

NATIONAL COMPANY LAW APPELLATE TRIBUNAL**CHENNAI BENCH****CHENNAI****COMPANY APPEAL (AT)(CH)(INSOLVENCY) NO.27/2022**

(Appeal arising under Section 61 of I&B Code, 2016 against the impugned order dated 05.05.2020 passed by the Adjudicating Authority, National Company Law Tribunal, Division Bench-I, Chennai in CP/328/IB/2018)

In the matter of:

Bindals Duplux Limited,
Through its Authorised Representative
Mr Devkant Agarwal,
Regd Office
10.6 Km. Bhope Road Village Jat Mujhera
Distt. Muzaffarnagar, UP 251038

Also at

148, South Bhopa, New Mandi
Muzaffarnagar, UP 251308

Appellant

Vs

ICMC Corporation Limited
Corporate Debtor,
Regd Office
No.36, Ambattur Industrial Estate,
Chennai 600058

Respondent

Present:

Mr. Tariq Muneer and Mr Shafiq Khan, Advocates for Appellant

JUDGEMENT
(VIRTUAL MODE)

M. VENUGOPAL, MEMBER (J)**INTRODUCTION**

The Appellant has preferred the instant Comp App (AT)(CH)(Ins) No.27/2022 as an 'Aggrieved person' in respect of the impugned order dated

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05.05.2020 in CP No.328/IB/2018 passed by the 'Adjudicating Authority', (National Company Law Tribunal, Division Bench I, Chennai).

2. The 'Adjudicating Authority' while passing the impugned order dated 05.05.2020 in CP No.328/IB/2018 (National Company Law Tribunal, Chennai) at paragraph 10 to 13 had observed the following:-

"10. Heard both sides and perused the documents including the pleading placed on record. As to the facts of the present case, it may be seen that the Operational Creditor has raised various Invoices after supplying the materials to the Corporate Debtor and the Operational Creditor has also filed the Ledger Statement, which is maintained in the books of the Operational Creditor and a perusal of the same shows that a sum of Rs.53,52,607.73/- is due and payable by the Corporate Debtor. However, on the contrary, the Corporate Debtor has also filed the Statement of Accounts in relation to the Operational Creditor maintained in their books of account, which goes to on show that only a sum of Rs.60,169/- is pending to be paid by the Corporate Debtor to the Operational Creditor. Taking into consideration this aspect, this Tribunal as early as on 05.12.2018 has directed the parties to reconcile their Statement of account and to report the difference if any on the next date of hearing. Subsequently, the time was again granted to reconcile the account for the parties on 05.02.2019, 11.03.2019, 29.03.2019, 26.04.2019, 28.08.2019, 15.11.2019, 19.11.2019, 29.01.2020, 11.02.2020 and 09.03.2020. Since the parties have failed to comply with the directions, the Orders were finally reserved on 09.03.2020.

11. As to the facts of the case, from the records it is evident that a series of notices and reminders have been exchanged between the parties from the year 2018 and even the Corporate Debtor by their letter dated 09.03.2017 has disputed the claim of the Operational Creditor. Further, it may be seen that the Corporate Debtor at no point of time has admitted the liability of the Operational Creditor. In so far as the e-mail dated 29.10.2015 which is referred by the Operational Creditor as an admission of liability by the Corporate Debtor, a perusal of the same shows that nowhere the Corporate Debtor has stated that the sum is due and payable by them to the Operational Creditor.

12. Further upon perusal of the documents filed by the Operational Creditor, the 'debt' and 'default' on the part of the Corporate Debtor cannot be ascertained. The cause of action giving rise to the claim to the Operational Creditor is from the Invoices, which were claimed from the year 2012 and after going through the Statement of Accounts of both the parties, there appears to be vast difference in the amount and certain debit notes which were raised by the Corporate Debtor were not given due credit. Further, the orders passed by this Tribunal to reconcile the accounts have also proved to be a futile exercise.

