

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Ins) No. 1266 of 2019

IN THE MATTER OF:

**G. T. POLYMERS
A Partnership Firm,
Having its office at: No. 249,
Sydenhams Road, Ist & 2nd Floor,
Periamet, Chennai-600003.**

**Acting through its Authorized Representative
Mr. Ankit Doshi,
S/o Pravin Doshi**

...Appellant

Versus

**KESHAVA MEDI DEVICES PVT. LTD.
(CIN): U33111AP2012PTC081066**

**Having Its Registered Office At:
Plot No. 31 & 36, Industrial Estate Settipalli,
Renigunta Road, Tirupati Andhra Pradesh,
517506 India.**

...Respondent

Present:

For Appellant:- Mr. Gulshan Kr. Satija, Advocate.

For Respondent:- Mr. Purushottam Kr. Jha, Advcoate.

JUDGEMENT

(03.06.2020)

Jarat Kumar Jain. J.

The Appellant G.T. Polymers filed an Application under Section 9 of the Insolvency & Bankruptcy Code (I&B Code for short) against the Keshava Medi

Devices Pvt. Ltd. (Corporate Debtor). The Adjudicating Authority (National Company Law Tribunal) Amrawati, Bench at Hyderabad by the impugned order dated 30.09.2019 rejected an Application on the ground that the claim of the Appellant falls within the ambit of disputed claim.

2. The brief facts leading to this Appeal are that the Appellant had supplied the goods between 30.08.2016 to 20.12.2016 and raised 5 invoices amounting to Rs. 23,22,537/-. The Respondent sent balance confirmation as on 31.08.2018 and promise to pay the same. The Respondent however, did not honour the invoices and clear the dues. The Appellant accordingly issued demand notice on 07.09.2018 under Section 8(1) of the I&B Code, for the above amount and interest total 31,73,578/-. The Respondent replied notices by email dated 05.10.2018 disputing the claim and maintainability of the notice under Section 8(1) of I&B Code, and also disputed the genuineness of so called balance confirmation letter. The Respondent sent an email on 08.11.2018 indicating that it had filed civil suit before the XIII Additional City Civil Court Chennai, interalia seeking a declaration that Respondent has no outstanding dues to be paid to the Appellant. It is also contended that in view of pendency of the Civil Suit, an Application u/s 9 of the I&B Code, would be infructuous.

3. An Application under Section 9 of I&B Code, filed before the Adjudicating Authority, Hyderabad Bench in February 2019 subsequently, the matter is transferred to Adjudicating Authority Amrawati Bench.

4. The Respondent resisted the claim on the ground that under invoices dated 26.11.2016 and 20.12.2016 an amount of Rs. 8,05,395/- was outstanding against the Respondent. However the Respondent paid Rs. 3,05,395/- on 25.07.2017 and paid balance amount Rs. 5 Lakh on 15.12.2017. The Appellant forged an undated letter of balance confirmation showing as an acknowledgement of debt of Rs. 23,04,537/- as on 31.03.2018. After receiving the notice, the Respondent has filed suit before City Civil Court Chennai. There is a pre-existing dispute. Therefore, an Application under Section 9 of the I&B Code is not maintainable.

5. In the Rejoinder, the Appellant denied the allegation of forgery however, admitted that on 18.11.2017 Respondent had paid an amount of Rs. 5 Lakh only.

6. Ld. Adjudicating Authority after hearing the parties reached to the conclusion that the Appellant failed to prove that the Respondent owns an operational debt of Rs. 23,22,537/- and there is pre-existing dispute about the claim therefore, by the impugned order rejected the Application under Section 9 of I&B Code.

7. Learned counsel for the Appellant submitted that the Respondent has raised false and baseless dispute after service of notice under Section 8 of I&B Code. The goods were received and accepted by the Respondent (Corporate Debtor) and there was no dispute at the time of delivery of goods in regard to quantity and quality of goods and the Corporate Debtor issued account
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confirmation on its letter head duly signed and stamped by its authorized signatory thereby confirming balance of Rs. 23,04,537/- as on 31.03.2018. After service of notices the Respondent has filed a civil suit with an intention to resist the Application under Section 9 of I&B Code Respondent has failed to prove pre-existing dispute. Ld. Adjudicating Authority has not properly appreciated the material available on the record and rejected the Application therefore, the order is liable to be set aside.

