

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT)(Insolvency) No. 1089 of 2022

[Arising out of order dated 20.06.2022 passed by the Adjudicating Authority, National Company Law Tribunal, New Delhi, Bench-IV, in C.P. (IB) No.3151(ND)/2019]

IN THE MATTER OF:

Oyster Steel and Iron Pvt. Ltd.
102, First Floor, Roots Tower,
Laxmi Nagar, Delhi – 110 092

...Appellant

Versus

Brilliant Metals Private Limited
A-7/1, Jhilmil Industrial Area,
G.T. Road, Shahdara,
New Delhi – 110 095

Also At:
C-30, First Floor,
Prithviraj Road, Adarsh Nagar,
Delhi – 110 033

...Respondent

Present:

For Appellant: Mr. Rajat Jain, Mr. Prashant Tripathi, Advocates.

For Respondent: Mr. Praveen Mahajan, Advocate

J U D G M E N T

[Per: Barun Mitra, Member (Technical)]

The present appeal filed under Section 61 of the Insolvency and Bankruptcy Code, 2016 ('**IBC**' in short) by the Appellant arises out of the order dated 20.06.2022 (hereinafter referred as '**Impugned Order**') passed by the Adjudicating Authority (National Company Law Tribunal, Bench-IV, New Delhi in CP(IB) Company Appeal (AT)(Insolvency) No. 1089 of 2022

No.3151(ND)/2019. By the impugned order, the Adjudicating Authority dismissed the application filed by Operational Creditor (the present Appellant) under Section 9 of the IBC seeking initiation of Corporate Insolvency Resolution Process (**'CIRP'** in short) against Corporate Debtor-Brilliant Metals Private Limited (the present Respondent). Aggrieved by the impugned order, the present appeal has been preferred by the Operational Creditor.

2. Making his submissions on the factual background of the case, the Learned Counsel for the Appellant, pointed out that the present matter emanates from the business relationship wherein the Respondent/Corporate Debtor purchased copper wire rods from the Appellant/Operational Creditor. The sales made by the Operational Creditor to the Corporate Debtor were in the nature of in-transit sales. In this sale-purchase process, while the Corporate Debtor placed the purchase order upon the Operational Creditor, it was submitted that the Operational Creditor in turn would place an order on its own supplier, Vedanta Limited. Vedanta Limited, in turn, would supply goods directly to the Corporate Debtor as a consignee of the Operational Creditor. The Operational Creditor on meeting the orders placed by the Corporate Debtor would raise invoices.

3. It was further added that the Operational Creditor maintained a running account of the supplies made to the Corporate Debtor while the Corporate Debtor made lumpsum payments to the Operational Creditor to meet outstanding dues in the running account. The last lumpsum payment received by the Operational Creditor from the Corporate Debtor against outstanding dues in the running account was Rs.24 lakhs on 15.03.2018.

4. Submitting that out of total goods supplied worth Rs.10,58,62,877/-, an amount of Rs.5,15,41,000/- remained unpaid as principal debt, it was added that the invoices for the outstanding dues pertained to the period 05.06.2015 to 30.06.2015 as per running account maintained between the Operational Creditor and Corporate Debtor. Further, the Learned Counsel for the Appellant submitted that the credit period of payment allowed to the Corporate Debtor was 120 days from the date of transaction and interest was levied @ 18% per annum on late payment. Since a principal amount of Rs.5,15,41,000/- remained outstanding on goods claimed to have been supplied to the Corporate Debtor, the Appellant/Operational Creditor sent a Demand Notice under Section 8 of IBC on 06.09.2019. Admitting that the Corporate Debtor had replied to the demand notice denying their liability to make any payments, however, it was contended that their denial to make payment was a bald denial without any supporting documents and lacked credible basis. It was also argued that besides the issuance of Form-C and TDS certificate in Form 26AS which clearly established purchases made by the Corporate Debtor, the consignment invoices raised by Vedanta Limited to the Appellant also evidences the supply of goods to the Corporate Debtor.

5. It has been further vehemently contended that no evidence/document was produced by the Corporate Debtor to validate their stand that payments were not outstanding on their part. The Corporate Debtor's counsel emailed ledger of the Corporate Debtor to the counsel of the Operational Creditor on the same day on which the final arguments were heard by the Adjudicating Authority. It has been contended that ledgers were filed belatedly after completion of pleadings and after the matter had already been reserved for orders. Therefore, the Operational Company Appeal (AT)(Insolvency) No. 1089 of 2022

Creditor never got an opportunity to respond to the said ledgers which were filed behind their back in the Court. Hence it was stated that the Adjudicating Authority committed an error in relying upon these ledgers filed by the Corporate Debtor.

