NATIONAL COMPANY LAW APPELLATE TRIBUNAL,

PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Ins) No.498 of 2021

IN THE MATTER OF:

Sh. Anshdeep Chaddha,
S/o SH. Deepak Chaddha,
19/310, Shahzada bagh,
Daya Basti, Old Rohtak Road,
New Delhi – 110 035
Promoter/Shareholder
Chowdhry Rubbers & Chemicals Pvt. Ltd. ...Appellant

Vs.

1. **S.E.Power Ltd.**
   Survey No. 54/B, Pratapnagar,
   Jarod-Savli Road,
   Samlaya, Vadodara – 391 520 (Gujarat) ...Respondent No.1

2. **Chowdhry Rubbers & Chemicals Pvt. Ltd**
   19/310, Shahzada bagh,
   Daya Basti, Old Rohtak Road,
   New Delhi – 110 035
   Through its IRP Sh. Mukesh Gupta ...Respondent No.2

Present:
For Appellant : Ms. Jaya Goyal and Ms. Manpreet Kaur, Advocates.

For Respondents : Mr. Rahul Kumar, Advocate for R1

J U D G M E N T

DR. ASHOK KUMAR MISHRA, TECHNICAL MEMBER

1. The Appeal has been filed by the Appellant under Section 61 of the 'Insolvency and Bankruptcy Code 2016' (the Code) against the impugned order dated 03.06.2021 passed by the 'National Company Law Tribunal, Principal Bench-IV, New Delhi (the Adjudicating Authority) in C.P. No. IB-218(PB)/2018.
2. The Appellant has sought the followings reliefs:
   - Call for record for the Adjudicating Authority in respect of C.P. No. IB-218(PB)/2018 titled as S.E.Power Ltd. Vs Chowdhury Rubbers & chemicals Pvt. Ltd;
   - Allow the present appeal and set aside the impugned final order/judgment dated 03.06.2021 passed by the Adjudicating Authority etc.
3. The Adjudicating Authority, while passing the impugned order dated 03.06.2021 has observed the followings:

> *"13.In the given facts and circumstances, the present application is complete and the Applicant is entitled to claim its dues, establishing the default in payment of the operational debt beyond doubt. The present application is admitted, in terms of section 9 (5) of IBC, 2016.*
>
> *14. The applicant had proposed the name of IPR in the application filed under section 9 of I& B Code, 2016, thereafter, the applicant had filed an application seeking*

to change the name of the proposed IPR and proposed the name of Mr.Mukesh Gupta as IRP. The application was allowed vide order dated12.05.2021, taking Form 2 on record of the said IRP. As a consequence, Mr. Mukesh Gupta is be and hereby appointed as IRP of corporate debtor having registration number IBBI/IPA001/IP-P-01494/2018-19/12254 (email – camukeship@rediffmail.com) as IRP subject to the condition that no disciplinary proceedings are pending against such an IRP named who may act as an IRP in relation to the CIRP of the Respondent and specific consent is filed in Form 2 of Insolvency and Bankruptcy Board of India (Application to Adjudicating Authority) Rule, 2016 and make disclosures as required under IBBI (insolvency Resolution Process for Corporate Persons) Regulations, 2016 within a period of one week from the date of this order.

15. We direct the Operational Creditors to deposit a sum of Rs. 2 lacs with the Interim Resolution Professional, namelyMr.Mukesh Guptato meet out the expense to perform the functions assigned to him in accordance with regulation 6 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Person)

Regulations, 2016. The needful shall be done within one week from the date of receipt of this order by the Operational Creditor. The amount however be subject to adjustment by the Committee of Creditors, as accounted for by Interim Resolution Professional, and shall be paid back to the Operational Creditor.

16. As a consequence of the application being admitted in terms of Section 9(5) of IBC, 2016, moratorium as envisaged under the provisions of Section 14(1), shall follow in relation to the Corporate debtor, prohibiting as per proviso (a) to (d) of the Code. However, during the pendency of the moratorium period, terms of Section 14(2) to 14(4) of the Code shall come in force.

17. A copy of the order shall be communicated to the Applicant, Corporate Debtor and IRP above named, by the Registry. In addition, a copy of the order shall also be forwarded to IBBI for its records. Applicant is also directed to provide a copy of the complete paper book to the IRP. A copy of this order be also sent to the ROC for updating the Master Data. ROC shall send compliance report to the Registrar, NCLT."

