NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT)(Insolvency) No. 890 of 2022

[Arising out of order dated 25.05.2022 passed by the Adjudicating Authority, National Company Law Tribunal, Kolkata Bench-I in CP(IB) No.2023/KB/2019]

IN THE MATTER OF:

B.C.P.L. International Ltd.
4, Synagogue Street, Room No.810, 8th Floor,
Kolkata – 700001, West Bengal **...Appellant**

Versus

Kalimata Ispat Industries Pvt. Ltd.
14/2, Old China Bazar Street, Room No.213,
3rd floor, Kolkata-700001, West Bengal **...Respondent**

Present:

For Appellant:	**Mr. Abhijeet Sinha, Mr. Akshay Goel, Advocates**
For Respondent:	**Mr. Sanjiv Sen, Sr. Advocate, Mr. Siddhant Jaiswal, Mr. Mridul, Ms. Shreya, Advocates**

J U D G M E N T

[Per: Barun Mitra, Member (Technical)]

The present appeal filed under Section 61 of Insolvency and Bankruptcy Code, 2016 ("**IBC**" in short) by the Appellant arises out of the Order dated 25.05.2022 (hereinafter referred to as "**Impugned Order**") passed by the Adjudicating Authority (National Company Law Tribunal, Kolkata Bench-I) in CP (IB) No. 2023/KB/2019. By the Impugned Order, the Adjudicating Authority has rejected the Section 9 application filed by the Operational Creditor (the present Appellant) seeking initiation of Corporate Insolvency Resolution Process ('**CIRP**' in short) against Corporate Debtor-Kalimata Ispat Industries Private Ltd. (the present Respondent). Aggrieved by this impugned order, the present appeal has been preferred by the Operational Creditor.

2. Giving the factual background, the Learned Counsel for the Appellant submitted that the Operational Creditor sold steel products to the Corporate Debtor. In the course of their business transactions, 129 invoices had been raised by the Appellant of which 46 invoices remained unpaid by the Corporate Debtor. The unpaid invoices aggregated to an amount of Rs.3,01,89,141/- only which included interest @ 18% per annum. This amount being due and payable by the Corporate Debtor, the Appellant had sent a Section 8 demand notice on 28.06.2019. It was submitted that the Respondent sent reply to the notice much beyond the statutory period of 10 days prescribed by the IBC, thus being non-est in the eyes of law. As no further payment was forthcoming from the Respondent, a Section 9 application was filed by the Appellant.

3. It has been further contended by the Learned Counsel for the Appellant that the Corporate Debtor in order to evade payment of outstanding liabilities created a moonshine defence of pre-existing disputes. Holding the grounds of defence to be only a mirage, it was stated that the first set of fictitious disputes were allegedly raised through three communications. The first two dated 01.07.2017 and 03.10.2017 raised alleged disputes centering around defective goods having been supplied by the Operational Creditor. These were followed by a third communication dated 25.04.2019 wherein the Corporate Debtor had notified termination of contract and reiterated the removal of rejected goods from their premises.

4. Substantiating their contention that these disputes were fictitious and fabricated; it is submitted that these letters were actually never issued by the Corporate Debtor and were disclosed for the first time by the Corporate Debtor in their reply Affidavit to Section 9 application. These letters did not either figure in the reply to the Section 8 demand notice and thus it can be inferred that these letters were created later. Furthermore, the letters were never received by the Appellant as they were issued from a non-existent post office as per confirmation received from the Department of Posts basis an RTI application. Thus, the handwritten postal receipt from a post- office which had already closed cannot be credible evidence of dispatch and delivery of the said letters. To top it, the first two communications dated 01.07.2017 and 03.10.2017 were addressed to the registered office of the Operational Creditor which came into existence only on 28.06.2018 which made it clear that the letters were forged and fabricated later.

5. The Learned Counsel for the Appellant further pointed out that the Respondent had acknowledged their liability to pay Rs.2,20,00,724/- on 01.04.2019 by sending a communication captioned “Confirmation of Accounts”. However, a defence has been raised by the Respondent by raising the issue about two credit notes raised upon the Operational Creditor on 31.01.2018 amounting to Rs.14,03,472/- and that this was only a ruse to escape from their liability to pay. That the Respondent continued to accept supplies from the Appellant and also made payments for materials supplied, even after the issue of the credit notes, showed that there is no foundation of any genuine dispute.