6. The Learned Counsel for the Respondent refuting the submissions of the Operational Creditor submitted that the Corporate Debtor received a demand notice under Section 8 of IBC on 06.09.2019. However, the Corporate Debtor sent a reply to the Demand Notice on 24.09.2019 denying all outstanding liabilities and stating that nil payment was due to the Appellant/Operational Creditor. It was further added that this nil payment was reiterated by the Corporate Debtor in their reply to the Section 9 application on 03.03.2020 in categorical terms that no sum was payable to the Operational Creditor.

7. It was also pointed out that the invoices raised by the Appellant were provisional invoices and therefore the amounts indicated therein were not final. It is also contended that the invoices of the Operational Creditor were not acknowledged by the Respondent since the invoice prices were always provisional. It was pointed out that the conduct of the Operational Creditor was not in accordance with the natural conduct of commercial business and trade practices as the final amount due was to be arrived at only after taking into account the difference between the provisional invoice and the settled rate and the difference between the two were captured by debit notes. Further, the ledger account of the Operational Creditor was not supported by any acknowledgment by the Corporate Debtor and was a self-styled and self-serving document fabricated by the Operational Creditor. The Learned Counsel for the Respondent also pressed hard

that the claim of interest @ 18% per annum was an arbitrary claim as there was no contract between the parties for payment of interest. It was also mentioned that they had raised debit notes on account of short supply of contracted quantity by the Operational Creditor and that on adjusting the debit notes with the claimed amount, no liability survived against the Respondent.

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

9. Before dwelling on the facts of the case, we may look into the statutory scheme of IBC in respect of operational debt. Section 8 of the IBC requires the Operational Creditor, on occurrence of a default by the Corporate Debtor, to deliver a Demand Notice in respect of the outstanding Operational Debt. Section 8(2) lays down that the Corporate Debtor, within a period of 10 days of the receipt of the Demand Notice, would have to bring to the notice of the Operational Creditor, the existence of dispute, if any. Post issue of demand notice by the Operational Creditor, if the Operational Creditor does not receive payment from the Corporate Debtor or notice of the dispute under Sub-section (2) of Section 8, he may file an Application under Section 9(1) of the Code.

10. In the present case, Section 8 demand notice was admittedly issued on 06.09.2019 to which the Corporate Debtor had replied on 24.09.2019 denying liability to pay. It is also an undisputed fact in the present matter that the Operational Creditor did not receive any payment from the Corporate Debtor thereafter and, therefore, proceeded to file an application under Section 9 of IBC following which the Corporate debtor filed reply affidavit on 03.03.2020.

11. It is the case of the Appellant that the Corporate Debtor had issued Form C to the Operational Creditor on 18.05.2016 certifying the purchases by detailing the bill numbers, dates of transactions and value of goods and that these are identical to the record maintained by the Operational Creditor in its ledger thus establishing operational debt. It is the contention of the Appellant that the very fact that the Form C was issued shows that the contracted amount of goods has been delivered. The Learned Counsel for the Appellant relying on the judgment of the Hon'ble High Court of Delhi in ***Chemical Systems Technologies (India) Pvt. Ltd. Vs. Simbhaoli Sugar Mills Ltd., 2013 SCC Online DEL 416*** submitted that issue of Form C is acknowledgment of having purchased the goods of value thereof. The Learned Counsel for the Appellant also stated that the Corporate Debtor was required to clear debts within 120 days of the sale transactions in terms of an oral agreement and that the Corporate Debtor was liable to pay interest on late payment @ 18% per annum from the date of sale transaction which was mentioned on the invoices issued.

12. The Learned Counsel for the Respondent countered the submission of the Appellant and stated that issuance of Form C/TDS is akin to statutory compliance and does not fall under the category of acknowledgment of liability. At best, it is a proof of receipt of invoices. The Learned Counsel for the Respondent further contended that the Operational Creditor had not produced any statement of account or balance sheet of the Corporate Debtor where the amount alleged to be claimed by the Operational Creditor is shown as admitted or acknowledged as debt in favour of the Operational Creditor. The claim is based upon mere surmises without any concrete evidence. It was also contended that the Section 9

application was not maintainable as the alleged invoices were never acknowledged by the Corporate Debtor and were generated by the Operational Creditor.

13. We are of the considered view that there is sufficient weight in the stand taken by the Corporate Debtor that merely on the basis of TDS, no operational debt liability can be fastened on the Corporate Debtor. Moreover, such an assumption would fail to take into account disputes, if any, raised with regard to adjustment of prices or quality of goods or delay in delivery of goods.

