

NATIONAL COMPANY LAW APPELLATE TRIBUNAL

PRINCIPAL BENCH, NEW DELHI

COMPANY APPEAL (AT) (INSOLVENCY) No. 16 of 2022

(Arising out of Order dated 16.11.2021 passed by National Company Law Tribunal, Mumbai Bench, Court-III in C.P. No. 1559/IBC/MB/2018).

IN THE MATTER OF:

Kartik Patel,

Having his address at 36, Baliyadev Colony,
Por, Vadodara - 391243

...Appellant

Versus

1. Punjab Renewable Energy System Pvt. Ltd.,

J-105, Tower No. 7,
1st Floor, Belapur Railway Station,
Cum Commercial Complex,
CBD Belapur, Navi, Mumbai – 400614.

...Respondent No. 1

2. Spark Green Energy (Ahmednagar) Pvt. Ltd.,

(Through CA Suyash Rajendra Chhajed, IRP)
2nd Floor, Shree Gurudeo Tower,
Canada Corner, Ganpati Madir,
Near Ahirrao Photo Studio,
Nashik, Maharashtra – 422005
Email – suyashchhajed@gmail.com
Mob: 9373534040

...Respondent No. 2

Appellant: Mr. Akash Agarwal and Mr. Pulkit Deora,
Advocates.

Respondents: Mr. K. D. Sharma, Advocate for R-1.
Mr. Shashank Agarwal, Advocate for R-2.

J U D G E M E N T

[Per: Shreesha Merla, Member (T)]

1. Aggrieved by the Impugned Order dated 16.11.2021 passed in C.P. No. 1559 /IBC/MB/2018 by the Adjudicating Authority (National Company Law Tribunal, Mumbai Bench, Court-III), the Suspended Director of the Corporate Debtor-M/s. Spark Green Energy (Ahmednagar) Pvt. Ltd. preferred this Appeal under Section 61 of the Insolvency and Bankruptcy

Code, 2016 (hereinafter referred to as 'The Code'). By the Impugned Order, the Adjudicating Authority has admitted the Application filed under Section 9 of the Code by the M/s. Punjab Renewable Energy Systems Pvt. Ltd.- Respondent No. 1 (hereinafter referred to as 'The Operational Creditor') and observed as follows:

“35. It is appropriate to mention here that the invoices are for the fuel supply from February 2016 to April, 2016. The above acknowledgements of liability upto 01 May 2016 by the Corporate Debtor makes it very clear that the Corporate Debtor made the above admission without any dispute. As rightly contended by the Operational Creditor the Corporate Debtor vide their letter dated 18.02.2016 agreed to clear the outstanding payments due to the Operational Creditor without raising any dispute and further agreed to pay interest on the delayed payments also. The invoices annexed to the Company Petition from page nos. 94 to 116 clearly shows that the Operational Creditor has supplied both Cane Trash and Cotton Stalk and not cotton stalk alone as falsely contended by the Corporate Debtor. Since the Operational Creditor started exerting pressure on the Corporate Debtor for payment of their outstanding bills subsequent to the admission of liability in May 2016 by the Corporate Debtor, the Corporate Debtor in order to threaten and restrain the Operational Creditor from taking legal action, got issued the above referred legal notices on 30.10.2017 and 06.12.2017 respectively as counterblast as an afterthought which clearly exposes the true colours and the conduct of the Corporate Debtor. It is also appropriate to mention here that the Corporate Debtor also filed another Company Petition bearing CP No. 3741 of 2019 subsequent to filing of the present Company Petition by the Operational Creditor as a counterblast.”

2. Submissions of Learned Counsel for the Appellant:

- Learned Counsel for the Appellant submitted that 'Demand Notice' dated 23rd February, 2018 was never received by them and that the alleged delivery slip forwarded by email dated 10.04.2018 by the

Mumbai GPO does not state whether the Demand Notice was either 'delivered' or 'rejected'.

- It is submitted that under the 'Fuel Supply Agreement', the Operational Creditor was under obligation to supply Cane Trash, however Cotton Stalk was supplied several times in huge quantities and the issue was addressed to the Operational Creditor vide emails from 15th December, 2015 till 22nd September, 2016.
- It is also contended that vide a letter dated 18.01.2016, the Corporate Debtor specifically directed the Operational Creditor not to supply Cotton Stalk till the rates were fixed. Since the Operational Creditor continued to supply Cotton Stalk, in contravention of the terms of the 'Fuel Supply Agreement, the Corporate Debtor got issued a Legal Notice on 30.10.2017 and on 06.12.2017 calling upon the Operational Creditor to supply the balance 16600 MT of Cane Trash out of the 20000 MT stipulated under the Fuel Supply Agreement.
- It is stated that Cotton Stalk is a free fuel, for the reason, that its moisture content is upto 50% which results in a severely low calorific value when compared with Cane Trash where the moisture content is upto 20%. Therefore, the supply of Cotton Stalk should have been the exception rather than the norm. An amount of Rs. 6 Crores was also demanded as compensation for the loss occurred due to non-supply of Cane Trash Fuel. The Operational Creditor refused to accept the service of the Legal Notice and the same was returned with an endorsement 'unclaimed'.

