

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH

Company Appeal (AT) (Insolvency) No. 228 of 2022

[Arising out of Order dated 21.02.2022 passed by the Adjudicating Authority/National Company Law Tribunal, New Delhi Bench - IV, in Company Application No. IB-1049/ND/2019]

IN THE MATTER OF:

Suristh Tiwary

S/o Late Shri I.D. Tiwari
R/o D-106, Sector – 26 Noida,
Gautam Buddh Nagar,
Uttar Pradesh – 201301
E-mail : stcstiwary@gmail.com

...Appellant

Versus

1. JMS Steel & Power Corporation

C-206 Gautam Nagar Hanuman Nagar
Jaipur 302021, Rajasthan

Also at:

Khasra No. 374
Village Dhundaheda Pargna
Ghaziabad 201102.
Uttar Pradesh
Through its Authorized Signatory
Mr. Sudhanshu Bihani
E-mail : sudhanshu.bihani@gmail.com

...Respondent No. 1

2. S.T. Constructions Pvt. Ltd.

Through Mr. Anshuman Kaushik,
Interim Resolution Professional
IBBI/IPA-001/IP-P-02523/2021-22/13825
Office at: P-93, 1st Floor, C.R. Park,
New Delhi – 110019.
Email : anshumanksk@gmail.com

...Respondent No. 2

Present:

For Appellant : Mr. Adarsh Tiwari, Mr. Vineet Pathak, Adv.

For Respondents : Sr. Adv. Sanjoy Ghose, Adv. Baasir Aziz, Adv. Alok Ranjan Jha, Adv. Mohd. Anas.

J U D G M E N T

(27.07.2023)

NARESH SALECHA, MEMBER (TECHNICAL)

1. The present appeal has been filed under Section 61 of the Insolvency & Bankruptcy Code, 2016 (in short '**Code**') against the Impugned Order dated 21.02.2022 in Company Application No. IB-1049/ND/2019 passed by the Adjudicating Authority (National Company Law Tribunal, New Delhi Bench, - IV), whereby the 'Adjudicating Authority', allowed application filed by the Respondent No. 1 – JMS Steel & Power Corporation an Operational Creditor under Section 9 of the Code.
2. The Appellant- Suristh Tiwary holds 56.42% equity in the Corporate Debtor and he is one of the Suspended Director of the Corporate Debtor. Aggrieved by the Impugned Order he has filed the present appeal.
3. Heard the Counsel for Parties and perused the records made available including cited judgments.
4. Learned Counsel for the Appellant gave overall background of the case and alleged that the Impugned Order was passed wrongly as the evidence produced by the Corporate Debtor showing that claims by Operational Creditor were bogus on the basis of 12 fake invoices, were not considered suitably by the Adjudicating Authority.
5. Learned Counsel for the Appellant further alleged that the Respondent No. 1 has shown fake sale being declared using GSTR-1 return and for the same, notice was issued to the Respondent No. 1 by GST Department.

6. Learned Counsel for the Appellant stated that the Respondent No.1 filed an application under Section 9 of the Code for initiation of the Corporate Insolvency Resolution Process (in short '**CIRP**') on account of alleged default of Rs. 1,56,31,219/- which was refuted by the Corporate Debtor.

7. Learned Counsel for the Appellant mentioned that the Corporate Debtor was incorporated on 25.06.2004 with paid up equity of Rs. 320.65 Lakhs and is having reserves of Rs. 3059.05 Lakhs and net worth of the Corporate Debtor was Rs. 3380 Lakhs as on 31.03.2021 and was a solvent Company. Learned Counsel for the Appellant submitted that the Corporate Debtor has been doing business of construction and completed several government construction projects.

