

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 231 of 2020

[Arising out of order dated 23rd December, 2019 in CP IBA/868/2019 passed by National Company Law Tribunal, Division Bench, Chennai]

IN THE MATTER OF:

M/s Quippo Energy Ltd.

Vishwakarma, 86C

Topsia Road (S)

Kolkata – 700046

Represented by its Authorized Representative

Ms. Shimpa Vyas

...Appellant
(Operational Creditor)

Versus

M/s Soundararaja Mills Limited

Soundararaja Buildings

G.T.N. Salai

Dindigul - 624005

...Respondent
(Corporate Debtor)

Present: -

For Appellant: Ms. Manasi Chatpalliwar, Mr. Gaurav Mahajan, Mr. Jayant Mehta and Mr. Srikar Pagadala, Advocates.

For Respondent: Mr. E. Om Prakash, Sr. Advocate with Mr. G. Ananda Selvam, Advocate.

J U D G M E N T

Justice Anant Bijay Singh,

The instant Appeal has been preferred by the Appellant (Operational Creditor) being aggrieved and dissatisfied by the Impugned Order dated 23rd

December, 2019 in CP IBA/868/2019 passed by the National Company Law Tribunal, Division Bench, Chennai, whereby and whereunder an Application filed by the Appellant under Section 9 of the Insolvency and Bankruptcy Code, 2016, was rejected.

2. **Brief facts of the case is as under: -**

i) The Respondent (Corporate Debtor) approached the Appellant (Operational Creditor) for the lease of various equipment for power generation from the Appellant.

ii) Accordingly the parties entered into a lease agreement dated 5th January 2015 (read with addendum dated 20th September, 2015) and a lease agreement dated 20th January, 2016, respectively.

iii) The Appellant and the Respondent also entered into a Service Agreement dated 5th January, 2015 (read with addendum dated 20th September, 2015) and a Service Agreement dated 20th January, 2016 for manpower.

iv) The business dealings under the Lease Agreements and the Service Agreements between the parties commenced from February, 2015, which continued till the Financial Year 2018-2019.

v) During this period, two mutual open and current running accounts were maintained by the Appellant - Operational Creditor for business dealings under the Lease Agreements and the Service Agreements with respect to the various transaction with the Respondent.

vi) Under the Lease Agreements and the Service Agreements, the Appellant raise its invoices fortnightly, in respect of rental charges for the leased equipment and the services respectively supplied upon which the Respondent was to make full payment, regularly and punctually, without delay, within thirty days of the receipt of invoices.

vii) Although the business dealings between the parties continued till 13th December, 2018, the last part payment received from the Respondent on 6th October, 2018 for an amount of INA 9,56,160/- (Rupees Nine Lakh Fifty-Six Thousand One Hundred and Sixty only) through RTGS.

viii) After this, no further payment was made by the Respondent to the Appellant.

ix) The last invoice raised by the Appellant upon the Respondent on 1st February, 2019.

x) From a perusal of the statement of accounts kept and maintained by the Appellant in its ordinary course of business a sum of INR 1,10,04,298/- ("Operational Debt") is due from the Respondent to the Appellant.

xi) The Appellant had sent representations (via email) on various occasions i.e. on 6th July, 2018, 10th July, 2018, 13th July, 2018, 8th September, 2018, 24th September, 2018, 25th September, 2018, 1st October, 2018, 15th October, 2018, 13th November, 2018, 27th November, 2018, 28th November, 2018, 11th December, 2018, 12th December, 2018 and 13th December, 2018, respectively wherein the Appellant requested the Respondent to make payment of the outstanding amount.

xii) In response to the emails sent by the Appellant in July, 2018, the Respondent sent an email dated 19th July, 2018, wherein it expressly acknowledged the pending payment due and payable to the Appellant from July, 2018 to October, 2018. For this acknowledged operational debt, the Respondent further assured a repayment plan to the Appellant and specified a schedule of release of the outstanding payment in the following manner:

- “1. July 2018- Rs. 28 Lakhs on or before 30/07/2018*
- 2. Aug. 2018- Rs. 28 Lakhs on or before 25/08/2018*
- 3. Sep. 2018- Rs. 28 Lakhs on or before 25/09/2018*
- 4. Oct. 2018- Rs. 28 Lakhs on or before 25/10/2018 ”*

These acknowledged pending payments payable by the Respondent to the Appellant were duly reflected as a debit in the statement of account maintained by the Operational Creditor in its ordinary course of business. Copy of the email dated 19th July, 2018 at Annexure- A-7 page 312 (Vol.- II) of the Appeal Paper Book.

xiii) Further case of the Appellant that the Appellant sent a demand notice dated 20th April, 2019 in ‘Form 3’ and ‘Form 4’ under Section 8 of the IBC read with Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 which is kept at Annexure – A-10 Page 329 (Vol.-II) of the Appeal Paper Book wherein the principal amount of debt due from the Corporate Debtor is INR. 1,13,29,658/- which is payable along with interest from the date of the last invoice raised i.e. 1st February, 2019 at the rate of 18% per annum amounting to INR. 4,35,803/- the total amount of Rs. 1,17,65,461/-.

xiv) The Respondent replied to the Demand Notice vide a reply dated 28th April, 2019, which is marked as Annexure- A-11 at page 345 (Vol.-II) of the Appeal Paper Book is as under: -

“1. At this outset, our client states that all the statements, allegations and claims contained in the Demand Notice dated 20th April 2019 received on 27/04/2019, (“impugned notice under reply”) shall be deemed to have been fully denied by my client as if the same were set out herein and nothing contained therein shall be construed as admitted or accepted for want of specific traverse.

2. Our client fully denies the alleged payable not to speak of the acknowledgment mail dated 19th July 2018 and further states that you have distorted the facts to suit your convenience and projected a false mail as an acknowledgment of debt. It’s a mail sent to you, out of good faith and business understanding, to make you comfortable about their future debt to you and their budgetary allocations accordingly.

3. Your notice is devoid of evidences showing how that debt of INR 1.12 crore arose on 19th July 2018. It is maliciously projected to implicate my client unlawfully. It is pertinent to note you mail dated 29th May 2018, wherein you confirmed an outstanding of INR 61 Lakhs only. It’s clear that my client’s proposal in the mail dated 19th July 2018 is only about future budgetary proposals, which are always subject to future happening. Hence, showing that mail as an acknowledgment of debt is done with an intention to mislead the forums to get rich unjustly.

4. The cordial relationship between you and my client was so good that even the agreement no. LEAS/COM/019/1066 dated 5th January 2015, which got expired on 4th Jan 2018, was not renewed but still both the parties were continuing with business.

Moreover they have not insisted you over the contractual obligations saddled on you such as calibration of meters, which would have saved lot of money for my client. The portion is reproduced hereunder for your attention;

“(iii) QUIPPO will do the measurement and will get it verified by SOUNDARARAJA QUIPPO will provide calibration certificate of gas flow meters prior to commissioning. Calibration to be done once every year by QUIPPO”...

6. My client further states that their DEBIT NOTE bearing no. SRMAO/B/C68/18-19 Dated 28th November, 2018 is raised in line with above clause of the contract vis-à-vis the Log book record and input unit record maintained by my client. The debit note is supported by a detailed data sheet, which may be refuted, if at all, by reconciling your log book and other records. Denying debit note without any evidential support is insincere and exposes your fake claims.

