

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

Company Appeal(AT)(Insolvency) No. 350 of 2021

IN THE MATTER OF:

**Anoop Kumar Chhawchharia
Director of M/s. ANR International Pvt. Ltd.,
B-279, Yozna Vihar,
Shakarpur, East Delhi – 110 092** **...Appellant**

Vs.

- 1. M/s.Emgreen Impex Limited
H-1419, Ground Floor, DSIDC Narela,
Delhi – 110 040** **...Respondent No.1**
- 2. Devendra Umrao,
Interim Resolution Professional of
ANR International Pvt. Ltd.
IBBI/IPA-003/IP-N00223/2019-2020/12640
B-43A, First Floor, Kalkaji,
New Delhi – 110 019** **...Respondent No.2**

Present:

For Appellant: Mr. Ramji Srinivasan, Sr. Advocate with Mr. Iswar Mohapatra, Mr. Eshna Kumar, Mr. Prithvi Singh, Mr. Shivkrit Rai and Mr. Aditya Maheshwari, Advocates & Mr. Anoop Kumar Chhawchharia.

For Respondents: Mr. Virender Ganda, Sr. Advocate with Mr. Nitya Sharma, Mr. Vishal Ganda, Mr. Anand Singh Sengar, Ms. Akanksha Mathur, Mr. A K Babbar, and Mr. Surendra Kumar, Advocates for Respondent No. 1.

Mr.S.P Singh Chawla (RP), and Mr. Tapas Gaur, Advocates for Respondent No. 2. Mr. Devendra Umrao (IRP) in person.

J U D G M E N T

DR. ASHOK KUMAR MISHRA, TECHNICAL MEMBER

1. The present appeal has been filed by 'Appellant' – 'Anoop Kumar Chhawchharia' Director & Shareholder of Corporate Debtor - 'M/s. ANR International Pvt. Ltd.,' under Section 61 of the 'Insolvency and Bankruptcy Code, 2016' (in short 'Code') against the order dated 19.04.2021 passed by the 'Adjudicating Authority' (National Company Law Tribunal), New Delhi Bench – VI in CP(IB) No.1623/ND/2019.
2. The Adjudicating Authority has initiated 'Corporate Insolvency Resolution Process' (CIRP) based on the observation that the 'Operational Creditor' has elaborately explained the faulty procedure followed by the Corporate Debtor in sending the invoices in a different company address, lack of proof of delivery of material, sending the material on a single day which is humanly impossible, using the cranes instead of trucks and offences committed by the 'Corporate Debtor' in the CGST Act which amounts to committing fraud on the Operational Creditor besides misleading the Tribunal.
3. The corporate debtor / Appellant has submitted the followings:
 - a. The Corporate Debtor is a profit making and a solvent company with a net worth of Rs.72 Crores and a turnover of Rs.400 Crores.
 - b. There is a valid pre-existing dispute as the Corporate Debtor has made a claim of Rs.1,13,84,168 against the Operational Creditor's claim of Rs.1,12,99,101 for the goods supplied by the Corporate Debtor to the Operational Creditor in June, 2018 for which he has

submitted the invoices raised and lorry receipts, GST payments made & GST returns filed in July, 2018 and ledger account of Operational Creditor in the books of Corporate Debtor, as from the Appellant an amount of Rs.85,066 is recoverable from the Operational Creditor. While the operational creditor has claimed an interest of Rs.33,76,950 over and above the principal amount as stated above, such interest was never agreed. The account between the parties are operating as current running account and has also stated that it is settled law that documentary evidence showing outstanding amount in the running account prior to the date of the demand notice under Section 8 of the Code raises a valid and substantial question on the existence of debt and has supplement it with judgment of Hon'ble Apex Court and of this Appellate Tribunal.

- c. The issues raised in the impugned order based on rejoinder and without considering sur-rejoinder are triable issues which are beyond the scope of Section 9 of the Code. The issues relating to forged invoices, manual invoices improbability of high amount of product being delivered in a single date, non-delivery of goods etc., have also been raised.
- d. The Adjudicating Authority has prima facie accepted the contentions raised by the operational creditor without considering the sur-rejoinder by the corporate debtor and has cited certain judgments of Hon'ble Apex Court and of this Appellate Tribunal that these are triable matter and are matter of evidence beyond the jurisdiction of the Adjudicating Authority.

