NATIONAL COMPANY LAW APPELLATE TRIBUNAL, PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 65 of 2022

(Arising out of the order dated 24.12.2021 passed by the National Company Law Tribunal, New Delhi Bench, Court No. III in IB-230/ND/2020)

IN THE MATTER OF:

RAVI KUMAR TOMAR

S/o Shri Jaipal Das

Ex-Director of Royal Polyurethane (India) Pvt. Ltd.

R/o House No. 3034, Ground Floor,

ELDECO, Sonipat, Haryana **...Appellant**

Versus

NEWGEN SPECIALITY PLASTICS LTD.

Through its Liquidator, Shri Sandeep Kumar Bhatt

Office: 83-B, Pocket-IV,

Mayur Vihar, Phase 1,

Delhi 110091

Eamil Id: vk.singh@newgenpoly.com **...Respondent No. 1**

ROYAL POLYURETHANE (INDIA) PVT. LTD.

Through its Interim Resolution Professional

Shri Rakesh Kumar Parakh

Regn. No. IBBI/IPA-001/IP-00272/2017-18/10516

Email Id. Parakh.rajesh@gmail.com

Office: 507, Plot No. 3B1, Twin District Centre,

Sector 10, Commercial Block of Hotel cum

Commercial Building, Rohini, Delhi 110085 **... Respondent No. 2**

Present:

For Appellant: **Mr. Rajat Aneja, Ms. Aditi Shastri, Advocates**

For Respondents: **Mr. Mohit Nandwani, Adv. For R1**
CMA Sandeep Kr. Bhatt and CMA Kamal Tyagi, Advocates for Liquidator

J U D G M E N T

Per: Justice Rakesh Kumar Jain.

This appeal has been filed by an Ex-Director of M/s Royal Polyurethane (India) Pvt. Ltd. (Corporate Debtor) against the order dated 24.12.2021 passed by the Adjudicating Authority (National Company Law Tribunal, New Delhi Bench, Court No. III) by which an application filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 (in short 'Code') read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (in short 'Rules') by M/s Newgen Speciality Plastic Ltd. (Operational Creditor)/Respondent No. 1 has been admitted.

2. In brief, the case set up by Respondent No. 1 before the Adjudicating Authority is that the Corporate Debtor had placed a purchase order dated 10.08.2018 for supply of Ice Box and Carrier Frames for a sum of Rs. 4,67,98,086/-. It is alleged that the Operational Creditor had carried out its contractual obligation successfully and issued various invoices No. 0423, M-0468, 0487 and 0533 respectively. The Corporate Debtor had accepted the invoices and made part payments and no dispute was raised about the invoices. It is alleged by the Operational Creditor that last order for the Ice Box and Carrier Frames was delivered on 15.03.2019 and since the payments were not being made, it called upon the Corporate Debtor through notice to pay a sum of Rs. 27,15,669/-. This application was contested by the Appellant by filing a reply in which it is averred that it was engaged as a

dealer by the Operational Creditor on 09.08.2019 to manage the distribution of boxes from Hyderabad to various districts of Telangana and pursuant to a contract awarded by the Govt. of Telangana in favour of the Respondent No. 1, The Respondent No. 2 placed the purchase order dated 10.08.2018 for a sum of Rs. 4,67,98,086/- for supply of Ice Box and Carrier Frames against which the Respondent made an advance payment of Rs. 29,51,011/- to the Operational Creditor and thereafter, the goods worth Rs. 27,15,699.11/- was supplied by the Operational Creditor through the invoice. It is alleged that after adjusting the advance amount of Rs. 29,51,011/- against the invoice of Rs. 27,15,699.11, the operational creditor was liable to refund Rs. 2,35,341.89/- but instead of refunding this amount, the Operational Creditor sent a notice dated 31.07.2019 in terms of Section 8 of the Code alleging that the outstanding debt is of Rs. 27,15,669/-. It is also averred that the said demand notice was replied on 23.08.2019 and the refund of Rs. 2,35,341.89/- was claimed. It is also an admitted fact that before goods could have been supplied by Respondent No. 2 to Respondent No. 1, the CIRP proceedings were initiated against the Respondent No. 1 in a separate case on 19.11.2018 and according to the Appellant the advance payment was made by the Respondent No. 2 to Respondent No. 1 for the supply of goods under the same purchase order dated 10.08.2018 and thus, by mere initiation of CIRP against the Respondent No. 1 will not invalid the advance made by the Respondent No. 2 to the Respondent No. 1 in relation to the same purchase order dated 10.08.2018.

