NATIONAL COMPANY LAW APPELLATE TRIBUNAL NEW DELHI

Company Appeal (AT) (Insolvency) No. 464 of 2020

[Arising out of Order dated 19.02.2020 passed by the Adjudicating Authority (National Company Law Tribunal), Ahmedabad Bench in CP (IB) 241/9/NCLT/AHM/2018]

IN THE MATTER OF:

Saurabh Bharatbhushan Jain
Shareholder & Director of
M/s. Sysco Industries Ltd.
23, Vaundhara Society,
Behind Big Bazaar,
Vesu, Surat- 395 007 **...Appellant**

Versus
1.Excel Tubes & Cones
A/101, Green Acre, Movie time
Cinema Lane, Link Road,
Malad (W), Mumbai
Maharashtra- 400 064 **...Respondent No.1**

2.Kailash T. Shah
Interim Resolution Professional
Reg. No.IBBI/IPA-001/IP-P00267/2016-17/10511
Of M/s. Sysco Industries Ltd.
505, 21st Century Business Center,
Near World Trade, Ring Road,
Surat – 395 002 **...Respondent No.2**

Present:

For Appellant : Mr. Keith Varghese, Advocate.

For Respondents: Mr. Pavan Godiawala, Advocate for R-1. Mr. Vishnu Sankar, Advocate for R-2. Mr. Kailash T Shah, Advocate for R-2 (IRP).

J U D G M E N T

DR. ASHOK KUMAR MISHRA, TECHNICAL MEMBER

1. The Appeal has been filed by Mr. Saurabh Bharatbhushan Jain, a Director and Shareholder of the Corporate Debtor- M/s. Sysco Industries Limited, Surat, Gujarat under Section 61 of the 'Insolvency and Bankruptcy Code, 2016' (for short 'Code') against the impugned order dated 19.02.2020 passed by 'Adjudicating Authority' ('National Company law Tribunal, Ahmedabad bench at Ahmedabad') in CP (IB)-241 /9/NCLT/AHM/ 2018. The Operational Creditor is Excel Tubes and Cones, Mumbai, Maharashtra (Respondent No.1).
2. The Adjudicating Authority has initiated 'Corporate Insolvency Resolution Process' (for short 'CIRP') against the Corporate Debtor and has appointed Mr. Kailash T.Shah, 'Interim Resolution Professional' and has directed him to follow the provisions of Section 13, 14 and other relevant provision of the Code. The Adjudicating Authority has observed that the petition has been filed within limitation period and has also established that the default of payment has occurred apart from other related issues. Reliance has been placed by the Adjudicating Authority on the settlement proposal of Corporate Debtor which has been received by the Operational Creditor on 05.07.2018 and has arrived at the conclusion that amount of Rs.21 Lakhs is an undisputed amount and the Corporate Debtor has defaulted the payment, hence, initiation of CIRP.
3. The Appellant has submitted that the paper tubes supplied by the Respondent No.1 were of inferior quality as the core of the paper tubes

used to get lapsed. He has further submitted that Mr. Ajit Thakur, 'Head of Production Department' of the Corporate Debtor, had written email dated 06.07.2017 to the internal 'Directors' of the Corporate Debtor and the Corporate Debtor has forwarded the same to the Respondent No.1 informing them about defective paper tubes supplied by them. The relevant emails exchanged between the Corporate Debtor and Operational Creditor is attached and is at page No.109 and 110 of the Appeal paper book. They have also submitted references to other emails. The Appellant has confirmed receipt of Demand Notice dated 10.03.2018 and he has replied to the same vide its Letter dated 13.03.2018 and has informed that the Corporate Debtor has to incur huge losses because of poor quality of paper tubes. They have also asked to depute company representative along with quality control personnel to visit their plant and take back the rejections. They have also given them option to settle all pending dues and disputes, if any.

4. The Respondent No.1 has denied the issue of supply of inferior quality of goods as also that the Corporate Debtor had admitted the liability. They have also denied that the Settlement proposal given by Corporate Debtor was under any duress. They are also raising the issue of created problem by the Corporate Debtor to lift back some value of goods to reduce their financial burden and re-scheduling of dues. They are also raising that the Corporate Debtor is passing through tough time for last six to eight months and hence are raising such inferior quality supply issue to buy

time or admitting in the Court that the matter will be settled with Corporate Debtor. They have also alleged that the Corporate Debtor is demonstrating fictitious dispute. It is also stated that items should have been checked prior to consuming in production and not after that. During the course of submission, it was also stated that they were getting payment of all invoices upto June 2017 without any dispute except one invoice where the cheque was dishonored. They are alleging when they started pressurizing the Corporate Debtor for releasing the outstanding dues, the Corporate Debtor started raising the issue of dispute.