13. Thus we are of the view, that only upon when the accounts are reconciled. The exact amount, which has become due and payable by the Corporate Debtor can be ascertained. We are well aware of the fact that this Authority cannot reject the claim of the Operational Creditor on the ground of amount not having become crystallized. However, as to the

facts of the present case, in order to ascertain the ‘debt’ and ‘due’ the accounts needs to be reconciled and only upon reconciliation, as also if any cost reduction is ascertained, it may pass on to the Corporate Debtor and in the said circumstances, we cannot beforehand presume that the debt as claimed by the Operational Creditor will cross the threshold limit as prescribed under Section 4 of the IBC, 2016. In exercise of summary jurisdiction, all of the above is also not possible and in the circumstances, it will be appropriate for the parties to relegate to civil proceedings or to Arbitration if the same is contemplated.”

and dismissed the application without costs.

APPELLANT’S CONTENTIONS

3. Challenging the impugned order of dismissal dated 05.05.2020 in CP/328/IB/2018 (Filed by the Appellant/Operational Creditor under Section 9 of the Code) passed by the ‘Adjudicating Authority’ (National Company Law Tribunal, Division Bench I, Chennai), the Learned Counsel for the Appellant submits that the ‘Adjudicating Authority’ had erroneously dismissed the application of the Appellant, without considering the circumstances, evidence and documents adduced by the Appellant in support of its ‘Corporate Debt/Claim’ of Rs.53,52,607 with interest at 30% per annum, which was disputed by the Respondent/Corporate Debtor on the basis of the bald, vague, fake and forged statements of accounts and corresponding credit/debit notes of different dates/occasions.

4. The Learned Counsel for the Appellant contends that the ‘Adjudicating Authority’ had committed an error in entertaining and placing reliance upon

the forged and fabricated documents of the Respondent at a belated stage of which not even a 'whisper' was made in the reply of the Respondent to the Statutory Notice in Form IV sent by the Appellant.

5. It is the stand of the Appellant that the impugned order was passed by the 'Adjudicating Authority', resting on presumption and assumption and there was no proper appreciation of Documents on Record and therefore, the impugned order is liable to be set aside.

6. The Learned Counsel for the Appellant advances an argument that the 'Adjudicating Authority' had disregarded and brushed aside the facts and circumstances of the case that the 'sum' and details of 'Invoices' reflecting in Statutory C-Forms issued for the concerned period and the amount and details appearing in corresponding invoices were matching. As such, there is no question of raising the impugned debit/credit notes must have taken place, because there was no impact on the 'Purchase Figure' and issued C-Form and Figures reflecting therein.

7. The other contention put forward on behalf of the Appellant is that the 'Corporate debt sum' claimed by the 'Appellant' was 'certain', admitted and recognised and thereby undeniable by the Respondent and in that view, the impugned order of dismissal of the Section 9 application filed by the Appellant/Operational Creditor, by the 'Adjudicating Authority' is an incorrect one and hence prays for allowing the instant 'Appeal' in the interest of justice.

8. This Tribunal has heard the Learned Counsel for the Appellant/Applicant/Operational Creditor (at the admission stage itself) and noticed the contentions.

GIST OF REPLY OF THE RESPONDENT/CORPORATE DEBTOR

9. Before the 'Adjudicating Authority', the Respondent/Corporate Debtor had filed a reply to CP No.IB/328/2018 inter alia stating that it is not concerned with the email dated 29.10.2015 and the said mail had not originated from the office of the Respondent. Furthermore, this email correspondence does not reveal that who had mailed and to whom it was sent.

10. Continuing further, the Respondent/Corporate Debtor had taken a plea before the 'Adjudicating Authority' that at no point of time the Respondent had admitted or acknowledged or accepted the 'payment liability' of any amount due to the 'Appellant/Applicant/Operational Creditor'.

11. Besides the above, the clear cut stand of the Respondent is that it does not admit that the contractual rate of interest was accepted at 30% per annum on the due amount and that the Respondent had issued a reply notice dated 09.03.2017 to the Appellant's notice dated 02.03.2017 wherein, the allegations of the Appellant/Applicant were denied and the claim of the Appellant was disputed. In reality, the Respondent/Corporate Debtor had averred in its 'Counter Statement' before the 'Adjudicating Authority' that there was business transactions between it and the Applicant (Appellant) but all the dues were settled as early as on 2015 itself and due to the supply of sub-standard/inferior quality of material by the Appellant/Applicant, heavy loss was suffered and that steps are being taken to recover damages from the Appellant.

