National Company Law Appellate Tribunal

Principal Bench, New Delhi

COMPANY APPEAL (AT) (INSOLVENCY) No. 431 of 2021
(Arising out of Order dated 06th May, 2021 passed by National Company Law Tribunal, Mumbai Bench, Court-V, in C.P. (IB) 424/MB/2020).

IN THE MATTER OF:

M/s. G.L. Engineering Industries Pvt. Ltd.
Regd. Office: 39/44, TV Chidambaram Road,
Sion (East), Mumbai – 400022.
CIN No. U28920MH1981PTC023662 **...Appellant**

Versus

Supreme Engineering Ltd.
R-223, M.I.D.C. Complex,
Rabale, Thane Belapur Road,
Navi Mumbai – 400701.
CIN No. L99999MH1987PLC043205 **...Respondent**

For Appellant: **Mr. Abhijeet Sinha, Ms. Neeha Nagpal and Mr. Udbhav Nanda, Advocates.**
For Respondent: **Ms. Meenakshi Arora, Sr. Advocate alongwith Mr. Mohit D. Ram, Ms. Aditi Hambarde, Mr. Vipul Patel, Advocates.**

J U D G E M E N T

[Per; Shreesha Merla, Member (T)]

1. Challenge in this present Appeal is against the Impugned Order dated 06/05/2021 passed by the Learned Adjudicating Authority (National Company Law Tribunal, Mumbai Bench, Court-V) in C.P. (IB) 424/MB/2020, wherein the Adjudicating Authority has dismissed the Application filed by the Appellant under Section 9 of the Insolvency and Bankruptcy Code, 2016, (hereinafter referred to as 'the Code') observing as follows:

"29. The Bench further notes that for this additional amount which has been claimed by the Petitioner by way of random expenses like delay charges, khalapur expenses and travel charges, no supporting invoices have been produced. In fact, the Bench further notes that the claims regarding the delay charges, khalapur expenses, travel charges etc. has no documentary evidence regarding any agreement between the parties. The Bench also notes that the 37 invoices referred to by the Petitioner do not mention any payment terms. Only in 7 invoices an interest at 18% p.a. has been mentioned. Similarly, in none of these 37 invoices, barring one, any proof of payable amount on account of delayed payment has been mentioned. Only one invoice mentions in its terms a delay of 365 days.

30. The Bench takes note that this applicable rate of 2.25% as claimed by the Petitioner has never been a part of any of the invoices and it has been mentioned by the Petitioner only while drawing a summary table without any proof. Therefore, the Bench finds that all these charges like delayed charges, khalapur expenses, travel charges, for which no invoices have been raised are baseless claims, not based on any mutual agreement or any documentary proof.

31. This Bench, therefore, concludes that there is nothing on record which shows that any outstanding Operational Debt as a claim in respect of provision 'supply of goods or services' by way of invoices or any documents has been proved by the Petitioner. In fact, all the 37 invoices which have been put on record by the Petitioner as due from the respondent has been fully paid and are not outstanding. The additional claim amount raised by way of other charges is frivolous, unsubstantiated, not based on any documentary proof and not even any invoices to that effect has been raised from the Petitioner. Further any claim arising out of Journal entries are unilateral adjustment claims and by no stretch of imagination can be said to be a claim arising out of supply of goods and services.

32. Regarding the two confirmatory letters from the Respondent i.e., 30.05.2019 and 01.07.2019 the Respondent has mentioned that it is a forged and fabricated document which has not been signed by them and its contents are also denied as false and

> *baseless. The contention of the Respondent in light of the above that it had issued those two cheques of about Rs.4.16 crores and about Rs.7.76 lakhs was only as security keeping in mind the business relationship between the parties, appears to be tenable. In any case, the dishonor of the cheques is a subject matter of Negotiable Instruments Act, 1881 and only proves that the Respondent is not interested in paying any 'security deposit' to the Petitioner. The Bench is of the view that it does not relate to any outstanding amount due from the Respondent by way of any operational debt."*

