NATIONAL COMPANY LAW APPELLATE TRIBUNAL, PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 788 of 2021

[Arising out of order dated 05.07.2021 passed by the Adjudicating Authority (National Company Law Tribunal, Court No. IV, New Delhi) in Company Petition No. IB-1294/ND/2018]

IN THE MATTER OF:

Abdos Polymers Limited

8/1, Hardutral Chamaria Road,

Howrah 711101 (WB). **……. Appellant.**
(Operational Creditor)

Versus

Callina Care Overseas Pvt. Ltd.

C-21, First Floor, Hauz Khas,

New Delhi – 110016. **…… Respondent.**
(Corporate Debtor)

Present:

For Appellant:	**Mr. Kanwal Chaudhary, Advocate.**
For Respondent:-	**Ms. Smitakshi Talukdar and Mr. Rahul Jain, Advocates.**

J U D G M E N T
(20th March, 2023)

Justice Anant Bijay Singh;

The instant Appeal under Section 61 of the Insolvency and Bankruptcy Code, 2016 ***(for short IBC)*** has been preferred by the Appellant being aggrieved and dissatisfied by the order 05.07.2021 passed by the Adjudicating Authority (National Company Law Tribunal, Court No. IV, New Delhi) in Company

Petition No. IB-1294/ND/2018 whereby petition under Section 9 of the IBC filed by Appellant through Mr. Sunil Kumar Gupta (Manager- Finance & accounts in the Appellant Company) with a prayer to initiate the Corporate Insolvency Resolution Process against M/s Callina Care Overseas Pvt. Ltd. (Corporate Debtor) was dismissed holding that there were disputes existing between the parties prior to the issuance of the Demand Notice.

2. The facts giving rise to the instant Appeal are as follows:

i) That Respondent Company came to be incorporated on 20.12.1999 under the Companies Act, 1956, having its Registered Office as mentioned in Memo of Parties bearing CIN No. U7414(U)L1999PTC102884. The Appellant supplied goods (P.P. Sacks) to Respondent Company. During the course of business, Appellant raised invoices upon Respondent Company from 19th November, 2015 to 29th December, 2015. On account of aforesaid invoices raised, Respondent Company made part payments thereby leaving an amount of Rs. l0,96,184/- (Rupees Ten Lacs Ninety-Six Thousand One Hundred and Eighty-Four Only) due and recoverable. This debt fell due on 1st February, 2016. The Appellant maintains a ledger of Respondent Company in the ordinary course of business. The Sub-ledger as maintained was duly acknowledged by Respondent Company for the period 1stApril, 2014 to 31st March, 2016 which would indicate that an amount of Rs.10,96,184/- (after discount) was duly acknowledged to be due and payable to Appellant Company. That upon taking the discount, Respondent issued a Debit Note on 14.06.2014 for Rs. l7,500/-. It would appear that Respondent Company too maintains a ledger for the transactions held with Appellant Company and from the said ledger, it can be confirmed that an amount of Rs.l0,96,184/- is reflected as payable to Appellant Company.

ii) Further case is that on 28th April, 2016, Respondent / Corporate Debtor issued Sales Tax Forms for the Invoices against which the Goods were supplied in the following manner:

a. Sales Tax Form No. 0037769 dated 28.04.2016

Invoice No.	**Date**	**Amount in Rs.**
432	19.11.2015	5,33,736.00
446	23.11.2015	1,77,401.00
448	25.11.2015	95,547.00
453	27.11.2015	2,20,633.00
454	28.11.2015	1,50,639.00
460	30.11.2015	2,39,781.00

Total Form and Invoice Value Rs.14,17,737.00/-

b. Sales Tax Form No. 0037770 dated 28.04.2016

Invoice No.	**Date**	**Amount in Rs.**
471	02.12.2015	2,27783.00
472	04.12.2015	1,50,843.00
479	09.12.2015	2,77,926.00
481	10.12.2015	3,20,047.00
490	12.12.2015	1,61,957.00

Total Form and Invoice Value Rs.11.38,556.00/-

iii) The Respondent Company inspite of having acknowledged its liability to pay since was unable to pay its debt, Appellant was constrained to serve Demand Notice dated 01st November, 2017 *(Annexure A-8 at page 56 to 63 of the Appeal)* upon the Respondent Company under Section 8 of the IBC calling upon the Respondent to pay an amount of Rs. 14,18,462/- thus computing interest @ 24% per annum in terms of the Invoices amounting to Rs. 3,22,278/-. The Demand Notice was duly served upon the Respondent Company vide speed post and Registered post and the same was delivered on 16.12.2017 as per address recorded/reflected on MCA website. As per the tracking report, the item was shown to be delivered on 16.12.2017 however the same was returned with remark “Left” mentioned on envelope.

