

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT)(Insolvency) No. 256 of 2023

[Arising out of the order dated 12.01.2023 passed by the Adjudicating Authority, National Company Law Tribunal, New Delhi (Court No. III) in Company Petition No. (IB)-966/(ND)/2020]

IN THE MATTER OF:

**East India Udyog Ltd.
Through its Authorized Representative
Ritesh Tripathi
C-8, Sector 3, Noida,
Uttar Pradesh - 201301**

...Appellant

Versus

**SPML Infra Limited
Represented through its Managing Director
Regd. Office:
F-27/2, Okhla Industrial Area,
Phase-II, New Delhi – 110020**

...Respondent

Present:

**For Appellant: Mr. Arvind Verma, Mr. Arvind Nayar, Mr. Aman
Vachher and Mr. Ashutosh Dubey, Advocates**

**For Respondent: Mr. Udayaditya Banerjee and Mr. Siddhant Jaiswal,
Advocates.**

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 the order Company Appeal (AT)(Insolvency) No. 256 of 2023

dated 12.01.2023 (hereinafter referred as '**Impugned Order**') passed by the Adjudicating Authority (National Company Law Tribunal, New Delhi Bench), in CP(IB) No.966/(ND)/2020. By the impugned order, the Adjudicating Authority dismissed the application filed by Operational Creditor-East India Udyog Ltd., (the present Appellant) under Section 9 of the IBC seeking initiation of Corporate Insolvency Resolution Process ('**CIRP**' in short) against Corporate Debtor-M/s. SPML Infra Limited (the present Respondent). Aggrieved by the impugned order, the present appeal has been preferred by the Operational Creditor.

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

- The Respondent/Corporate Debtor was in the business of executing rural electrification contract for South Bihar Power Distribution Company Limited ('**SBPDCL**' in short). For this purpose, it engaged in a business relationship with the Appellant/Operational Creditor since 2014 for supply of power and distribution transformers and other related items.
- The Corporate Debtor issued purchase orders ('**POs**' in short) to the Operational Creditor against which materials were delivered and payments were made by the Corporate Debtor by Letter of Credit ('**LC**' in short) having 90 or 180 days tenure.
- The Appellant/Operational Creditor sought early release of payment for goods delivered against POs issued in 2017-18 but the Corporate

Debtor on refusing to make good the payment, the Appellant/Operational Creditor sent a demand notice under Section 8 of IBC on 29.07.2020 claiming a sum of Rs. 8,47,95,390/- including interest.

- The Corporate Debtor sent a reply on 08.08.2020 refuting the claim of the Appellant and disputed the amount payable to the Operational Creditor besides raising other disputes.
- Not having received any further payment from the Corporate Debtor post service of Demand Notice, a Section 9 IBC application was filed before the Adjudicating Authority by the Operational Creditor for initiation of CIRP against the Corporate Debtor.
- The Corporate Debtor filed its reply to the Section 9 application on 22.12.2020 disputing the liability to pay and stating that Operational Creditor has defaulted in performing their part of the obligations under the terms of the PO.
- The Corporate Debtor also filed 5 applications under the Arbitration and Conciliation Act, 1996 before the Hon'ble Calcutta High Court between September 2020 and December 2020.
- The Adjudicating Authority dismissed the Section 9 application filed by the Appellant on grounds of pre-existing dispute with respect to the outstanding amount and quality of goods and services rendered by the Operational Creditor.

- Aggrieved by the impugned order, the present appeal has been preferred by the Operational Creditor.

3. The Learned Counsel for the Appellant has submitted that the Operational Creditor was in a continuous business relationship with the Corporate Debtor supplying them transformers and other items for which POs were issued by the Corporate Debtor. It has been submitted that most of the payments during 2014, 2015 and 2016 were made by the Corporate Debtor through LC. However, from 2017 onwards there was delay in the opening of the LC by the Corporate Debtor due to their financial problem. However, the Corporate Debtor requested the Operational Creditor to supply material on credit with the assurance that payments would be made within 45 days from date of delivery of goods as mentioned in the POs. Accordingly, the Operational Creditor continued to deliver goods on POs placed upon them and raised invoices on the Corporate Debtor.

