

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 1208 of 2019

(Arising out of order dated 25.10.2019 in CP (IB) 1689 / MB/ C-IV/2019
passed by National Company Law Tribunal, Mumbai Bench-IV)

IN THE MATTER OF:

Mr. Akbar Kothawala,

Erstwhile Promoter/Director – Supreme Startech Pvt. Ltd.

(Through, Power of Attorney Holder – Mr. Mohsin Khan)

Resident of 7A, Sai Sewashram Society,

Gandhi Layout, Jafar Nagar, Nagpur-440018,

Maharashtra.

**...Appellant
(Corporate Debtor)**

Versus

1. Megamet Steels Private Limited,

Registered Address at: 411, Embassy Centre,

Nariman Point, Mumbai – 400021, Maharashtra.

**...Respondent No. 1
(Operational Creditor)**

2. Supreme Startech Private Limited

(Through the IRP- Mr. Pawan Kumar Ramdhan Agarwal)

Registered Address at: Block No. 13-14,

Seva Sadan, C.A. Road, Nagpur – 440018

**.... Respondent No. 2
(Corporate Debtor)**

3. Mr. Pawan Kumar Ramdhan Agarwal

(IRP – Supreme Startech Private Limited)

Resident of : 42, Gopal Bhavan, 199, S.G. Marg,

Marine Lines (E), Near Parsi Dairy,

Mumbai – 400002.

.... Respondent No. 3

Present: -**For Appellant: Mr. Dhruv Gupta, Advocate.****For Respondents: Mr. Gurcharan Singh, Advocate for Respondent No. 1****Mr. Parikshit Ahuja, Advocate for Respondent No. 2 & 3.****J U D G M E N T****Justice Anant Bijay Singh,**

This appeal has been filed by the Appellant (Corporate Debtor), aggrieved and dissatisfied by the impugned order dated 25.10.2019 passed by the Ld. Adjudicating Authority (National Company Law Tribunal) Mumbai Bench-IV in CP (IB) 1689/MB/C-IV/2019 whereby and whereunder, an application under Section 9 of the Insolvency and Bankruptcy Code, 2016 (**in short IBC**) was filed by Megamet Steels Private Limited –Respondent No. 1 (Operational Creditor) was admitted for initiation of ‘Corporate Insolvency Resolution Process’ (**in short CIRP**) against the Company (Appellant / Corporate Debtor).

Brief facts of the case: -

2. The Appellant is one of the Promoters and the Managing Director of the Company- Respondent No. 2. Due to ill-health the Appellant executed Power of Attorney and the present Appeal is being filed through his Power of Attorney holder - Mr. Mohsin Khan. Copy of the Power of Attorney at Annexure – A-2 at page 40 of the Appeal Paper Book.

3. That the Appellant (Corporate Debtor) and Respondent No. 2 – Supreme Startech Private Limited is a closely held family company. Its initial Promoters and the only Directors are Mr. Akbar Kothawala (the present Appellant), Mr. Murtaza Kothawala (Elder brother of the Appellant) and Mr. Hamza Kothawala (father of the brothers).

4. The company into business of marketing industrial field, construction chemicals, pipe wrapping, job work contracts etc. and also supplying of Road Bitumen.

5. The Megamet Steels Private Limited –Respondent No. 1 (Operational Creditor) had business relations with Respondent No. 2 since 2017.

6. That against the purchase of Bitumen from the Operational Creditor / Respondent No. 1, the Respondent No. 2 made timely payments and there is no bill pending.

7. While so the Respondent No. 1 filed an application under Section 9 of the IBC before the Ld. Adjudicating Authority on the ground that the Respondent No. 2 (Corporate Debtor) failed to make payment of a sum of Rs. 14,78,496/- (Rupees fourteen lakhs seventy-eight thousand four hundred ninety-six only) as principal amount and Rs. 5,83,297/- (Rupees five lakhs eighty-three thousand two hundred ninety-seven only) as interest aggregating to Rs. 20,61,793/- (Rupees twenty lakhs sixty-one thousand seven hundred ninety-three only) as on 01.09.2017 which is the date of default.