iv) Further case is that as Respondent/Corporate Debtor failed to comply with requisites of aforesaid Demand Notice, the Appellant approached the NCLT, New Delhi and filed an Application/Petition under Section 9 of the IBC. While Appellant's Application/Petition was pending consideration before the Adjudicating Authority, on 31stOctober, 2019 while entertaining another Application/Petition bearing CP(IB) No. 1060/ND/2018 against Respondent/Corporate Debtor, preferred by another Operation Creditor namely Jaswant International Pvt. Ltd., The Adjudication Authority admitted the Petition, initiated CIRP and appointed Mr. Piyush Moona as IRP. In view of the above Application/Petition under Section 9 of the IBC having been admitted, the Adjudicating Authority by way of its order dated 15.02.2019 while observing that another CIRP since cannot be initiated against Respondent and that Appellant could file its claim before IRP, granted liberty to Appellant to file an appropriate Application for revival of its Application/Petition, in the event, for any reason the order dated 31.01.2019 is CP(IB) 1060/ND/2018 is set aside. The Appellant accordingly submitted its claim on 01st March, 2019 in requisite Form B with the IRP. The IRP by way of its email dated 08.03.2019 *(Annexure A-10 at page 73 of the Appeal)* informed the Appellant that its claim is admitted for an amount of Rs.18,92,534/-.

v) On 12th July, 2019, a Settlement Agreement came to be arrived at amongst Operational Creditor namely Jaswant International Pvt. Ltd. and Respondent and consequently CA No. 228/2019 in CP(IB) 1060/ND/2018 under Section 12A of the IBC for withdrawal of CIRP came to be allowed by the Adjudicating Authority by way of order dated 25.07.2019. Consequent to the withdrawal of aforesaid CP(IB) 1060/ND/2018, Appellant herein preferred CA475/2019 in CP(IB) 1294/ND/2018 on 17.10.2019 seeking revival of its Petition/Application under Section 9 of the IBC and the same Application by way of order dated 25.10.2019 came to be allowed by the Adjudicating Authority and Appellant's Petition was revived. Thereafter, the Respondent/Corporate Debtor filed reply to Section 9 Petition and the Respondent with vemhence disputed the service of Demand Notice. Further, Respondent placed reliance on some emails to contend that goods supplied were defective *(Annexure A-11 at page 74 to 84 of the Appeal).*

vi) Further case is that emails relied upon by Respondent by way of its reply nowhere mention as to which goods are being referred to. In none of the emails has it been alleged the goods supplied against Invoices relied upon by Appellant were defective. Moreover, amounts reconciled in terms of ledger was never disputed. Nothing could be ascertained from alleged emails as to if there was any quality or quantity issue with respect to goods supplied in terms of Invoices relied upon by Appellant. The Respondent never sent any Notice nor filed any Suit or Claim against Appellant. The copy of emails dated 07.08.2014, 27.03.2015, 01.02.2016, 25.03.2016 and 08.04.2016 are collectively annexed in the memo of Appeal *(Annexure A/12, Colly, at page 85 to 98 of the Appeal).*

vii) Finally, the Adjudicating Authority heard the submissions on behalf of Appellant and Respondent, and by way of impugned judgment dated 05th July, 2021 rejected the Application/Petition filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 by the Appellant, which led to filing of this instant Appeal.

3. The Ld. Counsel for the Appellant during the course of argument and grounds taken in the memo of appeal submitted that the Adjudicating Authority failed to consider the acknowledgement of debt made by Respondent/Corporate Debtor on the ledger of Appellant. The ledger of Respondent which confirmed the amount payable to Appellant. Further, also failed to consider the Sales Tax Forms issued by Respondent on 28th April, 2016 for the goods supplied by Appellant against invoices for which partial payments were made. Needless to mention that Sales Tax Forms are normally issued when there was no dispute as regards goods supplied and goods having been accepted.

4. It is further submitted that the Adjudicating Authority failed to consider that reliance placed by Respondent on alleged emails was just an afterthought in order to evade the liability to pay. Further, also failed to consider or deal with the fact that if emails of Respondent dated 07.08.2014, 27.03.2015, 01.02.2016, 25.03.2016 and 08.04.2016 were of any following substance:

- Why would Respondent on 06th April, 2016 confirm the ledger balance?
- Why on 31.03.2016 Respondent's ledger would show Rs. 10,96,184/- payable?
- Why on 28th April, 2016 Respondent would issue Sales Tax Forms if Goods were sub-standard or rejected by the buyer of Respondent?