8. Learned Counsel for the Appellant stated that the Corporate Debtor approached Respondent No. 1 in the year 2015 for supply of TMT Bars to the various projects being executed by the Corporate Debtors mainly in Noida Area. Learned Counsel for the Appellant further stated that the Corporate Debtor used to issue purchase orders specifying the requirements and Respondent No. 1 used to supply material on the basis of said requirements. Learned Counsel for the Appellant admitted that after doing considerable business with the Respondent No. 1, on certain occasions the site attendant/ project engineer of the Corporate Debtor used to ask Respondent No. 1 to supply TMT Bars without any formal purchase order and Respondent No. 1 would supply the same to the Corporate Debtor and the same were also been paid by the Corporate Debtor to Respondent No. 1.

9. Learned Counsel for the Appellant further submitted that on supply of the material, the Respondent No. 1 used to furnish several documents to the Corporate Debtor even without formal purchase order which included – lorry receipt, weight scale receipt of Dharamkata, test reports of the goods supplied and Goods Receipt, etc., along with Invoice.

10. Learned Counsel for the Appellant submitted that the Respondent No. 1 supplied TMT Bars to the Corporate Debtor from 2015 till 19.05.2018 when the last invoice bearing No. 227 dated 19.05.2018 for Rs. 15,90,360/- was raised by the Respondent No. 1. Learned Counsel for the Appellant emphasised that since he has procured material from the Respondent No. 1 worth Crores of Rupees over the period of time, all the payment made to Respondent No. 1 in the ‘Running Account Manner’.

11. Learned Counsel for the Appellant stated that he was undergoing some financial distress at the relevant time and requested the Respondent No. 1 for some accommodation in time for making outstanding payments which was agreed to by the Respondent No. 1. Learned Counsel for the Appellant further stated that the opening credit balance as on 01.04.2018 in the Ledger Account of the Respondent No. 1 was Rs. 1,01,72,740.09/- and the Corporate Debtor has been gradually paying the same on various dates as per running account system of payment.

12. Learned Counsel for the Appellant stated that in background of such cordial relationship based on trust between the Appellant/ Corporate Debtor and Respondent No. 1, the Corporate Debtor was shocked to receive demand notice dated 19.09.2018 demanding Rs. 1,76,10,766/- based on various

invoices mentioned in the demand notice. Learned Counsel for the Appellant further stated that the upon receipt of such demand notice, he sought details from the Respondent No. 1 about various invoices which were not received by the Corporate Debtor. Learned Counsel for the Appellant submitted that during the negotiation between the parties to settle the matter, the Corporate Debtor received another demand notice on 20.03.2019 for Rs. 1,61,10,767/-.

13. Learned Counsel for the Appellant submitted that admittedly the Corporate Debtor could not pay of Rs. 31,20,149.39 as on 31.03.2019 pertaining to- (a) Invoice No. 918 dated 23.03.2018 for Rs. 10,62,345/-; (b) Invoice No. 227 dated 19.05.2018 for Rs. 15,90,360/-; (c) Remaining amount of Rs. 4,67,449.39 out of Invoice No. 861 dated 11.03.2018 for an amount of Rs. 12,35,793. However, the Respondent No. 1/Operational Creditor has been demanding payment of an imaginary sum of Rs. 1,61,31,2199/- only pertaining to the various invoices randomly mentioned which were fabricated.

14. Learned Counsel for the Appellant submitted that the Ledger Account Statement for the period from 01.04.2018 till 31.03.2019 reveals that against the total liability of Rs. 1,27,59,789.09/- the Corporate Debtor has paid Rs. 96,39,639.70/- to the Operational Creditor and only Rs. 31,20,149.39/- was remaining to be paid as on 31.03.2019.

15. Learned Counsel for the Appellant submitted that (a) invoice no. 543 dated 27.02.20 17 for amount Rs.10,13,939/-, (b) invoice no. 572 dated 15.03.2017 for the amount Rs.15,96,942/-, (c) Invoice no.582 dated

19.03.2017 for amount of Rs. 10,11,878/-, (d) Invoice No. 587 dated 28.03.2017 for amou.at of Rs.12,09,852/- (e) Invoice no. 596 dated 31.03.2017 for amount of Rs.10,09,874/-, which have been mentioned by the Operational Creditor in his Application as not paid, had already been paid as per the Running account system of payment.