8. On the other hand, Learned Counsel for the Respondent vehemently, opposes the prayer and submits that the Learned Adjudicating Authority after elaborate discussion held that there was a pre-existing dispute and Respondent has cleared all payments payable to the Appellant on 18.11.2017 and no amount was outstanding against any of the invoices in favour of the Appellant. The Appellant suppressed the final payment of Rs.5 Lakhs in the demand notice and it is also submitted that the Appellant relied on Form-C but the same were not filed before the Adjudicating Authority. The balance confirmation letter is a forged document. The application is perused with malicious intention. It is further submitted that in the insolvency proceedings the Appellant is not entitled to claim interest as held by this Tribunal in Company Appeal (AT) (Insolvency) No. 1227/2019 SS Polymers Vs Kanodia Technoplast Ltd. decided on 13.11.2019. Thus Adjudicating Authority has rightly rejected the application.

9. After hearing the Learned Counsel for the Parties we have perused the record.

10. The Hon'ble Supreme Court in Mobilox Innvations Pvt. Ltd. Vs. Kirussa Software Pvt. Ltd. 2017 1 SCC Online SC 353 held as to what are facts to be examined by the Adjudicating Authority while examining an Application under Section 9 of I & B Code which is as follows: -

“34. Therefore, the adjudicating authority, when examining an application under Section 9 of the Act will have to determine:

- (i) Whether there is an “Operational Debt” as defined exceeding Rs. 1 Lakh? (See Section 4 of the Act)*
- (ii) Whether the documentary evidence furnished with the application shows that the aforesaid debt is due and payable and has not yet been paid? And*
- (iii) Whether there is existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before the receipt of the demand notice of the unpaid operational debt in relation to such dispute?*

If any one of the aforesaid conditions is lacking, the application would have to be rejected. Apart from the above, the adjudicating authority must follow the mandate of Section 9, as outlined above, and in particular the mandate of Section 9(5) of the Act, and admit or reject the Application, as the case may be, depending upon the factors mentioned in Section 9(5) of the Act.”

11. In the light of this pronouncement firstly, we examined whether there is an Operational Debt exceeding Rs.1 lakh as defined in u/s 4 of the I &B Code. In the application u/s 9 of the Code it is mentioned that during the period from 30.8.2016 to 20.12.2016, Appellant has supplied the goods to the Respondent and raised 5 invoices. In the application it is also mentioned that as on the date the Corporate Debtor is liable to pay to Operational Creditor (Appellant) a sum of Rs. 23,22,537/- along with interest. The Application is supported by the Affidavit of Ankit Doshi partner of the Appellant following documents are annexed with the application in support of the claim:

(i) Copy of five invoices.

(ii) Copy of ledger of Respondent (Corporate Debtor) maintained by Appellant from 1.4.2016 to 31.3.2017 and 1.4.2017 to 31.3.2018.

(iii) Copy of Bank Account of Appellant maintained by Kotak Mahindra Bank from 1.9.2018 to 11.10.2018.

(iv) Central Sales Tax Form-C

(v) Confirming Balance of Rs. 23,04,537/- as on 31.3.2018.

(vi) Notice u/s 8(1) of I & B Code.

12. From the above referred documentary evidence furnished with the application shows that Rs.23,22,537/- along with interest i.e. operational debt is due and payable and has not yet been paid.

13. Now we have considered whether there is a pre-existing dispute between the parties. The Respondent in the reply dated 5.10.2018 to the notice, raised the dispute however in support no documentary evidence was filed. For appreciating the facts we would like to reproduce some portions of the reply to the notice which are as under:

“Secondly it is pertinent to note that the facts and circumstance of the present dispute was not elucidated by your client to yourselves in detail. Your client had regularly supplied ribbon packed film used for precision medical devices. Based on the supplies and invoices raised by your client we state that we had as on 15.11.2017 cleared all payments payable to your client.

At this juncture we were in demand Ribbon Pack Film in the year 2015-16. As your client was regularly supplying in adhoc basis we have placed purchase orders for supply of Ribbon Pack Film on your client. As your client had replied that they had shortage of raw material and hence there would be a delay of supply of Ribbon Pack Film.