2. **Submissions of the Learned Counsel appearing on behalf of the Appellant:**

- Learned Counsel for the Appellant submitted that the Appellant Company has supplied steel material to the Respondent both on high-sea sale basis and domestic since October, 2013 and payments were made according to mutually agreed terms which is payment against delivery including delayed payment charges, if any.
- As against the last sale invoice dated 23/01/2018 for Rs.3,26,45,901.32/-, the Respondent made a payment of Rs.1 Crore after one year in January, 2019.
- During the period 13/02/2018 to 24/11/2018, the Respondent Company issued several cheques, but requested the Appellant not to deposit any of them. As the date of three months had lapsed, the cheques were returned and fresh cheques were issued by the Respondent Company.
- Vide letter dated 15/05/2019, the Respondent confirmed a liability of Rs.4 Crores in favour of the Appellant with a condition that in case the deposit of the cheque is requested to be delayed, the Respondent

would pay interest at 1.92% per month till the date of realisation. A cheque no. 255124 dated 16/05/2019 for an amount of Rs.4 Crores was issued.

- Again, vide letter dated 30/05/2019, the Respondent confirmed that a payment of Rs.4,16,18,466/- was payable in favour of the Appellant and another cheque dated 30/06/2019 was issued for this amount. But on 01/07/2019, extension of time was requested by the Respondent till 31/07/2019 and a cheque of Rs.7,76,706/- was issued towards delayed payment charges and 1.92% penalty interest per month.
- Subsequent to deposit of the cheques, both the cheques of Rs.4,16,18,466/- and Rs.7,76,706/- were dishonoured on the ground of insufficient ones. The Appellant issued a Notice under Section 138 of the Negotiable Instrument Act, 1881 (hereinafter referred to as 'NI Act'), but there was no response.
- The Appellant got issued a Section 8 Notice under the Code on 10/01/2020 for a debt amount of Rs.42,39,172/- as on 31/07/2019 along with delayed payment charges at 1.92% up to 31/12/2019.
- In response to the Section 8 Notice, the Respondent raise baseless allegations, stating that the letter dated 30/05/2019 and 01/07/2019 were forged. Learned Adjudicating Authority dismissed the Application on the ground that the letters dated 30/05/2019 and 01/07/2019 were fabricated. Learned Counsel relied on the Judgement of the Hon'ble Supreme Court in *'APS Forex Services Private Limited' Vs. 'Shakti International Fashion Linkers and Ors.', (2020) 12 SCC 724,* in

which the Hon'ble Apex Court has observed that *'once a person admits the issuance of cheque bearing his/her signature, there is presumption of a legally enforceable debt, which is rebuttal in nature but would require leading evidence for rebuttal'.*

- The Appellant filed two Forensic Reports pertaining to the subject letters. The Respondent had consistently accepted the liability to make the payment from 13/02/2018 onwards. To buttress his argument, the Learned Counsel has placed reliance on the following Principles:
    - *'M/s. Global Infonet Distribution Pvt. Ltd. Vs. M/s. Tespa Infotech Pvt. Ltd., Company Appeal (AT) (Insolvency) No. 185 of 2019,* in which it was held that *'….such dispute could not have been decided by the Adjudicating Authority nor can be decided by this Appellate Tribunal as to whether the documents were fictitious or is of earlier period which can be decided only by the forum of competent Jurisdiction'.*
    - Para 18 of *'A2 Interiors Products Pvt. Ltd.' Vs. 'Ahluwalia Contracts India Ltd.', C.P. (IB) No. 2135/ND/2019* also stipulates that *'Admission of the 'Operational Debt' leaves no scope for further adjudication'.*
    - This Tribunal in *'Duke Sponge & Iron' Vs. 'Laxmi Foils & Ors.', Company Appeal (AT) (Insolvency) No. 950 of 2019,* has observed that *'the aggrieved party has option to move appropriate civil/criminal forums and in case it is established that in any appropriate proceeding the document was falsified, forged or fabricated'.*