6. On the plea of the Respondent that two communications dated 02.05.2019 and 04.06.2019 had also been sent asking the Appellant to give a credit note of Rs.2,25,53,061/-, it was contended by the Learned Counsel for the Appellant that

these two communications were never delivered to the Appellant nor any material has been brought on record evidencing their delivery. Moreover, as the credit notes were disclosed by the Respondent through a supplementary affidavit before the Adjudicating Authority, the Appellant was denied an opportunity to deal with the same. It was asserted that the Adjudicating Authority by placing reliance on documents which were not on record had committed an error and hence the impugned order suffers from illegality.

7. Making his submissions further, it was stated that the admission of non-payment of Rs.2,20,00,724/- by the Corporate Debtor is in itself a sufficient ground to admit the Section 9 application. It has been contended by the Learned Counsel for the Appellant that the Corporate Debtor had admitted to the existence of 129 invoices aggregating Rs.10,16,11,515/- against which admittedly a payment of only Rs.7,96,10,791/- was made. Thus, a substantial sum beyond the threshold limit still remained due and payable by the Corporate Debtor to the Operational Creditor.

8. Refuting the above submissions, the Learned Senior Counsel for the Respondent stated that much prior to the issue of Section 8 demand notice, communications had been sent to the Operational Creditor disputing the quality of goods. On 01.07.2017, it had been clearly pointed out that in-house tests had revealed that the material supplied by the Operational Creditor was sub-standard and not in conformity with the production requirements. The Operational Creditor had also been advised to improve the quality of supply failing which they would be compelled to terminate the business relationship. This was followed by another communication dated 03.10.2017 wherein it was pointed out that a large quantity of materials upon being tested had to be rejected. It was stated that this was also

informed to a representative of the Operational Creditor who was asked to remove the rejected goods from the factory premises and replace with goods meeting quality specifications failing which termination of relationship and claim for damages was notified. Again on 25.04.2019, it was stated that since the Operational Creditor had failed to improve the quality of products, the Corporate Debtor delisted them from their list of suppliers. A list of invoices was also sent by the Corporate Debtor to the Operational Creditor of the materials rejected. The Operational Creditor had been asked to remove the rejected goods besides reserving right to charge damages.

9. It was further emphasized that this dispute relating to inferior quality of goods had been raised in the reply to the Section 8 demand notice as well as in the Reply affidavit to Section 9 application. The reply notice had clearly disputed the claim of the operational debt made by the Operational Creditor amounting to Rs. 3,01,89,141/-. It was also mentioned that the list of pending invoices raised by the Operational Creditor were false and fabricated documents and that these fabricated invoices were precipitated merely because of the issue of termination letter dated 25.04.2019.

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

11. The basic issue which needs consideration is whether operational debt above the statutorily prescribed threshold limit, as claimed by the Operational Creditor, had become due and payable, and if so, whether there has been any default in respect of such payment on the part of the Corporate Debtor and whether the debt has been disputed. This examination would be in consonance

with the test laid down by the Hon'ble Supreme Court in **Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software Private Limited (2018) 1 SCC 353** (hereinafter referred to as 'Mobilox').

12. The first set of dispute raised is the issue of credit notes in the context of outstanding dues. It is the case of the Appellant that the Respondent had clearly admitted their liability to pay Rs.2,20,00,724/- in their Account Confirmation Statement of 01.04.2019 as placed at page 253-256 of Appeal Paper Book ('**APB**' in short). Thus, it is a fit case for admission of Section 9 application. It has also been contended that the Corporate Debtor failed to respond to letter dated 05.06.2019 from Operational Creditor seeking outstanding dues. The Learned Senior Counsel for Respondent denied the receipt of letter dated 05.06.2019 and further submitted that the Account Confirmation Statement was a forged and fabricated document and that the Corporate Debtor had therefore filed a police complaint with Hare Police Station on 07.03.2020 to lodge an FIR against the Operational Creditor for use of counterfeit stamp/seal of the Corporate Debtor as placed at page 252 of APB.