ASSESSMENT***COMPANY APPEAL (AT)/(CH)/(INSOLVENCY) NO.27/2022***

12. Before the 'Adjudicating Authority' the 'Appellant/Applicant/Operational Creditor' filed CP/328/IB/2018 (under Section 9 of the I&B Code, 2016) against the Respondent/Corporate Debtor. As a matter of fact, in the Form 5, under Part IV, 'Particulars of Operational Debt', it is mentioned as under:-

1	TOTAL AMOUNT OF DEBT, DETAILS OF TRANSACTIONS ON ACCOUNT OF WHICH DEBT FELL DUE, AND THE DATE FROM WHICH THE DEBT FELL DUE.	<p>A) The total outstanding Debt due and payable by the Corporate Debtor to the Operational Creditor stands at Rs.53,52,607.73 (Rupees Fifty three lakhs fifty two thousand six hundred and seven Rupees and Seventy three Paise) as on date (hereinafter referred to as 'Operational Debt'). The above total 'Outstanding Dues' is excluding the contractual rate of interest mutually agreed at 30% p.a.</p> <p>B) The Operational Creditor is engaged in the manufacturing of Kraft Paper and Duplex Board ("Business of the Operational Creditor") and are well known in the market for their high quality products. The Operational /Creditor has supplied /Duplex Boards to the Corporate Debtor based on purchase order placed in the Corporate Debtor upon the Operational Creditor. The Operational Creditor has against very such purchase order performed the supply of Duplex Boards against which specific invoices/Bills have been raised which are marked and annexed on the Application.</p> <p>C) The Corporate Debtor has acknowledged the Total Outstanding Debt due to the</p>
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		<p>Operational Creditor vide an email dated 29th October, 2015. The Corporate Debtor has accepted and not disputed the quantity and quality of the products supplied until the issuance of a statutory notice under the Companies Act, 1956 by the Operational Creditor dated 3rd August, 2016 to wind up the affairs of the Corporate Debtor. The notice for winding up was considered as the last resort, after multiple reminders issued by the Operational Creditor dated 31st August, 2015, 11th September, 2015, 19th September, 2015, 29th September, 2015 and 8th July, 2016.</p> <p>D) The Operational ebt fell due and payable immediately upon the receipt of the invoice issued by the Operational Creditor to the Corporate Debtor. The dues of invoices raised by the Operational Creditor summing up the total amount due has been marked and annexed to the Applicant with the type set of documents (Annexure No.14 and 18).</p>
2	AMOUNT LAIEMD TO BE IN DEFAULT AND THE DATE ON WHICH THE DEFAULT OCCURRED (ATTACH THE WORKINGS FOR COMPUTATION OF AMOUNT AND DATEWS OF DEFAULT IN TABULAR FORM)	<p>A) The amount which is due/payable and claimed to be under default by the Corporate Debtor is Rs.53,52,607.73 (Rupees Fifty Three Lakhs Fifty Two Thousands Six Hundred and Seven Rupees and Seventy Three Paisa) which is exclusive of the agreed contractual rate of interest @ 30% etc.</p>

13 The Appellant/Applicant/Operational Creditor in Form 5 'Particulars of Operational Debt (Documents, Records and evidence of default) at S.No.6 had mentioned the following:

6	PROVISION OF LAW, CONTRACT OR OTHER DOCUMENT UNDER WHICH OPERATIONAL DEBT HAS BECOME DUE.	A) The Operational Debt become due based on the purchase orders and the subsequent invoices raised by the Operational Creditor on the Corporate Debtor. Therefore, the total Operational Debt payable by the Corporate Debtor is Rs.53,52,607.73 (Rupees Fifty three Lakhs Fifty Two Thousand six hundred and seven Rupees and Seventy Three Paisa) which is exclusive of the agreed contractual rate of interest @ 30%. The Operational Debt has arisen as the Corporate Debtor has failed to make the lawful and legitimate payments due under the said Invoices raised by the Operational Creditor.
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14. The Appellant had issued a Statutory Winding Up Notice dated 03.08.2016 (under Section 433(e) and 433(f) r/w Section 434(1)(A) of the Companies Act, 1956) to the 'Corporate Debtor', its 'Managing Director' and the other 'Directors of the Corporate Debtor', wherein a demand for payment of Rs.53,52,607.73 along with interest @ 30% per annum (outstanding amount due to the Appellant) was made. Also the Respondent and others were informed that the Appellant is separately entitled to recover all or any of the losses suffered due to the non-payment.

