

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

Company Appeal (AT) (Ins) No. 927 of 2022

IN THE MATTER OF:

Nilanjana Chakravorty Dutta

...Appellant

Versus

Binod Kumar Choudhary & Ors.

...Respondents

Present:

**For Applicant: Mr. Abhijit Sinha, Mr. Soumya Dutta, Mr. Saikat Sarkar,
Advocates**

**For Respondent: Mr. Arunava Mukherjee, Mr. Pratyaksh, Advocates for
R1
Mr. Arijit Mazumdar, Mr. Shambo Nandy, Advocates for
R2**

With

Company Appeal (AT) (Ins) No. 1473 of 2022

&

I.A. No. 4646 of 2022

IN THE MATTER OF:

Nilanjana Chakravorty Dutta

...Appellant

Versus

Debdas Chakraborty & Ors.

...Respondents

Present:

For Applicant: Mr. Soumya Dutta, Adv.

For Respondent: Mr. Arijit & Mr. Shambo Nandy, Adv.

O R D E R

Per: Justice Rakesh Kumar Jain: (Oral)

23.08.2023: Company Appeal (AT) (Ins) No. 927 of 2022

This appeal is directed against the order dated 13.06.2022 passed by the Adjudicating Authority (National Company Law Tribunal, Kolkata Bench, Kolkata) admitting the application bearing CP (IB) No. 315/KB/2019 purported to have been filed under Section 9 of the Insolvency and

Bankruptcy Code, 2016 (in short 'Code') r/w Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (in short 'Rules'), declaring moratorium and appointing Mr. Debdas Chakraborty as the Interim Resolution Professional (in short 'IRP').

2. The brief facts of this case are that the Operational Creditor issued a demand notice under Section 8 of the Code on 13.09.2018 to the Corporate Debtor to which no reply was filed and then filed an application under Section 9 of the Code on 25.02.2019 for resolution of an amount of Rs. 27,68,141/- with interest @ 24% as outstanding payment of the whole spices supplied by the Operational Creditor to the Corporate Debtor from time to time.

3. The application was filed by Binod Kumar Choudhary, as a proprietor of Isha Food Products (proprietorship firm) through his son Vikas Kumar Choudhary to whom the power of attorney was given by him on 02.01.2019. It is alleged that though there was no written contract between the parties yet supplies were made on oral instructions of the Corporate Debtor. The application under Section 9 of the Code was filed with various documents including copies of challan cum invoices but there is no reference of particulars of the invoices in Para 8 of the application.

4. Be that as it may, the application filed under Section 9 of the Code by the Operational Creditor was contested by the Corporate Debtor, inter alia, on the ground that there was a pre-existing dispute between the parties about the sub-standard and spurious quality of the goods supplied even before the demand notice was issued, therefore, the application filed under Section 9 of the Code was not maintainable in view of Section 8(2)(a) of the Code.

5. The Adjudicating Authority rejected the contention of the Appellant on the ground that the letters dated 27.06.2018 and 04.08.2018 by which the Corporate Debtor raised pre-existing dispute were addressed to Mr. Shankar Singh who was not the proprietor of Isha Food Products because Mr. Binod Kumar Chaudhary claimed himself to be the proprietor by way of an affidavit. In this regard, the Adjudicating Authority recorded a finding in Para 48 of the impugned order which is reproduced as under:-

“48 However, the letters dated 27 June 2018 and 04 August 2018 regarding the same as sent by the Corporate Debtor are wrongfully addressed towards one Mr. Shankar Singh, whom the Corporate Debtor mistakenly addresses as the proprietor of Isha Food Products. Even though the relationship between Isha foods and Vashishta grinding works is not quite elaborated in the pleadings, it appears that no case has been made to prove that Shankar Singh is running all these companies, namely, Abhilasha Exports, Isha foods and Vashishtha Grinding, whereas the Operational Creditor has affirmed through an affidavit that the proprietor of Isha foods is Mr. Binod Kumar Chaudhary”

6. The Adjudicating Authority also recorded a finding in Para 49 of the impugned order that nothing has been brought on record to prove that the spurious goods, being the blackish turmeric powder and other spurious powdered spices, supplied by the Operational Creditor belonged to the batch of whole spices. In this regard, observation made by the Adjudicating Authority in Para 49 of the impugned order is also reproduced as under:-

“49. Further, even if the wrongful mention of the addressee is taken to be a bona fide mistake, there is nothing on record to prove that the spurious goods being the blackish turmeric powder and other spurious powdered spices belonged to the batch of whole spices provided by Isha Food Products”

7. Opening his argument, Counsel for the Appellant has submitted that the Adjudicating Authority has committed a patent error in mis-appreciating

the evidence on record about the identity of the Operational Creditor and rejecting the plea of the Appellant that there was a pre-existing dispute between the parties before the proceedings were initiated through demand notice.

