NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 468 of 2023

IN THE MATTER OF:

Chawla Silica Sand Trading Co. **...Appellant**

Versus

Indo Farm Equipments Ltd. **...Respondent**

Present:

For Appellant: Mr. M.L. Lahoty, Mr. Anchit Sripat, Mr. Arvind Kumar, Advocates

For Respondent: Mr. Abhishek Gupta, Ms. Ikshita Singh, Ms. Tanya, Advocates

O R D E R

24.04.2023: Heard Learned Counsel for the Appellant.

2. This Appeal has been filed against the Order dated 21.02.2023 by which Order the Adjudicating Authority has rejected Section 9 Application on the ground that there was pre-existing dispute between the parties.

3. Learned Counsel for the Appellant challenging the Order contends that the notice under Section 8 was sent by an email on 12th November, 2019 and was also sent through registered post which was received on 15th November, 2019 and the Civil Suit filed by the Corporate Debtor on 14th November, 2019 can not be said to be pre-existing dispute so as to reject Application under Section 9 of IBC. It is submitted that there was no pre-existing dispute and amounts were due from 2015.

4. We have considered the submissions of Learned Counsel for the Appellant and have perused the record.

5. The Adjudicating Authority has considered the entire issue in Paragraph 12 and 13 of the Judgement which is to the following effect:

> *"12. The next issue for consideration is whether the operational debt was disputed by the corporate debtor. With respect to the contention raised by the corporate debtor in his reply regarding the pre-existing dispute between the parties and not affidavit under Section 9(3)(b) is filed by the operational creditor. However, it is seen from the records that the affidavit under Section 9(3)(b) was filed vide diary no. 991 dated 05.02.2020 by the operational creditor deposing that no notice was given by the corporate debtor in terms of Section 8(2)(a) of the Insolvency and Bankruptcy Code, 2016 nor any payment of the unpaid operational debt was made to the operational creditor. It is further deposed that no issues or concerns with respect to the delivery/quality of goods have ever been raised by the corporate debtor. Another contention raised by the corporate debtor is with respect to the sum of Rs. 9,82,835/- which was due to the respondent from the petitioner and a civil suit for recovery was filed and is pending before Ld. Civil Judge (Senior Division), Chandigarh bearing No. CS/2129/2019. It is contended by Ld. Counsel for petitioner that the civil suit (dated 14.11.2019) relied upon by the corporate debtor to claim pre-existing dispute between the parties was filed after the receipt of the demand notice dated 12.11.2019. However, contention of Ld. Counsel for petitioner is not much convincing because the operational creditor through Mr.Bharat Chawla attended the meeting dated 12.11.2019. A civil suit for recovery OF Rs. 9,82,835/- due to higher prices charged by petitioner was filed*

before Ld. Civil Judge (Senior Division), Chandigarh bearing No. CS/2129/2019 dated 14.11.2019 which is still pending. The demand notice was sent after the meeting through email on 12.11.2019 and through registered post on 15.11.2019 after filing of Civil Suit on 14.11.2019. The petitioner after realising the higher prices, vide e-mail dated 23.10.2019 stated that they have reduced the rates. In the meeting held on 12.11.2019, the invoices were shown to the petitioner and he was confronted with the huge difference between the market price and the price charged by the petitioner.

