

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI
Company Appeal (AT)(Insolvency) No. 620 of 2019

[Arising out of order dated 2nd May, 2019 passed by the Adjudicating Authority, National Company Law Tribunal, Ahmedabad Bench, Ahmedabad in CP No. (IB) 520/9/NCLT/AHM/2018]

IN THE MATTER OF:

M/s Mohit Minerals Limited,

(Earlier Known as M/s Mohit Minerals Pvt. Ltd.)

19-20, 1st Floor, TDI Mall,

Fun Cinema, Moti Nagar,

New Delhi- 110 015

.. Appellant

Vs.

M/s Shree Rama Newsprint Limited,

Village- Barbodhanta, OLPAD,

District- Surat,

Gujarat – 395 005.

.. Respondent

Present:

For Appellant:

Mr. Mritunjay Kr. Tiwary and Mr. Sumit Kumar, Advocates

For Respondent:

Mr. Arpan Behal, Advocate

J U D G M E N T

(26th November, 2019)

KANTHI NARAHARI, MEMBER(TECHNICAL)

The Appellant M/s Mohit Minerals Limited filed the present appeal aggrieved by the order dated 2nd May, 2019 passed by the Adjudicating Authority (National Company Law Tribunal)

Ahmedabad Bench, Ahmedabad in C.P. No. (IB) 520/9/NCLT/AHM/2018.

2. The Appellant filed the application before the Adjudicating Authority under Section 9 of Insolvency and Bankruptcy Code, 2016 (In short '**IBC**') read with Rule-6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 to trigger Insolvency Resolution Process against the Respondent M/s Shree Rama Newsprint Limited. The Adjudicating Authority dismissed the application filed by the Appellant. The said order is impugned in this appeal by the Appellant. The Adjudicating Authority rejected the application on the ground of existence of dispute prior to issuance of Demand Notice dated 01.02.2018.

3. The Appellant had taken various grounds in this appeal to show that the dispute which was raised by the Respondent is not a bonafide dispute and it is a mere sham dispute raised by the Respondent-Corporate Debtor to escape liability of the operational debt. The Respondent has denied, the stand taken by the Appellant and submitted that the existence of dispute prior to the issuance of Demand Notice is a bonafide dispute and raised much prior to the issuance of Demand Notice.

4. Heard learned Counsel appearing on behalf of the respective parties, perused the pleadings and the documents filed in their support. Before proceeding to decide the issue regarding whether

there is existence of dispute prior to the issuance of Demand Notice or not:

5. The Facts of the case are: -

The Respondent-Corporate Debtor placed a Purchase Order bearing no. 4400000023 dated 09.08.2016 (page No. 59 of Paper Book) for supply of 3000 MT of (non-coking) coal of Indonesian origin at the rate of Rs. 4350/per MT on the Appellant/Operational Creditor. The said Purchase Order contains the terms and conditions which reads as follows:

Clause (8)

‘Risk Purchase- In case you fail to supply the coal as per dispatch schedule given above, SRNL shall have the right to buy the coal from the coal market at your risk & cost and the amount of difference in the rate will be debited in your account’

6. While matter stood thus, the Appellant issued a Demand Notice dated 01.12.2018, demanding an amount of Rs. 43,18,668/- stated to be defaulted by the Corporate Debtor basing upon certain invoices. The Respondent vide reply dated 13.02.2018 to the said Demand Notice stated that they have raised Debit Note dated 31.12.2016 for Rs. 49.50 lakhs against non-supply of 3500 MT coal as the same had to be procured by them from other parties at a differential price @ Rs. 1650/per MT.

7. It is not in dispute that the Respondent- Corporate Debtor raised the Debit Note dated 31.12.2016(at page 66 of the paper book) for Rs. 49,50,000/- on the Appellant. Further the Respondent issued the Debit Note for the same amount dated 06.01.2017 (at page -67) addressed to the Appellant stating that “Dear Sir, We have debited your account with Rs. 49,50,000/- (Rupees Forty Nine Lakhs Fifty Thousand only) as per the details given below”. In the particulars of the said Debit Note it is mentioned that “The following amount credited to you’re A/c coal materials our P.O. No. 4400000000023 dt. 9.8.2016 for 3000 MT coal @ Rs. 1650.”