4. Submitting further that the last payment received from the Corporate Debtor was on 16.11.2019, it has been further claimed that the Operational Creditor sent an email on 22.04.2020 to the Corporate Debtor to clear outstanding dues and requested for issue of new security cheques till the time outstanding payments were cleared. However, since payments were not released, the Operational Creditor sent further reminder emails on 04.06.2020, 18.06.2020 and 25.06.2020 but these communications did not lead to any payment being received.

5. A sum of Rs. 5,04,70,413 was due and payable by the Corporate Debtor as principal amount besides an interest amount of Rs. 1,37,24,977/- only. In addition, an amount of Rs. 2,06,00,000/- was due from the Corporate Debtor on account of manufacture of 261 transformers which were however admittedly not lifted by the Corporate Debtor. Instead of releasing the payments, the Corporate Debtor on 18.07.2020 refused to accept the outstanding operational debt and made allegations of lapses on the part of the Operational Creditor. It has been contended by the Learned Counsel for the Appellant that the allegations of deficiencies raised were false since the Corporate Debtor had been accepting all supplies till then without any demur and protests. The Operational Creditor therefore sent a reply on 27.07.2020 to the Corporate Debtor denying the disputes as false and vexatious and sought payment of outstanding dues besides threatening further legal action.

6. It is further submitted that the Operational Creditor thereafter sent a demand notice under Section 8 of IBC on 29.07.2020 claiming a sum of Rs. 8,47,95,390/-. Admitting that the Corporate Debtor in their reply to the demand notice dated 08.08.2020 had disputed the amount payable to the Operational Creditor besides raising vexatious claims, it is however contended by the Learned Counsel for the Appellant that the factum of issuance of bank guarantee and security cheques by the Corporate Debtor in favour of the Operational Creditor was a clear admission of liability. It was further stated that the Corporate Debtor had categorically assured on 24.04.2020 by email that payment would be made

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to the Operational Creditor and that the delay in payment was occasioned by Covid 19. It was therefore strenuously contended that the Corporate Debtor having clearly acknowledged their liability in their email dated 24.04.2020, it clearly establishes debt due and payable. Further, it was stated that the Corporate Debtor having never raised any dispute at any point of time either with regard to the outstanding liability or the goods supplied, the present objection was clearly an attempt to thwart the payment of outstanding dues to the Operational Creditor. On not receiving the payment from the Corporate Debtor, it was added that Section 9 application was filed by the Operational Creditor for initiation of CIRP against the Corporate Debtor.

7. The Learned Counsel for the Corporate Debtor making rival contentions submitted that the business transactions between the Operational Creditor and the Corporate Debtor were based on payments to be made through the LC. Moreover, payments that were released by the Corporate Debtor did not correspond to any particular PO but was released corresponding to consolidated amounts that was due. However, the Operational Creditor has cherry-picked particular invoices which was contrary to the business model and commercial understanding between the parties. Further there has been no reconciliation of accounts and prior to reconciliation of accounts, no default could have arisen. In support of their contention, it has been submitted by the Learned Counsel for the Respondent that the Hon'ble Supreme Court in the matter of ***Sabarmati Gas Ltd. v. Shah Alloys Ltd. (2023) 3 SCC 229*** has held that the failure of Company Appeal (AT)(Insolvency) No. 256 of 2023

reconciliation of accounts also qualifies as a pre-existing dispute between the parties in terms of Section 8 of the IBC Code. It was further added that post-2016, the Operational Creditor started defaulting in performing their part of obligations under the terms of the PO and that this was conveyed from time to time to them even before receipt of demand notice. It was added that these shortcomings had a consequential impact in that Corporate Debtor in turn defaulted in performing their contractual obligations in respect of rural electrification contracts qua SBPDCL resulting in sanctions from SBPDCL. It is also submitted that several arbitration applications were also filed before the Hon'ble Calcutta High Court which is indicative of pre-existing disputes.