13. We also notice that the Corporate Debtor has placed on record counter claims of credit notes issued by them. Two credit notes had been issued on 31.01.2018 for a sum of Rs.7,96,809/- and Rs.6,03,663/- by the Operational Creditor as communicated by an email dated 04.04.2018. These having been issued by the Operational Creditor, it is, therefore, contended by the Learned Senior Counsel for the Respondent that it amplifies that in the past too consignments were supplied by the Operational Creditor which were defective and not found conforming to the quality specifications laid down by the Corporate Debtor. This has been disputed by the Appellant on the ground that the email ID

from which the credit notes were sent to the Corporate Debtor did not belong to the Operational Creditor. This matter has been looked into by the Adjudicating Authority and held that though the email ID birdhi123@gmail.com does not match the email ID of the Operational Creditor as reflected in the master data but the Board Resolution filed in the rejoinder reflects this to be the email ID of the Operational Creditor. It has therefore been held by the Adjudicating Authority that the credit notes sent via the email are genuine and the issuance of the said letters further confirms the Corporate Debtor's contention that the instant petition has pre-existing disputes. That apart we notice that at pages 309 and 310 of APB, two letters dated 02.05.2019 and 04.06.2019 have been sent by the Corporate Debtor requesting the Operational Creditor to issue credit notes for a balance sum of Rs.2,11,52,579/- on the ground that material worth of Rs.2.25 crore had been rejected by them.

14. We are satisfied with the finding of the Adjudicating Authority that the balance amount claimed as operational debt has been unequivocally disputed by the Corporate Debtor and no liability admitted on this count. The present is therefore not a case where there is an undisputed debt for which Corporate Debtor can be brought under the rigors of CIRP.

15. The second realm of dispute centers around three communications purportedly issued by the Corporate Debtor. In the first communication of 01.07.2017, the Corporate Debtor had alleged the supply of defective goods of substandard quality on the basis of in-house test report. The second communication dated 03.10.2017, the Corporate Debtor had raised the issue of removal of the rejected goods from their factory premises and their replacement with proper quality goods. In the third communication dated 25.04.2019 notifying

termination of the contract by the Corporate Debtor on account of failure on the part of the Operational Creditor to improve the quality of their products, it reiterated removal of rejected materials and reserved the right to claim damages.

16. It is, however, the case of the Appellant that the three communications dated 01.07.2017, 03.10.2017 and 25.04.2019 were false and fabricated and had never been delivered to the Appellant prior to issue of demand notice. The letters were purportedly posted with a manually signed postal receipt from a post office at 'Hide Road'. However, based on information as confirmed by the Department of Posts following an RTI query as placed on record at pages297-299 of the APB, it was asserted that there was no post office nomenclated as 'Hide Road' Post Office. There was a post office named 'Hyde Road' but that was already closed on 28.02.2017. The closure of the said post office was prior to the date of issue of the said letters thus raising doubts about these having been issued. That these letters were never delivered is further substantiated by the fact that the postage receipt did not have tracking number of the courier and there is no delivery report produced by the Respondent. It has been further contended that the letters dated 01.07.2017 and 03.10.2017 had been sent to the Appellant at the address 4, Synagogue Street, Room No.810, 8th Floor, Kolkata while the registered office of the Appellant at that time was at 27, Biplabi Trailokya Maharaj Sarani, Narayan Building, 7th Floor, Room No. 703, Kolkata-700001. It was therefore contended that as the two letters were addressed to the new registered office which came into existence much after the date of issue of the letter, it can well be inferred that the letters were belatedly fabricated.

17. This was countered by the Learned Senior Counsel for the Respondent by stating that operations of the Hyde Road Post Office were continuing and had only

been tagged with Brace Bridge Post Office. It was also contended that the service of the letter was done in a bona-fide manner and postage receipts have also been placed on record. It was further vehemently contended that issues relating to forgery of documents do not fall within the ambit of the Adjudicating Authority for adjudication as it is not akin to a trial court.

18. The Learned Counsel for the Appellant has contended that this Tribunal in CA (AT)(Ins.) No.164 of 2019 has held that dispatch and delivery of letters must be supported by proof of service. In the present case, the facts are distinguishable in that the Respondent has submitted the postage receipts. However, in the present case, the availability of postage receipts is not in question but it is the authenticity of the postage receipt which has been disputed. We are of the considered view that this citation therefore does not come to the aid of the Appellant.

19. We find that the Adjudicating Authority in the impugned order has duly considered this aspect and relied on the decision taken by this Tribunal in the matter of Shelendra Kumar Sharma v. DSC Limited in Company Appeal (AT) (Ins.) 1459 of 2019 wherein it has been held that the question as to whether documents are forged or not cannot be decided by the Adjudicating Authority.

