

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 1058 of 2019

IN THE MATTER OF:

Shri IRK Raju

...Appellant

Vs.

Immaneni Eswara Rao & Ors.

...Respondents

Present: For Appellant: - Mr. Rajiv Ranjan, Senior Advocate with Mr. K. Datta, Mr. Rahul Gupta and Mr. Tulsi Raj Gokul, Advocates.

For Respondents: - Mr. Ajit K. Sinha, Senior Advocate with Mr. Praveen Kumar Singh, Mr. Rajiv Shankar Divedi, Mr. Karan Bhardwaz and Mr. Ziauddin Ahmad, Advocates.

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

‘M/s. Ice TV Private Limited’- (‘Operational Creditor’) moved an application under Section 9 of the Insolvency and Bankruptcy Code, 2016 (‘I&B Code’ for short) for initiation of ‘Corporate Insolvency Resolution Process’ against ‘M/s. Sreedevi Digital Systems Private Limited’- (‘Corporate Debtor’). The Adjudicating Authority (National Company Law Tribunal), Amaravati Bench at Hyderabad by impugned order dated 4th October, 2019 admitted the application.

2. The Appellant has challenged the said order on the ground that the application under Section 9 was filed fraudulently with malicious intent for any purpose other than for the resolution of insolvency or liquidation and attracts penal amount in terms of Section 65(1) of the 'I&B Code'.

3. Learned counsel for the Appellant submitted that the Adjudicating Authority has failed to consider that the debt claimed was not payable in fact and the application under Section 9 was filed fraudulently with malicious intent for extracting money and not for resolution or liquidation.

4. The case of the Appellant is that the 'operational debt' claimed by the 2nd Respondent can be bifurcated into two; (i) Rs.1,06,38,500/- on account of the 1st Memorandum of Understanding dated 22nd November, 2015 and (ii) Rs.1,29,80,018/- on account of 2nd Memorandum of Understanding dated 22nd November, 2015.

5. Further, the case of the Appellant is that despite the Appellant offered 100% of the amount actually payable in terms of the original Memorandum of Understanding dated 22nd November, 2015 i.e. Rs.1,06,38,500/- which was raised on account of the invoices raised by the 2nd Respondent, but the 2nd Respondent declined to settle the amount and asked for more.

6. It was submitted that the 2nd MoU dated 22nd November, 2015 is as per the version of the 2nd Respondent was executed between the

parties in order for the 3rd Respondent to reimburse the 2nd Respondent for customs duty paid to the relevant authorities. However, no such arrangement has been made.

7. Further, according to counsel for the Appellant, even if it is assumed and not admitted that custom duty is payable, it cannot come within the meaning of 'operational debt' payable to the 2nd Respondent, the supplier of goods.

8. When the matter was taken up before this Appellate Tribunal on 16th October, 2019, learned counsel for the Appellant reiterated its stand and submitted that the Appellant agreed to pay the total outstanding amount to the 'Operational Creditor' based on the original MoU dated 22nd November, 2015 (1st MoU) and not on the forged MoU enclosed with the Demand Notice under Section 8(1) of the 'I&B Code', but the said Respondent refused to accept the same.

9. On 17th December, 2019, we asked the Appellant to pay entire amount of Rs.1,06,38,500/- and also ordered to pay additional amount of Rs.10,00,000/-. However, the 2nd Respondent refused to accept the same and asked for more interest.

10. It is in this background, we heard the case on merit.

11. According to counsel for the 2nd Respondent, both the Memorandum of Understanding(s) dated 22nd November, 2015 are

genuine. The 1st Memorandum of Understanding dated 22nd November, 2015 was reached with regard to the claim against the invoices and the 2nd Memorandum of Understanding dated 22nd November, 2015 was reached towards excise duty which is to be paid by the 2nd Respondent.

12. For determining the issue, it is relevant to refer the Memorandum of Understanding dated 22nd November, 2015, as under:

SREEDEVI DIGITAL SYSTEMS PVT. LTD.