5. The Resolution Professional/Respondent No.2 has submitted that he has received claims from Financial Creditor is approximately Rs.89 Crore and from Operational Creditor is approx. Rs.7 Crore and from Employees approx. Rs.6 lakhs. He has also provided the Audited 'Financial Statement' upto 05.03.2019, which reflects that the Company is having total assets of Rs. 70 Crore approx. and the Company has become a loss making Company in the 'Financial Year 2018-19'.

6. On the question of using the goods without prior testing by the Corporate Debtor before forwarding the material for production, it was clarified by the counsel for the Appellant that technically after using the paper tubes supplied by the Respondent No.1, the Appellant comes to know that the paper tubes are perfect or defective. As far as the legal position is concerned under the Sale of Goods Act, 1930 vide Section 13 read with Section 59 if the goods supply are defective the buyer has two options (1)

Either to reject goods and ask for resupply or (2) to accept/use goods and sue for damages or diminution or extinction of the price.

7. The Corporate Debtor/Appellant, therefore, claims, it has a right to claim damages, and has cited following cases:

   - Eternit Everest Ltd. Vs. Abraham, AIR 2003 Ker 273 (Para 13 & 15), it is observed as under:

     Para – 13.Another argument advanced by the learned counsel for the appellant was that the 1st respondent had filed the suit for damages after using and retaining the articles. It was further argued that Section 59 of the Sale of Goods Act does not allow such a claim for compensation. Though the entire value of the goods had been claimed towards damages, the court below allowed only 75% of the value of the goods. Further some amount was allowed towards the expenditure met by the 1st respondent in arranging additional facilities for avoiding leakage. Even in the plaint it was alleged that as a result of the leakage, the ceiling made of plaster of paris had been damaged and additional amount had to be spent for safeguarding the above ceiling. Thus additional expenditure had to be met by the 1st respondent for safeguarding the ceiling due to the dripping of water from the roof by providing pitamin coated Hassan clothes over the plaster of paris over the entire area. It was a case where the 1st respondent was entitled to compensation under Sub-section (2) of Section 59 also. Thus the 1st respondent was entitled to compensation for the breach of the implied warranty. The Court below was fully justified in granting a decree for a portion of the claim put

forward in the plaint and I see no reasons to interfere with the amount decreed by the Court below.

15. Another argument advanced by the learned counsel for the appellant was that the Court below had no territorial jurisdiction to try the suit as the sale took place at Coimbatore in Tamil Nadu. The article were sold for being used at Shornur. Only by the use of the articles the latent defect of the material could be ascertained and thereby the cause of action for damages arose. The court below found that it had jurisdiction to decide the matter. Though a contention as to the jurisdiction was raised, the appellant did not move the court below to consider the above issue on jurisdiction as a preliminary issue and to decide the same before taking evidence. The judgment would further reveal that the above issue was not canvassed too. No reasons are there to disbelieve the above recital. On these circumstances I find no reasons to interfere with the above finding of the court below on jurisdiction. Thus this appeal has only to be dismissed.

- Sorabji Hormusha Joshi and Co. Vs. V.M.Ismall and Anr., AIR 1960 Mad 520 (para 33 & 34), it is observed as under:

Para – 33. Therefore there is, or there would appear to be, tow conditions or implied terms upon which such a condition in respect of sale of specific goods by description can be held to have been fulfilled as between parties. The first is that the goods must correspond to the description. The second is that, impliedly, they must be of merchantable quality. The rights of the buyer are not extinguished by the mere fact of acceptance, or the mere fact of passage of title in the goods to him. This has been made very clear by two decisions of this Court, where the applicable principles of law are stated and expounded.

Para – 34. In Sha Thilokchand Poosaji v. Crystal and Co., MANU/TN/0192/1955: AIR 1955 MAD 481, the learned Chief Justice and Rajagopala Ayyangar, J. had occasion for expounding the law upon this aspect. As the learned Chief Justice observes, the right of a

buyer for damages for breach of warranty proceeds upon the basis of acceptance of the goods delivered, and not a rejection thereof. In other words, the right of rejection of goods, and the right to sue for damages for breach of warranty, are alternative remedies. They are not cumulative. A buyer can (where goods not answering to the description contracted for are delivered) waive the condition and accept the goods, and sue for damages for breach of warranty, and this is the effect of S. 13(1) of the Sale of Goods Act.