16. Learned Counsel for the Appellant emphasised that the Corporate Debtor has found that following are the invoices which the Corporate Debtor has never received and the Respondent No. 1/Operational Creditor has not supplied any material to the Corporate Debtor against these invoices. Learned Counsel for the Appellant stated these invoices are not genuine Invoices and the Respondent No. 1 has forged these invoices to defraud the Corporate Debtor.

S.No.	INVOICES No.	DATE	AMOUNT
01.	832	26.02.2018	Rs.7,93,988/-
02.	846	06.03.2018	Rs.12,36,920/-
03.	847	06.03.2018	Rs. 9,80,908/-
04.	35	09.04.2018	Rs.11,46,854/-
05.	155	30.04.2018	Rs. 6,23,756/-
06.	156	30.04.2018	Rs. 6,22,306/-
07.	349	16.06.2018	Rs.11,21,779/-
08.	350	16.06.2018	Rs. 12,89,749/-
09.	359	18.06.2018	Rs. 12,15,431/-
10.	360	18.06.2018	Rs. 12,71,858/-
11.	402	30.06.2018	Rs. 11,67,651/-
12.	403	30.06.2018	Rs. 12,58,708/-

17. Learned Counsel for the Appellant submitted that for the 12 invoices attached by the Respondent No. 1/ Operational Creditor with the Application as mentioned above, the Respondent No. 1 has neither supplied

the above said invoices nor copies of any documents to the Corporate Debtor.

18. Learned Counsel for the Appellant submitted that the material supplied by the Operational Creditor used to be weighed at the nearest Dharam Kanta at the Work site of Corporate Debtor, and Dharam Kanta used to issue a Weight Scale Receipt (DharamKanta Slip). Learned Counsel for the Appellant further submitted that the Weight Scale Receipt of material supplied is important for determining the quantity of material supplied and therefore the amount payable is computed on the quantity of material supplied and the same used to be paid to the Respondent No. 1.

19. Learned Counsel for the Appellant stated that the Respondent No. 1 has taken the plea that the Corporate Debtor has used Input Tax Credit (in short “**ITC**”) of GST on the invoices attached with the Application, which cannot be basis for admission of the application under Section 9 of the Code.

20. Learned Counsel for the Appellant submitted that during hearing before the Adjudicating Authority on 10.07.2019, the Corporate Debtor admittedly mentioned about the efforts for settlement between both the parties and Rs. 25 Lakhs was paid in the month of June, 2019 and this fact was noted by the Adjudicating Authority in order dated 10.07.2019 and similarly another Rs. 25 Lakh was paid to the Respondent No. 1 on 10.07.2019 in interest of proposed settlement which was also duly recorded by the Adjudicating Authority in its order dated 21.08.2019. Learned Counsel for the Appellant further submitted that after making payment of

Rs. 50 Lakhs against the total outstanding liability of Rs. 31,20,149/-, resulted into over payment of Rs. 18,79,851/- by the Corporate Debtor to the Respondent No. 1 as such admission of Section 9 Application by the Adjudicating Authority was erroneous.

21. Learned Counsel for the Appellant submitted that during pendency of the matter before the Adjudicating Authority, the Corporate Debtor received notice of SGST Department, where the Corporate Debtor was alleged for purchasing material from the Respondent No. 1 which according to SGST Department was bogus/ non-existent company. Learned Counsel for the Appellant further stated that this indicate that 12 invoices claimed by the Respondent No. 1 never existed.

22. Learned Counsel for the Appellant, concluding his pleadings, requested to set aside the Impugned Order dated 21.02.2022.

23. Learned Counsel for the Respondent No. 1 denied all the averments made by the Appellant, which according to him is based on conjunctures and on unspecific allegations without any substance.

