

NATIONAL COMPANY LAW APPELLATE TRIBUNAL NEW DELHI

COMPANY APPEAL (AT)(INSOLVENCY) No.214 of 2020

In the matter of:

**Gaurang Nipinbhai Nagarsheth
Ex-Director/Shareholder of
Poggenamp Nagarsheth Powertronics
Pvt. Ltd.
S/o Nipinbhai Sahebhsinh Nagarsheth
Residence of: D-36, Aryamam Bunglows,
Thaltej Shilaj Road,
Shilaj, Ahmedabad- 380059**

...Appellant

Vs

**1.POSCO-India Pune Processing Center Pvt Ltd
CIN: U27107PN2005PTC02180
Plot NO. A-9, Floriculture Park,
Talegaon Industrial Area (MIDC),
Pune, Maharashtra- 410507**

**2.Mr. Sachin Bhatt Bhatt, IRP
Poggenamap Nagarseth Powertronics,
Pvt. Ltd.
A-103, Yogi Raj Villa-2, Kunal Char Rasta,
Nr. Signat Plaza, Behind Iscon Heights,
Gotri Laxmipura Raod,
Gotri, Vadodara- 390023.
R.No. IBBI/IPA-003/IP**

...Respondents

Present:-

For Appellant:-Mr. Sakal Bhushan, Advocate for the Appellant.

For Respondent:- Mr. Sanjiv Sen, Advocate for Respondent No.1

Mr. Atul Sharma, Advocate for Respondent No. 2

JUDGEMENT**(20th August, 2020)****Jarat Kumar Jain. J**

The Appellant Gaurang Nipinbhai Nagarsheth, Ex-Director/Shareholder of Poggenamp Nagarseth Powertronics Pvt. Ltd. (Corporate Debtor) filed this Appeal under Section 61 of Insolvency & Bankruptcy Code (In Short I&B Code) against the Order dated 22nd January, 2020 passed by the Ld. Adjudicating Authority (National Company Law Tribunal) Ahmedabad Bench, in CP No. (IB)/268/09/NCLT/AHM/2018, whereby admitted the Application under Section 9 of I&B Code.

2. Brief facts of this case are that Poggenamp Nagarseth Powertronics Pvt. Ltd. Respondent No. 2 (herein after referred as Corporate Debtor) and POSCO-India Pune Processing Centre Pvt Ltd. Respondent No. 1 (herein after referred as Operational Creditor) have regular business transactions between the year 2007 to 2014. The Operational Creditor had supplied Steel (Goods) to the Corporate Debtor and had raised invoices against the same. The Corporate Debtor failed to pay the dues towards the invoices. After, continuous follow ups Corporate Debtor issued a letter dated 03.06.2015 to the Operational Creditor, acknowledging debt due as on 1st June, 2015 amounting to Rs. 16,04,87,392/- and gave an assurance that the Corporate Debtor shall pay the said amount with simple interest at the rate of 10.5% per annum in 18 (eighteen) equal monthly instalments i.e. from June, 2015 to November, 2016. The Corporate

Debtor made payments from June, 2015 to November, 2015 total sum of Rs. 3,36,00,000/-. Which was adjusted against the principal amount. Thereafter, The Corporate Debtor made certain ad-hoc payments Rs. 2,75,00,000/- which were adjusted by the Operational Creditor against the interest on the outstanding dues. That inspite of undertaking and agreed timelines, the Corporate Debtor failed to make payment of the outstanding dues.

3. The last payment of Rs. 5 Lakhs was made by the Corporate Debtor on 31.08.2017. Thereafter, the Corporate Debtor has not made any payment. The Operational Creditor had issued a letters dated 19.10.2016, 12.09.2017 & 08.11.2017 calling for a payment of outstanding dues. However, the Corporate Debtor has not paid any amount. Then the Operational Creditor had issued a demand notice dated 11.05.2018. The Corporate Debtor has not replied the notice. Thereafter, the Operational Creditor filed Application under Section 9 of I&B Code, alongwith the documents.