8. In so far as, the issue regarding identification of the proprietor is concerned, the application under Section 9 of the Code was filed by Binod Kumar Chaudhary as proprietor of M/s Isha Food Products, having its official address as 159 Rabindra Sarani, 12th Floor, Kolkata- 700007. It is argued that the Adjudicating Authority erred in appreciating the letter dated 04.08.2018 which was addressed to M/s Isha Food Products and sent on the same address which has been mentioned in the application filed under Section 9 of the Code. It is further submitted that the letter dated 04.08.2018 was on the subject of supply of spurious products by the Operational Creditor to the Corporate Debtor and in this regard, the dispute was raised by the Corporate Debtor with the Isha Food Products and not a particular person. It is further submitted that the letter dated 04.08.2018 was duly received by the Operational Creditor and has been made a part of its pleadings of Section 9 application in which it has been averred that “the Corporate Debtor by its letter dated 04.08.2018 had in acknowledgement of its liability and the said goods, the corporate debtor had assured the operational creditor to make the payment through RTGS”. It is thus submitted that on the one hand the Operational Creditor is claiming that letter has been addressed to a wrong person (Shankar Singh) and on the other hand, it uses the said letter for the purpose of acknowledgment of debt by the Appellant. When this argument was raised by Counsel for the Appellant, we have specifically asked Counsel

for the Respondent as to whether there is any averment made in Section 9 application to the effect that M/s Isha Food Products is not being represented by Mr. Shankar Singh to which he has candidly admitted that it is not mentioned as such in the application.

9. Arguing further, Counsel for the Appellant drew our attention to the letter dated 27.06.2018, a letter prior to the letter dated 04.08.2018, which was addressed to Mr. Shankar Singh as Proprietor of M/s Vashishta Grinding, Isha Food Products and M/s Abhilasha Exports. In this letter, the Appellant made a reference to invoice no. IFP/18-19/503 dated 23.06.2018 by which 60 bags of turmeric supplied were found to be bad in quality as the colour of the turmeric was blackish and there were insects in the bags of turmeric. The vehicle no. WB19F7734 which is mentioned in the original invoice was also referred to in the said letter but this letter was also stated to have not been taken into consideration by the Adjudicating Authority on the ground that it was addressed to Mr. Shankar Singh as Proprietor of M/s Isha Food Products. It is argued that the Appellant has been consistently raising its voice about the sub-standard product being delivered which tantamounts to a pre-existing dispute. It is also submitted that on the one hand, the Operational Creditor has used the letter dated 04.08.2018 for the purpose of alleging acknowledgment of debt on the part of the Corporate Debtor but on the other hand, it is submitted that the said letter cannot be relied upon to raise the issue of pre-existing dispute because there is reference of Mr. Shankar Singh as proprietor of M/s Isha Food Products. It is vehemently argued that the Operational Creditor cannot be allowed to blow hot and cold in the same breath. It is further submitted that even for taking a defence to contest the

application filed under Section 9 of the Code, issue of pre-existing dispute is not necessarily be bonafide and all that is required is that there should be dispute between the parties and in this regard, he has relied upon a decision of the Hon'ble Supreme Court in the case of Rajratan Babulal Agarwal Vs. Solartex India Pvt. Ltd. & Ors. (2023) 1 SCC 115. He has pressed Paras 73, 74 and 75, which are reproduced as under:-

“73. In Mobilox (supra), this Court took the view that one of the objects of the IBC in regard to operational debts is to ensure that the amount of such debts which is usually smaller than the financial debts does not enable the operational creditor to put the corporate debtor into the insolvency resolution process prematurely. It is further declared that it is for this reason that it is enough that a dispute exists between the parties. It is further the law as declared in Mobilox (supra) that Section 5(6) of the IBC excludes the expression bona fide which qualified the words suit or arbitration proceedings in Section 5(4) under the Bankruptcy Law Reforms Committee Report. All that is required is to see whether there is a plausible contention which must be investigated. This Court has gone on to declare that a ‘patently feeble’ legal argument may not be a plausible dispute. We respectfully agree. We are unable to find that in the facts of this case, that the case set up by the second respondent was a patently feeble legal argument.

74. Again, following what this Court held in Mobilox (supra), we do not have to go to the extent of finding that the second respondent is likely to succeed. Still further, finding guidance from Mobilox (supra), the examination of the merits need not transcend the limited extent which we have undertaken which is to find that the case of the second respondent is not to be brushed aside as spurious, hypothetical or illusory. We cannot find that the dispute as projected by the appellant on behalf of the second respondent does not exist. In the teeth of the emails which we have adverted to, and the inference sought to be drawn in particular as also the Lab Reports produced, no doubt, from the second respondent's Labs, we cannot also find that the case of the corporate debtor is wholly unsupported by evidence. As to the acceptability of these materials and the weight to be attached to them, needless to say, we have not pronounced on the same.