- Invoices are not necessary to establish an 'Operational Debt' in terms of Form 3 of Rule 5 of IBBI (Application to the Adjudicating Authority) Rules, 2016, specifically in view of the fact that clear admission of liability exists. This Tribunal in *'Neeraj Jain' Vs. 'Cloudwalker Streaming Technologies Private Limited & Ors.', Company Appeal (AT) (Insolvency) 1354 of 2019,* has clarified that *'for filing Application under Section 9 of the Code, in case the Demand Notice would deliver in Form 3 of IBBI (Application to the Adjudicating Authority), Rules, 2016, within the submissions of the copy of the charges along with the Application in Form 5 is not a mandatory requirement, providing the documents to prove the existence of 'Operational Debt' and the amount in default is attached with the Application'.*
- The endorsement of the dishonoured cheques mentioned 'exceeds arrangement' but did not relate to forged signatures. This Tribunal in *'Sudhi Sachdev' Vs. 'APPL Industries Ltd.', Company Appeal (AT) (Insolvency) No. 623 of 2018* has held that *'pendency of case under Section 138/141 of the NI Act amounts to Admission of debt and not an 'existence of dispute''.*
- There is sufficient evidence on record to prove that the 'Operational Debt' is due in terms of detailed 37 invoices pertaining to high sea-sale, Statement of Debit Notes to the delayed payments, Ledger Accounts of the Respondent showing a Closing Balance of Rs.4,16,18,466/- along with a signed and stamp Statement of Account as on 30/06/2019 and therefore the Adjudicating Authority has erroneously dismissed the Application filed under Section 9 of the

Code on the ground that there was no evidence of any services rendered or amounts ‘due and payable’.

3. **<u>Submissions of the Learned Counsel appearing on behalf of the Respondent:</u>**

- Learned Counsel for the Respondent contended that the letters dated 30/05/2019 and 01/07/2019 are forged and fabricated and the Respondent has filed two Affidavits dated 14/02/2020 and 17/02/2021 stating that the contents of the aforesaid letter are false and fabricated.
- The Appellant has relied on two cheques issued by the Respondent for Rs.4.16 Crores and Rs.7.76 Lakhs which the Respondent had actually issued only as a security to the Appellant, keeping in view the old business relations between the parties, but not towards any specific payment. The Appellant has approached this Tribunal only on the basis of such dishonoured cheques and false claims in respect of the alleged ‘Operational Debt’.
- The Appellant never produced the invoice against which the amount was ‘due and payable’. The Learned Counsel placed reliance on the deposition made in the Affidavit dated 14/02/2020, which is detailed as hereunder:

> *“5. … I state that neither the pleadings of the Appellant has made out a cause of action nor is there a single document annexed to the Petition supporting the purported allegations and claims as required u/s. 8 of the IBC. I say that the Appellant has failed and neglected to provide any invoice due for payment as is mandated u/s. 8 of the IBC.*

> *6. …I say that, without prejudice, and assuming without admitting that the claim is for an operational debt, the definition of the term "Operational Debt" required a claim in respect of provisions of goods or services including employment or a debt in respect of the payment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority." I state that the Appellant has failed to disclose the type and details of the goods in terms of date/s on which these purported transactions took place, quantities, amounts, Purchase Orders, Contracts, Invoices, Delivery Challans and/or Receipts. It is pertinent to note that the Appellant has used the term "oral orders" and usual "business practice" in order to conceal the fact that there were actually no transactions for provision of goods. The Appellant has failed in its legal obligation to provide any such details as mandated u/s. 8 of the IBC. It is further pertinent to note that the Appellant failed to produce the aforesaid documents even at the time of inspection held on 19th December, 2019 at 12 pm citing that the same are only "supplementary" as specifically stated in the letter dated 20th December, 2019 annexed as Exhibit K to the Petition. I say that in the absence of any such proof of transactions, the said claim of the Appellant is merely an extortion based on false and fabricated letters, after forging my signature and thus the present Petition deserved to be dismissed in the limine with costs. I state that in view of the absence of details of the purported transactions including any documents to substantiate such transactions the issue of limitation under law arises. In the absence of relevant dates, amounts and quantity, I am not aware and deny of any/all transactions having taken place in the past three years for which any sums are due and thereby deny the legal validity and locus of this present Petition."*