- In support of his submission that service was specifically evaded by the first Respondent and that the letter which returned with the endorsement 'unclaimed' should be deemed to be served, the Counsel placed reliance on the following decisions:
 - 'C.C. Alavi Haji Vs. Palapetty Muhammed & Ors.',
MANU/SC/2263/2007
 - 'K. Bhaskaran Vs. Sankaran Vaidhyan Balan & Ors.',
MANU/SC/0625/1999
 - 'V. Raja Kumari Vs. P. Subbarama Naidu & Ors.',
MANU/SC/0937/2004
 - 'Karnataka Public Service Commission Vs. P.S. Ramakrishna', (1996)
2 SCC 519
- While so, on 23.02.2018 the Operational Creditor issued a Demand Notice under Section 8 of the Code which was never received by the Appellant as it is evident that it was delivered at 'Shingvetukai BO' and not at the registered office address at Ahmednagar. Hence, there is a clear non-compliance of Section 8 of the Code and the Petition ought to have been dismissed as non-maintainable, at the admission stage. Thereafter on 27.04.2018, the Application was filed under Section 9 of the Code, for which the Appellant filed a Reply on 14.01.2020 specifying the dispute with respect to the quality of Fuel supplied by the Operational Creditor.
- The Adjudicating Authority without taking into consideration, the material on record has returned a finding that there was no 'pre-existing dispute'. The Adjudicating Authority has also erred in

recording in the Impugned Order that the Appellant preferred a Company Petition i.e., C.P. No. 3741 of 2019 as a counterblast to this Company Petition. It is submitted that though both the Company Petitions were clubbed together and were supposed to be heard together, only this Petition was disposed of.

- It is strenuously argued by the Learned Counsel for the Appellant that they had never agreed to pay any amount for Biomass Fuel other than Cane Trash and the rate for Cotton Stalk and Juliflora were not specifically fixed because there is no cost of extraction of this raw material. The Operational Creditor has raised invoices towards supply of Cane Trash and Cotton Stalk, though they are aware that Cotton Stalk does not have any intrinsic value. It is submitted that a clear dispute with respect to the quality of the Biomass Fuel, the type of fuel and also the rate, apart from the fact that the Appellant was denied an opportunity of replying to the Section 8 Demand Notice which was never delivered to their registered address at Ahmednagar.

3. Submissions of Learned Counsel for the Respondent:

- Learned Counsel for the Respondent contended that if the Appellant was not satisfied with the quality of the Biomass Fuel they could have easily invoked the cancellation clause of the Fuel Supply Agreement, but they have never done so, but, instead the Fuel that was supplied to them was accepted and consumed and was never returned. Therefore, the question of any 'dispute' regarding the quality of fuel does not arise. It is further submitted that the amount 'due and payable' was acknowledged in the ledger confirmation letters and

therefore it cannot be said that there was any dispute 'pre-existing' to the issuance of Section 8 Demand Notice. The letter from the Postal Authorities that the Demand Notice was delivered on 03.03.2018 'Shingvetukai BO' confirms that the Letter was indeed delivered at the registered address.

Assessment:

4. It is an admitted fact that the Operational Creditor and the Corporate Debtor entered into a Fuel Supply Agreement (FSA) on 14.10.2015 whereunder the Corporate Debtor had agreed to purchase Biomass Fuel from the Operational Creditor on the terms and conditions stated in the said Agreement. It is seen from the FSA that five types of fuel Cotton Stalk, Cane Trash, Corn Cob, Soya Hush and Juliflora were agreed to be supplied individually or in a combination thereof.

5. The issue of 'Pre-Existing Dispute' raised by the Appellant is to be seen on the touchstone of the ratio of the Hon'ble Supreme Court in **'Mobilox Innovations Private Limited Vs. Kirusa Software Private Ltd.'** (2018) 1 SCC 353, in which it is held as hereunder:

"51. It is clear, therefore, that once the operational creditor has filed an application, which is otherwise complete, the adjudicating authority must reject the application under Section 9(5)(2)(d) if notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility. It is clear that such notice must bring to the notice of the operational creditor the "existence" of a dispute or the fact that a suit or arbitration proceeding relating to a dispute is pending between the parties. Therefore, all that the adjudicating authority is to see at this stage is whether there is a plausible contention which requires further investigation and that the "dispute" is not a patently feeble legal argument or an assertion of fact unsupported by evidence. It is important to separate the grain from the chaff and to reject a

spurious defence which is mere bluster. However, in doing so, the Court does not need to be satisfied that the defence is likely to succeed. The Court does not at this stage examine the merits of the dispute except to the extent indicated above. So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application.”

.....

56. Going by the aforesaid test of “existence of a dispute”, it is clear that without going into the merits of the dispute, the appellant has raised a plausible contention requiring further investigation which is not a patently feeble legal argument or an assertion of facts unsupported by evidence. The defense is not spurious, mere bluster, plainly frivolous or vexatious. A dispute does truly exist in fact between the parties, which may or may not ultimately succeed, and the Appellate Tribunal was wholly incorrect in characterizing the defense as vague, got-up and motivated to evade liability.”

