of any discrepancy. This was followed by another reminder email dated 07.04.2017 (as at page 150 of APB). We however do not find any material on record to show that the Corporate Debtor raised any objection with the Operational Creditor on the aforesaid outstanding amount or sought any clarification thereto.

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12. Instead we find that there is clear admission made by the Corporate Debtor/Appellant on 10.04.2018 of a net outstanding amount of Rs.33.74 lakhs only as payable on it's part to the Operational Creditor (as at page 137 of APB). The said letter also concedes that against the gross outstanding amount of Rs. 58.74 lakhs, only Rs. 25 lakhs had been paid in two separate instalments till then.

13. It is further observed that another reminder missive was issued by Respondent No. 1 to the Corporate Debtor on 26.02.2018 (as at page 139 of APB) to clear the outstanding amount of Rs.33.74 lakhs as the said sum had become overdue for more than nine months. Following this reminder, the Corporate Debtor again made two tranches of payment amounting Rs.8 lakhs and Rs.5 lakhs on 24.05.2018 and 28.05.2018 respectively bringing down the outstanding amount to Rs.19.95 lakhs.

14. Thereafter, the Operational Creditor sent the first Demand Notice of Rs.19.95 lakhs on 04.07.2018 to the Corporate Debtor. The Corporate Debtor did not send any written response to the Demand Notice but released an amount of Rs.8 lakhs on 04.08.2018. Yet another Demand Notice was issued in respect of the unpaid operational debt on 21.01.2019 amounting Rs.11.54 lakhs and Rs.5.85 lakhs as interest at the amount rate of 24% per annum. On this Demand

Notice, the Corporate Debtor chose neither to reply nor make any further payments.

15. On the issue of non-receipt of the Demand Notice as claimed by the Appellant, the Adjudicating Authority after taking cognizance of the tracking consignment information and postal receipt details as submitted by the Respondent No. 1 to establish delivery of the Demand Notices has rejected the contention of the Corporate Debtor of non-delivery of Demand Notice. Moreover, it has also been observed by the Adjudicating Authority in the impugned order that this fact remained uncontroverted during the hearing. Hence we find no reasons to disagree with the reasoned finding of the Adjudicating Authority in this respect.

16. The Adjudicating Authority in the impugned order has noted that the Corporate Debtor having already admitted vide letter dated 10.04.2018 that an amount of Rs. 33.74 lakh is due and payable was sufficient in itself for admission of the Section 9 petition. The Adjudicating Authority was therefore satisfied in holding that an operational debt was actually in existence and in arriving at this conclusion has not committed any error.

17. Be that as it may, in the interest of justice, we feel that the tenability of the defence raised by the Corporate Debtor that there was no outstanding due also needs to be examined particularly in the light of the undisputed fact that the dues of the First Work Order was entirely discharged and cleared by the

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Corporate Debtor. In examining the defence raised by the Corporate Debtor/Appellant, we have noted that the Learned Counsel for the Appellant has emphatically contended that Respondent No. 1 had intentionally clubbed invoices of the closed Work Order of 17.10.2015 with the subsequent Work Order of 01.10.2016 to inflate the gross outstanding amount and mislead the Adjudicating Authority. To substantiate this contention, the Learned Counsel for the Appellant in the short written submissions has referred to the following tabular chart appearing at page 155 of the APB to show that the balance amount of Rs. 11.53 lakhs is derived only after adding the three invoices which had already been honoured by the Appellant :

Invoice Date	Invoice No.	Balance Amt.
30-Apr-2016	Bill No. 32120-9206	445,133/-
31-May-2016	Bill No. 32667-9206	944,625/-
30-June-2016	Bill No. 3320-9206	110,750/-
	Work Order 17.10.2015 Total	15,00,508/-
31-Dec-2016	Bill No. 35404-9206	8,81,076/-
31-Jan-2017	Bill No. 35947-9206	9,20,000/-
28-Feb-2017	Bill No. 36311-9206	7,07,694/-
31-Mar-2017	Bill No. 36651-9206	7,78,463/-
30-Apr-2017	Bill No. 37205-9206	6,01,533/-
31-May-2017	Bill No. 37277-9206	9,20,000/-
30-Jun-2017	Bill No. 37603-9206	9,20,000/-
19-Jul-2017	UP/SL/00001-9206	1,45,230/-
	Work Order 01.10.2016 Total	58,73,996/-
	Grand Total of Both Work Orders	73,74,504/-
	Payments received by Operational Creditor	62,20,687/-
	Balance Amount as Derived	11,53,817/-