7. In view of the above, my client fully denies the liability to you as claimed by you in your notice, not to speak of the alleged acknowledgment of debt to the tune of Rs. 1.12 Crore in the light of your own confirmation on 29th May 2018 dated mail in your notice exposes your insincerity in claim and you are duty bound to state how the debt of Rs. 61 lakh doubled in a span of 49 days. Your act of misusing a communication issued in a different context as an acknowledgement of debt, is malicious and abuse of process of law. Since it is a dishonest claim your notice issued under the Insolvency and bankruptcy Code, 2016 is liable to be withdrawn immediately.”

xv) Thereafter, the Appellant filed Application under Section 9 of the IBC, 2016 before the Ld. Adjudicating Authority.

xvi) The Respondent appeared and file reply and after hearing the parties impugned order dated 23.12.2019 was passed. Hence, the Appeal.

3. Although, one-week time was granted both the parties to file their Written Submissions but only Respondent has filed Written Submissions.

Submissions on behalf of the Appellant

4. The learned counsel for the Appellant during the course of argument submitted that the Ld. Adjudicating Authority while dismissing the Application filed by the Appellant under Section 9 of the IBC, 2016 failed to appreciate that there was no prior dispute till 28th November, 2018 which was raised by the Respondent.

i) The Learned counsel for the Appellant further submitted that the Ld. Adjudicating Authority even in the reply dated 28th April, 2019 to the Demand Notice, the Respondent has admitted an amount of INR 61,00,000/- toward the operational debt and also referred email dated 27th November, 2018 and submitted that the Respondent has not denied the operational debt which is due to the Appellant.

ii) The learned counsel for the Appellant further submitted that the learned Adjudicating Authority has failed to consider the email dated 28th November, 2018 sent by the Respondent at page 324 of the (Appeal Paper Book) wherein the Respondent has admitted the pending due of Rs. 68,06,280/-.

iii) It is further submitted by the Appellant that the Ld. Adjudicating Authority has failed to consider that the Respondent has not denied as operational debt due to the Appellant.

iv) It is further submitted that the objection raised by the Respondent in its email dated 28th November, 2018 (supra) regarding the difference in the amount of debt does not fall within the meaning of dispute under Section 5(6) of the IBC.

v) On the basis of the submissions it was submitted that the impugned order is fit to be set aside and the Appeal is allowed.

Submissions on behalf of the Respondent

5. The learned counsel for the Respondent during the course of oral arguments and also in the Written Submissions has taken interalia following grounds: -

i) The Respondent (Corporate Debtor) has a textile unit at Karaikal, Pondicherry and was on the need for non-conventional power and had the source of gas supply by GAIL.

ii) The Appellant (herein) provided two gas based Generators to generate electricity at Respondent's premises on monthly Lease and also undertook service.

iii) The business between the parties were governed by two Lease Agreements and two Service Agreements which is at page Nos. 55, 75, 101 & 115 of the Appeal Paper Book Vol. II.

iv) It was further submitted that the according to clause 5 of the Lease Agreements provided for billing and payment, the Appellant was entitled to raise fortnightly bills under clause 5.1 in respect of the Rental Charges.

v) It is also provided under clause 5.2 for bills / credit note / debit note for recovery, charge of penalty, being payable or deductible (at page 78 of the Appeal Paper Book). As per clause 12.2 the Appellant guarantees 8400 hours of power generation without tripping every year. Failure to do so clause 12.3, empowers Respondent to raise debit note for deficiency and supply breakage (at page 82-83 of the Appeal Paper Book). On 30.05.2018, the Appellant acknowledged receipt of such Notes but had not given effect in their accounts (at page 11 of the Reply of Respondent) which is reads hereunder:

“Dear Mr. J. Sivakumar,

We have reconciled the account statement sent by you. And as on 29th May, 2018 total outstanding is as below.

Request you to kindly release the payment at the earliest.

<i>Customer account</i>	<i>Name</i>	<i>Gross O/S</i>
<i>C-000061</i>	<i>Soundararaja Mills Ltd.</i>	<i>32,45,418.00</i>
<i>C-000076</i>		<i>28,83,986.00</i>
<i>Total</i>		<i>61,29,404.00</i>
<i>Note 1</i>		<i>3,54,564.00</i>
<i>Note 2</i>		<i>2,58,085.00</i>

Note 1 Credit note issued by customer but not yet booked in QEL Ledger-

This is to be discussed on what reason CN issued.