He has also stated that because of the poor quality goods supplied by the Operational Creditor, its finished product (LDPE) got wasted and also, it was not able to fulfil various customers orders, resulting into loss of around Rs. 32,00,000/-, Thus, as per Section 13 of Sale of Goods Act, 1930 the Corporate Debtor has legitimate claim of damages against the Operational Creditor (Respondent No.1).

8. The Appellant has also alleged that their settlement proposal dated 05.07.2018 was after admission of the case before the Adjudicating Authority. While they have already raised the issue of dispute in the reply to the demand notice as well as while filing reply before the Adjudicating Authority. However, getting sacred about the filing petition and hearing of the case, they have to give the settlement proposal. They were worried not only for the family of the Directors but more than 100 workers and their family dependent on the Corporate Debtor. Submission of settlement proposal is always without prejudice to the rights and contentions of the parties and, therefore, any admission made in the settlement proposal

cannot be used against the Corporate Debtor. They have also given the following citation to supplement their proposition:

- Kamta Prasad and Ors. Vs. Ram Agyan and Ors., AIR 1952 All 674, Para No. 11 & 12, it is observed as under:

  Para – 11. - In the notice in the present case there is merely an offer for a compromise of a pending dispute coupled with a warning that proceedings which are open in law to the opposite parties would be taken in case the offer was rejected. The threat, if any, is not specifically to take proceedings at law upon a wrong that was supposed to be done by the institution of the applicant's complaint but to take recourse to law in protection of the opposite party's rights which had accrued to them upon their version of the dispute between the parties.

  Para -12. The law favours compromise and amicable settlements of disputes out of Court. It is for this reason that the law does not allow offers made without prejudice, during the course of a talk for compromise, for the settlement of disputes to be proved in evidence against the party making them. Therefore, where a party offers the settlement of dispute out of Court and, as part of the settlement, suggests the withdrawal of a pending legal proceedings, he cannot, by that suggestion, be said to be interfering with the course of justice.

- Shibcharan Das Vs. (Firm) Gulabchand Chhotey Lal, AIR 1936 All 157, Para No. 4, it is observed as under:

  The defendant also called a Vakil, Pandit Behari Lal Sharma, who gave evidence corroborating that given by the defendant himself in our judgment this witness's evidence was not admissible.

Negotiations were being conducted with a view to settlement, and that being so, we are bound to hold that these negotiations were being conducted without prejudice." In such circumstances it is not open for one of the parties to give evidence of an admission made by another. If negotiations are to result in a settlement each side must give away a certain amount. If one of the parties offers to take something less than what he later claims he is legally entitled, such must not be used against him; otherwise persons could not make offers during negotiations with a view to a settlement. Further, it appears to us that this vakil was at the time of these negotiations acting on behalf of the plaintiff and conducting litigation for him and that being so he could not, by reason of Section 126, Evidence Act, give evidence as to communications made to him without the express consent of his client, viz., the plaintiff himself. In the present case the vakil gave evidence against his own client and clearly without the latter's consent. Even eliminating the evidence of this witness the evidence of the defendant himself and his munim, coupled with the books, does establish that the defendant received a lesser sum than that which appears on the face of the note.

- Sri Bauribandhu Mohanty and Ors. Vs. Sri Suresh Chandra Mohanty and Ors., AIR 1992 Ori 136 Para 10 & 11, it is observed as under:

Para 10 - The Opposite Parties have relied on a decision the Division Bench of the Allahabad High Court in the case of Shib Charan Das v. Gulabchand Chhotey Lal MANU/UP/0197/1935, wherein the High Court has held thus(At page 158) :

*"xx xx xx. Negotiations were being conducted with a view to settlement, and that being so, we are bound to hold that these negotiations were conducted 'without prejudice'. In such circumstances it is not open for one of the parties to give evidence of an admission made by another. If negotiations are to result in a settlement each side must give away a certain amount. If one of the parties offers to take something less than what he later claims he is legally entitled, such must not be used against him; otherwise could not make offers during negotiations with a view to a settlement. *** ***"*

The same view was taken by the High Court of Oudh in the case of Kuar Nageshar Sahai v. Shiam Bahadur, AIR 1922 Oudh 231, where a Division Bench of the Court held follows:

"Parties often willing to make admissions for the purpose of effecting a compromise to which it would be unfair to hold them if the compromise falls through."