18. To remove all ambiguities and to have a more judicious approach, we felt that it would be more prudent to rely on the complete set of accounts in terms of invoices raised and payments received for both the work orders i.e. 17.10.2015 and 01.10.2016 as detailed out at page 181 of APB as reproduced below:

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Anindya Infratech Private Limited

Invoice No.	Date	Site	Amount
29213	25-Oct-15	Kanpur	570000
30244	14-Nov-15	Kanpur	361733
30245	30-Nov-15	Kanpur	472316
30721	31-Dec-15	Kanpur	944625
31000	31-Jan-16	Kanpur	973690
31414	29-Feb-16	Kanpur	944625
32040	31-Mar-16	Kanpur	871968
32120	30-Apr-16	Kanpur	944625
32667	31-May-16	Kanpur	944625
33260	30-Jun-16	Kanpur	620341
34042	01-Oct-16	Etawah	500000
34655	31-Oct-16	Etawah	601533
35022	30-Nov-16	Etawah	920000
35404	31-Dec-16	Etawah	881076
35947	31-Jan-17	Etawah	920000
36311	28-Feb-17	Etawah	707694
36651	31-Mar-17	Etawah	778463
37205	30-Apr-17	Etawah	601533
37277	31-May-17	Etawah	920000
37603	30-Jun-17	Etawah	920000
1718/UP/SL/00001	19-Jul-17	Etawah	145230
		Total	15544077

Less:

TDS

245171

Total Payment Recd.			
19/10/2015		1000000	
14/11/2015		710000	
04/01/2016		663275	
17/02/2016		862158	
15/03/2016		378125	
20/04/2016		885564	
24/06/2016		1000000	
28/06/2016		500000	
22/09/2016		500000	
01/10/2016		500000	
01/10/2016		509591	
12/01/2017		400000	
16/01/2017		182376	
20/01/2017		904000	
27/04/2017		1000000	
28/04/2017		1500000	
24/05/2018		800000	
28/05/2018		500000	
04/08/2018		800000	
			14145089
		Net Amt Outstanding	1153817

This chart depicted above clearly spells out the net outstanding amount as Rs 11.53 lakhs as on 04.08.2018 and therefore clearly establishes debt above the

threshold of Rs. One lakh having become due and payable. Coupled with the fact that the Corporate Debtor by his own admission on 10.04.2018 has admitted that there was an outstanding amount payable on its part leads to the conclusion that there was debt due and payable beyond the threshold of Rs. one lakh on the part of the Corporate Debtor.

19. This now brings us to the other aspect as to whether there is existence of dispute between the parties. As regards the dispute of the cranes not being in good working condition, the Respondent No. 1 has asserted that the cranes were used without any demur or objections by the Corporate Debtor during the entire contract period. It has also been contended that the Work Order terms and conditions did not stipulate any condition relating to the age of crane and neither any complaints in this regard were lodged by the Corporate Debtor either during the contract period or prior to issue of Demand Notice. As there is nothing on record to suggest that the Corporate Debtor/Appellant raised any such dispute before receipt of invoices or at any period prior to the issue of demand notice, this cannot be held as a case of pre-existing dispute. There is no exchange of correspondence raising any dispute prior to issue of demand notice. Thus even on this test laid down by Mobilox judgment supra we find that there is nothing credible to substantiate the pre-existence of dispute.

20. From the aforesaid discussion and analysis of facts and circumstances, we are of the considered opinion that the Corporate Debtor/Appellant has defaulted in the payment of operational debt, of an amount exceeding Rs one

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lakh, which amount had clearly become due and payable, and further in the absence of any pre-existing dispute, we find that no error has been committed by the Adjudicating Authority in admitting the application under Section 9 of IBC and initiating CIRP. We find no merit in this Appeal. Appeal is dismissed. No Costs.

**[Justice Ashok Bhushan]
Chairperson**

**[Mr. Barun Mitra]
Member (Technical)**

Place: New Delhi

Date: 12.10.2022

Shashi