Note 2 Total differential TDS not yet booked in QEL ledger.”

vi) It is further submitted by the Respondent (Corporate Debtor) that the power supply was never regular all through the contract period and that the Respondent suffered heavily and drawn power from 'Tamilnadu Electricity Board' at a higher cost. By an email dated 09.06.2018 the Corporate Debtor sent a detailed list of tripping with an indication that more than two tripping would be seriously looked which is the email are at page 12 to 14 of the Reply Affidavit by the Respondent.

vii) The further case of the Respondent that the one of the generators was not generating electricity since July, 2018. In this regard a debit not was raised for various tripping period and both were intimated to the Appellant on 28.11.2018 (at page 304 of the Appeal Paper Book Vol. II)

viii) Debit Note dated 28.11.2018 for a sum of Rs. 55,53,730/- was acknowledged by the Respondent.

ix) It is further submitted that the Appellant initially resisted to accept Debit Note, agreed to send ledger statement for reconciliation which is email dated 28.11.2018 (at page 301 of the Appeal Paper Book Vol. II) apart from other thing "we will send our ledger account statement for reconciliation to arrive the final outstanding."

x) It is further submitted by the Respondent that based on various communications back and forth, prior to Section 8 of the IBC Notice, the Ld. Adjudicating Authority has dismissed the Application under Section 9 of the IBC on pre-existing dispute ground and relied upon judgment in "**Mobilox Innovations Private Ltd. Vs Kirusa Software Private Ltd. 2018 (1) SCC 353**", para 51 is as under:

“51. 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.”

xi) The learned counsel for the Respondent further submitted that on the basis of these facts and also placed reliance by the judgment of Hon’ble Supreme Court in **“Mobilox Innovations Private Ltd. Vs Kirusa Software Private Ltd., 2018 (1) SCC 353”**, that much prior to issuance of notice under Section 8 of the IBC the Ld. Adjudicating Authority has rightly held pre-existing dispute between the parties. So there is no illegality in the impugned order passed by the Ld. Adjudicating Authority.

FINDING

6. We have perused the records of the case, considering the arguments advanced on behalf of the parties and gone through the written submission filed on behalf of Respondent. Taking the aforesaid facts and circumstances, we are of the considered view that the Ld. Adjudicating Authority has rightly taking notes of the facts.

- i) In view of the averment made at page 11 of Reply Affidavit of the Respondent which has been quoted above (supra), despite the Appellant acknowledged receipt of such notes through email and shows that the credit note issued by the Appellant has not booked in QEL ledger. Operational Creditor wanted to discuss why Credit Note was issued.
- ii) Through email dated 28.11.2018 at page 301 of the Appeal Paper Book the Appellant resisted to accept Debit Note, agreed to send ledger statement for reconciliation. E-mail dated 28.11.2018 (Page 304) sent by Corporate Debtor to Operational Creditor on 28.11.2018 (i.e. before Notice under Section 8 of IBC dated 20.04.2019) clearly complained of deficiency in service by frequent trippings causing Corporate Debtor to consume power from E.B. at a higher cost. It shows that there was a pre-existing dispute between the parties.
- iii) Ld. Adjudicating Authority has rightly relied on the judgment of Hon'ble Supreme Court in **“Mobilox Innovations Private Ltd. Vs Kirusa Software Private Ltd., 2018 (1) SCC 353”** have held that

there was a pre-existing dispute between the parties and rightly dismissed the Application under Section 9 of the IBC.

ORDER

7. Having regard to the foregoing discussion, we do not find any merit in the Appeal. The Appellant has failed to demonstrate that the impugned order suffers from any legal infirmity. The Appeal being devoid of merit, is dismissed. No order as to costs.

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

**[Justice Anant Bijay Singh]
Member (Judicial)**

3rd November, 2020

NEW DELHI

RN