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

9. The short point for consideration is whether there was any discernible pre-existing dispute surrounding the debt claimed to be due and payable by the Operational Creditor.

10. We find that the Corporate Debtor in its reply dated 08.08.2020 to the Section 8 demand notice had disputed both the quantum of operational debt and also deficiencies in respect of discharge of contractual obligations by the Operational Creditor.

11. On the issue of operational debt, it was contended by the Learned Counsel for the Respondent that the amount claimed by the Operational Creditor was disputed in the reply dated 08.08.2020 of the Corporate Debtor to the demand notice dated 29.07.2020 as extracted hereunder: -

“3. From the notice, it appears that your client is demanding payment of an alleged unpaid operational debt from our client. The total amount of alleged claim as mentioned in the notice is Rs.8,47,95,390/-. Not only is such claim totally baseless, the same has been made wrongfully and without adverting to several material facts and documents which destroy the alleged claim.”

(Emphasis supplied)

12. We also notice that even prior to receipt of demand notice dated 29.07.2020, the Corporate Debtor on 18.07.2020 had refused to accept the outstanding operational debt, inter-alia, on the ground of reconciliation of accounts. We also notice that at page 855 of Appeal Paper Book (**‘APB’** in short), the Operational Creditor in their counter affidavit dated 15.12.2021 to the additional affidavit dated 27.09.2021 filed by the Corporate Debtor has on their own admitted that they had given numerous reminders to the Corporate Debtor prior to 18.07.2020 to reconcile the account. The Adjudicating Authority has also taken note of the fact that since the Appellant had themselves sent email to the Corporate Debtor on 31.08.2018 and 04.09.2019 for reconciliation of accounts, that by itself shows that there existed a dispute between the parties regarding

the amount of debt due and the requirement for reconciliation of accounts as both the parties were having counter claims against the other. It is the case of the Appellant that the emails for reconciliation of accounts were sent since the Corporate Debtor was not sharing their books of accounts. Be that as it may, this does not detract from the fact that there was a dispute around the debt due and payable since both parties had raised the issue of reconciliation of accounts. We also do not find any material to have been placed on record by the Operational Creditor wherein the Corporate Debtor can be said to have unambiguously admitted the operational debt claimed by the Appellant. We, therefore hold that the Adjudicating Authority has rightly observed in the impugned order that the Corporate Debtor had raised an issue with regard to the existence of amount claimed by the Operational Creditor and asked for reconciliation of accounts.

13. Next we come to the issue of deficiencies in respect of discharge of contractual obligations by the Operational Creditor as raised by the Corporate Debtor. The crux of the matter in the present case is to find out as to whether there was a plausible dispute supported by the materials raised by the Corporate Debtor in Reply to Demand Notice. It will be useful at this stage to peruse the reply dated 08.08.2020 of the Corporate Debtor in response to the demand notice dated 29.07.2020 as extracted below: -

“4. It is a matter of record that there were transactions between our client and your client whereby our client had issued several purchase

orders to EIUL for supply of Distribution Transformers for Patna, Gaya and Kaimur projects and Power Transformers for Patna and Gaya projects. The supplies of the Distribution and Power Transformers as aforesaid were required to be made strictly as per the technical specifications which were informed to EIUL and the supplies were to be made within stipulated time together with submission of appropriate performance bank guarantees by EIUL.

5. However, EIUL has acted in breach of its obligations and there were several lapses on the part of EIUL in the supply of the required Distribution and Power Transformers.

6. One of the main defaults committed by EIUL was non-submission of requisite performance bank guarantees and also non-renewal of bank guarantees though the same were a very important and critical terms of the contract between the parties.

7. Furthermore, there were inordinate and unjustified delays by EIUL in making supplies within the stipulated time which rendered EIUL liable for liquidated damages which, however, EIUL has failed and neglected to account for in breach of its obligations.