8. The Operational Creditor had served a Demand Notice in Form 3 dated 13.04.2018 to the Corporate Debtor claiming Rs. 14,78,496/- along with

interest. However, the Corporate Debtor has not replied to the Demand Notice. Thereafter, as stated above an application under Section 9 of the IBC was filed before the Ld. Adjudicating Authority and the Notices were issued to the Corporate Debtor. The Ld. Adjudicating Authority had taken note in para 7 of the impugned order that the Corporate Debtor has remained unrepresented in spite of many opportunities given to it to appear and submit a reply in the matter but Corporate Debtor did not appear.

9. The Operational Creditor / Respondent No. 1 has submitted 5 Invoices mentioned in para 9 of the impugned order is as under: -

- i) Invoice No. 305 dated 14.08.2017 of Rs. 532,770/- at pg. 8
- ii) Invoice No. 306 dated 14.08.2017 of Rs. 490,644/- at pg. 9
- iii) Invoice No. 307 dated 14.08.2017 of Rs. 501,052/- at pg. 10
- iv) Invoice No. 308 dated 14.08.2017 of Rs. 489,405/- at pg. 11
- v) Invoice No. 309 dated 14.08.2017 of Rs. 464,625/- at pg. 12

10. After hearing the parties, Application under Section 9 was admitted and initiated 'CIRP' and appointed the 'Interim Resolution Professional'- Mr. Pawan Kumar Ramdhan Agarwal.

11. The Appeal was filed on 06.11.2019 and Notices were issued to the Respondents. thereafter, the Respondents appeared and filed their Replies.

Submissions on behalf of the Appellant

12. The learned counsel for the Appellant during the course of argument and in his written submissions assailed the impugned order on two grounds, while referring to Annexure- A-11 at page 130 of the Appeal Paper Book which

is the Notice issued to the Respondent No. 2 along with copy of the Appeal, where signature of the learned counsel Shri. Anil Agarwal, Advocate for the Respondent No. 1 informing that on 09.09.2019 Notice was issued by the NCLT but the matter was not taken up on 20.09.2019, so the Appellant could not appear on that date.

13. The other ground that there was a Pre-existing dispute between the parties. Learned counsel for the Appellant while assailing the impugned order has also referred to paragraph 9 of the impugned order where the Ld. Adjudicating Authority has taken note of the 5 Invoices submitted by Respondent No. 1 / Operational Creditor.

14. It was submitted that out of the total 5 invoices, no goods were ever dispatched against invoices 306, 307 and 309 and while referring to invoices at Annexure- A-6 page 49 to 85 of the Appeal Paper Book submitted that when the goods were supplied, the details of Driver, Transporters name and Lorry Receipt Nos. were given.

15. While referring to Annexure- A-11 at page 141 to 145 of the Appeal Paper Book only the vehicle No. was given. Particulars of Driver, Transporters and Lorry Receipt No. is not given and these are the 5 Invoices, on that basis application under Section 9 of IBC has been filed.

16. Learned counsel for the Appellant filed Rejoinder to the Reply filed by Respondent No. 1 before this Tribunal and while referring to Annexure- A-17 at page 45 of the Rejoinder which is e-mail dated 9th September, 2017 sent by the Appellant to the Respondent No. 1 is as under: -

“DEAR SIR,

With regards to five invoices we have received the material against the two invoices and against the balance three invoices kindly provide the despatch details as we haven't received any material, if the same not received within two to three days the bill will reversed from ours books of accounts.

Thanks & regards, ”

17. Further e-mail dated 13th September, 2017 at page 46 of the Rejoinder informing that they have not received any material against three invoices Nos. 306, 307 and 309 from the Respondent No. 1 and no denial have been made by Respondent No. 1 and no denial has been made by Respondent No. 1.

18. Learned counsel for the Appellant submitted that the Ld. Adjudicating Authority has not considered these aspects of the matter as there was a pre-existing dispute between the parties much prior to the filing of the Application under Section 9 of the IBC, so on this ground impugned order is fit to be set aside.

Submissions on behalf of the Respondent No. 1

19. The learned counsel for the Respondent No. 1 during the course of argument and in his written submissions stated that the Demand Notice dated 13.04.2018 was duly served upon the Corporate Debtor / Appellant and reply to Demand Notice not received by the Respondent No. 1.

20. Learned counsel for the Respondent No. 1 while referring to paragraph 6 of the impugned order submitted that the Ld. Adjudicating Authority has taken note the Demand Notice was duly served upon the Appellant.

21. It was further submitted that despite receipt of the Demand Notice the Appellant failed to appear before the Ld. Adjudicating Authority to contest the case and also failed to reply the Demand Notice dated 13.04.2018, so taking all these facts and consideration the Ld. Adjudicating Authority passed the impugned order which is in accordance with Law, so there is no merit in the Appeal therefore, fit to be dismissed.