- On 27/02/2020, the Adjudicating Authority gave one more opportunity to the Appellant, *'to submit an Affidavit enclosing all the invoices and proof of delivery of the material to the other side corresponding to the amount of debt which is mentioned in their Petition'*. On 03/03/2020, the Appellant produced 37 invoices and also filed an 'Additional Affidavit' on 09/03/2020 annexing a Ledger Account, which clearly evidences that the payment sought against the invoices submitted by the Appellant has already been paid. Hence, no amount was 'due and payable'.

- As against 37 invoices was referred to, the Respondent paid sum of Rs.9,50,93,520/- by three modes of payment such as NEFT, Cheque, Letters of Credit vide 37 entries as is evidenced in the chart 'Annexure-2'. An additional sum of Rs.1,16,87,154/- was also paid to the Appellant advance towards future Orders.
- Learned Counsel submitted that in that Affidavit dated 17/02/2021, the Respondent denied that interest at 2.25% per month was ever agreed to be paid.
- It is vehemently argued that each and every invoice raised in the Affidavit dated 03/03/2020 has already been paid and the Respondent has deposed so in their Affidavit dated 17/02/2021. The Appellant has produced a Forensic Report without the permission of the Court, which amounts to producing a manipulated report. The Appellant has failed to prove the existence of any valid debt and hence, the Adjudicating Authority has rightly concluded that there is nothing on record which shows that any outstanding 'Operational Debt' as a claim in respect of provision, of 'supply of goods and services' by way of invoices or any documents has been proved by the Appellant herein.

Analysis:

4. The main point which arises for consideration in this Appeal is whether the Appellant has filed sufficient documents to establish whether the amounts claimed in Part IV of Form 5 of the Application, are 'due and payable'. It is the main case of the Appellant that there is 'acknowledgement of debt' by the Respondent Company by way of letters dated 15/05/2019, 30/05/2019 and 01/07/2019 acknowledging a liability of Rs.4,16,18,466/- and Rs.7,76,706/-. The Respondent Company has filed two Affidavits denying the signatures on these letters and strenuously contended that they are forged and fabricated. We find force in the contention of the Learned Counsel for the Respondent Company that the Forensic Report filed by the Appellant herein has been obtained by them without taking the permission of the Adjudicating Authority. It is the case of the Appellant that the Respondent Company has taken different stands i.e., in their Reply to the Demand Notice dated 14/11/2019, the Respondent has submitted that the amount claimed is a 'Security Deposit' and pertains to the Leave and License Agreement. But in their Rejoinder to the Reply dated 08/01/2020, they have denied the same. The Respondent also denies that there was any supply of goods and services between the Appellant and the Respondent.

5. At this juncture, we find it relevant to reproduce Sections 5(20) & 5(21) of the Code as hereunder:

> ***"5(20) "operational creditor"*** *means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred;*
>
> ***5(21) "operational debt"*** *means a claim in respect of the provision of goods or services including*

> *employment or a debt in respect of the [payment] of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority;*