Corporate Office: D-1/2, Industrial Estate, Visakhapatnam- 530 007.
Tel No: 0891-2799937, Fax No: 0891-2713955, Email: sreevedev@gmail.com
TIN: 37740008200 IEC: 2612002871 ST: AA/SCS/1540ASD001

MEMORANDUM OF UNDERSTANDING

This Memorandum of Understanding is made on this 22nd day of November 2015 by and BETWEEN:

1. **M/s. Sreedevi Digital Systems Pvt Ltd**, a company incorporated under the Indian Companies Act, 1956 having its Registered Office at D.No.39-6-16, SAGAR NIVAS, MURALINAGAR, VISAKHAPATNAM- 530007 represented by its Managing Director Mr. I Ramakrishna Raju S/o. Sri Peraraju aged about 67 years, resident of Visakhapatnam (hereinafter referred to as 'COMPANY'), being the party of the FIRST Part

And

2. **M/s. ICE TV Pvt Ltd**, a company incorporated under the Indian Companies Act, 1956 having its Registered Office at 8-2-411, Flat No.205, Lumbini Rock Castle Apts. Road no.6, Banjara Hills HYDERABAD 500034 represented by its Directors Mr. DOLENDRA PRASAD NELLORE resident of Hyderabad (Hereinafter referred to as 'SUPPLIER'), being the party of the SECOND Part

WHEREAS is Party of the First Part is carrying on the business of Digital and Multimedia distribution services, including Multi System Operation and Distribution of TV Channels as one division and Internet broadband distribution services as another division in the city of Visakhapatnam, in the state of Andhra Pradesh.

ICE TV Pvt Ltd is also carrying the similar kind of business of Digital and Multimedia distribution services, including Multi System Operation and Distribution of TV Channels and Internet broadband distribution services in the city of Hyderabad.

The Second Party has supplied Set Top Boxes to the First Party as per the Schedule of Goods to this agreement and first party was confirming the receipt of the same. The First party has made certain payments to the

Head Office: D.No.39-6-16 Sagar Nivas, Muralinagar, Visakhapatnam- 530 007

second party The payment was outstanding from First Party to the Second party.

NOW THIS MEMORANDUM OF UNDERSTANDING WITNESSETH AS FOLLOWS:

1. Parties of the First part and Second part shall obtain the consent from their Board of Directors and shall authorise their representative to sign this MOU.
2. ICE has supplied the Set Top Boxes (STB) with Conditional Access System CAS (as mentioned in the schedule of goods mentioned in this agreement) 45,000 units in parts, Iredeto Server with Keys and DVB Streamer, M/s Sreedevi is hereby confirming that the STBs were received by them.
3. It was agreed among the both parties that the total amount due of Rs 4,81,95,000/- (Rupees Four Crores Eighty One Lakhs Ninety Five Thousands only) towards supply of STBs and other items.
4. The First Party has already paid to the second party the part payments towards the cost of STBs supplied and the Second Party is confirming the same

a. 02-06-2014	40,00,000	RTGS
b. 14-06-2014	40,00,000	RTGS
c. 01-08-2014	10,00,000	RTGS
d. 16-06-2014	57,000	CASH
e. 17-06-2014	1,20,00,000	RTGS
f. 21-06-2014	57,000	CASH
g. 22-08-2014	10,00,000	RTGS
h. 23-08-2014	1,42,500	CASH
i. 13-03-2015	30,00,000	RTGS
j. 27-04-2015	4,50,000	RTGS
k. 01-07-2015	20,00,000	RTGS
l. 31-08-2015	10,00,000	RTGS
m. 01-10-2015	10,00,000	RTGS
n. 23-10-2015	8,50,000	RTGS
o. 31-10-2015	10,00,000	RTGS
p. 20-08-2015	2,00,000	CASH

Total 3,15,56,500

(Rupees Three Crores Fifty Six Lakhs Five Hundred only)

[Signature]