4. The Corporate Debtor filed the Affidavit, in reply raising various objections to the admission and maintainability of the Application filed by the Operational Creditor. The Corporate Debtor's principal objection is that there is Pre-existing Dispute that the payment made by the Corporate Debtor has been adjusted by the Operational Creditor towards interest rather than the principal amount which was wrong and contrary to the letter dated 03.06.2015.

5. The Ld. Adjudicating Authority held that the objections raised by the Corporate Debtor are imaginary and not supported by any

documents, whereas, the documents produced on record by the Operational Creditor are enough to establish that Operational debt is due and payable to the Operational Creditor but the Corporate Debtor has defaulted in payment of debt as on 30.04.2018 a sum of Rs. 16,08,45,996/-. Hence, admitted the Application and the moratorium is declared in terms of Sub-Section (1) of Section 14 of I&B Code. Being aggrieved with this order, the Appellant Being Ex-Director/Shareholder of the Corporate Debtor has filed this Appeal.

6. Learned Counsel for the Appellant submits that Rs. 2,75,00,000/- paid by the Corporate Debtor between December, 2015 to August, 2017 which had been adjusted by the Operational Creditor towards the interest contrary to the terms of the letter dated 03.06.2015. In this regard, the Corporate Debtor sent emails from 29.01.2016 to 21.09.2016 and thereafter, the Corporate Debtor vide letter dated 02.03.2017, email dated 12.09.2017 and 09.11.2017 demanded copy of ledger. However, the Operational Creditor has not resolved dispute. Thus, the Corporate Debtor had raised plausible dispute much prior to the notice dated 11.05.2018 under Section 8 I&B Code, which clearly satisfied the test laid down by the Hon'ble Supreme Court in the case of Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software Pvt. Ltd. (2018) 1 SCC 353.

7. Learned Counsel for the Appellant submits that this Appellate Tribunal in the case of M/s Lloyd Insulations India Ltd. Vs. M/s Sintex Prefab and Infra Ltd. decided on 14.01.2020 held that it is not desirable to decide whether the dispute raised by the Corporate Debtor is genuine

or not which can be decided by the Court of Competent Jurisdiction and not by the Adjudicating Authority or this Appellate Tribunal.

8. It is further submitted on behalf of the Learned Counsel for the Appellant that when there is a negotiation on going between the parties relating to the quantum of payment, it can be accepted that there was a existence of dispute about the payment of debt as held by this Appellate Tribunal in the case of Nayan Shah Vs. Viral Rajarashi Mehta & Anr. decide on 29.06.2018.

9. Thus, there is Pre-Existing Plausible Dispute in this case. Therefore, the impugned order deserves to be set aside.

10. On the other hand, the Learned Counsel for the Respondent No. 1 (Operational Creditor) submits that the Corporate Debtor had not raised any dispute in exchange of emails between them. However, it demanded copy of ledger. The Operational Creditor vide email dated 28.09.2017 duly provided the ledger to the Corporate Debtor for the purpose of reconciliation. Thereafter, the Operational Creditor sent a Letter dated 08.11.2017 and demand notice dated 11.05.2018 under Section 8 of I&B Code, to the Corporate Debtor calling to pay outstanding dues. However, the Corporate Debtor has not paid any amount and has not replied the same. The Corporate Debtor vide letter dated 03.06.2015 acknowledged outstanding debt of Rs. 16,04,87,392/- and admitted to repay the debt with interest @ 10.5% per annum in 18 instalments. However, the Corporate Debtor had defaulted in payment. The Corporate Debtor had made some ad-hoc payments, therefore, the Operational Creditor has adjusted such payments towards interest and such right, is derived from

the settled law in force. For this proposition place reliance on the Judgment of the Hon'ble Apex Court in the case of Leela Hotels Ltd. Vs. Housing and Urban Development Corporation Ltd. (2012) 1 SCC 302.

11. Learned Counsel for the Respondent No. 1 further submits that the Corporate Debtor has duly admitted that the demand notice dated 11.05.2018 was received by them yet chose not to file Reply to the same and is therefore, estopped from making the allegation of dispute at this stage. The objection raised by the Corporate Debtor imaginary and not supported by any document whereas the document produced by the Operational Creditor are enough to establish debt due and payable.