8. The Respondents vide e-mail dated 23.09.2017 at 12.58 P.M. addressed to the Appellant stated that “there is no outstanding balance as per our books. Plz find attached Debit note copy.” The Appellant on very same day i.e. 23.09.2017 at 3:14 P.M. replied to the said e-mail stating that debit note is not acceptable. The relevant portion is extracted hereunder:

“Dear Sir without prejudice, the attached Debit Note is not acceptable and you cannot raise such Debit Notes arbitrarily without mutual consent advised earlier in our e-mail dated 09.09.2017, We had provided you two reasonable option which was fair for both parties however your e-mail is not acceptable hence we are not left with no option but to proceed legally to recover the dues.”

[Emphasis supplied]

9. It is an admitted fact that the Appellant failed to supply coal as per the P.O. dated 9.8.2016. It is not in dispute and in view of the requirement, the Respondent had placed Purchase Order on one Trona Minerals India Pvt. Ltd. vide Purchase Order no. 4400000028 dated 19.09.2016 for supply of 3000 MT of Coal. The stand of the Respondent is that the Appellant had failed to supply coal as ordered on 09.08.2016 and in view of necessity, they had placed and purchased coal from Trona Minerals India Pvt. Ltd. and raised a Debit Note on the Appellant in accordance with clause-8 of the Terms and Conditions as specifically mentioned along with the Purchase Order dated 9.8.2016, which is part of the said Purchase Order.

10. The Appellant filed the application before the Adjudicating Authority claiming an amount of Rs. 49,53,335/- from the Respondent. In paragraph-4 of the application, the Appellant clearly stated that the Respondent- Corporate Debtor, on 09.08.2016, placed an order on Appellant for purchase of 3000 MT of non-coking coal of Indonesian origin at the rate of Rs. 4350 per MT. However, the Operational Creditor (Appellant herein) was not in a position to supply coal because of shortage of coal in the market and the said Purchase Order was cancelled by the Corporate Debtor (Respondent herein). Thus the Appellant clearly admitted that they could not supply the material as per the Purchase Order and the Respondent had issued a Debit Note on the Appellant debiting an amount of Rs.

49,50,000/- and the same has been communicated to the Appellant by e-mail dated 23.09.2017 at 12:58 P.M. and the Appellant had received the said e-mail and replied to the said e-mail on the very same day i.e., on 23.09.2017 at 3.14 P.M. Thus it is a case of pre-existence of dispute prior to the issuance of Demand Notice dated 01.02.2018.

11. We are of the view that the learned Adjudicating Authority rightly rejected the application with a reasoned order and no interference is called for.

12. Learned Counsel for the Appellant filed Written Submission and relied upon the judgment of the Hon'ble Supreme Court in the matter of "**Mobilox Innovations Private Limited vs. Kirusa Software Private Limited**" to show that the Adjudicating Authority/NCLT can only reject the application under Section 9 of IBC if the Corporate Debtor raises a substantial or bonafide dispute as to the existence of the debt. Learned Counsel for the Appellant contended that the dispute raised by the Respondent-Corporate Debtor is not a bonafide dispute as held by the Hon'ble Supreme Court. Further learned Counsel relied upon the judgment of this Tribunal in the matter of "**Sudhir Sales and Services Ltd. Vs. Dart Furniture systems Pvt. Ltd.**" – Company Appeal (AT) (Insolvency) No. 327 of 2018 (Manu/NL/0248/2018). This Tribunal at paragraph-26 held:

...

“26. In “Mobilox Innovations Pvt. Ltd.(Supra)”, the Hon’ble Supreme Court held that a dispute truly exists in fact and is not spurious, hypothetical or illusory. Here there is no such dispute was pre-existing apart from that a hypothetical or illusory dispute which has been raised by the ‘Corporate Debtor’ while replying to the demand notice served under Section 8(1) by the ‘Operational Creditor’.”