75. When we speak about evidence, we must not overlook the law laid down in Mobilox (supra) that the court need not be satisfied that the defense is likely to succeed. The standard, in other words,

with reference to which a case of a pre-existing dispute under the IBC must be employed cannot be equated with even the principle of preponderance of probability which guides a civil court at the stage of finally decreeing a suit. Once this subtle distinction is not overlooked, we would think that the NCLAT has clearly erred in finding that there was no dispute within the meaning of the IBC.”

10. In reply, Counsel for the Respondent has vehemently argued that there is no error in the impugned order. It is submitted that there were various invoices issued in the past on the basis of which the goods were supplied and payments were made. It is argued that there is no reference by the Appellant about the invoices through which the goods were supplied and found to be spurious. He has also submitted that there were six invoices which were issued for which amount has been claimed from the Appellant. He has also argued that the Appellant had also filed a Criminal Complaint under Section 418, 420 and 406 of IPC in which there is no reference of invoices and also the letter dated 04.08.2018. It is thus submitted that the defence of the Appellant that there is a pre-existing dispute is imaginary and made-up story which has rightly been not taken into consideration by the Adjudicating Authority.

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

12. There is no dispute that the application filed under Section 9 is not maintainable until and unless there is a demand notice issued under Section 8 of the Code. The demand notice was issued on 13.09.2018 to which reply was not filed by the Appellant. The application under Section 9 of the Code was filed on 25.02.2019. The Appellant has raised a dispute also about the genuineness of the invoices, inter alia, on the ground that these invoices,

namely, Invoice No. IFP/17-18/867, Invoice No. IFP/17-18/888, Invoice No. IFP/18-19/016 and Invoice No. IFP/18-19/027 does not inspire confidence because no document is referred to in the said invoices to show that as to how the goods were delivered. In this regard, he has referred to invoice no. IFP/18-19/503 to contend that there was a dispatch document vide vehicle no. WB41E-6998. At present, we are not going into this controversy only because of the reason that the Appellant has raised the issue that there was a pre-existing dispute between the parties in regard to the sub-standard quality of the goods supplied and as such the application filed under Section 9 of the Code was not maintainable.

13. The very fact that there is a letter issued by the Corporate Debtor on 27.06.2018 in which issue was raised with regard to the spurious goods supplied on 23.06.2018 through invoice no. IFP/18-19/503 pertaining to 60 bags of turmeric which was allegedly blackish and there are insects in the bags of turmeric is sufficient to show that there was a dispute raised much before the proceedings started under Section 8 and 9 of the Code respectively.

14. Even for the sake of argument, it is presumed that the letter dated 27.06.2018 was addressed to Mr. Shankar Singh, Proprietor of M/s Isha Food Products which has not been taken into consideration by the Adjudicating Authority only on the ground that the some affidavit has been filed by Binod Kumar Choudhary, alleging himself to be a proprietor of the said firm but the letter dated 04.08.2018 is addressed to the proprietor of Isha Food Products, 159, Rabindra Sarani, 12th Floor, Kolkata, 700007 and in this letter again the subject was in regard to supply of spurious powdered spices to Corporate Debtor. In this letter, the Corporate Debtor has specifically mentioned that

who is the proprietor of the said firm which was not denied by the Respondent in the application filed under Section 9 of the Code and has itself used this letter for its own purposes to show that the debt has been acknowledged by the Corporate Debtor.

15. In our considered opinion, the Adjudicating Authority has committed a serious error of law in misreading the evidence available on record to hold that the letter dated 04.08.2018 does not relate to M/s Isha Food Products. The dispute is not who is the owner, the dispute is who has supplied the goods, the goods were supplied by the firm and not disputed by the Respondent herein. On this ground, we are of the considered opinion that there is an error on the part of the Adjudicating Authority in admitting the application filed under Section 9 of the Code especially when the Corporate Debtor/Appellant has been constantly raising the dispute of supply of spurious goods which comes within the ambit of pre-existing dispute.

16. Thus, in view of the aforesaid discussion, the present appeal is found to be meritorious and the same is hereby allowed. The impugned order dated 13.06.2022 is set aside. No costs.

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Since, CA (AT) (Ins) No. 927 of 2022 has been allowed today by a separate order, therefore, Counsel for the Appellant has submitted that this appeal has become infructuous. Dismissed as infructuous.

[Justice Rakesh Kumar Jain]
Member (Judicial)

[Naresh Salecha]
Member (Technical)

Sheetal/R.R