24. Learned Counsel for the Respondent No. 1 submitted that on 19.09.2018, the Respondent No. 1 has issued first demand notice under Section 8 of the Code for Rs. 1,76,10,767/- for which the Corporate Debtor requested the Respondent No. 1 not to initiate any legal proceeding with assurance to make payments shortly and made payment of Rs. 15 Lakhs accordingly. Learned Counsel for the Respondent No. 1 submitted that no dispute was raised by the Corporate Debtor at that stage. Learned Counsel for the Respondent No. 1 submitted that since the Corporate Debtor failed to

make payments post first demand notice, the Corporate Debtor issued second demand notice dated 20.03.2019 for Rs. 1,61,10,767/-. Learned Counsel for the Respondent No. 1 further stated that subsequent to second demand notice, the Corporate Debtor again paid Rs. 5 Lakhs and undertook to settle the entire liability in due course, which the Corporate Debtor again failed to adhere to. Subsequent to all these events, the Respondent No. 1 was compelled to file an application under Section 9 of the Code and during the course of various hearing the Corporate Debtor mentioned before the Adjudicating Authority about intent of the Corporate Debtor to settle the matter by payment and accordingly the Corporate Debtor made two payments of Rs. 25 Lakhs each in June 2019 and 10.07.2019, respectively to the Respondent No. 1.

25. Learned Counsel for the Respondent No. 1 submitted that it is admitted fact that the Corporate Debtor elaborated his intention to settle the amount before the Adjudicating Authority and alleged defence now being taken is only moonshine defence to avoid his liability. Learned Counsel for the Respondent No. 1 further submitted that the Corporate Debtor never raised any dispute of whatsoever nature prior to issuance of demand notices regarding outstanding payments.

26. Learned Counsel for the Respondent No. 1 stated that the outstanding amount was duly admitted by the Corporate Debtor which can be established by the fact that the Corporate Debtor had claimed the input of said amount i.e. Input Tax Credit (ITC) in its monthly GST return which is

sufficient to indicate the liability of the Corporate Debtor towards the Respondent No. 1.

27. Learned Counsel for the Respondent No. 1 submitted that the validity of Respondent No. 1 registration with GST Department is valid and continuing till date and no coercive action, whatsoever, has been taken by GST Department against the Respondent No. 1. The Appellant/ the Corporate Debtor, in order to prejudice the case of the Respondent No. 1 has tried to use some internal communication between two divisions of GST Department, which has no impact on genuine claims of the Respondent No. 1.

28. Learned Counsel for the Respondent No. 1 submitted that in relation to the allegations pertaining to the non-existence status of the Respondent No. 1, the Respondent No. 1 is effectively performing its business from its registered place of business and the same is evident from the GST records, which as on date clearly mentions the Respondent No. 1 as a Normal Taxpayer in its Records and as per the GST Records, the annual aggregate turnover of the Respondent No. 1 for the Financial Year 2019-20 was in relevant slab: 100 Crore to 500 Crore. Learned Counsel for the Respondent No. 1 submitted emphatically that it is a matter of fact that the GST Department has never initiated any action against the Respondent No. 1.

29. Learned Counsel for the Respondent No. 1 submitted that the GST Notice/orders filed and relied by the Appellant itself reveals the fact that the Appellant has claimed the input tax credit for the invoices raised by the

Respondent No. 1, but denied the said invoices before the Adjudicating Authority to run away from its liability for payment of invoices.

30. Learned Counsel for the Respondent No. 1 submitted that he had supplied materials to the Appellant even after 19.05.2018 and accordingly raised various invoices during that period and the last invoice issued by the Operational Creditor against the supply of material to the Corporate Debtor was for an amount of Rs. 12,58,708/- dated 30.06.2018. Learned Counsel for the Respondent No. 1 stated that the Respondent No. 1 had duly paid the VAT and GST amount (as the case may be) for each and every invoices being raised against the supply of material to the Corporate Debtor.

31. Learned Counsel for the Respondent No. 1 submitted that he had supplied various “lots of material” to the Corporate Debtor during the course of their business relationship and accordingly issued invoices for the said “lots of material” supplied to the Corporate Debtor and after adjusting all the amount received from the Corporate Debtor in the running account maintained by the Respondent No. 1 claimed outstanding amount is dues from the Corporate Debtor which the Appellant had failed to settle.