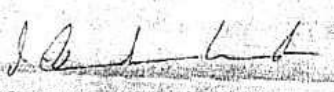
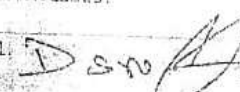
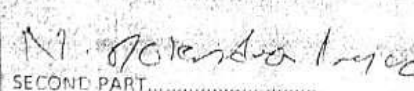
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5. Both parties here by agreeing that the outstanding amount payable by the First party to the Second party as on the date of the this agreement is of Rs 1,66,38,500/- (Rupees One Crore Sixty Six Lakhs Thirty Eight Thousands Five Hundred only)
6. The First party is hereby agreeing to pay the outstanding amount in 12 monthly instalments commencing from 20th December 2015 onwards.

Schedule of the Goods Supplied and Invoice Details:

- A. Model & Make: SD-MPEC-2 DVB-C Receiver with USB PVR, 8 MB Flash and 64 MB RAM MSTAR5017Chip (STB)
- B. CAS: IREDETO embedded M No5366C
- C. Invoices of STBs from Invoice 001 dated 10/06/2014 to Invoice 009 dated 22/08/2014 each value of Rs. 53,55,000/- (including VAT) Total of Rs. 4,81,95,000/-

This Memorandum of Understanding is read by all the parties and signed as on the date as mentioned above.

SIGNATURES	WITNESSES:
 FIRST PART	1.  D.S. NITHIN, 222, Talle H.No RD #24, HYD
 SECOND PART	2.

13. The other Memorandum of Understanding of the same date i.e. 22nd November, 2015 though signed on the same date, but it is not in the same format, as extracted below:

This Memorandum of Understanding is made on this **22nd day of November 2015** by and BETWEEN:

1. **M/s. Sreedevi Digital Systems Pvt Ltd**, a company incorporated under the Indian Companies Act, 1956 having its Registered Office at D.No.39-6-16, SAGAR NIVAS, MURALINAGAR, VISAKHAPATNAM- 530007 represented by its Managing Director Mr. I Ramakrishna Raju S/o. Sri Perraju aged about 67 years, resident of Visakhapatnam (hereinafter referred to as 'COMPANY'), being the party of the FIRST Part

And

2. **M/s. ICE TV Pvt Ltd**, a company incorporated under the Indian Companies Act, 1956 having its Registered Office at 8-2-411, Flat No.205, Lumini Rock Castle Apts, Road no.6, Banjara Hills HYDERABAD 500034 represented by its Directors Mr. DOLENDRA PRASAD NELLORE resident of Hyderabad (Hereinafter referred to as 'SUPPLIER'), being the party of the SECOND Part

The Second Party has supplied Set Top Boxes to the First Party and First party was confirming the receipt of the same. The First party has made certain payments to the second party and certain balance was outstanding from First Party to the Second party.

Both parties here by agreeing that the outstanding amount payable by the First party to the Second party as on the date of the this agreement is of

Rs. 1,29,80,018/- (Rupees One Crores Twenty Nine Lakhs Eighty Thousands Eighteen only).

[Signature]

NI. Nolenanda Nayak

with no. 9.
[Signature]

14. The 2nd Memorandum of Understanding dated 22nd November, 2015 though stated to have been executed on the same date, but is not in the letter head of 'M/s. Sreedevi Digital Systems Private Limited'. It does not mean to say that the 1st MoU of the same date i.e. 22nd November, 2015 is read by all the parties and signed on the date as mentioned. The signature of the 1st Party and 2nd Party and Witnesses are in different boxes of the 1st Memorandum of Understanding, but there is no such separate signature box and as such it is difficult to find out whether the same witnesses etc. have signed.

15. The 2nd Memorandum of Understanding dated 22nd November, 2015 which the Appellant alleged to have been forged not only varies from the 1st Memorandum of Understanding, but also varies in the details of supply of Set Top Boxes and dates in respect of invoices as detailed in the 1st Memorandum of Understanding. It does not say that the claim is against the custom duty or any other statutory dues.

