

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL PRINCIPAL BENCH,
NEW DELHI**

Company Appeal (AT) (Ins) No. 909 of 2022

IN THE MATTER OF:

CONCEPT GROUP, LLC

25, Kazanskaya Str Lit. A.,
office 304, 190031, Saint Petersburg, Russian Federation.
Ph. No.-+ 7 812 322 11 22 (ext. 7152)
Email Id- georgiy.karaoglanov@conceptgroup.ru

...Appellant

Versus

CNS FASHION RETAIL PVT. LTD.

252E, 2nd Floor, Front Portion,
Sant Nagar, New Delhi-110065,
Ph. No.: 01206831111
Email ID- SAAMAGROC@YAHOO.COM

Also at:

JA 0911, Plot No. 10, DDA District Centre,
Jasola, Delhi- 110020, India

Also at:

39C, Pocket- A1, DDA Flats,
Mayur Vihar-3, Delhi, East Delhi,
Delhi-110096, India

...Respondent

Present:

For Appellant : **Mr. Gyanendra Kumar, Mr. Robin Grover, Advocates**
For Respondents : **Mr. Nitish Kr. Sharma, Adv.**

J U D G M E N T

Per: Justice Rakesh Kumar Jain:

This appeal is directed against the order dated 06.06.2022, passed by the
Adjudicating Authority (National Company Law Tribunal, New Delhi (Court No.

II) by which an application bearing (IB)-1024(ND)2020, filed by the Appellant under Section 9 of the Insolvency and Bankruptcy Code, 2016 (in short 'Code'), has been dismissed, inter alia, on the ground that the Appellant is a related party in terms of Section 5(24)(j) of the Code and there was a pre-existing dispute.

2. In brief, the Appellant entered into a Goods Supply Contract on 23.08.2017 with the Respondent (Corporate Debtor). There was an addendum to the said contract dated 27.08.2018. It is an admitted case that the Appellant served a pre-trial notice (Annexure A-5) in terms of the provision of Russian Laws to the Respondent on 03.09.2019 to which reply was filed by the Respondent on 23.09.2019. Thereafter, the Appellant served a demand notice dated 23.01.2020 (Annexure A-7) claiming an amount of Rs. 20,143,443.87/- on account of non-payment of the goods supplied by the Respondent. The Respondent sent a reply dated 15.02.2020 to this demand notice in which it was averred that "fact that you have supplied substandard goods to our client not capable of fetching a market in India". Thereafter, the Appellant filed an application under Section 9 of the Code before the Adjudicating Authority and in part-iv of the application, claimed an amount of USD 281,203.41 INR 20,143,443.87/- approx. alleging that the default has occurred on 01.09.2019 which is the date agreed between the parties vide addendum contract. It is also averred that subsequently the default had occurred on 04.10.2019 (14 days from the date of receipt of the said notice/pre-trial notice), on 15.02.2020 (10 days from the demand notice) and it continued. The Respondent took the stand to non-suit the Appellant that the it

has 49 % share in the Respondent (CD) and thus it is a related party in terms of the definition provided in Section 5(24)(j) of the Code. The Respondent also relied upon a decision of the NCLT in the case of Zoom Communications Pvt. Ltd. Vs. M/s Par Excellence Real Estate Pvt .Ltd. in IB No. 616/ND/2020 decided on 17.05.2022 which was later on approved by this Appellate Tribunal in CA (AT) (Ins) No. 619 of 2022 and also took the stand that since the goods were substandard, therefore, there was a pre-existing dispute between the parties and that there is a provision for arbitration in the contract which was the genesis of their relationship. The Adjudicating Authority decided both the issues against the Appellant and dismissed the application filed under Section 9 of the Code.

3. Aggrieved against the impugned order, the present appeal has been preferred in which, while challenging the first issue decided by the Adjudicating Authority qua the related party, while relying upon the judgment delivered by the Tribunal, approved later on by this Appellate Tribunal in the case of Zoom Communication Pvt. Ltd. (Supra), it is submitted that the facts in the case of Zoom Communication Pvt. Ltd. (Supra) are altogether different from the present case. It is submitted that in the case of Zoom Communication Pvt. Ltd. (Supra) the court has come to the conclusion that it was a sham transaction between the parties which cannot be followed for initiation of CIRP whereas in the present case no such finding has been recorded. It is further submitted that even if the appellant is a related party then there would be two hurdles before it that in case of initiation of CIRP it cannot be a part of the CoC and cannot be a resolution

applicant being barred under Section 29A of the Code. Besides that there is no such bar that a related party cannot file an application under Section 9 of the Code. In support of his submissions, he has relied upon a decision rendered by this Tribunal in the case of Periasamy Palani Gounder (Promoter & Erstwhile Director) Appu Hotels Limited Vs. Radhakrishnan Dharmarajan RP Appu Hotels Limited & Anr. 2022 SCC Online NCLAT 86. He further submitted that as per his instructions and information the judgment which is being cited has been challenged before the Hon'ble Supreme Court but there is no stay.