32. Learned Counsel for the Respondent No. 1 mentioned that on the basis of order placed by the Corporate Debtor, the Respondent No. 1 used to supply the goods to the place of the Corporate Debtor against which the corresponding Invoices were issued and sent to the Corporate Debtor. Learned Counsel for the Respondent No. 1 further submitted that the Respondent No. 1 was never required to submit Dharam Kanta Receipt as it is an obligation on the part of the Buyer i.e., Appellant herein to get the

products weighted at its end, if so desires, and to report and communicate discrepancy, if any, to the Respondent No. 1. However, since there was no occasion of such discrepancy therefore, the Appellant never raised any issue in context of the weight of the products being supplied to it. Learned Counsel for the Respondent No. 1 mentioned that even for the Invoices, which are specifically admitted by the Corporate Debtor, there is no Dharan Kanta Receipt being supplied by the Respondent No. 1 to the Corporate Debtor.

33. Learned Counsel for the Respondent No. 1 submitted that the Notices/Order of GST Department to the Corporate Debtor itself establishes the malafide of the Corporate Debtor that on one hand the Corporate Debtor denies the invoices and on the other hand the Corporate Debtor claims Input Tax Credit on the said invoices. Learned Counsel for the Respondent No. 1 submitted that the GST on the said invoices was deposited by the Respondent No. 1 and Input Tax Credit on the said invoices was claimed by the Appellant.

34. From the order dated 07.03.2022 passed by this Appellate Tribunal, it is noted that the Appellant stated that he was ready to deposit the balance amount of Rs. 1,06,31,219/- and accordingly it was directed that the CoC shall not be constituted and left for the parties to enter into settlement, if any. The Order reads as under :-

“Heard learned counsel for the Appellant. Learned counsel for the Appellant at the very outset submitted that

Appellant is ready to deposit balance amount of Rs.1,06,31,219/-.

In view of above statement, a Demand Draft drawn in the favour of 'The Pay and Accounts Officer, Ministry of Corporate Affairs, New Delhi' may be deposited by the Appellant within two weeks.

Learned counsel for the Respondent may file Reply within two weeks. Rejoinder may be filed within two weeks thereof. Learned counsel for the parties submit that the CoC has not yet been constituted.

Subject to deposit of the aforesaid amount, in pursuance of impugned order dated 21.02.2022, CoC shall not be constituted. In the meantime, it shall also be open for the parties to enter into settlement, if any.

List the Appeal on 18.04.2022."

(Emphasis Supplied)

35. We also note that Mr. Adarsh Tiwari, Advocate for the Appellant had deposited Rs. 1,06,31,219/- by way of two Demand Draft as per these letters dated 21.03.2022 which is seen as under :-

ADARSH TIWARI
ADVOCATE
SUPREME COURT OF INDIA

To,

Registrar
National Company Law Appellate Tribunal (NCLAT)
Principal Bench at New Delhi, Delhi

Sub: Deposit of a sum of Rs.1,06,31,219/- by way of demand draft in Company Appeal (AT) (INS) No. 228/2022 in the matter of Suristh Tiwary vs JMS Steel & Power Corporation pending before Hon'ble NCLAT.

Dear Sir,

Vide order dated 07.03.2022 in the aforesaid matter, Hon'ble NCLAT was pleased to direct the Appellant to deposit a sum of Rs.1,06,31,219/- by way of demand draft drawn in the favour of The Pay and Accounts Officer, Ministry of Corporate Affairs, New Delhi'. Therefore, in pursuance of aforesaid order, the aforesaid sum is being deposited herewith by way of the two demand drafts (i) bearing no. 273520 for Rs. 50,00,000/- (ii) bearing no. 278521 for Rs. 56,31,219/- both issued by Canara Bank, Large Corporate Branch, Noida, 201301.