12. In such circumstances, no interference is called for in the detailed and well-reasoned order of the Ld. Adjudicating Authority.

13. We have heard Learned Counsel for the Parties and gone through the record.

14. The question for consideration is whether the Corporate Debtor has raised a plausible dispute before Service of Notice dated 11.05.2018 under Section 8 of I&B Code.

15. According to the Appellant the Corporate Debtor has raised dispute through emails and letters sent to the Operational Creditor before receiving statutory Notice.

16. For appreciating the arguments, we have minutely examined the exchange of emails and letters between the parties. The Corporate Debtor sent emails dated 29.01.2016, 26.08.2016, 31.08.2016, 16.09.2016 and 21.09.2016 and asked the Operational Creditor for providing copy of

ledger for reconciliation of their Account books. Material emails and letters between the parties are considered.

17. On 11.09.2017, the Respondent No. 1 (Operational Creditor) sent email to Corporate Debtor, relevant portion of the letter reads as under:-

“This is with reference to the captioned subject and all earlier correspondences in respect thereof. We have been continuously following-up with you through emails, letters and telephonic communications for clearance of the said Outstanding Dues. There is no payment made by you towards Outstanding Principal except an amount of Rs. 33,600,000/- (Rupees Three Crore Thirty-Six Lakh Only) as on 31st August, 2017.

Also, no payment made by you towards Outstanding Interest except an amount of Rs. 2,75,00,000/- (Rupees Two Crore Seventy-Five Lakh Only) as on 31st August, 2017.”

18. On 12.09.2017 the Corporate Debtor has replied the email, which reads as under:-

“Dear Mr. Moon,

First of all your outstanding as on August 31, 2017 is not matching with our books of account. Further we demand your ledgers from April 2009 till date so that we can arrive at a correct figures. Hence, we do not accept your outstanding amount unless reconciliation is done by both the offices. Please treat your mail as null and void till we arrive at a figure acceptable to us.

Secondly we are after your office for getting balance confirmation as on March 31, 2017 however we are not getting the same. Please note that UCO Bank will declare both the units NPA (Non-Performing Assets) if we do not get if by today evening. In event we fail to submit our ABS by 13th we will not be in a position to pay any outstanding to you!!

Kindly take this seriously and see that it is done without fail by today evening specially in PPES.”

19. Thereafter, the Respondent No. 1 (Operational Creditor) provided copy of ledger to the Corporate Debtor through email dated 28.09.2017, and sent a letter dated 08.11.2017 which reads as under:-

“We have been continuously following-up with you through emails, letters and telephonic communications for clearance of the said Outstanding Dues. Only a payment of Rs. 33,600,000/- (Rupees Three-Crore Thirty-Six Lakh Only) as on 31st October, 2017, has been made by you towards the Outstanding Principal, as against the Outstanding Principal of Rs. 160,645,635/- (Sixteen Crores Six Lakh Forty-Five Thousand Six Hundred and Thirty-Five Only), as on 31st October, 2017, and only Rs. 27,500,000/- (Rupees Two Crore Seventy-Five Lakh Only) as on 31st October, 2017, has been paid by you towards the outstanding Interest, as against the Outstanding Interest of Rs. 53,494,481/- (Rupees Five Crores Thirty-Four Lakh Ninety-Four Thousand Four Hundred and Eighty-One Only) as on 31st October, 2017.”

20. The Corporate Debtor has replied the letter through email dated 09.11.2017, relevant portion as under:-

“Your allegations are baseless and we totally deny any life threatening threats to Mr. Lee. It was purely heated arguments to the behaviour of Mr. Lee who did not respond to my calls on supply of material and was not understanding our position and asking for overdue from us. We also have a claim along with interest on you which we are expecting to get resolved simultaneously with your outstanding as both are interlinked.

Regarding our claim and your dues since both are co-related, interlinked and have arisen from our JV clauses. You are requested to have an urgent meeting with us to sort this out which we have been repeatedly requesting to you.”