- e. The operational creditor has suppressed material fact before the Adjudicating Authority and before this Appellate Tribunal by not bringing the issue of counter claim, replied to the demand notice under Section 8 of the Code and the issues of GST against the manual invoices raised and goods supplied whereas the corporate debtor has paid the GST amount and the operational creditor has failed to reject the same on the GST portal and thereby the operational creditor has violated the provisions of the GST Act. The Operational Creditor has misrepresented and suppressed the material fact and has cited Hon'ble Apex Court and various High Court's judgment.
 - f. The Appellant has also raised the issue that the operational creditor was silent for two and half year of pursuing its dues, had it been due and has not provided any written communication of pursuing of payment and only confirmation of statement of account till 2017 has been submitted for his dues whereas our supply was made in June, 2018 and they are not shown any confirmation of balances after June, 2018.
 - g. He has also presented before this Appellate Tribunal that payment made by the Corporate Debtor to transporter and explained that truck number was wrong in only one truck out of six trucks and that was due to typographical error.
4. The Respondents have submitted the followings:
- a. The Respondents have vehemently opposed that the debt is due, defaulted and admitted by the corporate debtor and supply made by

the corporate debtor from July to September, 2017. The case is fit for admission under section 9 of the Code and corporate debtor has issued demand notice under section 8 of the Code. Thereafter, the Corporate Debtor has replied to the demand notice and raised a false claim of dispute of an outstanding amount of Rs.85,067 payable to the corporate debtor without supporting invoices & delivery chalan.

- b. There is no pre-existing dispute and no communication were raised by the Corporate Debtor with respect to alleged pre-existing dispute prior to the issue of demand notice. They have not mentioned of alleged invoices in the reply to the demand notice and have cited the Hon'ble Apex Court and this Appellate Tribunal's judgment to support his claim that there is no pre-existing dispute.
- c. The dispute is limited to the question of outstanding amount as above which was also not supported invoices, delivery challans, GST payments at the time of reply of demand notice. No other disputes were raised or mentioned in the reply to the demand notice. The Corporate Debtor raised the issue that the truck was not the truck but rather it was a crane number and so also the belated issue of GST payment and have also submitted that they have not claimed input credit for those payments made by the corporate debtor as the same is false & fabricated and concocted to mislead the Adjudicating Authority. His invoices are manual in nature and not in the series.
- d. There are glaring defects in the invoices which substantially shows that the invoices are fabricated. No communications of alleged invoices by the Corporate Debtor to operational creditor, as invoices

were incorrect name and incorrect address of operational creditor and he has elaborately explained the same while making submissions including in its written submission.

- e. He has also raised the issue of sur-rejoinder filed by the Corporate Debtor which is unheard of in the Code proceedings. He has also cited the Hon'ble Apex Court and this Appellate Tribunal judgment. Counter claim proposition developed by Corporate Debtor is a feeble defence which cannot be taken. Transporters also belong to the SAME corporate group of company and is having same phone number as per web portal. They have violated the Carriage Road Act, 2017.
- 5. We have gone through the submissions made by the parties including the citations. What we observe in this case is that there is no confirmation of counter claim of corporate debtor from operational creditor, even in the reply to the demand notice, it was unsupported by the invoices, delivery challans and GST payments. Truck Number - one of the consignment number is not correct and all the invoices and deliveries are of one day. Simply making GST payment cannot prove that they have supplied the material to the other side. The Corporate Debtor has never raised that they have due recoverable from the operational creditor prior to the issue of the reply to the demand notice.
- 6. We understand that Rule 46 of CGST Rules, R/w Rule 48 of CGST Rules permits manual GSTIN Number. For the issues is that the Corporate Debtor invoiced is not supported by the purchase order nor a confirmation of account at a later date from the operational creditor.

7. The Corporate Debtor is a healthy company, not substantiated by the corresponding balance sheet of the company as they have not filed the same nor alone this cannot be a sole basis to substantiate that it does not require to go to CIRP. High turnover with positive net worth may reflect good fund flow but it does not substantiate a good cash flow. Here we would like to refer the Hon'ble Apex Court Judgment in *Mobilox Innovations Pvt. Ltd Vs. Kirusa Software Private Limited in Civil Appeal No. 9405 of 2017 dated 21st September, 2017 para 13,14 and 15* are as follows:

13. All this then led to the Bankruptcy Law Reforms Committee, set up by the Department of Economic Affairs, Ministry of Finance, under the Chairmanship of Shri T.K. Viswanathan. This Committee submitted an interim report in February 2015 and a final report in November of the same year. It was, as a result of the deliberations of this Committee, that the present Insolvency and Bankruptcy Code of 2016 was finally born.