Finding

22. We have heard the argument of both the sides and closely scrutinised the records as well as Written Submissions filed on behalf of the parties.

23. The Supreme Court in the case of **Mobilox Innovations Private Limited V/s Kirusa Software Private Limited** reported in **2008 (1) SCC 353** and held as follows: -

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“34. Therefore, the adjudicating authority, when examining an application under Section 9 of the Act will have to determine:

- (i) Whether there is an operational debt as defined exceeding Rs.1 lakh? (See Section 4 of the Act)
- (ii) Whether the documentary evidence furnished with the application shows that the aforesaid debt is due and payable and has not yet been paid? And
- (iii) Whether there is existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before the receipt of the demand notice of the unpaid operational debt in relation to such dispute?

If any one of the aforesaid conditions is lacking, the application would have to be rejected. Apart from the above, the adjudicating authority must follow the mandate of Section 9, as outlined above, and in particular the mandate of Section 9(5) of the Act, and admit or reject the application, as the case may be, depending upon the factors mentioned in Section 9(5) of the Act.

35. Another thing of importance is the timelines within which the insolvency resolution process is to be triggered. The corporate debtor is given 10 days from the date of receipt of demand notice or copy of invoice to either point out that a dispute exists between the parties or that he has since repaid the unpaid operational debt. If neither exists, then an application once filed has to be disposed of by the adjudicating authority within 14 days of its receipt, either by admitting it or rejecting it. An appeal can then be filed to the Appellate Tribunal under Section 61 of the Act within 30 days of the order of the Adjudicating Authority with an extension of 15 further days and no more.”

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24. Learned counsel for the Appellant by filing the Rejoinder to Reply filed on behalf of the Respondent No. 1 at page 45 and 46 of the Rejoinder i.e. e-mails dated 9th September, 2017 and 13th September, 2017 much prior to filing of the Demand Notice in Form 3 under Section 8 of the IBC on 13.04.2018 raised the dispute regarding non-supply of the construction material. The Ld. Adjudicating Authority has not taken any note. No reply has been sent by the Respondent No. 1 to these e-mails. Further the Ld. Adjudicating Authority failed to take note of these e-mails.

25. Learned counsel for the Respondent No. 1 in his written submissions tried to make out the case the e-mails dated 09.09.2017 and 13.09.2017 forged and fabricated.

26. After going through the records and hearing the counsel for the parties, we are of the considered view that the Ld. Adjudicating Authority have failed to consider the facts that there was a pre-existing dispute between the parties much prior to filing of application under Section 9 of the IBC. The impugned order cannot be sustained in the eye of Law and in view of the Judgment of the Hon'ble Supreme Court (Supra) and is hereby fit to be set aside and the Appeal is allowed.

ORDER

- For the reason(s) aforesaid, we set-aside the impugned order dated 25.10.2019 passed by the Ld. Adjudicating Authority (National Company Law Tribunal), Mumbai Bench-IV in CP (IB) 1689 / MB/ C-IV/2019 and dismiss the application under Section 9 of the IBC filed by the Megamet Steels Private Limited / Operational Creditor.
- In the result, 'Corporate Debtor' is released from the rigor of the 'Corporate Insolvency Resolution Process'. All actions taken by the 'Interim Resolution Professional / Resolution Professional' and 'Committee of Creditors', if any, are declared illegal and set-aside. The 'Interim Resolution Professional / Resolution Professional' is directed to handover the records and assets of the 'Corporate Debtor' to the Director of the 'Corporate Debtor' immediately.

- The matter remitted to the Ld. Adjudicating Authority to decide fees and costs of 'CIRP' payable to IRP/RP, which shall be borne by the Operational Creditor / Respondent No. 1.
- The Appeal is allowed with the aforesaid observations and directions. No costs.
- Let the Registry to communicate the Judgment to the Ld. Adjudicating Authority (National Company Law Tribunal), Mumbai Bench-IV.
- Copy of the Judgment be provided to the party concern as per Rule.
- Copy of the Judgment will be up-loaded in the Website of this Appellate Tribunal.

(Justice Anant Bijay Singh)
Member (Judicial)

(Kanthi Narahari)
Member (Technical)

3rd September, 2020.

NEW DELHI

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