14. We next notice that it is the contention of the Appellant that the reply of the Corporate Debtor to the Section 8 notice has merely denied the dues but is bereft of details on how the debts have been discharged. It has also been contended that the Respondent failed to bring to the notice of the Operational Creditor any pre-existing disputes in respect of the said operational debt. Moreover, the Corporate Debtor had failed to take steps to pay off the operational debt post-receipt of the demand notice and hence the Section 9 application was filed. Learned counsel for the Appellant also claimed that no debit notes had ever been received by the Operational Creditor and there were no discussions for agreement regarding alleged adjustments on account of difference in rates or on account of any alleged short supply and that this issue has been raised for the first time in the reply to Section 9 application.

15. It has also been asserted by the Learned Counsel for the Appellant that the Adjudicating Authority committed an error in relying upon the ledgers filed by the Corporate Debtor in their defence. It was argued that these ledgers were never brought on record with the pleadings/reply of the Respondent and that they were placed before the Adjudicating Authority after the matter had already been

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reserved for judgment and that too without the permission of the Adjudicating Authority. These ledgers were not even relied upon during the oral arguments made by the Corporate Debtor before the Adjudicating Authority.

16. We are not convinced about this line of argument as we note from the print-out of the filing history of the case numbered IB-3151/ND/2019 titled M/s Oyster Steel and Iron Pvt. Ltd. V. M/s Brilliant Metals Pvt. Ltd. as downloaded from DMS of NCLT which has been filed by way of additional affidavit by the Appellant as Annexure A-18 that the Respondent had submitted the ledger account on 18.05.2022. Since the matter was virtually heard, there is no reason to doubt that the ledger was not available to the Adjudicating Authority. Moreover we cannot lose sight of the fact that the Adjudicating Authority has clearly held in para 6 of the impugned order that it has perused all the averments made in the application, reply, and rejoinder and additional affidavits filed by the parties.

17. Now coming to the facts of the present case, we notice that after demand notice was sent by the Operational Creditor on 06.09.2019, reply dated 24.09.2019 was sent by the Corporate Debtor disputing the demand categorically denying that any debt is due on the Corporate Debtor. In the instant case, it was emphasized that where there is no acknowledgment of any sort of liability, the mere raising of invoices in the name of Corporate Debtor cannot create either a right to payment or right to remedy under law. The Section 9 cannot be triggered for non-existing debt or for disputed debts.

18. It will be useful at this stage to notice the reply dated 24.09.2019 to the Section 8 demand notice as under:

Date: 24.09.2019

To

*A.K. Vali & Co., (Advocate)
Chamber No.31, Lawyers Chambers,
Supreme Court of India,
Tilak Marg, Delhi 110001*

Subject: Reg. Demand notice in respect of unpaid operational debt due to Oyster Steel & Iron Pvt. Ltd. under the Insolvency and Bankruptcy Code, 2016.

Respected Sir,

I, Amit Gupta, Director of Brilliant Metals Pvt. Ltd., received your demand notice Dt. 06.09.2019 demanding payment of an unpaid operation debt due from Brilliant Metals Pvt. Ltd. to Oyster Steel & Iron Pvt. Ltd.

In this respect, we would like to inform you that as on date we have nothing to pay to Oyster Steel & Iron Pvt. Ltd. as per Books of Accounts of Brilliant Metals Pvt. Ltd.

As on today's date, account ledger balance of Oyster Steel & Iron Pvt. Ltd. as per Books of Accounts of Brilliant Metals Pvt. Ltd. stands at Nil.

Kindly acknowledge our submissions.

Thanking You,

Yours Faithfully

For Brilliant Metals Pvt. Ltd.

(Emphasis supplied)

19. It was further pointed out by the Learned counsel for the Respondent that in the reply to Section 9 application, it has been contended that the Operational Creditor had failed to supply the contracted quantity to the Corporate Debtor and that on account of the said short supply, a debit note had been raised upon the Operational Creditor. It has also been claimed that invoices were always
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provisional invoices and the amount stated therein not being final, there was never any acknowledgment of the alleged invoices raised by the Operational Creditor. Moreover, the final amount could be arrived at only after taking into account difference between the rate settled and rate in provisional invoice, the difference of which was captured by debit notes and that at page 235 of the Appeal Paper Book, the ledger account of the Corporate Debtor clearly reflected rate difference column. These debit notes had been handed over to the Operational Creditor and therefore in the reply to demand notice on 24.04.2019, it was clearly mentioned that there were no dues against them. It was also pointed out that the interest claimed apart from being exorbitant was also unilateral as provision for interest was not contracted between the parties. The Operational Creditor had not only failed to establish debt due from the Corporate Debtor but had also failed to provide the date of occurrence of default for initiating insolvency proceedings. The intent of the Operational Creditor was entirely geared towards recovery of time barred debts and not for insolvency resolution.