15. It transpires that the 'Appellant' on 31.08.2015 under the subject 'payment due against goods sold' had addressed a communication to the Managing Director of the Corporate Debtor/ICMC Corporation (with a copy being marked to Mr. Nand Lal of the Respondent) wherein it was mentioned that inspite of several requests made to the Managing Director of the Respondent and Mr. Nand Lal, they had not completed the payment for goods invoice as on date and further that the Appellant received the last payment 30.06.2015 of Rs.3,03,165/- and since then they had not received a single rupee. Added further, it was mentioned that a Debit Balance in their account was shown as Rs.77,52,020.89 and at the earliest, the full payment was requested by the Appellant, from the Managing Director (Mr. Mahadevan Kannan) of the Respondent

16. The Appellant on 11.09.2015 had made a similar request for 'payment due against goods sold' wherein the full payment of Rs.77,52,020.89 was sought for from the Managing Director of the Respondent. Once again a request was made by the Appellant on 19.09.2015 by addressing a letter to the Managing Director of the Respondent seeking full payment of the amount mentioned earlier. Besides this another letter dated 29.09.2016 was addressed by the Appellant's Director to the Managing Director of the Respondent claiming full payment of Rs.77,52,020.89 at the earliest.

17. It is evident from the letter dated 08.07.2016 (sent by speed post) addressed to the Managing Director, wholetime Director Mr. Nand Lal, Mr. Jagan Nathan that a payment of outstanding demand till 15.07.2016 was sought for in regard to the unpaid invoices amounting to INR 53,52,607.73.

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18. The Appellant on 02.03.2017 had issued a notice Form 4 Notice addressed to the Respondent claiming the repayment of unpaid sum of Rs.53,52,607.73 (being the amount in default) and the Respondent was required to pay the debt due within 10 days from the date of receipt of the Notice failing which it was informed that an application under Section 9 of the Code before the 'Adjudicating Authority' would be filed for initiating CIRP.

19. The Respondent through its Advocate had issued a notice dated 09.03.2017 to the authorised person Mr. Devkant Agarwal, of the Appellant wherein it was mentioned that there was no admitted liability by the Respondent against the Appellant at any point of time and in fact only the Appellant, only owes to the Respondent in respect of their business transaction for which the Respondent is initiating steps to claim it through appropriate forum.

DISPUTE

20. Under Section 9 of the Code, an 'Adjudicating Authority' is required to examine before admitting or rejecting an application under Section 9 of the Code whether the 'dispute' raised by the 'Corporate Debtor' qualify as a 'dispute', in terms of Section 5 (6) of the Code and whether Notice of Dispute given by the 'Corporate Debtor' satisfies the conditions prescribed in Section 8(2) of the Code. The 'Adjudicating Authority' is to scrutinise the attendant circumstances to the issue of 'Demand Notice' with a view to decide whether a bona fide dispute exists between the parties. The 'dispute' must be one which necessitates more investigation and at this juncture, the 'Adjudicating

Authority' will not examine the merits of the 'dispute'. If the 'dispute' is not an imaginary one or a hypothetical one and if the 'dispute' really exists, the application is liable to be rejected, as opined by this Tribunal.

21. If there is plausible contention raised on behalf of the concerned party, which requires a further investigation, then the application cannot be admitted. The 'dispute' in whatever form, ought to have been raised before the 'Demand Notice' under section 8 of the Code was served on the 'Corporate Debtor'.

22. The I&B Code, 2016 is not a 'Debt Enforcement Procedure'. The application of an 'operational creditor' is not maintainable, if the 'Corporate Debtor' has a dispute about its outstanding/debt. The 'dispute' is to be seen by the 'Adjudicating Authority' as one based on tenable substantial grounds. In this connection, it is relevantly pointed out that if there is a 'dispute' about the debt, then, it is for the 'applicant' to approach the competent Civil Court to decide the triable issues. In short, the 'Adjudicating Authority/Appellate Tribunal' is not to be utilised as a 'Debt Collecting Agent'.