A similar view was also taken in the case of Smt. Surjit Kaur v. Gurcharan Singh, MANU/PH/0103/1973 in which the Court held thus :

*"** ** ** **. In any case, this letter, admittedly, was written during the period when the compromise talks going on. The inference drawn by the learned Judge from all these circumstances was that the letter was written at a time when the parties had agreed that no evidence would be given regarding it. That being so, the case will be covered by the second condition laid down in Section 23, quoted above, and as such, the husband could claim privilege regarding the same. It has been ruled in a Bench decision of the Allahabad High Court in Shibcharan Das v. Firm, Gulabchand Chhotey Lal, AIR 1936 All 157, that where negotiations were being conducted with a view to a settlement, it should be held that those negotiations were so conducted without prejudice. "*

From this it follows that where the compromise is not binding on the parties, any recital is of no much value as evidence. The parties are often willing to make admissions for the purpose of affecting a compromise to which it would be unfair to hold them if the compromise falls through.

11. In view of the above discussions, there is no doubt in my mind that the statements made in the compromise petition even if treated as valid admissions, were not intended to be treated as evidence by any of the parties because of failure of the compromise petition.

- Surjit Kaur Vs. Gurcharan Singh, AIR 1973 P&H 18, Para No. 2, 3, 4&5, it is observed as under:

Para – 4 . It is common ground that this letter was written on 11th March, 1971, the Learned Judge has found that the parties were trying to effect a compromise during the period 27th February to 20th March, 1971. Since the records of the case had not been sent for, I asked the learned Counsel to read that letter to me. Therein, the husband seems to have confessed that he was guilty for cruelty and was seeking apology from his wife's father. Undoubtedly, if the said letter is produced on the record, it would seriously damage the case of the husband. Reference was made by the Court below to the provisions of Section 23 of the Indian Evidence Act, which read as under:--

"In civil cases no admission is relevant, it is made either upon an express condition that evidence of it is not to be given, or under circumstances from which the court can infer that the parties agreed together that evidence of it should not be given."

Para -5. A perusal of this section would show that if an admission is made upon an express condition that evidence regarding it would not be given or under circumstances from which the Court could infer that the parties had agreed that the evidence regarding it would not be given, then such an admission would not be relevant. In the present cases, as I have already said, both the parties were trying to effect a compromise and during that interval, the said letter was written by the husband. It may be stated that the husband has frankly admitted that he did write that letter, but he claimed privilege regarding the same on the ground that it was written when the talks of compromise were going on between the parties. It appears from the circumstances

of this case that he had written this letter perhaps at the instance of the wife, because she might be ready to go back to the husband, but her father may not be giving her permission to do so, and it is quite possible that he wrote that letter just to prevail upon her father to send her back to him. Equally probable is that the father might have asked the husband to write such a letter, so that he could show it to his daughter and on its basis persuade her to go back after telling her that the husband had admitted his fault and apologised for the same. In any case, this letter, admittedly, was written during the period when the compromise talks were going on. The inference drawn by the learned Judge from all these circumstances was that the letter was written at a time when the parties had agreed that no evidence would be given regarding it. That being so, the case will be covered by the second condition laid down in Section 23, quoted above, and as such, the husband could claim privilege regarding the same.

9. The Resolution Professional has submitted a list of shareholders as on 31.03.2019 of the Corporate Debtor and the list contains the list of 198 shareholders. He has also informed that the Income Tax Department, Pan No. and GST Department is active in respect of Corporate Debtor.

10. The Respondent No.1 has submitted that there is no preexisting dispute and once the material is sold and used, it is the entire responsibility of Users. The damages may be due to the mistake of transportation of supply or the Corporate Debtor not keeping the material with proper packing and outside climate. They have alleged that the

Corporate Debtor and its erstwhile management has swindled systematically the assets to the detriment and the prejudice to the rights and claims of numerous creditors. They have alleged that the Corporate Debtor is dragging the proceedings and misleading the courts.

11. We have gone through the emails and also with the demand notice and the response from the Corporate Debtor to the Operational Creditor and observed that all problems have started from June 2017 from the time the quality of material supplied in few lots were of inferior quality leading to production disruption to the Corporate Debtor. It is also clear that the dispute has been raised also against the reply to the demand notice and the demand notice was replied within due time as per the provisions of the Code. The Hon'ble Apex Court has observed in **Mobilox Innovative Private Limited Vs. Kirusa Software Private Limited** in Civil Appeal No. 9405 of 2017 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 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 required 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."