...

13. Now we deal with the judgements relied upon by the learned Counsel for the Appellant. The Judgements are not at all applicable to the facts of present case. Firstly, the judgment of this Tribunal which was relied upon by the learned Counsel for the Appellant from the facts it is evident that the Corporate Debtor therein had raised certain disputes in reply to the Demand Notice. Therefore, this Tribunal had taken a view that the dispute which was taken/raised by the Corporate Debtor therein is not prior to the issuance of Demand Notice. Therefore, the said judgment of this Tribunal is not applicable to the facts of the present case.

14. Judgment of the Hon’ble Supreme Court in the matter of **“Mobilox Innovations Pvt. Limited. Vs. Kirusa Software Private Limited.”** reported in (2018) 1 SCC 353 is a landmark judgment particularly with respect to Sections 8 & 9 of the IBC. Paragraph-51 of the judgment is extracted hereunder:

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.”*

As held supra in the present case the dispute between the parties truly exists prior to issue of Demand Notice and we are of the view that it is a bonafide dispute and not by hypothetical or spurious.

15. Learned Counsel for the Respondent filed Written Submission taking the stand that in the Purchase Order dated 09.08.2016 at clause-8 it has been clearly mentioned that in case if the Appellant failed to supply the coal as per schedule, the Respondent has the right to buy coal from the Coal Market at the risk of the Appellant. The amount of difference in the rate will be debited from the account of the Appellant. Further, they have also relied upon the judgment of the Hon'ble Supreme Court in the matter of ***Mobilox Innovations Private Limited vs. Kirusa Software Private Limited*** – (2018) 1 SCC 353.

Relevant Provisions of Law in IBC

Relevant portions of the Sections need to be reproduced: -

16. **“Insolvency resolution by operational creditor.**

Sec. 8.(1) An Operational Creditor may, on occurrence of a default, deliver a Demand Notice of unpaid Operational Debt and 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 Operational Creditor:

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

(b) the payment 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.”

...

“Application for initiation of corporate insolvency resolution process by operational creditor.

Sec. 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”.

Sub-Section 5 of Section 9 of IBC reads as under:

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 of the Operational Creditor and the Corporate Debtor if,-*
- ii) Reject the application and communicate such decision to the Operation Creditor and the Corporate Debtor, if-*

(a), (b), (c) ..

- (d) notice of dispute has been received by the Operational Creditor or there is a record of dispute in the information Utility.*

[Provided the Adjudicating Authority shall, before rejecting an application under sub-section (c) of clause (ii) give a notice to the applicant to rectify the defect in his application within seven days of the date of receipt from the Adjudicating Authority.]”

17. From the aforesaid provisions of law, it is clear that the Adjudicating Authority has to satisfy whether there is pre-existence of dispute prior to the receipt of Demand Notice or there is a record

of dispute in the Information utility and in such case, the Adjudicating Authority shall reject the application.

18. The Hon'ble Supreme Court upholding the above provisions of law clearly stated at paragraph-51 supra that the Adjudicating Authority must reject the application under Section 9(5)(2)(d) if notice of dispute has been received by the Appellant/Operational Creditor or there is a record of dispute in the Information Utility. It is also held that such notice must bring to the notice of the Appellant-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.

19. The dispute has been defined in Section 5(6) of IBC which reads as follows:

"dispute" includes a suit or arbitration proceedings relating to:-

- (a) the existence of the amount of debt;*
- (b) the quality of goods or service; or*
- (c) the breach of a representation or warranty;"*

20. In view of the above provisions of law and the facts, we are of the view that there is an existence of dispute prior to the receipt of Demand Notice. The Adjudicating Authority rightly rejected the

application and no interference is called for. Accordingly, the appeal is dismissed. No order as to cost.

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

(Kanthi Narahari)
Member(Technical)

(V P Singh)
Member(Technical)

Akc