

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
NEW DELHI

Company Appeal (AT) (Insolvency) No. 1171 of 2019

(Arising out of order dated 23-09-2019 in C.P. No. (IB) 2/9/NCLT/AHM/2019
passed by National Company Law Tribunal, Ahmedabad Bench)

IN THE MATTER OF:

A K Alloys

Through its Proprietor Mr. Prakash Doshi

Having address at:

Plot No. 512/7 Road No. 14, GIDC,

Kathwada, Odhav, Ahmedabad- 382415.

...Appellant
(Operational Creditor)

Versus

Emrise Engineering Pvt. Ltd.

Having its Registered Office at

Above Parekh Transport (Land Survey No. F2:110),

Near Teen Darwaja, Grain Market Road,

Jamnagar, Gujarat - 361005.

...Respondent
(Corporate Debtor)

For Appellant: Counsel appeared and argued but did not mark appearance.

For Respondent: Counsel appeared and argued but did not mark appearance.

J U D G M E N T

(27th July, 2020)

Justice A.B. Singh,

The instant Appeal has been filed against the order dated 23rd September, 2019 passed by the Adjudicating Authority, National Company Law

Tribunal, Ahmedabad Bench, whereby the petition under Section 9 of the Insolvency and Bankruptcy Code, 2016 filed by Appellant (Operational Creditor) has been dismissed.

2. The Appellant (Operational Creditor) a sole proprietorship firm is Manufacturer and Supplier of Iron & Steel Castings in India and has supplied the goods being the Valve Casting products to the Respondent (Corporate Debtor) who is a supplier of Gate Valves, Globe Valves in India.

3. The said goods were received and accepted by Corporate Debtor and there was no dispute at the time of delivery of the goods or thereafter relating to the Quantity and Quality of goods but subsequently the Respondent (Corporate Debtor) has failed to make the payment for the outstanding dues of the invoices from August 4, 2016 till December 9, 2017 amounting to Rs. 15,57,708/- (Rupees Fifteen Lakh Fifty Seven Thousand Seven Hundred Eight Only). The Corporate Debtor never refused its liability to make payment of outstanding amount but did not make any payment and thus it fell in default of total amount of Rs. 18,58,101/- payable to the Operational Creditor which includes an interest @ 18% p.a.

4. Further case is that the Appellant (Operational Creditor) had served upon the Respondent (Original Corporate Debtor) a Demand Notice in Form 3 along with Form 4 as required under Section 8 of the I&B Code, 2016 dated 22.08.2018 which was duly replied by the Respondent. The liability was not denied and further urged in the said email dated 19.09.2018 as under:-

"please note that we have come up to this due to certain financial slowdown in our cashflow. Never the less we are committed to repay dues at the earliest and we are working on this."

5. That vide subsequent email dated 27.09.2019, the Respondent (Corporate Debtor) again acknowledged and admitted its liability to make payment to the Appellant and also furnished the repayment plan in instalments. The contents of email dated 27.09.2018 sent by the Respondent to the Appellant is reproduced hereunder for ready reference:-

"Dear Prakash Bhai & Saurabh Bhai,

As per our telephonic discussion here with we are

Proposing payment plan as below"

3,66,095.00 - 25-Dec-2018

3,75,061.82 - 20-Jan-2019

3,07,756.98 - 20-Feb-2019

5,07,956.20 - 20-Mar-2019

We request you with humble to accept above payment plan.

If required I propose to meet at your office and conclude if you have any suggestions or modifications.

Best Regards,

Vipul K. Parekh"

Thus the Respondent (Corporate Debtor) admitted its liability to make payment to the Appellant in writing and also gave payment plan. The Respondent also paid Rs. 1,50,000/- to the Appellant on 05.11.2018 but failed to make payment even after its own admission and written promise.

6. The Respondent failed to adhere to its promise to make payment and did not make any payment as per the payment schedule given by itself (except Rs. 1,50,000/- paid on 05.11.2018). The appellant (Operational Creditor) filed application in Form 5 as envisaged under Section 9 of the I&B Code, 2016 before the Ld. NCLT, Ahmedabad to initiate Corporate Insolvency Resolution Process against the Respondent (Corporate Debtor).

7. The Respondent (Corporate Debtor) appeared and file its Reply Affidavit interalia stated as follows:-

i) That the Operational Creditor has manipulated its ledger account at page 59 of the petition wherein the entry of the receipt of Rs. 25,00,000/- dated 02-09-2016 have been shown with a malafied intention.

ii) Copy of email dated 23.01.2017 by the Operational Creditor to the Corporate Debtor with ledger account of 2016-17 is annexed at Annexure R-1 (Page No. 163 of the Appeal Paper Book relevant as page No.164).

8. It is further submitted by the Respondent (Corporate Debtor) that the amount of Rs. 25,00,000/- as advance loan from the Appellant (Operational Creditor) with a condition to repay when the Appellant (Operational Creditor) is successful to recover the same from the Flovel Valves P. Ltd. with default in payment.

9. It is further submitted by the Respondent (Corporate Debtor) that one Company Petition No. (IB) 444 of 2019 before the NCLT, Ahmedabad was filed

by the Operational Creditor against Flovel Valves P. Ltd. which was dismissed as withdrawn.

10. It is submitted by the Respondent (Corporate Debtor) that the Appellant (Operational Creditor) tampered with the ledger account which was produced before the Ld. Adjudicating Authority and further committed fraud not disclosing the arrangement made between the parties.