Yours faithfully

Date: 21.03.2022



Adarsh K. Tiwari
Advocate for the Appellant

Attached:

1. The Order dated 07.03.2022 in Company Appeal (AT) (INS) No. 228/2022.
2. Demand draft bearing no. 278520 for Rs. 50,00,000/-
3. Demand draft bearing no. 278521 for Rs. 56,31,219/-

(both issued by Canara Bank, Large Corporate Branch, Noida, 201301)

Dispy No.	34422
Date of Presentation	21.3.2022
D.D. No.	278520
D.D. Date	21.3.2022
D.D. Amount	278521
For	
By	
Signature	
Stamp	

₹ 50,00,000
₹ 56,31,219

Office:
Chamber:

18, Todermal Road, Bengali Market, New Delhi, 01
005, Lawyer's Chambers, C K Daphtary Block, Tilak Lane,
Supreme Court of India, New Delhi-01.
+91-851285-3939

Mob.
e-mail:

adarsh@advocates.in, adv@adarsh@gmail.com

36. Subsequently various dates were notified for hearing before this Appellate Tribunal i.e., 18.04.2022, 29.04.2022, 13.05.2022, 02.06.2022, 05.07.2022, 20.07.2022, 30.08.2022, 18.10.2022 & 16.01.2023.

37. During hearing before this Appellate Tribunal on 16.01.2023, it was brought to the notice of this Appellate Tribunal that the settlement did not arrive between the parties despite the orders passed by this Appellate Tribunal, and the following order was passed on 16.01.2023 :-

“In terms of the order dated 18.10.2022, the Ld. Counsel for the Appellant has filed the short Affidavit with regard to negotiation of settlement between the parties have failed and there is not hope for settlement through out side the court, which is taken on record.

Let this matter go out of my list. The Registry is directed to place the matter before the Hon’ble Chairperson for listing the matter before appropriate Bench in which Hon’ble Mr. Justice Anant Bijay Singh, Member (Judicial) not a member.

Interim order to continue.”

(Emphasis Supplied)

38. Subsequently the case was again listed for hearing on 23.01.2023, 13.02.2023, 31.03.2023, 17.04.2023, 02.05.2023, 26.05.2023 and 13.07.2023. The case was finally heard fully on 13.07.2023 and judgment was reserved.

39. From the averments of both the parties as well as documents made available, it is required to be seen by us now is that whether operational

debt over Rs. 1 Crore existed between the Corporate Debtor and the Respondent No. 1. Similarly, another fact is required to be considered whether any pre-existing dispute existed between the parties.

40. It is noted that no written contract is available between the Corporate Debtor and the Respondent No. 1 regarding supply of TMT Bars. On a pointed query by this Appellate Tribunal to both the parties, the same fact was confirmed that indeed there was no formal written agreement between both the parties.

41. We noted from the averments of the Corporate Debtor that based on the purchase order, the Respondent No. 1 used to supply the material and for which the Respondent No. 1 used to furnish the invoices. On this issue since this Appellate Tribunal could not link any purchase order in the records made available, another query was posed to the Corporate Debtor regarding system of such purchase order and placing/linking such purchase orders from the record available. The Corporate Debtor conceded that no formal purchase orders were issued by the Corporate Debtor to the Respondent No. 1.

42. This Appellate Tribunal wanted to understand the mechanism based on which the Corporate Debtor used to seek the material i.e. TMT Bars from the Respondent No. 1. The Corporate Debtor explained that since he was constructing several projects in Noida, as per prevalent trade practices as well as understanding with the Respondent No. 1, the representative of the Corporate Debtor used to place orders through verbal communication or telephonic conversation. We also noted that subsequent to supply of such

TMT Bars to the Corporate Debtor, the Respondent No. 1 used to raise the concerned invoice regarding supply of said material and indicated the payments to be made by the Corporate Debtor.

43. It is also observed that the business relationship between both the parties started in 2015 and was continuing till middle of 2018. The Corporate Debtor fairly accepted that the Respondent No. 1 had supplied material worth Crores of Rupees during the period and Corporate Debtor was also making payment based on “Running Account Manner”. The Corporate Debtor explained that payment made by the Corporate Debtor were required to be adjusted for the invoices issued by the Respondent No. 1 in successive order i.e. running payment made by the Corporate Debtor was required to be adjusted by the Respondent No. 1 for the previous pending bills. According to the parties, the payments were being made from time to time, however due to financial crises faced by the Corporate Debtor there have been delays/ defaults in payment to the Respondent No. 1.