4. "The submission made by the Appellant/ pleadings and Written Submission available on record are summarized in the following manner:

a) It is the case of the Appellant that the Appellant has received demand notice dated 09.11.2017 under the Code in Form III & IV claiming an amount of Rs. 8,42,863/- towards the goods supplied from 29.02.2016 till 09.08.2016.

b) It is stated by the Ld counsel for the Appellant that the Corporate Debtor (CD) in response to the demand notice dated 09.11.2017 sent a reply through its counsel dated 23.11.2017 stating that the dispute with regard to the quality of goods, adjustment of cost of material not lifted, difference of profit towards commission are still pending and cited various emails. Certain issues raised in the reply to the demand notice are extracted below for convenience:

> *"it is surprising that you the addressee have mentioned you're your emails of demand but conveniently forgot to address the emails raised by my client of the disputes as of the supplied to various customers on account of products rate, sub-standard quality, rejection of your product reclaimed rubber. Rather your sub-standard quality product have put my client's reputation of supplier of quality raw material at risk and instead of resolving the dispute raised by different customers and my client was*

forced to sell the goods at loss of more than (Rs. 1,33,000/-) of cochin supply which is mentioned in your present notice. (If you require the invoice of the said sale of the customer, can be sent to you for your perusal.

Further, my client have also sent you the work sheets, test reports; complaint from various customers are enclosed, herewith as your product was not meeting the specifications as claimed by you the addressee. However, you the addressee failed to resolve the same till date. Complaints from customers are an eye opener yet you the addressee chose to issue notice of insolvency and bankruptcy to my client and it is more so shocking that the same is in backdrop of that you have made my client as Distributor and Consignment agent for development of your business and approached my client as my client has goodwill in the business of rubber and chemicals since last more than 50 years through its predecessors.

Further you had put responsibility on my client to share all updates about the products (Reclaimed rubber) you supplied, my client took orders 'through its hard earned goodwill across India through sheer dint of hard work and my client placed before you. The market information, with regard to product/customers/competitors and about the customers complaint regarding the product through various, emails, which you have deliberately forgot to mention in your instant notice, and you the addressee had agreed to ensure timely delivery, product quality, time need based support but failed to adhere to the same and dispute are still, pending. It is shocking that instead of resolving the dispute, you the addressee chosen the provisions of Insolvency & bankruptcy to recover the dues, for which you are not entitled at all for the demanded sum. Further, it is made clear that my client in made payment in running account manner and never made any, payment as per invoice and as you the addressee failed to address the issues arisen in the *supplies made by you, my client have not received the payments from the customers and you the addressee despite being problems faced by customers, instead of resolving the dispute and issues, Pressurizing my client to make the payment for the goods (reclaimed rubber) you have supplied and stock weighing around 3,750 Kg. still lying at Kolkata against the invoice mentioned in your notice and you can take back the stock, which is of no use to my client. You the addressee could have taken back the unused stock long back, yet did not made any effort to resolve the issue and forcing my client to succumb to your demand under Insolvency & bankruptcy Code, 2016. Further you the addressee is liable to pay to my client Rs. 30,797/ as neither you had paid the said amount nor issued Credit note for the same being difference noted in the transactions. Work sheet is annexed herewith for your reference. Further, you are aware that you the addressee cannot escape the issues which are still pending since last 18 months but you the addressee* *yourself stopped the business through my client since then as you could not attend the complaints of the customers across India and very conveniently with malafide intention did not even mentioned emails, addressed by client to you. Emails dated 26.4.2016, 27.4.2016, 4.5.2016, 7.5.2016, 25.5.2016, 1.6.2016, 4.6.2016, 9.6.2016, 27.6.2016, 6.7.2016, 15.7.2016, 27.7.2016, 8.9:2016, 18.11.2016 are annexed herewith. Neither you have taken back the material weighing around 3,750 Kg. from Kolkata nor adjusted the losses suffered by any client and as your unused material is of no use to my client and by not lifting the material, you the addressee yourself is responsible for the same and cannot demand from my client for the said delivery. Further, you the addressee cannot demand the amount for questionable goods supplied and lying unused as my client is consignment agent. and not a manufacturer of running an industry for the consumption of goods supplied by you. It is further very ironic that at the same time you the* *addressee demanding amount for the goods supplied, but for the reasons best known to you, fails to take back the material lying unused and pressurizing my client to pay for the same, which you yourself failed to sold on your own to the same manufacturer across the country. You are further called upon to lift the material weighing 3,750 kg. As stated in the reply and reduce the value of the said unused material, adjust the loss of Rs.1,33,000/- suffered in Cochin issue credit note worth Rs. 30,797 and freight charges (actual) borne by my client failing which my client will have no option. but to initiate legal action for the same in addition to claim for damages."*