21. With the aforesaid exchange of correspondence, it is apparent that the Respondent No. 1 (Operational Creditor) has informed the Corporate Debtor that they have adjusted Rs. 3,36,00,000/- towards outstanding principal amount and Rs. 2,75,00,000/- towards outstanding interest. In response, the Corporate Debtor has not raised objection that the Operational Creditor has contrary to the terms of the letter dated 03.06.2015 adjusted the amount towards the interest. The Corporate Debtor in reply dated 09.11.2017 has referred about another claim and dues. However, particulars are not disclosed in the letter and reply to the Application before Adjudicating Authority.

22. Admittedly, the Corporate Debtor has not replied statutory notice dated 11.05.2018. Thus, from the correspondence it cannot be inferred that the Corporate Debtor has raised any plausible dispute.

23. Now, we have considered whether the so called dispute raised in reply to the Application under Section 9 of I&B Code, is a Plausible dispute. As per the acknowledgement and assurance letter dated 03.06.2015, the Corporate Debtor has to pay Rs. 16,04,87,392/- with 10.5% interest in 18 instalments starting from the month of June, 2015, i.e. Rs. 89,15,966/-per month. Thus as per agreement from June, 2015 to November, 2015 the Corporate Debtor has to pay (Rs.89,15,966/- x6) Rs. 5,34,95,796/- but paid Rs. 3,36,00,000/-. It means the Corporate Debtor has committed default in payment to Operational Creditor. Thereafter, from December, 2015 to August, 2017 the Corporate Debtor made ad-hoc payments total Rs. 2,75,00,000/- to the Operational Creditor. In such a situation, the Operational Creditor can use discretion and adjusted the amount against

the interest. For this purpose, it is useful to refer the Judgment of Hon'ble Supreme Court in the case of *Leela Hotels Ltd. Vs. Housing and Urban Development Corporation Ltd.*, (2012) 1 SCC 302, the Hon'ble Supreme Court held as under:-

“The Philosophy behind the principle set out in *Venkatadri Case* and as reiterated in *Rai Bahadur Seth Nemichand Case* and also in *Smithaben Case* and then consistently followed by this Court, is that a debtor cannot be allowed to take advantage of his default to deny to the creditor the amount to which he would be entitled on account of such default, by way of elimination of the principal amount due itself, unless, of course, the provisions of Section 59 of the Contract Act, 1872, were attracted or there was a separate agreement between the parties in that regard.”

24. Now, we have considered whether the dispute raised in reply to the Application is a plausible dispute. In this regard, it is useful to refer the Judgment of the Hon'ble Supreme Court in the case of *Mobilox Innovations (Supra)* in which it is held that:-

“It is clear, therefore, that once the operational creditor has filed an application, which is otherwise complete, the adjudicating authority must reject the application under Section 9(5)(2)(d) if notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility. It is clear that such notice must bring to the notice of the operational creditor the existence of a dispute or the fact that a suit or arbitration proceeding relating to a dispute is pending between the parties. Therefore, all that the adjudicating authority is to see at this stage is whether there is a plausible contention which requires further investigation and that the dispute is not a patently feeble legal argument or an assertion of fact unsupported by evidence. It is important to separate the grain from the chaff and to reject a spurious defence which is mere bluster. However, in doing so, the court does not need to be satisfied that the defence is likely to succeed. The

Court does not at this stage examine the merits of the dispute except to the extent indicated above. So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application.”

(Emphasis supplied)

25. In the light the above principle we have examined the facts of this case, the Corporate Debtor has raised the dispute that the sum of Rs. 2,75,00,000/- has wrongly been adjusted towards the interest. There is no such dispute raised before statutory notice. The Dispute raised in reply to the Application does not require any investigation and such dispute is a patently feeble legal argument and not supported by any evidence.

26. With the aforesaid, we are of the view that the impugned order does not require any interference by this Appellant Tribunal.

Hence, the Appeal is dismissed. However, no order as to costs.

(Justice Jarat Kumar Jain)
Member (Judicial)

(Mr. Balvinder Singh)
Member (Technical)

(Mr. V. P. Singh)
Member (Technical)

NEW DELHI
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