

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL**  
**NEW DELHI**

**Company Appeal (AT) (Ins) No.130 of 2019**

[Arising out of Order dated 20.12.2018 passed by National Company Law Tribunal, New Delhi Bench in CP No.(IB)-1326(ND)/2018]

**IN THE MATTER OF:**

**Before NCLT**

**Before NCLAT**

Shyam Metalics and  
Energy Limited  
Formerly Shyam Dri  
Power Limited  
“Trinity Tower”,  
83, Topsia Road,  
7<sup>th</sup> Floor,  
Kolkata - 700046

Operational Creditor/  
Applicant

Appellant

**Versus**

Rathi Steel and  
Power Limited,  
Formerly known as  
Rathi Udyog Limited  
Chauhan Market,  
Madanpur Khadar,  
Near Local Shopping  
Complex,  
Pocket – D & E,  
Sarita Vihar,  
New Delhi - 110076

Corporate Debtor/  
Non-Applicant

Respondent

**For Appellant:**

**Shri Abhijeet Sinha, Shri Aditya Shukla, Ms. Pratiksha Sharma, Shri Ankit Acharya and Shri Saiket Sarkar, Advocates**

**For Respondent:**

**Shri Tanmay Mehta and Shri Subhash Chawla, Advocates**

**J U D G E M E N T****A.I.S. Cheema, J. :**

1. Appellant - Shyam Metalics and Energy Limited (Operational Creditor) filed CP No.(IB)-1326(ND)/2018 before the Adjudicating Authority (National Company Law Tribunal, New Delhi Bench) against the Respondent - Rathi Steel and Power Limited (Corporate Debtor) under Section 9 of the Insolvency and Bankruptcy Code, 2016 (IBC – in short) claiming outstanding debt in default of Rs.1,12,63,389/- which Application was rejected by the Adjudicating Authority on 20.12.2018 referring to the arbitration proceedings and also observing that the Appellant had not satisfied the Adjudicating Authority on the ground of limitation as there was no proof of payments made within three years of filing of the Petition.

2. It appears that the Corporate Debtor had placed three purchase orders with the Operational Creditor in 2012 and 2013 for supply of Ferro Chrome Lumps and Medium Carbon Silico Manganese. Appellant claimed that it had supplied the said material but in spite of raising the invoices, payments have not been made. Various cheques issued in 2013 by the Respondent had been dishonoured.

3. The Appellant issued a Notice under Section 8 of IBC on 19<sup>th</sup> March, 2018 (Annexure - A3 – Page 40) and the Respondent disputed the demand and default by Reply dated 9<sup>th</sup> April, 2018 (Annexure – A4 – Page 54)

claiming that it had made the payments and also claimed that the material supplied was defective/ of inferior quality and caused huge losses for which the Respondent had initiated arbitration proceedings. It is stated that the Appellant – Operational Creditor issued another Notice under Section 8 of IBC (Page 119) for the same claim. In this Notice (at Page – 130), the Appellant specifically mentioned that it was withdrawing its earlier Notice dated 19<sup>th</sup> March, 2018 in Form – 3 without prejudice to its rights and contentions.

4. On the basis of such subsequent Notice dated 13<sup>th</sup> June, 2018, the Appellant filed Petition under Section 9 (Annexure – A5 – Page 56) and in Form – 5 Part V relating to “Particulars of operational debt (documents, records and evidence of default)”, the Appellant relied on its Bank Statement and the two purchase orders dated 30.07.2012 and one purchase Order dated 16.02.2013 to claim that Rs.1,12,63,389/- was due from the Corporate Debtor and was in default. In the Form, the Appellant also claimed that there had been ad hoc payments to the Appellant till October, 2015.

5. The Respondent has claimed that there was pre-existing dispute and that the raw material supplied by the Appellant was found to be not meeting the ordered specifications and was substandard leading to loss of the Respondent – Corporate Debtor due to which, it appointed one Mr. P.K. Sinha as sole Arbitrator. Reference has been made to Notice dated 15.05.2017 (Page – 267) issued by Advocate of Respondent relating to

appointment of the sole Arbitrator. In the record, there is an Order dated 17.05.2017 of said sole Arbitrator – P.K. Sinha (Page 429) along with photocopy of postal receipt dated 17.05.2017 and tracking report to show that the Order of the sole Arbitrator was served on the Appellant. The Appellant has filed Additional Affidavit (Diary No.13565) claiming that in the envelope sent by PK Sinha no such order was received but that the envelope contained copies of some Public Notice issued by Central Ground Water Authority. The Appellant wants to rely on the inward register to support itself.

6. We find that we need not enter into the dispute as to what document was sent by the said Arbitrator, as even without entering into that aspect of the matter, it is apparent and clearly on record that the Section 9 proceeding relied on by the Appellant was based on Notice dated 13<sup>th</sup> June, 2018, before which admittedly the Respondent (in response to earlier Notice under Section 8 which was admittedly withdrawn by the Appellant) had sent Reply dated 9<sup>th</sup> April, 2018 raising disputes regarding the quality and that it had already moved for arbitration. Clearly, there was pre-existing dispute before the Section 8 Notice relied on by the Appellant was sent.

7. Apart from the above, we find substance in the observations of the Adjudicating Authority where, while declining to admit the Application under Section 9, the Adjudicating Authority observed that the Appellant – Operational Creditor had not been able to satisfy the Adjudicating

Authority on the grounds of limitation as no proof of payments made by the Corporate Debtor to the Operational Creditor within three years of filing the Petition, had been filed. We have already referred to copy of the Application which was filed under Section 9 before the Adjudicating Authority and it appears that merely making vague statement of “time to time” “ah-hoc payment” without evidence of payment actually by Corporate Debtor or without showing written acknowledgement so as to save limitation, will not help. Apparently orders were placed in 2012 and 2013 and even the cheques dated April, 2013 had admittedly bounced. Section 8 Notice was issued only in 2018.

8. We do not find any reason to interfere with the Impugned Order rejecting the Section 9 Application.

The Appeal is dismissed. No Orders as to costs.

[Justice S.J. Mukhopadhaya]  
Chairperson

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

[Kanthi Narahari]  
Member (Technical)

29<sup>th</sup> August, 2019

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