c) In spite of the reply to the demand notice, the Respondent No.1 filed an application before the Adjudicating Authority for claiming of Rs. 8,42,863/- On the issue of defective goods, reference may be made to Annexure 9-12 of the Appeal paper book. The Respondent No.2 even then settled the dispute with R1. The impugned order passed by the Adjudicating Authority, the R2 without prejudice to its rights and contentions made the entire payment of Rs.8,43,000/- released to the R1 against the total amount of Rs. 8,42,863/- as mentioned in the claim form. Thereafter, the Respondent No.2 approached the R1 and the 'Interim Resolution Professional' (IRP) to close the matter as the entire payment claimed in Section 9 application was paid. However, the R1 has increased the claim amount which he has made in the Application Form of Rs. 8,42,863/- to an illegal demand of Rs. 16,22,682/-.

d) It is stated by the Ld counsel for the Appellant that the differential amount which they have increased from Rs. 8,42,863/- to Rs. 16,22,682/- on 15.06.2021 is the differential amount as towards interest rate @24% p.a.

e) Ld counsel for the Appellant has also stated that the R2/CD filed an application bearing no IA No. 2641/ND/2021 under Rule 11 of the NCLT Rules 2016 before the Adjudicating Authority which was subsequently withdrawn by the order dated 02.07.2021 on the statement made by the IRP that the Operational Creditor and CD are discussing the resolution of the issue involved with respect to the settlement and payment of additional debt. Now the OC, even raised the issue of some payment of penalty for Form-C for Rs. 2,10,000/- as per the Appellant which was not raised in the Application filed before the Adjudicating Authority.

f) The Ld counsel for the Appellant has also stated that the R1 didn't settle the matter while the CD has already paid the amount claimed in Form-V and have increased the frivolous demand of Rs. 16 lakhs plus.

g) The Appellant has cited case laws to supplement his case:

- State of Punjab and Ors. Vs. Krishan Dayal Sharma, AIR 1990 SC 2177;
- S.S.Polymers, Vs. Kanodia Technoplant Limited, CA(AT)(Ins) No. 1227 of 2019

h) The Ld counsel for the Appellant has submitted that they have already prepared a Bank Draft bearing No. 022495 dated 17.06.202 of Rs. 15,21,553/- drawn on HDFC Bank in favour of S.E. Power Ltd/R1, towards full and final settlement of the claim but still R1 is not filing withdrawal form as per Regulation 30A r/w Section 12A of the Code.

5. The submission made by the Respondent No.1 is stated herein below in a summarized manner:

a. The R1 has submitted that they have filed an application on 02.02.2018 before the Adjudicating Authority on the failure of the Appellant not paying their dues and they have also stated since the Adjudicating

Authority has passed order after three years of filing his Application so they are charging interest.

b. It is also stated in the reply of the R1/ OC that they have filed a petition for CIRP before the Adjudicating Authority and not for recovery of payment. They are claiming the amounts towards Form-C because that penalty was levied on them by the concerned department of commercial tax.

c. The Ld counsel for the Respondent no.1 has also stated that they are charging 20% interest p.a. as has been charged by sales department and the CD delayed release of payment and hence they are charging interest. They have also cited the Hon'ble Supreme Court Judgments in Syndicate Bank, Chennai Vs. Mohan Brothers, (2004) 10 SCC 549, in view of the proviso to Section 34(1) CPC, stated that "if the liability in relating to the sum adjudged had arisen out of commercial transaction, the rate of such further interest may exceed 6%p.a. but shall not exceed the contractual rate of interest. Accordingly, the interest being charged can neither be called exorbitant or a belated claim". There is no requirement under law for the Applicant under the Code to approach the Adjudicating Authority showing the interest payable by law while determining debt due. It is submitted that the requirement is to show that an amount as specified by the Code as threshold is due and the debt is ascertainable. The debt in question is not the interest component only. The principal was outstanding on the basis of which the Respondent approached the Adjudicating Authority, not with a view of recover the amounts but to ensure that the affairs of the Cd are brought in order and it remains a going concern.