16. On the other hand, in the 1st Memorandum of Understanding dated 22nd November, 2015 'Schedule of the Goods Supplied and Invoice Details' have been shown, including each Set Top Box and Value Added Tax.

17. For the first time in Demand Notice issued under Section 8(1) dated 24th January, 2018, it was mentioned that the parties agreed that whatever amount towards Custom Duty will be paid by 'ICE TV', the same

will be reimbursed by the 'Corporate Debtor'. Therein the details of the Custom Duty have been explained for the first time which is not mentioned in the 2nd Memorandum of Understanding dated 22nd November, 2015, as quoted above. Thereafter, application filed under Section 9 in Form-5 wherein at Paragraph 9, the total amount of debt payable is shown as "Rs.2,36,18,518/-" and it was mentioned that after due negotiations, it was mutually agreed between the 'Operational Creditor' and the 'Corporate Debtor'. It was further agreed that the Custom Duty amount incurred in respect 45,000 DSTBs would be initially borne by 'Operational Creditor' and the same was to be subsequently reimbursed by 'Corporate Debtor'. Relevant portion of Form-5 reads as under:

"Part-IV

PARTICULARS OF OPERATIONAL DEBT		
1.	Total amount of debt, details of transactions on account of which debt fell due, and	Rs.2,36,18,518 (rupees Two Crore Thirty Six Lakh Eighteen Thousand Five Hundred Eighteen Only) and interest thereon @24% p.a. from 21.12.2016. a. Corporate Debtor through a mutual friend one Mr. D. Nitin Reddy approached the Operational Creditor to purchase 45,000 units of Digital Set-Top Box (DSTB) for its business needs viz. Digital Cable TV Network in Vishakapatnam. b. After due negotiations, it was mutually agreed between Operational Creditor and Corporate Debtor that the price for one DSTB would be Rs.1,020

		(One Thousand Twenty Only) plus applicable taxes. It was further agreed that the Custom Duty amount incurred in respect 45,000 DSTBs would be initially borne by Operational Creditor. However, the same was to be subsequently reimbursed by Corporate Debtor. c. It was mutually agreed between Operational Creditor and Corporate Debtor that the aforesaid amounts viz. cost and custom duty in respect of the 45,000 DSTBs were to be paid by Corporate Debtor within a period of one year from date of delivery of DSTBs. It was also agreed that in the event Corporate Debtor defaulted in paying the aforesaid amounts within the agreed period of one year from the date of supply, the Corporate Debtor would be liable to pay interest @ 24% p.a. on the outstanding due amounts. The same is even evident from the invoices raised by Operational Creditor. d. Operational Creditor has supplied 45,000 number of DSTBs to the Corporate Debtor between the period 10.06.2014 to 22.08.2014 e. In respect of the 45,000 DSTB supplied by the Operational Creditor to Corporate Debtor, Operational Creditor raised 9 invoices on the Corporate Debtor aggregating to a sum of Rs.4,81,95,000/- (inclusive of 5% CST). f. Operational Creditor incurred a sum of Rs.1,28,81,798/- towards customs duty in respect of the 45,000 DSTBs supplied to the Corporate Debtor. Thus, a
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		total amount of Rs.6,10,76,798/- was due and payable by the Corporate Debtor to the Operational Creditor in respect of the cost and custom duty for the 45,000 DSTB supplied to the Corporate Debtor.....”
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18. The Demand Notice is also not in terms of Section 8(1), as it allows 15 days’ time which will be evident from paragraph 21 of the said Notice, as under:

“21.....In the premises, we once again request Your Company to release our justified outstanding payments amounting to Rs.2,36,18,518/- (Two Crore Thirty Six Lakhs Eighteen Thousand Five Hundred and Eighteen Only) along with interest @ 24% due to us within 15 days of receiving this notice, failing which we will be constrained to take legal action against Your Company at your risk & cost.”