11. It is further submitted that amount under the petition as per the condition is recovered, the Operational Creditor has to return the amount of Rs. 25,00,000/- to the Respondent (Corporate Debtor).

12. Learned counsel for the Appellant during the course of argument submitted that the Adjudicating Authority have failed to considered the facts that the Appellant herein send a Demand Notice under Section 8 of the I&B Code, 2016 on 22.08.2018 and the Respondent (Corporate Debtor) in its reply to email dated 24.10.2018 admitted its liability and further its email dated 27.09.2019 address to the Appellant (Operational Creditor) has given proposal to repay this amount in instalment, so Ld. Adjudicating Authority has not considered this facts in proper prospective and mechanically rejected the application filed under Section 9 of the I&B Code, 2016.

13. The Ld. Adjudicating Authority after perusal of records has given a finding there is some mutual understanding between both the parties and in view of that the Corporate Debtor paid an amount of Rs. 25,00,000/- to the Operational Creditor as an advance with a condition to repay said amount as

and when the Operational Creditor is successful to recover the same from M/s Flovel Valves Private Limited who has defaulted in payment. The said fact is revealed from the email letter dated 12th November, 2016 to the reply issued by Mr. Vipul Parekh being the Director of the Corporate Debtor Company to Mr. Paresh Thakkar of M/s A.K. Alloys (Operational Creditor) which reads as under:-

"The e-mail I am writing herewith to clarify regarding the payment commitment (approx. 22.00 lacs) that was made on behalf of Flovel by EmRise.

We hereby confirm to AK Alloys to formally hold Rs. 22.00 lac from EmRise account against outstanding of Flovel that was for EmRise order. AK Alloys shall hold this amount until Flovel pays this Rs. 22 lacs to AK Alloys. This is required to be done to straighten accounting entries.

Further, Flovel has accepted that said amount of 22 lacs paid/committed by EmRise is from the advance of next EmRise PO (DODSAL order) to Flovel. Flovel shall try and clear the outstanding to AK Alloys during the course of execution of order so that AK Alloys can pay back/release hold payment to EmRise.

I Hope all points are clear to all parties involved. If any doubts or disagreement kindly revert back on timely manner."

14. So, taking the facts emerging the records and also the provision of law the Ld. Adjudicating Authority have given the finding that in reply issued by Mr. Vipul Parekh being the Director of the Corporate Debtor Company to Mr. Paresh Thakkar, Appellant (Operational Creditor) to show that there are some arrangement/understanding and/or agreement between the Operational

Creditor, Corporate Debtor and Flovel Valves which is continuing from 12.11.2016. This itself shows that there is dispute much prior to the issue of Demand Notice which was received on 22.08.2018 dismissed the application.

15. The learned counsel for the Appellant further, during course of argument referred to Page nos. 163 and 164 of the Appeal Paper Book which is the Account ledger of AK Alloys the Appellant (Operational Creditor) sent through email dated 23.01.2017 submitted that the ledger attached to the email Page no. 164 of the Appeal Paper Book shows that entry dated 02.09.2016 that the Corporate Debtor have paid Rs. 25,00,000/-to Operational Creditor and it's reflected in the Account of Operational Creditor.

16. The learned counsel for the Respondent (Corporate Debtor) on the other hand, referred to Page no. 164 of the Appeal Paper Book pointed out that the aforesaid entry regarding payment of 25,00,000/- to the Operational Creditor by the Respondent (Corporate Debtor) is reflected in the Account of Operational Creditor. But during course of argument, learned counsel for the Appellant (Operational Creditor) produced one letter dated 10th March, 2017 sent by the Respondent (Corporate Debtor) referred dues of Flovel Valves Pvt. Ltd. said to have been sent by the Corporate Debtor with regard to how the amounts paid are to be adjusted. This document was taken on record and marked as 'X'.

17. After hearing the parties and going through the order of the Ld. Adjudicating Authority, we are of the considered view that Annexure - 2 at Page

no. 107 of the Appeal Paper Book statement does not show dues payment of Rs. 25,00,000/- by the Appellant (Operational Creditor).

18. Further, Annexure R-1 of the Written Submissions filed by the Respondent (Corporate Debtor) which is the e-mail ledger account of the Appellant (Operational Creditor) relevant at page no. 164 of the Appeal Paper Book dated 02-09-2016 shows receipt of Rs. 25,00,000/- first time during the course of argument before this Appellate Tribunal. This document has been marked as 'X'.

19. In the above circumstances, as letter sent by the Respondent (Corporate Debtor) to the Appellant (Operational Creditor), this document 'X' was not placed before the Adjudicating Authority. So Ld. Adjudicating Authority rightly came to the conclusion that prior to filing of the application on 14th November, 2018, there is/are pre-existing dispute raised by the Respondent in respect of container detention charges. In the result, Company Petition (IB) No. 2 of 2019 filed by applicant M/s A. K. Alloys stands dismissed.

20. We also find that there was a pre-existing dispute and the Ld. Adjudicating Authority rightly dismissed the application filed under Section 9 of IBC.

21. We do not find any reason to interfere with the impugned order. There is no substance in the Appeal.

The Appeal is dismissed. No order as to costs.

[Justice A.I.S. Cheema]
Member (Judicial)

[Justice A.B. Singh]
Member (Judicial)

[Kanthi Narahari]
Member (Technical)

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