At the earlier invoices outstandings were cleared by us based on supplies made by your client. We had believed the said supplies would be made to us at the earliest. At this juncture no deliveries were made by your client to us. We had purchased the said Ribbon Pack Film from your clients competitors. At this juncture your client has

forced us not to purchase from your client's competitors. Hence your client has exerted pressure tactics to clear the earlier invoice payments and the said outstanding were cleared on 15.7.2017 which were due and payable to your client.

At this juncture it is pertinent to note that present notice was caused to exert pressure and undue hardship and duress to us and your client's competitors.

In the process the annexure containing invoices were never delivered. Hence the said payments under the invoices cannot be payable by us. Further it is also noted that your client is having possession of our letter head had forged the annexure-3 alleged confirmation of balance and forged our seal and signature to suit your client's convenience."

14. From the above referred facts it is clear that Appellant had regularly supplied goods to the Respondent i.e. earlier to the 5 invoices. The Respondent has denied that the Appellant has never delivered 5 invoices referred in the application but subsequently he admits that the Appellant has supplied goods as per invoice dated 26.11.2016 and 20.12.2016. In the C-Forms delivered by the Respondent to the Appellant there is reference to all the 5 invoices, the Respondent has no courage to say that the C-Forms are forged. From the ledger of Respondent maintained by the Appellant it is apparent that there was a long business relationship between the parties. Ledger and bank account entries corroborate with 5 invoices. If really the Appellant was unable to supply raw

material due to shortage then Respondent could have filed the correspondence with the Appellant in this regard. The Respondent has not placed on record any of the invoice to show that he had to purchase material from Appellant's competitors. The name of the competitors are not disclosed in the reply. There is vague allegation that Appellant had exerted pressure tactics.

15. Hon'ble Supreme Court, in the case of Mobilox Innovations Pvt. Ltd. (Supra) held that what is the scope of ascertaining the existence of a dispute at the time of admitting the Application, which is as follows:-

“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.”

16. We find that in this case in reply to the notice the Respondent has raised a vague and baseless allegations against the Appellant which are not supported

by any documentary evidence. Therefore, we are of the view that the dispute is spurious or hypothetical, hence the Adjudicatory Authority has to reject such defence.

17. We are of the view that there is no material to presume that the application is perused with malicious intention. Appellants claim is not for interest amount therefore the appellant will not get any benefit from the order of this Tribunal in the case of SS Polymers (Supra).

18. The Respondent has received the demand notice on 28.09.2018 and sent a reply to the notice on 05.10.2018. Thereafter Respondent has filed civil suit before the XII Additional Civil Court Chennai on 11.10.2018. Thus, it is clear that the Respondent has filed Civil Suit after receipt of the demand notice, therefore, it will not be a dispute as defined in Section 5(6) of I&B Code.

19. Learned Adjudicating Authority while examining the Application under Section 9 has not properly appreciated the material on record. We are of the view that the documentary evidence furnished with the application shows that the operational debt Rs. 23,22,537/- is due and payable and has not yet been paid. There is no dispute or a suit pending before receipt of demand notice.

20. The Adjudicating Authority wrongly rejected the claim on the ground that the claim raised by the Appellant falls within the ambit of disputed claim. Merely disputing a claim cannot be a ground, as held by the Hon'ble Supreme Court in Innovative Industries Ltd Vs ICICI Bank and Anr. wherein it is observed that

“claim means a right to payment even it is disputed. The Code gets triggered the moment the default of Rs.1 Lakh or more”.

21. From the record as we find that the Respondent has defaulted to pay more than Rs. 1 Lakh and in absence of any pre-existing dispute and the record being complete we hold that the application u/s 9 preferred by the Appellant was fit to be admitted.

22. For the reasons aforesaid, we set-aside the impugned judgment dated 30.9.2019 and remit the case to the Adjudicating Authority for admitting the application u/s 9 of I & B Code after notice to the Corporate Debtor to enable the Corporate Debtor to settle the matter prior to admission.

The appeal is allowed with aforesaid observations and directions. No Costs.

Justice Jarat Kumar Jain)
Member (Judicial)

(Balvinder Singh)
Member (Technical)

(Dr. Ashok Kumar Mishra)
Member (Technical)

NEW DELHI

SC