12. For better and fuller appreciation of the present subject matter in issue, it is useful for this Tribunal to make a pertinent reference to Section 8 & 9 of the Code which provides mechanism for Operational Creditor, which runs as under:

Section 8 – Insolvency Resolution by Operational Creditor:

8. (1) An operational creditor may, on the occurrence of a default, deliver a demand notice of unpaid operational debtor copy of an invoice demanding payment of the amount involved in the default to the corporate debtor in such form and manner as may be prescribed.

(2) The corporate debtor shall, within a period of ten days of the receipt of the demand notice or copy of the invoice mentioned in sub-section (1) bring to the notice of the operational creditor—

(a) existence of a dispute, if any, and record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoice in relation to such dispute;

(b) the repayment of unpaid operational debt—

(i) by sending an attested copy of the record of electronic transfer of the unpaid amount from the bank account of the corporate debtor; or

(ii) by sending an attested copy of record that the operational creditor has encashed a cheque issued by the corporate debtor.

Explanation.—For the purposes of this section, a "demand notice" means a notice served by an operational creditor to the corporate debtor demanding repayment of the operational debt in respect of which the default has occurred.

Section 9-application for initiation of Corporate Insolvency Resolution Process by Operational Creditor:

Section 9 -. (1) After the expiry of the period of ten days from the date of delivery of the notice or invoice demanding payment under sub-section (1) of section 8, if the operational creditor does not receive payment from the corporate debtor or notice of the dispute under sub-section (2) of section 8, the operational creditor may file an application before the Adjudicating Authority for initiating a corporate insolvency resolution process.

(2) The application under sub-section (1) shall be filed in such form and manner and accompanied with such fee as may be prescribed.

(3) The operational creditor shall, along with the application furnish—

(a) a copy of the invoice demanding payment or demand notice delivered by the operational creditor to the corporate debtor;

(b) an affidavit to the effect that there is no notice given by the corporate debtor relating to a dispute of the unpaid operational debt;

(c) a copy of the certificate from the financial institutions maintaining accounts of the operational creditor confirming that there is no payment of an unpaid operational debt by the corporate debtor; and

(d) such other information as may be specified.

(4) An operational creditor initiating a corporate insolvency resolution process under this section, may propose a resolution professional to act as an interim resolution professional.

(5) The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), by an order—

(i) admit the application and communicate such decision to the operational creditor and the corporate debtor if,—

(a) the application made under sub-section (2) is complete;

(b) there is no repayment of the unpaid operational debt;

(c) the invoice or notice for payment to the corporate debtor has been delivered by the operational creditor;

(d) no notice of dispute has been received by the operational creditor or there is no record of dispute in the information utility; and

(e) there is no disciplinary proceeding pending against any resolution professional proposed under sub-section (4), if any

(ii) reject the application and communicate such decision to the operational creditor and the corporate debtor, if—

(a) the application made under sub-section (2) is incomplete;

(b) there has been repayment of the unpaid operational debt;

(c) the creditor has not delivered the invoice or notice for payment to the corporate debtor;

(d) notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility; or

(e) any disciplinary proceeding is pending against any proposed resolution professional:

Provided that Adjudicating Authority, shall before rejecting an application under subclause (a) of clause (ii) give a notice to the applicant to rectify the defect in his application within seven days of the date of receipt of such notice from the adjudicating Authority.

(6) The corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (5) of this section.

As stated supra, Section 9(5) (ii) (d) of the Code, specifically provides for considering 'Dispute' by the Adjudicating Authority, empowering it to reject the Application and communicate the decision to the Operational Creditor and Corporate Debtor, if notice of dispute has been received by the Operational Creditor. Let us be very clear "IBC is not a recovery law". Its purpose is to save the companies and also to allow them to be going concern. Again, email dated 06.07.2017 does show pre-existing dispute regarding quality of supply.

13. Hence, in view of the above observations, this appeal is allowed. The impugned order dated 19.02.2020 passed by Adjudicating Authority ('National Company Law Tribunal, Ahmedabad Bench, Ahmedabad') is set aside and consequently order passed by the Adjudicating Authority appointing 'Interim Resolution Professional', declaring moratorium, freezing of accounts including consequential actions taken by the 'Interim Resolution Professional' like publishing in newspapers, constitution of committee of creditors, appointing valuers etc., are declared illegal and set aside. The Corporate Debtor is released from all the rigour of law and is allowed to function independently through its Board of Directors from immediate effect. The Corporate Debtor will, in the first instance, bear

CIRP costs so far incurred by IRP/RP & then entitled to recover it from Operational Creditor. No order as to costs.

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

[Dr. Ashok Kumar Mishra]
Member (Technical)

23rd September, 2020

New Delhi

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