6. A perusal of the invoices raised by the Operational Creditor from 01.06.2016 to 26.04.2016 show that the total amount was Rs.1,79,13,261/- for Biomass Fuel, Cane Trash and Cotton Chip. The material on record establishes that this amount has been acknowledged by the Corporate Debtor in their ledger and in the confirmation letter dated 01.04.2016 and 01.05.2016. The amounts were repeatedly requested to be paid by the Operational Creditor vide emails dated 09.04.2016, 19.04.2016 and 17.08.2016. The contention of the Learned Counsel for the Appellant that the Operational Creditor had supplied Cotton Stalk instead of Cane Trash in violation of the terms of the FSA, is untenable keeping in view that Article 1.1 defines ‘Biomass Fuel’ which is detailed as hereunder:

“1.1. Fuel-means biomass as specified in Schedule 3; and in accordance with Article 4, Article 6.1, Article 11.1”

‘Schedule 3’ List of Biomass with Moisture content

Biomass	Size(mm)	Moisture Content (%)
Cotton Stalk	15-30	20-48
Cane Trash	Bale	15-20
Corn Cob	20-30	15-25
Soya Husk	05-15	10-15
Juliflora	20-40	20-35

7. It is seen from the terms and conditions that it was never agreed between the parties that as per the FSA only Cane Trash Fuel would be supplied. It is also material to note that the Appellant had neither returned the Fuel nor invoked the cancellation clause of the Agreement or exercised any right in the event of the Fuel not being of the prescribed and agreed quality. A non-reply to the legal notices dated 30/10/2017 & 06/12/2017 issued by the ‘Corporate Debtor’ does not change the colour and character of the case on hand, having regard to the fact that the amounts were agreed to be paid by the ‘Corporate Debtor’ way back on 18/02/2016. Subsequent to the admission of liability in April and May 2016, after more than a year, the ‘Corporate Debtor’ got issued the above legal Notices, which appear to be an afterthought, specifically after having accepted and consumed the consignment and never taken steps to reject the same. Hence, we do not find it relevant to rely on the ratio of the Judgements referred to by the Appellant regarding ‘the service to be deemed’ when the Notice is returned with an endorsement ‘unclaimed’.

8. Article 6.1 of the Fuel Supply Agreement that Fuel would be supplied by the Operational Creditor, the rate whereof, would be agreed by and between the parties as per mutual discussions in the yearly collection and supply plan. Therefore, the argument of the Appellant that the Operational Creditor could not have supplied Cotton Stalk Fuel for want of a rate to be

decided in advance, is not acceptable. The letter of the year 2016 relied upon by the Appellant raising the issue of Cotton Stalk are lacking as they are devoid of any proof/acknowledgement of service. The receipt of these letters is specifically denied by the Counsel for the Respondent. The onus of proof is on the Appellant to establish service of these letters, which they have failed to discharge.

9. A perusal of the Postal Department letter dated 20.03.2018 shows that this Article Consignment No. RM 121958348IN dated 23/02/2018 (which refers to the Section 8 Demand Notice) has been delivered on 03.03.2018 'Shingvetukai BO'. We find force in the contention of the Learned Counsel for the Respondent that 'Shingvetukai BO' is the name of the village where the registered office of the Corporate Debtor is located as it is evident from the address of the registered office. The MCA website clearly states that the registered address of the 'Corporate Debtor' is Plot No. B-4, Village Shingwetukai, MIDC Newasa, Taluka Newasa, Newasa MH. Therefore, to state that the Application was non-compliant of Section 8 of the Code and deserves to be dismissed, is unsustainable. Needless to add, the 'Corporate Debtor' has filed a detailed reply before the Adjudicating Authority, which was discussed at length in the Impugned Order. As regarding the clubbing of C.P. No. 3741 of 2019 filed by the Appellant herein and the Section 9 Petition preferred by the Operational Creditor not having been disposed of in the same impugned order, we note that the Adjudicating Authority had listed C.P. No. 3741 of 2019 for hearing on 17.11.2021 and the same was dismissed for non-prosecution. Having regard to the admission of the liability in the correspondences and in the ledger confirmation letters dated

01.04.2016 and 01.05.2016 read with the invoices raised over a period of time from 2016 onwards for supply of both Cane Trash and Cotton Stalk, this Tribunal is of the earnest view that the 'dispute' raised by the Appellant at this belated stage, having accepted the fuel over a duration of time, is a patently feeble argument, unsupported by any substantial evidence.

Therefore, we are of the view that the ratio of the Hon'ble Supreme Court in '**Mobilox Innovations Private Limited**' (*Supra*) is clearly applicable to the facts of this case. Hence, this Appeal is devoid of any merit and is dismissed, accordingly.

[Justice Ashok Bhushan]
Chairperson

[Ms. Shreesha Merla]
Member (Technical)

[Mr. Naresh Salecha]
Member (Technical)

NEW DELHI
26th May 2022
Basant B./himanshu