3. On the other hand, Counsel for Respondent No. 1 has submitted that it is undergoing liquidation in which the liquidator has been appointed on 07.01.2019 by the Adjudicating Authority. The supplies were made during the CIRP i.e. 24.11.2018 and 15.03.2019 and former RP/Liquidator had never confirmed that the supplies have been made against the advance. The supplies were made so that funds may be made available with Respondent No. 1 to run the Company. It is alleged that insolvency commencement date of the Corporate Debtor has a great significance because thereafter moratorium was imposed, IRP is appointed, the officers of the management of the Corporate Debtor are suspended and any dues prior thereto of the Corporate Debtor can only be claimed by filing a claim with the Insolvency Professional of the Corporate Debtor but the settlement of pre-CIRP dues against the supplies made after the insolvency commencement date is not legal. In this regard, reference has been made to the case of Uttrakhand Power Corporate Ltd. Vs. M/s ANG Industries Ltd. CA (AT) (Ins) No. 298 of 2017 to contend that the dues, unpaid for the period prior to insolvency proceedings can be recovered only by submitting a claim before the RP. It is further submitted that any transfer of property of the Corporate Debtor on account of an antecedent debt to a creditor shall be a preferential transaction whereas in the case of Binani Industries Ltd. Vs. Bank of Baroda & Anr. CA (AT) (Ins) No. 82 of 2018, it has been held that non-differential treatment of similarly situated creditors shall be maintained. It is also urged that after the moratorium, payment/settlement of pre-CIRP claim during the CIRP period is contrary to Section 14 and in this regard a decision of this Appellate Tribunal, in the case of Indian Overseas Bank Vs.

Mr. Dinkar T. Venkatsubramaniam RP for Amtek Auto Ltd. CA (AT) (Ins) No. 267 of 2017 has been relied upon.

4. The Ld. Adjudicating Authority has observed that the Operational Creditor had made supplies to the Corporate Debtor during the time when it was going through CIRP and no payment is made by the Corporate Debtor post commencement of CIRP of the Operational Creditor with respect to those supplies.

5. Now, the issue involved in this case is as to whether the advance paid to the Operational Creditor before the commencement of the CIRP of the Operational Debt can be adjusted towards the supplies made to the Corporate Debtor during CIRP by the Operational Creditor?

6. It has been recorded in the impugned order that pursuant to the liquidation of Respondent No. 1, the Respondent No 2 (Corporate Debtor) has filed a claim in Form-C dated 14.02.2020 for a total outstanding amount of Rs. 23,23,133/- (including interest) before Anil Kumar and the same has been acknowledged.

7. However, the entire case of the Appellant is that the advance has been made against the same purchase order, therefore, it deserves to be adjusted. The argument raised by the Counsel for the Appellant may appear to be attractive and interesting but the fact remains that after initiation of CIRP against the Respondent No. 1, supplies made by it for creation of the liquidity, in order to run the Company, cannot be adjusted with the advance given before the initiation of CIRP against it because in that situation it would be transfer of the asset of the Corporate Debtor on account of an antecedent debt to a creditor (Respondent 2) which shall be preferential

transaction and the same has been frowned upon by this Tribunal in the case of Binani Industries Ltd. (Supra). Moreover, once the moratorium is kicked in it does not allow to recover any amount from the Corporate Debtor nor the Corporate Debtor can appropriate any amount towards its own dues. Thus, looking from any angle, we do not find any error in the impugned order for the purpose of interference and hence, the present appeal is hereby dismissed. No costs.

[Justice Rakesh Kumar Jain]
Member (Judicial)

[Ms. Shreesha Merla]
Member (Technical)

New Delhi

22nd August, 2022.

Sheetal