20. We agree that the authenticity of the postal stamps on the postage receipts are not the subject matter which can be decided by the Adjudicating Authority or this Tribunal in view of summary jurisdiction having been conferred on them by the IBC. Enquiry into such allegations and counter-allegations would entail detailed investigation and the legislative intent of the IBC does not clothe the Adjudicating Authority with such powers of investigation. We are thus of the

considered view that the Adjudicating Authority has not committed any error by restraining itself from entering into any sort of roving enquiry on this issue.

21. At this stage, what we need to find out is whether these three letters had raised a semblance of dispute and if so whether the dispute is patently feeble. The guiding precepts have been laid down in the ratio of Mobilox supra and the relevant para is extracted as hereunder:

> *"51. It is clear, therefore, that once the operational creditor has filed an application, which is otherwise complete, the adjudicating authority must reject the application under Section 9(5)(2)(d) if notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility. It is clear that such notice must bring to the notice of the operational creditor the "existence" of a dispute or the fact that a suit or arbitration proceeding relating to a dispute is pending between the parties. 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. 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."*

22. A plea was taken by the Learned Counsel for the Appellant that these letters were fabricated as they do not find specific mention in the reply to demand notice.

It is also the contention of the Appellant that the letter only states in generic terms that 'materials' were defective shorn of specific details. It has also been stated that the details of the tests certificate were also not produced. We are not persuaded to accept this argument since neither the Adjudicating Authority nor this Tribunal is required to go into the details of the goods found defective or enter into the procedural modalities of how they were detected as defective. There is no doubt in our mind that the three letters have consistently raised concerns about quality of goods as not matching the specifications besides replacement and removal of the defective goods. The letters also contained warning of termination of business which finally culminated in the delisting of the Operational Creditor by the Corporate Debtor.

23. It is sufficient to notice that the Corporate Debtor in the reply to statutory Demand notice made a categorical statement that whatever was due and payable has been paid and the amount withheld was on account of goods found defective dehors specifications. It may be useful to take note of the relevant portion of the reply notice dated 10.07.2019 at pages 243-247 of APB as reproduced below:-

> *"1. That, the items which has been supplied to us by you and/or your organization viz. BCPL International Ltd. (BCPL) in course of our business dealings were some <u>defective in nature & were of extreme low quality.</u> The said items could not be used by us in our manufacturing activity, as we has a goodwill & reputation in our business sphere, alternatively, if used the said supplied items of BCPL would definitely hampered our said goodwill & reputation. We earlier used very few of your supplied materials in our manufacturing process & for your kind information, the quality of the finished product/s made out of the said materials was of extreme inferior*

quality which was not fit to be supplied to our customers. Hence, times without number, we severally requested BCPL and /or your office representatives either to replace the aid materials or to take return back the same & issue credit note to us. But, neither of your representatives/officials acted as per our requests & hence ultimately the said delivered items served none of our purpose. The said inferior materials are still lying with us & has become scrap over a period of time. To maintain good relationship, you are again requested to remove/take back the said materials at any point of time with a prior permission/intimation to us. We, as a business entity definitely would not pose loss and/or hamper our business because of your's deficiency."

(Emphasis supplied)

So long as the reply to demand notice captures the essence of these disputes, it fulfils the requirements of Section 8(2)(1)(a) of IBC and in the present case the reply notice had adequately highlighted these disputes.

24. In sum, looking conjointly at the three communications issued by the Corporate Debtor regarding supply of defective goods and other related issues on 01.07.2017, 03.10.2017 and 25.04.2019 as also the credit notes issued on 31.01.2018, 02.05.2019 and 04.06.2019 questioning the existence of any operational debt, we have no hesitation in concurring in the findings recorded by the Adjudicating Authority in that there was sufficient foundation of genuine disputes between the two parties. The Adjudicating Authority has also not erred by not getting into the allegations and counter-allegations regarding forgery and fabrication of documents/postage receipts as such conduct of such enquiries/ investigations is beyond the remit of summary proceedings.

25. In view of the foregoing discussion, we are satisfied that the Adjudicating Authority did not commit any error in rejecting the Section 9 application on the ground of pre-existing dispute. There being no merit in the appeal, the same is dismissed. However, the Appellant will have the liberty to resort to other remedies in accordance with law. No costs.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

Place: New Delhi

Date: 26.04.2023

PKM