*14. The interim report went into the existing law on indebtedness in some detail and discussed the tests laid down in *Madhusudan Gordhandas v. Madhu Woollen Industries Pvt. Ltd (1972) 2 SCR 201*, by which a petition presented under the Companies Act on the ground that the company is "unable to pay its debts" can only be dismissed if the debt is bona fide disputed, i.e. that the defense of the debtor is genuine, substantial and is likely to succeed on a point of law. The interim report also adverted to an amendment made in the Companies Act, 2003, by which the threshold requirement of Rs.500 was replaced by Rs.1 lakh.*

15. The interim report found:

“Once the petitioning creditor has proved the inability of the debtor company to pay debts, van Zwieten states that courts in India have recognised a wide discretion that enabled it to give time to the debtor to make payment or even dismiss the petition. This is in stark contrast with the position in the UK (from where the law was transplanted) where once the company’s inability to pay debts has been proven, the petitioning creditor is ordinarily held to be entitled to a winding up order (although it should be noted that there is an alternative corporate rescue procedure, ‘administration’, which a debtor may be entitled to enter).

The effect of these abovementioned judicial developments has been to add significant delays in the liquidation process under CA 1956 and to add uncertainty regarding the rights of the creditors in the event of the company’s insolvency. Consequently, this has made creditor recourse to the liquidation procedure as a means of debt enforcement rather difficult, and secondly, rendered the liquidation procedure ineffective as a disciplinary mechanism for creditors against insolvent debtors.”

The interim report then recommended:

“Recommendations:

- *In order to re-instate the debt enforcement function of the statutory demand test for winding up, if a company fails to pay an undisputed debt of a prescribed value as per Section 271(2) (a), the creditor should be entitled to a winding up order irrespective of whether it is insolvent (in commercial or balance sheet terms) or not. Further, the NCLT should have the discretion to refer the company for rehabilitation under Chapter XIX before making a*

winding up order on such ground, if the company appears to be *prima facie* viable. Further, in order to prevent abuse of the provision by creditors and ensure that it is not used to force debtor companies to settle disputed debts, the provision should specify the factors that the NCLT may take into account to determine whether the debt under consideration is disputed or not. As laid down by the courts, a petition may be dismissed if the debt in question is *bona fide* disputed, i.e., where the following conditions are satisfied: (i) the defence of the debtor company is genuine, substantial and in good faith; (ii) the defence is likely to succeed on a point of law; and (iii) the debtor company adduces *prima facie* proof of the facts on which the defence depends. Further, as with initiation of rescue proceedings, the NCLT should also have the power to impose sanctions/costs/damages on a petitioning creditor and disallow reapplications on the same grounds if it finds that a petition has been filed to abuse the process of law.

- The Government may also consider revising the present value for triggering the statutory demand test under Section 271 (2) (a) from ‘one lakh rupees’ to a higher amount or revise the provision to state ‘one lakh rupees or such amount as may be prescribed’.
- ‘Balance sheet insolvency’ and ‘commercial insolvency’ should be identified as separate grounds indicating a company’s ‘inability to pay debt’ in order to avoid conflicts/confusion with the statutory demand test (as is the case of the IA 1986 where the statutory demand test, the commercial insolvency test and the balance sheet insolvency test are alternate grounds for determining a company’s inability to pay debts under Sections 123(1) (a), 123 (1) (e) and 123(2), respectively).”

8. Hence, this reflects that if, the corporate debtor is unable to pay its debt, while debt is legally due and default has occurred, dispute not raised or substantiated prior to the issue of demand notice then the Code can be enforced for timely resolution of Insolvency and Bankruptcy.
9. All this suggests that prima facie the Corporate Debtor needs CIRP and accordingly, the impugned order of the Adjudicating Authority invoking the provisions of the Code is in right spirit. Hence it needs to be uphold and accordingly, the appeal is dismissed.

Pending IAs, if any stands disposed of. Interim Orders, if any, passed by this Appellate Tribunal stands vacated. No orders as to costs.

[Justice Jarat Kumar Jain]
Member (Judicial)

(Dr. Ashok Kumar Mishra)
Member(Technical)

26th July, 2021

New Delhi

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