44. We also take into consideration desire of the Corporate Debtor settle the matter before the Adjudicating Authority during the hearing of Section 9 Application and accordingly two tranches of payments of Rs. 25 Lakhs each were made by the Corporate Debtor to the Respondent No. 1 and the same were indicated in the order sheets of the Adjudicating Authority dated 10.07.2019 & 21.08.2019 :-

ANNEXURE - A-11
IN THE NATIONAL COMPANY LAW TRIBUNAL
COURT NO. IV, NEW DELHI

56

Item No. 117
(IB)-1049(ND)2019

Under Section: 9 of IBC.

In the matter of:

JMS Steel & Power Corporation
Vs.
S T Constructions Pvt Ltd

....Applicant

....Respondent

Order delivered on 10.07.2019

CORAM

DR. DEEPTI MUKESH,
HON'BLE MEMBER (J)
SHRI PRADEEP R. SETHI
HON'BLE MEMBER (T)

For the Applicant	: Mr. Nitesh Kumar Singh, Adv.
For the Respondent	: Ms. Shantala Sankriti, Adv. Mr. Ateendra Saumya Singh, Adv.

ORDER

Learned counsel for the respondent states that parties are endeavouring settlement and part payment of Rs. 25,00,000/- is paid in the month of June 2019. Learned counsel further states that reply could not be filed due to his personal difficulty and short accommodation may be granted. As a last chance, let the reply be filed within one week, with copy in advance to the other side. Rejoinder within one week thereafter, with copy in advance to the other side. Adjourned to 21.08.2019.

54/

(PRADEEP R. SETHI)
MEMBER (TECHNICAL)

MUKESH

54/

(DR. DEEPTI MUKESH)
MEMBER (JUDICIAL)

ANNEXURE-A-12
IN THE NATIONAL COMPANY LAW TRIBUNAL
COURT NO. IV, NEW DELHI

517
Item No. 110
(IB)-1049(ND)2019

Under Section: 9 of IEC.

In the matter of:

JMS Steel & Power Corporation
Vs.
S T Constructions Pvt Ltd

.....Applicant

.....Respondent

Order delivered on 21.08.2019

CORAM

DR. DEEPTI MUKESH,
HON'BLE MEMBER (J)
SHRI HEMANT KUMAR SARANGI,
HON'BLE MEMBER (T)

For the Applicant : Mr. Farrukh Khan, Adv.
Mr. Abyigyan Chodhary, Adv.
Mr. Ateendra Saumya Singh, Adv.
For the Respondent : Mr. Adarsh Kumar Tiwari, Adv.

ORDER

Learned counsel for respondent states that he has been recently engaged and seeks time to file reply. On 10th July, 2019 last chance was given to file reply within week. Considering there is change of counsel we show indulgence and give one more week to file reply, subject to payment of cost of Rs. 25,000/- to the applicant, failing which right to file reply is closed. Learned counsel for the parties states that during the pendency, an amount of Rs. 25,00,000/- is paid to the applicant on 10th July 2019. If the Corporate Debtor is interested in settlement, a proposal for settlement is to be sent to the Learned Counsel for the applicant. For further consideration on 13.09.2019.

Sd/-
(HEMANT KUMAR SARANGI)
MEMBER (TECHNICAL)
Vaishali

Sd/-
(DR. DEEPTI MUKESH)
MEMBER (JUDICIAL)

45. It is noted from the averments that there has been no pre-existing dispute between the parties and the Corporate Debtor did not raise any dispute before the demand notice was issued. Even during pleading before this Appellate Tribunal, no pre-existing dispute on any ground has been brought out by the Corporate Debtor.