19. It is a legal notice as distinguished from Demand Notice under Section 8(1). It has allowed 15 days’ time to pay the amount with interest and mentioned that on failure the 2nd Respondent will take legal action against the Company. On the contrary, in terms of Section 8(1), in the

Demand Notice 10 days' time was to be granted on occurrence of default and in terms of Form-3 of the 'Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016', it is mandatory to state that on failure to pay the amount within 10 days', the 'Operational Creditor' 'shall initiate a corporate insolvency resolution process in respect of the Corporate Debtor', as evident from Clause 6 of Form 3, as quoted below:

"6. The undersigned request you to unconditionally repay the unpaid operational debt (in default) in full within ten days from the receipt of this letter failing which we shall initiate a corporate insolvency resolution process in respect of [name of corporate debtor]."

20. It is clear from Part-IV (Form-5) that the 'Operational Creditor' has supplied 45,000 number of Digital Set-Top Box to the 'Corporate Debtor' between the period 10th June, 2014 to 22nd August, 2014. The 'Operational Creditor' reached 1st Memorandum of Understanding on 22nd November, 2015, much thereafter.

21. Section 5(20) defines 'Operational Creditor' whereas Section 5(21) defines 'Operational Debt' which includes goods or services including employment or a debt in respect of the payment of dues arising under

any law for the time being in force and payable to the Central Government, any State Government or any local authority.

22. The statutory dues are payable under law to the Central Government for which the Central Government can claim to be the 'Operational Creditor'. The 2nd Respondent does not come within the meaning of 'Operational Creditor' for the purpose of Custom Duty.

23. Section 5(21) makes a provision of payment of statutory dues as 'operational debt'. however, what is pertinent to mention is "payment" of statutory dues. This by itself indicates that a statutory due is only operational in nature when it is paid to the relevant authority, and not when it is repaid to a party that has paid such statutory authority. In fact, the amendment of Section 5(21), where the word "repayment" in the context of statutory dues was replaced with the word "payment" makes clear the intent of the legislature that a statutory due becomes operational debt only when the same is to be paid to the relevant authority and not otherwise. Consequently, a statutory due *de hors* of the invoice of the good or service cannot be claimed as an 'operational debt' from a party, where the party is not a statutory authority.

24. In the circumstances, even if it is accepted that the 2nd Memorandum of Understanding dated 22nd November, 2015 was executed by the parties on the same date though we have doubt in looking to the 2nd Memorandum of Understanding on the same date and it should

have been reflected in the 1st Memorandum of Understanding, in such case also, the 2nd Respondent is not entitled to claim the same by filing petition under Section 9.

25. So far as the dues payable to the 2nd Respondent for supply of goods, pursuant to the Memorandum of Understanding dated 22nd November, 2015, the amount claimed is Rs.1,66,38,500/-. This Appellate Tribunal on the request of the Appellant allowed the Appellant to pay the amount to the 2nd Respondent with additional amount of Rs.10,00,000/. However, the 2nd Respondent refused to accept the same.

26. It is a glaring example that the 2nd Respondent moved an application under Section 9 fraudulently with malicious intent for extracting more amount, not for the liquidation or resolution as covered by Section 65 and as such calls for penal action. The Adjudicating Authority has failed to notice the aforesaid fact.

27. For the reasons aforesaid, while we are not passing any penal order under Section 65 on 2nd Respondent, set aside the impugned order dated 4th October, 2019. In the result, the 'Corporate Debtor' (company) is released from all the rigours of 'Corporate Insolvency Resolution Process' and is allowed to function through its Board of Directors from immediate effect. The 'Interim Resolution Professional' will hand over the assets and records to the Board of Directors. The case is remitted to the Adjudicating Authority to determine the fees and costs incurred by the 'Interim

Resolution Professional' and whatever the amount payable, it will be paid by the 2nd Respondent.

The appeal is allowed with aforesaid observations and directions.
No costs.

(Justice S.J. Mukhopadhaya)
Chairperson

(Justice Bansilal Bhat)
Member(Judicial)

NEW DELHI
30th January, 2020

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