4. As regards the other issue about the pre-existing dispute, it is submitted that to the pre-trial notice served by the Appellant, the Respondent while replying the same did not raise any issue regarding the goods being substandard which has been raised only when the demand notice was issued before filing the application under Section 9 of the Code and therefore, it was only an afterthought objection which is not made out from the record. It is also submitted that the Adjudicating Authority has relied upon the emails dated 31.08.2018, 27.10.2018 and 29.10.2018 to somehow reach to a conclusion that there was a pre-existing dispute. In this regard, while referring to the email dated 31.08.2018, it is submitted that the said email was only to improve 'Acoola' operation and sales and not regarding anything to say that the goods supplied were substandard. As regards the clause of arbitration is concerned, which is stated to have been mentioned in the contract itself, it is argued that the presence of the arbitration clause in the argument will not disentitle the

Appellant from preferring the application under Section 9 of the Code, in this regard, he has relied upon a decision of this Tribunal rendered in the case of Hasan Shafiq Vs. CT-Technologies Aps, CA (AT) (Ins) No. 802 of 2020 decided on 14.02.2022.

5. In reply, Counsel appearing on behalf of the Respondent has submitted that in so far as the first issue of the related party is concerned, he would rely upon the findings recorded by the Adjudicating Authority and shall refer to the decision rendered by this Tribunal in the case of Zoom Communication Pvt. Ltd. (Supra). Regarding the pre-existing dispute, it is not denied that in the reply filed to the pre-trial notice there was no such averment about the goods supplied being substandard but it is argued that in the reply to the demand notice which was served prior to the filing of the application under Section 9 of the Code the issue of goods being substandard has been raised. It is also argued that the Adjudicating Authority has rightly taken into consideration various emails which have been referred to by the Appellant which shows that there was some dispute between the parties about the manner in which the goods were supplied after delay and also that goods were not up to the mark. Counsel for the Respondent has also half-heartedly argued about the presence of the arbitration clause to contend that once the arbitration clause is there and the Appellant has raised the issue of arbitration then it is initiation of the arbitration proceedings.

6. In rebuttal, Counsel for the Appellant has submitted that Section 21 of the Arbitration and Conciliation Act, 1996 (Act) is in part -1 which pertains to the

domestic arbitration and shall not apply to any arbitration, which take place beyond India and in this regard, he refers to a decision of the Delhi High court in the case of Raffles Design International India Pvt. Ltd. & Anr. Vs. Educomp Professional Education Limited & Ors. 2016 SCC Online Del 5521, in which it has been observed that “Section 21 is in Part I of the Act and, indisputably, applies only to arbitral proceedings in India”. He has further submitted that pre-trial notice was sent in consonance with the laws of Russia and the Respondent was informed that if the claim is not satisfied then matter goes to the Arbitration Court of the St. Petersburg and Leningrad Region. He has further explained with the help of the report of one Baker McKenzie that the Arbitrazh Court are the commercial Court in Russia has nothing to do with Arbitral Tribunal. It originates from an old soviet tradition, whereby the disputes between state enterprises were heard before the so-called ‘State Arbitrazh’ and the procedural principles of the arbitrazh courts are based on those of continental European Civil Law Jurisdictions, regulated by the Code of Arbitrazh procedure approved in 2002. He has thus submitted that the objection raised by the Respondent about the arbitration, though not raised before the Adjudicating Authority is just for a sake of it and is not made out.

7. We have heard Counsel for the parties and perused the record with their able assistance.

8. In so far as the first issue, decided by the Adjudicating Authority for the related party is concerned, the judgment relied upon by the Respondent in the

Zoom Communications Pvt. Ltd. (Supra) is not at all applicable because it deals with the sham transaction between the parties which was not allowed for the initiation of CIRP whereas no findings have been recorded in the present case.

9. As regard the pre-existing dispute, the Adjudicating Authority has further erred in not looking to the fact that in the reply to the pre-trial notice, the Respondent did not raise any issue regarding the goods being substandard which issue came to be raised only when the demand notice was issued before filing the application and was an afterthought objection, not made out from the record. The emails relied upon the Adjudicating Authority are not directed to raise a pre-existing dispute rather the said emails are exchanged by the parties regarding the improvement in the operation and sales and has nothing to do with the goods which are now alleged to be substandard or defective. Argument of the Respondent that the Appellant has invoked the arbitration in the pre-trial notice is also neither here nor there in view of the fact that firstly, Section 21 of the Act would apply only to the Arbitral proceedings in India as has been held by the Delhi High Court in the case of Raffles Design International India Pvt. Ltd. (Supra) and secondly, it was the arbitration court in the St. Petersburg which is akin to Civil/Commercial Court having three tiers.

10. Thus, looking from any angle, there is an error of appreciation of facts and evidence on the part of the Adjudicating Authority in dismissing the application filed by the Appellant. The appeal is allowed and the impugned order is hereby set aside. Though in the given facts and circumstances without any order as to

costs. We direct the Adjudicating Authority to admit the application in accordance with law.

[Justice Rakesh Kumar Jain]
Member (Judicial)

[Mr. Kanthi Narahari]
Member (Technical)

New Delhi

28th November, 2022

Sheetal