

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) (Insolvency) No. 351 of 2018

IN THE MATTER OF:

M/s. Drulum India Pvt. Ltd.

...Appellant

Versus

M/s. Sharma Kalypso Pvt. Ltd.

...Respondent

Present:

For Appellant : **Mr. Sarwar Raza, Mr. Takreem Ahsan Khan,
Ms. Umama Zehra and Mohd. Waseem Akram,
Advocates**

ORDER

09.07.2018 The appellant (Operational Creditor) filed an application under Section 9 of the Insolvency and Bankruptcy Code, 2016(hereinafter referred to as the 'I&B Code') for initiation of 'corporate insolvency resolution process' against 'M/s. Sharma Kalypso Pvt. Ltd.' (Corporate Debtor). The Adjudicating Authority (National Company Law Tribunal) Bench III, New Delhi by impugned order dated 22nd May, 2018 rejected the application on the ground of 'existence of dispute'.

2. Learned counsel appearing on behalf of the appellant referred different pages to show that there is no existence of dispute and the 'Corporate Debtor' made frivolous attempt to deny the admitted dues and default. It is submitted that the Adjudicating Authority failed to take into consideration the different facts which suggest that the respondent was confused in counting the quantity

of goods delivered though the matter has already been resolved and that they issued cheques, which were bounced.

3. On hearing the learned counsel for the appellant and on perusal of the record, we find that the Adjudicating Authority heard both the parties and considered the relevant objections raised by the Corporate Debtor, some of which are quoted below:

- “(iii) On facts, it is contended that goods have not been supplied in full as per the purchase order dated 1.6.2017 and whatever supplies have been effected in relation to the purchase order dated 1.6.2017 have been supplied beyond time and that objections have also been duly recorded to the knowledge of the OC on the packing list dated 28.6.2017 annexed along with the counter affidavit.*
- (iv) It is also contended that in relation to the invoice No. IN1718TDS-046 dated 26.06.2017 has been manipulated as the OC has conveniently removed objections in relation to the number of boxes delivered to the OC where endorsements have been made by CD of the lesser quantity delivered.*
- (v) Further, documentary evidences has been also filed to disclose in acknowledgement or receipt of goods by the CD to the contrary as stated in the invoice which only goes to show that the goods have not been delivered to the CD as otherwise contended by*

the OC. In this connection, it is stated that while the invoice claimed that it had supplied 650 boxes and 8 bundles of material, however, on actual receipt of goods since it was found that CD had only received 588 boxes and 8 bundles and in view of the same, objection was duly recorded therein.

(vi) The objection in relation to the non-delivery of goods, it is contended can also be corroborated with endorsement made in the packing list.

(vii) It is contended by the DC that in order to cover up the objections which have been raised by the CD in relation to supply of goods/material, OC had deliberately filed illegible copy of logistics receipt dated 27.6.2017 and in order to set the records straight, a clear copy of the logistics receipt in claimed to have been annexed along with the counter affidavit which proves beyond doubt the shortage in the supply of goods effected.

(viii) Contention is also taken that in relation to the payment terms as contained in the purchase order, CD was liable to make 50% of the payment within 20 days upon complete goods being supplied and the remaining sum was to be paid 30 days thereafter provided the goods were supplied within the time specified. Thus, it is contended that the amount

claimed in default is not payable due to non-supply of the complete goods within the stipulated time as the same is material for fixing the false ceiling based on measurements and that the CD has suffered a irreparable loss particularly when time was the essence of the contract and the supply of goods were not on time as also admitted by the OC vide emails dated 16.06.2017 and filed as Annexure R-4 to the counter affidavit.”

4. In view of the aforesaid facts, the Adjudicating Authority came to a definite conclusion that there is ‘existence of dispute’ and refused to admit the application under Section 9 of the I&B Code, while we have noticed the plea taken by the appellant that no reply pursuant to demand Notice was given by the ‘Corporate Debtor’, but that will not take away the right of ‘Corporate Debtor’ to take plea of ‘existence of dispute’ before the Adjudicating Authority at the time of admission of application under Section 9 of the I&B Code..

5. The impugned order being reasoned one, we are not inclined to interfere with the same. The appeal is accordingly dismissed. No cost.

[Justice S.J. Mukhopadhaya]
Chairperson

[Justice Bansi Lal Bhat]
Member (Judicial)

/ns/sk/