5. It is further submitted that the Appellant has placed on record ledger for the period 01.04.2014 to 31.03.2015 and 01.04.2015 to 31.03.2016. In which it would appear that the said ledger were printed on 06.04.2016 and the Corporate Debtor after taking discount has reconciled the amount by putting its stamp and signatures. Further, the Corporate Debtor has again made an endorsement confirming the amount to be due and has put its stamp. Though, the Ld. Counsel for the Respondent/Corporate Debtor has disputed the stamp and signatures on this ledger, however, no explanation has come forth to Corporate Debtor's own ledger wherein it confirms an amount of Rs. 10,96,184/- to be due and payable and further the discount as mentioned in Appellant's ledger, the Corporate Debtor has issued a voucher for Rs. 17,500/-.

6. It is further submitted that the aforesaid emails relied upon by the Respondent, there is no mention in the emails as to for which material or sample fabric, the emails are sent. In none of the emails has it been disputed that material supplied against the invoices relied upon in present matter or amount reconciled in ledger is disputed. Nothing can be ascertained that there was any quality or quantity issue w.r.t material supplied against the invoices relied upon in present matter. The Respondent has never sent any notice or filed any claim disputing the amount to be due in terms of ledger and therefore by way of reply to Section 9 Application. The Respondent has made a frivolous attempt to raise sham, vague and moonshine defence. Further, in view of judgment of ***"Mobilox Innovation Pvt. Ltd. Vs. Kurusa Software Pvt. Ltd.,*** the Respondent has miserably failed to establish any pre-existing dispute amongst parties to present matter. In view of the above submissions, it is a fit case to remand the matter to Adjudicating Authority to consider afresh the material on record and then adjudicate the controversy.

7. The Ld. Counsel for the Respondent/Corporate Debtor in his Reply Affidavit filed in the instant appeal along with written submissions which was filed before the Tribunal in the matter annexed in the Reply Affidavit submitted that the term "dispute" under Section 9 of the IBC does not mean mere pendency of litigation but also any form of dispute which is not an illusory or a sham defence. The NCLT cannot examine the intricacies of the dispute or conclude on the success of the dispute. The relevant observations of the Hon'ble Supreme Court of India in ***"Mobilox Innovations (P) Limited Vs. Kirusa Software Private Limited, (2018) 1 SCC 353, Para 51,*** as hereunder:

> ***"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. <u>**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.**</u>"***

Further, the decision of the Hon'ble Supreme Court of India in *Mobilox (Supra)* has been followed in catena of decisions. In ***"Company Appeal (AT) (Insolvency) No. 738 of 2018 decision dated 24.01.2019, Mr. Dingo Ku Vs. M/s. Suntech Infra Solutions Pvt. Ltd., Para 10",*** it has been laid down that a communication showing delay in delivery of project and the loss sustained by the Corporate Debtor amounts to a pre-existence dispute and an application under Section 9 of the IBC is not maintainable. The ratio laid down in the above cases, is clearly applicable in the facts of the present case for the following reasons:

- There is a dispute relating to timely delivery and quality of the PP Sacks supplied by Corporate Debtor.

- As a result of the delay and defective products, the Corporate Debtor sustained a loss of USD 60030.
- These facts were made known to the Corporate Debtor by way of multiple emails, much prior to issuance of the Section 8 Notice and therefore, there is evidence of a pre-existence dispute between the parties.

8. Reliance is placed on the following emails:

- By email dated 07.08.2014, the Respondent informed the Appellant that the PP Sacks supplied by the Appellant were substandard and not in accordance with the specifications provided by the Respondent.
- By email dated 27.03.2015, the Respondent informed the Appellant that out of the total quantity supplied, approximately 4.23% comes as wastage and accordingly, the Appellant was requested to visit Respondent's factory for verification of the same.
- By email dated 01.02.2016, the Respondent informed the Appellant that because of delay in supplying the PP Sacks, the foreign customer has reduced the price of the raw material by INR 10/- per kg, by way of damages.
- Letter dated 25.03.2016 sent by the Respondent's customer stating that the goods supplied by Respondent stands rejected, causing a loss of USD 60030 to the Respondent. This letter was also sent to the Appellant by the Respondent vide email dated 25.03.2016.

- By email dated 08.04.2016, the Respondent sent two letters to the Appellant. These letters showed that (a) the shipment is rejected by the foreign buyer and (b) because of default on part of Corporate Debtor, Corporate Debtor has sustained a loss of USD 60030, which needs to be reimbursed by the Corporate Debtor.

In view of these extensive communications, which were sent by the Respondent to the Appellant, a clear and present pre-existence dispute is apparent on the face of records which is backed by documentary evidence and is not a mere bluster without any documentary support and therefore, the present matter ought to be rejected on this ground alone.