20. In result it is therefore clear that there existed signs of dispute between the parties. It is well settled that Section 9 of IBC can be invoked only if no notice of dispute has been received by the Operational Creditor. In the present case, it has been clearly disputed by the Corporate Debtor. The invoices having been disputed, they require detailed consideration which is beyond the ambit of the Adjudicating Authority since IBC only provides for summary proceedings and not a full throttled trial.

21. At this stage, it may be useful to reproduce relevant excerpts of the Impugned Order wherein the Adjudicating Authority has held as follows: -

6. *We have heard Ld. Counsel for the parties. We have perused the averments made in the application, reply, and rejoinder and additional affidavits filed by the parties. We are of the view that the proceeding under Section 9 of the I&B Code can only be initiated after delivery of the demand notice, upon the ‘Corporate Debtor’, under Section 8(1) of the Code, and on the occurrence of the default. Section 3(11) defines “debt” as a liability or Application in respect of a claim which is due from any person and includes Financial Debt and Operational Debt. Section 3(12) defines “default” as non-payment of debt when whole or any part or instalment of the amount of debt has become ‘due and payable’ and is not paid by the Debtor or the Corporate Debtor as the case may be. Further, under Section 8(1) of the Code, an Operational Creditor can deliver a demand notice only upon the occurrence of a ‘default’.*

7. *In the instant case, the Operational Creditor had not filed a copy of the bank statement. Instead of filing the relevant document, the Operational Creditor had solely placed reliance on invoices raised by the operational creditor, Form ‘26AS’ and Form ‘C’ dated 18.05.2016. Considering that a running account is maintained, considering the manner in which such businesses are conducted and accounts are kept, it would be material to consider the amount due would be arrived at after taking into account the difference between the rate settled and rate in provisional invoice. The corporate debtor vide its reply to the demand notice dated 24.09.2019 have categorically denied that that the corporate debtor have nothing to pay to the*

operational creditor. The Corporate debtor had placed on record the ledger statement of the operational creditor in the books of account of Corporate Debtor for the year financial years 2015-16, 2016-17, 2017-18 which evidently shows that around 26 debit notes were issued in the financial year 2016-17 by the corporate debtor to the operational creditor on account of short supply, difference between the rate settled and provisional invoice. Further, the corporate debtor made payment of the remaining balanced amount to the operational creditor in tranches, consequently the last and final payment of Rs.24,00,000/- was made by the corporate debtor to the operational creditor on 15.03.2018 as evident from the books of accounts.

8. From the perusal of the facts and documents on record we find that there is no crystallization of claim as there is no debt due or owed and default occurred, which is the sine qua for admission of under Section 9 of the Code. The two essential requirements, i.e. existence of ‘debt’ and ‘default’, for admission of a petition under Section 9 of the code, 2016, has not been met in this case. Accordingly, the present petition (IB-3151/(ND)/2019) stands dismissed, as to no order to cost.”

(Emphasis supplied)

22. Having regard to the factual matrix of the present case, we are satisfied that the Adjudicating Authority has correctly recorded the findings that the Operational Creditor having not filed any bank statement and that there was no acknowledgment of debt on the part of the Corporate Debtor, this is not a fit case for admission of Section 9 application. We also do not find any material to have

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been placed on record by the Operational Creditor wherein the Corporate Debtor can be said to have admitted the operational debt claimed by the Appellant at any stage. Moreover, in view of running account maintained between the parties and taking note of trade practice, Adjudicating Authority has made no error of judgment in recording the findings that the amount between the parties had not crystallized and therefore the essential ingredients of debt and default was missing in the present matter. For such disputed operational debt, Section 9 proceeding under IBC cannot be initiated at the instance of the Operational Creditor. Where operational creditor seeks to initiate insolvency process against a Corporate Debtor, it can only be done in clear cases where no real dispute exists between the two which is not so borne out given the facts of the present case.

22. Given this backdrop, we are satisfied with the findings of the Adjudicating Authority. In view of the foregoing discussion, we are of the view that the Adjudicating Authority did not commit any error in rejecting the Section 9 Application filed by the Appellant. The impugned order does not warrant any interference. There is no merit in the Appeal. Appeal is dismissed. No order as to costs.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

Place: New Delhi

Date: 18.04.2023

PKM

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