8. There were also several incidents of non-supply of materials including, inter-alia, transformer oil by EIUL and the Distribution and Power Transformers that were supplied suffered from various failures

and defects even post commissioning but during the guarantee period, as a result of which our client suffered loss and damage including financial loss and also loss of goodwill and business reputation. There were also significant expenses incurred by our client for rectifying the defects and failures in the transformers supplied by EIUL which EIUL has failed and neglected to compensate for, despite repeated reminders and requests.

9. All of the aforesaid major breaches and defaults committed by EIUL were made known to EIUL contemporaneously in writing and otherwise, despite which EIUL failed, neglected and refused to remedy the same. That apart, in addition to the defaults and breaches pointed out hereinabove, there were further and other breaches and defaults committed by EIUL in performance of its obligations under the contract which has caused loss and damage to our client, in respect of which our client is entitled to and is taking appropriate action against EIUL.”

(Emphasis supplied)

When we look into the contents of allegations made in the Reply to the Demand Notice as above, it is clear that Reply notice raises substantial and genuine issues to oppose the claim of the Operational Creditor's amount due.

14. We find that the issue of deficiency in terms of defects and delays in respect of supplies received from the Operational Creditor was raised by the Corporate Company Appeal (AT)(Insolvency) No. 256 of 2023

Debtor prior to issue of demand notice of 29.07.2020 as borne out from a series of emails placed at pages 432-437 of APB. Concisely put, the email dated 10.10.2017 from the Corporate Debtor raises issues about repair/replacement of supplies made; email dated 18.10.2017 relates to complaint about oil drums having been sent without sealing; email dated 18.05.2018 is about non-supply of oil; email dated 29.11.2018 is about oil drums sent without sealing; email dated 23.02.2019 is about repair of leaking power transformers; email dated 15.10.2019 and 26.11.2019 are about repair of power transformers. These emails which are on record clearly substantiate that the Operational Creditor was put to notice regarding non-supply of goods, delay in supplies, supply of defective goods which are clear signs of pre-existing disputes. We also find that the Adjudicating Authority in para 24 of the impugned order has also taken note of these emails in recording its findings.

15. It has also been submitted by the Learned Counsel for the Respondent that the Corporate Debtor from September 2020 onwards had preferred 5 applications under Section 11 of the Arbitration and Conciliation Act, 1996 before the Hon'ble Calcutta High Court with the last one filed on 22.12.2020. It has been however pointed out by the Appellant that these arbitral applications were filed after issue of the demand notice with a view to fabricate bogus pre-existing disputes to escape Section 9 proceedings. We find that the Adjudicating Authority having noted that the arbitration proceedings were kick-started by the Corporate Debtor starting September 2020, also observed that these arbitration

proceedings were clearly initiated after the issuance of the demand notice in July 2020. Hence, it has been rightly held by the Adjudicating Authority that the invocation of the arbitration proceedings being subsequent to the issue of the demand notice cannot be treated as a pre-existing dispute.

16. It has also been contended by the Learned Counsel for the Appellant that the objections raised by the Corporate Debtor are moonshine and that delay in supply of goods on their part was because LCs were not opened in time by the Corporate Debtor. Further, it was claimed that all after sales complaints had been handled promptly and cannot be looked upon as a real dispute. Moreover, it was submitted that the Adjudicating Authority made the mistake of taking cognizance of the above emails while remaining silent about the communication dated 24.04.2020 in which the Corporate Debtor has assured the Operational Creditor about its intention to clear the outstanding dues in future and that this communication of 24.04.2020 extinguished and subsumed all earlier emails of the Corporate Debtor in which disputes had been raised. It has therefore been contended that the defence undertaken by the Corporate Debtor is moonshine defence and that it was a well-calibrated tactic to create a mirage of pre-existing dispute.