9. As per Section 8 of the IBC, it is mandatory to "deliver" a demand notice of unpaid operation debt. Section 8 uses the word "deliver", which would mean that the Corporate Debtor has to ensure delivery of the notice on the Corporate Debtor. When the notice is returned unclaimed or with remarks "left', the Courts have held that this to be an invalid service. Reliance is placed on following decisions:

- In ***A. Muthuswamy Vs. G. Ayyappan, 2008 SCC Online Mad 81, Para 6,*** the Hon'ble Madras High Court has held that where the statutory notice is returned unclaimed, it does not amount to valid service.
- In ***Anil Raj Vs. Integrated Finance Co. Ltd., 2005 SCC Online Ker. 3, Para 6 and 7,*** the Hon'ble Kerala High Court has held that mere dispatch of notice cannot be equated with service of notice, particularly when, the reason for non-service is not attributable to the other party.

- The Hon'ble NCLAT in ***Company Appeal (AT) (Insolvency) No. 194 of 2019, M/s Krystal Integrated Services Pvt. ltd. Vs. M/s Indiaontime Express Pvt. Ltd., Para 2 and 9, decision dated 12.07.2019*** has held that return of the notice with remarks "left", even if the notice is issued at the correct address, is not a valid service for the purposes of Section 8(1) of the IBC.
- The Hon'ble NCLAT in ***Company Appeal (AT) (Insolvency) No. 272 of 2018, Sh. Sharad Kesarwani Vs. M/s Planetcast Media Services Limited & Anr., Para 5, decision dated 07.08.2018,*** has held that where the office is found locked and sealed on account of action by an authority, service of notice at such address does not amount to valid service.

In absence of any proof of receipt of the demand notice under Section 8 of the IBC, the present matter at the instance of the Appellant is not maintainable.

10. In support of its claim, the Respondent relied upon two ledgers *(supra)*. None of these ledgers bear the signature of the authorized signatories of the Respondent. Moreover, even the seal of the Respondent is *ex-facie* different from the official seal which is evident from the record. This is further substantiated by the fact that there is no covering letter or document produced on record, which shows that ledger was ever sent or issued by the Respondent. In absence of any such document, coupled with the difference in the signatures of the authorized signatory and the seal of the Respondent, it is clear that the ledger produced on record is a forged one and cannot be relied upon. There are genuine concerns that have been raised by the Respondent as to the authenticity of the ledger accounts produced by the Respondent and therefore, such ledgers cannot be acted upon.

11. In any event, this Appellate Tribunal in ***"Company Appeal (AT) (Insolvency) No. 57 of 2020, V Padmakumar v. Stressed Assets Stabilisation Fund (SASF) & Anr., decision dated 12.02.2020",*** has held that representation of debt in financials does not amount to acknowledgement of debt. Therefore, even if the ledger were to be acted upon, they cannot by any means be considered as an acknowledgement of debt.

Notwithstanding the above, the ledger is un-dated. There is no date of acknowledgement. The period of ledger is March 2014-01 April 2016. Pertinently, by email dated 08.04.2016, which is after the ledger date, the Respondent sent two letters to the Appellant the Respondent sent two letters to the Appellant showed that (a) the shipment is rejected by the foreign buyer and (b) because of default on part of Corporate Debtor, Corporate Debtor has sustained a loss of USD 60030, which needs to be reimbursed by the Corporate Debtor, thereby showing existence of dispute, after the alleged ledger accounts. In view of the aforementioned facts and circumstances, the Adjudicating Authority has rightly been passed the impugned order.

12. After hearing the parties and going through the pleadings made on behalf of the parties and the above discussions, we observe that the emails dated 07.08.2014, 27.03.2015, 01.02.2016, 25.03.2016 and 08.04.2016 sent by the

Respondent to the Appellant shows that there was pre-existence dispute between the parties before issuance of Demand Notice which is not permissible in IBC to initiate the Corporate Insolvency Resolution Process. Therefore, we are fully in agreement with the reasons assigned by the Adjudicating Authority in the impugned order. Keeping in view of the aforenoted facts, we do not find any merit in the Appeal to interfere with the order impugned passed by the Adjudicating Authority. The impugned order dated 05.07.2021 passed by the Adjudicating Authority (National Company Law Tribunal, Court No. IV, New Delhi) in Company Petition No. IB-1294/ND/2018 is hereby affirmed. The instant Appeal is hereby dismissed. I.A., if any, stands disposed off. No order as to costs.

13. Registry to upload the Judgment on the website of this Appellate Tribunal and send the copy of this Judgment to the Adjudicating Authority (National Company Law Tribunal, Court No. IV, New Delhi), forthwith.

[Justice Anant Bijay Singh]
Member (Judicial)

[Mr. Kanthi Narahari]
Member (Technical)

New Delhi
20th March, 2023
R. Nath.