6. We have carefully gone through the pleadings of the parties and extant provisions of the Code including their written submissions and we are having the following observations:

   a. It is also not in dispute that initiation of CIRP has been filed by OC/R1, no doubt reflects outstanding amount of Rs. 8,42,863/- and for raising that amount they have also provided the detail break down in the application form itself and the same amount of Rs. 8,42,863/- is also been shown in the demand notice in Form-III appearing at page 84 of the Appeal paper book.

   b. It is also not in dispute that the amount of Rs. 8,43,000/- has not been paid to the Respondent, as no where it is controverted that they have not received this amount.

   c. It is also evidently clear that in response to the demand notice and reply given by the CD it is made clear that there is an issue of the ‘product not meeting the specification’ i.e. quality dispute is existing and certain stocks to be lifted by the R1 which has been rejected by the CD. There is a complaint to the CD for some of the material supplied by R1 and the same is pointed out in multiple emails as mentioned in the reply to the demand notice.

d. As a result of all this, this Tribunal is coming to the firm view that initiation of CIRP is not warranted when CD is in a position to pay back the dues and have already paid back the dues under the threat of the Code and initiation of CIRP, the R1 raising a post frivolous claim by enhanced claim resulting from interest and other associated cost is unwarranted and unhealthy under the provisions of the Code. The Code has a prime object for ease of doing business and the Hon'ble Apex Court repeatedly settled the law that the purpose of the Code is not chasing for payment rather for ease of doing business and improving the wealth of the CD.

e. The Hon'ble Supreme Court has already settled the matter that the provision of the Code is not intended to be a substitute to be a recovery forum. The Hon'ble Supreme Court in Civil Appeal No.9597 of 2018, "Transmission Corporation of Andhra Pradesh limited Vs. Equipment Conductors and Cables Limited" vide para 15 has already held that "IBC is not intended to be a substitute to a recovery forum and also laid down that whenever there is existence of real dispute, the IBC provisions cannot be invoked. The Code cannot be used whenever there is existence of real dispute and also whenever the intention is to use the Code as a means for chasing of payment or building pressure for releasing the payments."

f. Section 9(5) of the Code which is enumerated herein below also specifically makes it clear that if there is a dispute, it is not the job of the 'Adjudicating Authority' or the 'Appellate Authority' to assess the dispute whether they will get the claim or not, but on certain perception of judicial assessment if it looks that the claim of dispute is genuine and the Operational Creditor has no other purpose except to put the CD into doldrum and to collapse its business then naturally it is not accepted from either provision of the Code or law laid on the subject to initiate CIRP. Section 9(5) of the Code, for brevity and clarity, is depicted below:

> *"The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), by an order—*
>
> *(1) admit the application and communicate such decision to the operational creditor and the corporate debtor if,—*
>
> *(a) the application made under sub-section (2) is complete;*
>
> *(b) there is no [payment] of the unpaid operational debt;*
>
> *(c) the invoice or notice for payment to the corporate debtor has been delivered by the operational creditor;*

> *(d) no notice of dispute has been received by the operational creditor or there is no record of dispute in the information utility; and*
>
> *(e) there is no disciplinary proceeding pending against any resolution professional proposed under sub-section (4), if any."*

g. In view of the above facts and circumstances of the case as also law laid down on the subject, we set-aside the impugned order dated 03.06.2021 passed by the Adjudicating Authority ('National Company Law Tribunal, Principal Bench-IV, New Delhi) in C.P. No. IB-218(PB)/2018. In the result, 'Corporate Debtor' is released from the rigor of the 'Corporate Insolvency Resolution Process'. All actions taken by the 'Interim Resolution Professional'/ 'Resolution Professional' and 'Committee of Creditors', if any, are declared illegal and set-aside. The Resolution Professional is directed to handover the records and assets of the 'Corporate Debtor' to the Director of the 'Corporate Debtor' immediately.

h. The matter is remitted back to the Adjudicating Authority to decide the fee and cost of the 'Corporate Insolvency Resolution Process' as incurred by the 'Interim Resolution Professional, which is to be borne and paid by the Operational Creditor. The Appeal is allowed with the aforesaid observations and directions.

Pending application, if any, stands disposed of.

Interim order, if any, stands vacated. No order as to costs.

[Justice Rakesh Kumar]
Member (Judicial)

(Dr. Ashok Kumar Mishra)
Member(Technical)

***04th August,* 2022**

New Delhi

Raushan.K