17. We do not feel adequately persuaded to subscribe to the submission made by the Appellant that the letter of 24.04.2020 subsumes all the disputes since prima-facie the aforesaid letter does indicate the Corporate Debtor to either admit the outstanding liability nor does it even remotely suggest that the Company Appeal (AT)(Insolvency) No. 256 of 2023

disputes raised by them earlier stood dissipated. We also find that the Adjudicating Authority in para 27 of the impugned order has clearly noted that even after the letter of 24.04.2020, the Corporate Debtor in their email to the Operational Creditor dated 18.07.2020 had again raised several issues of deficiencies in the supply of goods, breach of obligations, non-supply of bank guarantee by the Operational Creditor which clearly establish that disputes continued to subsist. It will be useful to reproduce relevant portions from the said communication appearing at page 95 of APB:

“However several lapses were observed on the part of EIUL towards supply of DTRs & PTRs required for our projects at Patna, Gaya & Kaimur which are as follows:

- 1. Non submission of CPBGs & PBGs in terms of PO's for the aforesaid projects. Please find enclosed worksheet towards value of non-submitted CPBG's & PBG's for sum of Rs.3.46 Cr. EIUL initially had submitted some PBGs for a sum of Rs.0.30 Cr however subsequently failed to renew the same.*
- 2. Delays in Supplies within Stipulated time period and thereby failed to account LD in terms of the PO's terms & Conditions. Please find enclosed worksheets towards the LD amount of Rs.0.81 Cr which are to be paid by EIUL towards delays in completing the Supplies as per PO's.*

3. *It is found that EIUL had not supplied transformer oil in terms of PO conditions. Please find enclosed worksheet duly mentioning the quantity and amount of Rs.0.163 Cr towards un-supplied transformer oils by EIUL.*
4. *Further several failures of DTRs and PTRs were occurred post commissioning of the same during the guarantee period. PTRs were sent to EIUL factory, got repaired and supplied back after rectification of defects. However sending DTRs to EIUL factory works out expensive and accordingly the same were rectified at site. Please find enclosed worksheet on the expenses incurred / to be incurred by SPML for Rs.0.368 Cr towards rectification of failure DTRs which are required to be paid by EIUL.*
5. *Interest on the aforesaid amounts at the rate to be debited to EIUL at the rate charged by EIUL earlier towards outstanding amounts.*
6. *Therefore without accounting aforesaid amounts towards defaults on the part of EIUL in terms of PO's towards supplies for Patna, Gaya & Kaimur Projects, we are not in position to reconcile your account to arrive at payable amount if any."*

(Emphasis supplied)

18. Given this backdrop, we have no reasons to disagree with the findings of the Adjudicating Authority at para 29 of the impugned order which is as reproduced hereunder:

*“29. In the instant case, we are of the considered view that there is sufficient evidence on record to exhibit a ‘Pre-Existing Dispute’ between the parties prior to the issuance of the Demand Notice under Section 8, IBC, 2016. Further, the defence is not spurious, mere bluster, plainly frivolous or vexatious. Therefore, we are of the consequent view that the ratio of the Judgement of the Hon’ble Supreme Court in the case of **M/s. Mobilox Innovations Pvt. Ltd. V/s. Kirusa Software Pvt. Ltd.** squarely applies to the facts of the attendant circumstances of the case.”*

19. On going through the submissions made by the parties and keeping in mind the provisions of law laid down in the Code and the Mobilox judgment cited supra, it is amply clear that there exists a pre-existing dispute with respect to the existence of amount due and payable and quality of goods and services supplied by the Operational Creditor to the Corporate Debtor. Present is a case where it cannot be said that defence taken by the Corporate Debtor in Reply Notice is a moonshine defence unsupported by any evidence. The ratio of judgment by the Hon’ble Supreme Court in **Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software Private Limited (2018) in C.A. No.9405 of 2017 (MANU/SC/1196/2017)** is indeed squarely applicable in the present case and has been correctly applied by the Adjudicating Authority.

20. Considering the overall facts and circumstance of the present case, and in view of the foregoing discussion, we are of the view that the Adjudicating Company Appeal (AT)(Insolvency) No. 256 of 2023

Authority did not commit any error in rejecting the Section 9 Application filed by the Appellant on the ground of pre-existing dispute. There is no merit in the Appeal. Appeal is dismissed. We however make it clear that it will remain open to the Appellant to resort to other remedies that may be available to it under any other law. No order as to costs.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

Place: New Delhi
Date: 23.03.2023

PKM