13. It is admitted fact that the petitioner-operational creditor reduced the rate of Silica Sand. Although, in its rejoinder, the explanation given by the operational creditor is that the rates were reduced in good faith keeping in view the long-lasting professional relationship between the parties. The petitioner has also denied receipt of legal notice dated 19.10.2019 when a demand of Rs. 9,82,835/- was raised by the respondent corporate debtor after adjusting the higher rates/prices of Silica Sand charged by the petitioner-operational creditor. If at all petitioner has not received such legal notice, then there was no reason to reduce the rates vide email dated 23.10.2019 sent by the petitioner-operational creditor. It is further admitted fact that the meeting held between the parties on 12.11.2019 in which Mr. Bharat Chawla a Representative of the petitioner-operational creditor attended the meeting. Since the parties failed to arrive at some amicable settlement/resolution of disputes. Therefore, in tearing hurry petitioner sent the demand notice on 12.11.2019 itself through email whereas the *demand notice through the registered post was snet on 15.11.2019. Before that respondent-corporate debtor after taking legal advice had filed Civil Suit No. CS/2129/2019 on 14.11.2019 in the court of Ld. Civil Judge (Senior Division), Chandigarh. This chronological development of the facts shows that there was pre-existing dispute between the parties about the rates of the Silica Sand supplied by the petitioner-operational creditor. Whether particular terms and conditions in the agreement were applicable to the parties would be decided by the Civil Court, Chandigarh. Be that at it may, but before this Bench, the application under Section 9 of the Code is not maintainable in present of pre-existing dispute. Reliance has been placed upon by Learned Counsel for the respondent-corporate debtor in the matter of* ***Mobilox Innovations Private Limited Vs. Kirusa Software Private Limited, Civil Appeal No. 9405 of 2017 dated 21.09.2017 and Rajratan Babulal Agarwal Vs. Solartex India Pvt. Ltd. and ORs., Civil Appeal No. 2199 of 2021 decided on 13.10.2022 by Hon'ble Supreme Court of India.*** *He has also placed reliance upon* ***Talbot & Company Vs. Austin Distributers Pvt. Ltd. passed by Hon'ble NCLAT, New Delhi in Company Appeal (AT) Ins. No. 1470 of 2022 dated 10.01.2023.*** *In the last mentioned authority, it has been held by the Hon'ble NCLAT "that it is well settled that in Section 9 proceedings the Adjudicating Authority is not to enter into final adjudication with regard to existence of dispute between the parties regarding operational debt. What has to be looked into is whether the defence raises a dispute which needs further adjudication by a competent Court. Disputes pertaining* *to contractual issues are not to be resolved in Section 9 proceedings. If we apply the test laid down in Mobilox by the Hon'ble Apex Court to the facts of the present case, it is clear that the defence raised by the corporate debtor in their reply filed in Section 9 Application is not illusory or moonshine. The present is neither a case where there is undisputed debt for which insolvency can be asked by the appellant to be initiated. The Adjudicating Authority has, therefore, correctly applied the ratio of the Mobilox Judgment in dismissing the Section 9 Application. The foregoing reasons, we are of the view that the Adjudicating Authority has rightly dismissed the application of the appellant filed under Section 9 of IBC. We are satisfied that the impugned order does not warrant any interference."”*

6. The email which has been relied on by the Adjudicating Authority dated 23rd October, 2019 which was sent by the Appellant themselves much before the demand notice states as follows:

"Dear Sir,

In reference to ongoing discussions with MD sir & Mr Khanna, we have submitted orders comparison and even if contact details are required, we do not mind sharing as we belief in transparency in all our operations.

With changing times and recessive market and downfall in freight rates, we already reduced the rates without being asked by you.

On request of MD sir and his assurance and our long term relations, we further reduced the rates as a special case *and on condition of special help at this critical need of the hour when on one side DCM is under lockout and our good amount has strucked up their. Mr Sumant Sir (MD DCM) has called upon us on 01.11.2019 for our issues. Meantime wedding expenses are more important for us which was ensured by you to release adhoc 20 lacs by 18th of this month.*

It will not be out of place to mention that customers without verifying suppliers credibility indirectly promote illegal mining and brokers who ultimately act unbusiness wise in unethical ways.

As far as our further considerations on rates are concerned, we do not accept any retrospective ideas on this. Further beyond 90 days if you agree to pay interest @ 18% and clear all dues above 90 days as on date, we may consider reductions which will have no longevity as it was and as the freight will increase/month of January/Months from 15th june to 15th Sept additional charges for mechanical drying @Rs 600 will be charged.

Please confirm so that we can send our offer along with validity.

We will be sharing more order copies and photos of our works with you.

Warm regards."

7. Learned Counsel for the Appellant submits that Appellant themselves has reduced the rate voluntarily and that can not be treated to be pre-existing dispute. We have looked into the email dated 23.10.2019 and has also gone through the order of the Adjudicating Authority as reflected in paragraph 12

and 13. The fact which is not disputed that there was a meeting between the parties on 12.11.2019 and the meeting itself indicated that there was some issues to be sorted out and on the same date the Appellant shot the email on 12th November, 2019 sending Section 8 Notice and the Corporate Debtor has also initiated suit by filing the same on 14th November, 2019. The filing of the suit can not be relevant to find out pre-existing dispute because Section 8 Notice was issued on 12th November, 2019 but the attending facts and circumstances including meeting between the parties to settle the issue and the email dated 23.10.2019 sent by the Appellant itself indicate that there was issue regarding the rates and the corporate debtor was complaining about the rates as well as there was pre-existing dispute and the Adjudicating Authority did not commit any error in rejecting the Application.

8. We are of the view that it shall be open for the Appellant to take legal remedy as per law to recover the dues amount, if any. There is no ground to interfere with the Impugned Order, the Appeal is dismissed.

[Justice Ashok Bhushan]
Chairperson

[Mr. Barun Mitra]
Member (Technical)

Basant/nn