23. At this juncture, this Tribunal pertinently points out that the 'Adjudicating Authority' in the impugned order had clearly mentioned that operational creditor (Appellant) had filed the Ledger Statement maintained in its 'Books' and it showed that a sum of Rs.53,52,607.73 was due and payable by the Respondent/Corporate Debtor. Per contra, the Respondent/Corporate Debtor had filed a Statement of Accounts pertaining to the Appellant/Operational Creditor (maintained in their Account Books) which

showed that a sum of Rs.60,169/- was pending, to be paid by the Corporate Debtor to the Operational Creditor. Although, enough and adequate opportunities were given to the respective sides to reconcile the account from 05.02.2019 till 09.03.2020, there was no head way and ultimately the 'Adjudicating Authority' had reserved the orders in the main Company Petition on 09.03.2020.

24. The 'Adjudicating Authority' on perusal of the email dated 29.10.2015 had opined in the impugned order that the said email does not show anywhere that the 'Corporate Debtor' had mentioned that the amount was due and payable by it to the Appellant/Operational Creditor.

25. The 'Adjudicating Authority' in regard to the Statement of Accounts relating to the parties had mentioned in the impugned order that there appears to be vast difference in the amount and certain debit notes which were raised by the Corporate Debtor were not given due credit. Also that the 'Adjudicating Authority' in the impugned order CP/328/IB/2018 came to the resultant conclusion that only upon the reconciliation of Accounts, the exact amount which became due and payable by the Respondent/Corporate Debtor could be ascertained. Further, to find out the aspect of 'Debt' and 'Default' the accounts of parties are only to be reconciled.

26. It is to be remembered that an 'Adjudicating Authority' is not a 'Court of Law' since it does not decide a money claim or a Civil Suit. The proceedings under the I&B Code, 2016 are summary in character and they are not 'adversarial'. Of course, the 'dispute' must be an existing and genuine one.

27. In the present case on hand, the Respondent/Corporate Debtor in its Counter to CP 328/IB/2018 at paragraph 7 had clearly averred that due to supply of sub-standard/inferior quality of materials by the Appellant/Applicant, the Respondent has suffered loss and was taking steps to recover damages from the Appellant. Therefore, it is quite evident that the Respondent/Corporate Debtor had raised a 'dispute' in regard to the quality of goods and it can be safely and securely said that a 'dispute' is pending about the 'Debt'.

28. In regard to the rate of interest at 30% per annum claimed by the Appellant/Operational Creditor in respect of the due amount, the Respondent comes out with a plea that never at any point of time, it had agreed for the said rate of interest by duly signing the contract in this regard. Significantly, the Respondent/Corporate Debtor had not admitted its liability and even in the Reply Notice dated 09.03.2017 of the Respondent/Corporate Debtor addressed to the Appellant it was categorically mentioned that the Appellant owes money to the Respondent in respect of the business transactions.

29. As far as the present case is concerned the Appellant/Operational Creditor/Applicant is not in a position to establish that the 'Debt due' free from any 'Dispute'. The 'Adjudicating Authority' cannot admit the application filed by the Appellant/Applicant (under Section 9 of the Code), based on assumptions and presumptions. In short, in the instant case the 'Dispute' raised by the Respondent/Corporate Debtor is not a mere denial but the same is projected on a tangible ground. Viewed in that perspective, this Tribunal holds that the 'Adjudicating Authority' came to the right conclusion that the ***COMPANY APPEAL (AT)(CH)(INSOLVENCY) NO.27/2022***

‘Debt’ claimed by the Appellant/Operational Creditor cannot be decided in a summary jurisdiction under the I&B Code, 2016 and opined that it would be appropriate for the parties to relegate to civil proceedings or to arbitration if the same was contemplated and dismissed the CP 328/IB/2018 which requires no interference in the hands of this Tribunal in ‘Appeal’. Consequently the Appeal fails.

CONCLUSION

30. In fine the ‘Company Appeal (AT)(CH)(Ins) No.27/2022 ’ is dismissed. No costs. Pending IA, if any, is closed.

(Justice M. Venugopal)
Member (Judicial)

(Mr. Kanthi Narahari)
Member (Technical)

7th February, 2022
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