6. Learned Counsel for the Appellant placed reliance on the Ledger Account and drew our attention to the entry dated 23/01/2018 in which an amount of Rs.3,26,45,901.32/- was squared off. Further, he also drew our attention to the Ledger Account dated 01/04/2018 to 31/03/2019 wherein the delayed payment charges of Rs.1,15,19,455/- is noted. It is also the case of the Appellant that these letters were denied *after* the filing of the Section 9 Application but not when the Demand Notice under Section 8 of the Code was sent. It is the case of the Respondent that even in the communication dated 14/11/2019, it was clearly stated that the amount was towards the Security Deposit of the Leave and License Agreement and denied that they have ever agreed to pay the delayed payment charges of Rs.7,76,706/-. Vide letter dated 04/12/2019, the Appellant denies that any such Leave and License Agreement has ever been executed between the parties and further submits that the alleged Leave and License Agreement has no nexus whatsoever to the unequivocal confirmation and admission during by the client for the payment of Rs.42,39,517/-. A perusal of the material on record shows that the Respondent vide letter dated 08/01/2020 (Annexure A-8) has sought for the original invoices and the Statement of Account based on which the claim was made, but the Appellant has not furnished the same. The Statement of Account filed before the Adjudicating Authority demonstrates that it is a running account from 23/01/2018 and it can be seen from the records that up to 23/01/2018 all the dues have been fully paid and the Ledger Account ends on 23/01/2018. However, in the Opening Balance on 01/04/2018 a debit amount of Rs.3,26,45,901.32/- appears in the absence of any invoices or any other additional documents to substantiate the argument of the Appellant that it is an 'Operational Debt' and the dues are 'Operational dues'.

7. We are of the earnest view that mere acknowledgement of amount in these two letters (even though denied by the Respondent), does not amount to *establishing* an 'Operational Debt' as defined under Section 5(21) of the Code. Annexures 1 & 2 are the Statements of Account filed by the Respondent Company in support of their case that out of the 37 invoices raised by the Appellant amounting to Rs.8,74,54,968/-, the Respondent has paid a sum of Rs.9,50,93,520/-. The Statement shows that these amounts were paid by NEFT, by cheque payments and also vide Letters of Credit. Hence, we are of the considered view that the amounts pertaining to 37 invoices have been paid by the Respondent. The same amounts reflect in Part IV of Form 5 of the Application claiming Rs.4,16,48,466/-and Rs.7,76,706/-. The delayed payment charges sought to be paid by the Appellant are not supported by any Agreement executed between the parties, based on which the Appellant could have exercised their rights to claim these amounts towards delayed charges. The interest charged towards penalty does not find a mention in any of the 37 invoices which are on record. The Journal Entries not supported by any other additional evidence cannot be *'solely'* relied upon to prove that the amount claimed arises out of 'supply of goods and services' to fall within the ambit of the definition of 'Operational Debt' as defined under Section 5(21) of the Code. Further we are inclined to observe that the dishonour of the two cheques is a subject matter of the NI Act, 1881 and recovery of those amounts under the NI Act, 1881 cannot be said to be paid towards the supply of goods and services, specifically in the light of the absence of any such Agreement or invoices to that effect.

8. The Appellant has already initiated steps under Section 138/141 of the NI Act, 1881 and submits that the ratio of *'Sudhi Sachdev' (Supra)* is applicable to the facts of this case, as it relates to 'Admission of debt' and *'not an existence of dispute'.* The issue in this case is not whether there is an 'Admission of debt' or 'existence of dispute' but whether in the absence of any sufficient evidence on record that the amounts claimed are *'in respect of the provision of goods and services including employment or a debt in respect of (payment) of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority'* as defined under Section 5(21) of the Code. Hence, we are of the view that the ratio of the Judgement of the Hon'ble Supreme Court in *'APS Forex Services Pvt. Ltd.' (Supra)* and the other Judgements relied upon by the Learned Counsel for the Appellant are not applicable to the facts of the attendant case, as we hold that mere Admission of any liability would not construe an 'Operational Debt' as envisaged under Section 5(21) of the Code. There is no sufficient evidence on record to prove that any kind of 'Operational Debt' is 'due and payable'. Therefore, we do not find any substantial grounds to interfere with the well-considered Order of the Adjudicating Authority.

9. For all the aforegoing reasons this Appeal fails and is accordingly dismissed. No Order as to costs.

10. The Registry is directed to upload the Judgement on the website of this Tribunal and send the copy of this Judgement to the Learned Adjudicating Authority (National Company Law Tribunal, Mumbai Bench) forthwith.

[Justice Anant Bijay Singh]
Member (Judicial)

[Ms. Shreesha Merla]
Member (Technical)

NEW DELHI
02nd March, 2022

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