46. It is the case of the Corporate Debtor that 12 invoices which have been claimed by the Respondent No. 1 are not genuine and have been fabricated by the Respondent No. 1 to get more money out of the Corporate Debtor. From this, only point emerges is regarding existence of 12 invoices and not regarding any other point including supply or quality of the material/ pre-existing disputes.

47. The Corporate Debtor has also taken the plea that the Respondent No. 1 has not furnished documents to prove his claims like weight scale receipt of Dharamkata. On this account the Respondent No. 1 has submitted that he was never required to submit the Dharamkata receipt as it was choice on part of the Corporate Debtor as buyer of the goods to get the products weighted at its end, if so required, and to communicate discrepancy, if any, the Respondent No. 1. The Respondent No. 1 further clarified that even for the invoices admitted by the Corporate Debtor, no Dharamkata receipts have been produced, by the Corporate Debtor as such the plea of the Corporate Debtor about non-submission of documents is prima-facie not convincing to us.

48. We have already noted that the Corporate Debtor has paid Rs. 50 Lakhs during the petition hearing before the Adjudicating Authority against

which the Corporate Debtor has now claimed that he has over paid Rs. 18,79,851/-. This Appellate Tribunal is not able to appreciate any reason for such alleged over payment by the Corporate Debtor to the Respondent No. 1, since these were supposed to be voluntary settlement payments by the Corporate Debtor and not by any judicial order from any judicial forum. We also take into account averments made by the Corporate Debtor that he was maintaining Ledger Account and was paying on the basis of 'Running Account Manner', as such the plea regarding over payment, if any, is not convincing to us.

49. The Corporate Debtor has admitted that there was no formal written contract agreement for supply of material by the Respondent No. 1 and similarly no formal purchase order was issued by him. The Corporate Debtor also admitted that on the representative of the Corporate Debtor used to ask the Respondent No. 1 to supply goods on oral instructions and subsequently payment would be claimed by the Respondent No. 1 based on invoices issued by him to the Corporate Debtor. Hence, there cannot be any dispute regarding payment being made on the basis of invoices issued by the supplier of the material, here in case, by the Respondent No. 1.

50. We take into consideration that the various invoices which have been relied upon by the Respondent No. 1 had been attached with the application filed before the Adjudicating Authority under Section 7 of the Code. On this account, it may also be pertinent to note that these invoices have stated to been reported in the GST returns and necessary ITC have also been claimed. It is the case of the Corporate Debtor that CGST Department had enquired

into alleged fake purchases by the Corporate Debtor based on the alleged fake documents/ invoices issued by alleged non-existent Respondent No. 1. We note from the averments of the Respondent No. 1 that no case has been framed against him by GST Authority and his GST Certificate is intact. On the point of CGST enquiries into the affairs of the Corporate Debtor and / or the Respondent No. 1, it is for the concerned authorities to look into and take necessary action, if any, in accordance with law and the concerned parties have to defend at appropriate forum. For us, in present appeal it will suffice to decide the matter under the Code based on the facts and the documents and not on the basis of complaints/ counter complaints/ enquiries by GST Authorities into the alleged affairs of the Corporate Debtor/ Respondent No. 1.

51. The Corporate Debtor has admitted that he was undergoing financial stress and there have been delays in making payments as well as in default at relevant period. In fact, the Corporate Debtor indeed tried to settle the matter by making payments as already discussed earlier, however, the Corporate Debtor failed to settle the matter.

52. In view of the detailed analysis, we are not in position to accept the plea of the Corporate Debtor regarding alleged fraudulent invoices claimed by the Respondent No. 1 or over payment made by the Corporate Debtor to the Respondent No. 1.

53. After careful consideration of all the facts, averments made by all parties, we do not find any error in the challenged Impugned Order. The

‘Appeal’ being devoid of any merit(s) is dismissed. No costs. Interlocutory Applications, if any, are closed.

54. Since, there has been stay on the constitution of CoC vide order of this Appellate Tribunal dated 07.03.2022, as discussed earlier, the stay on constitution of CoC is removed and the IRP shall proceed immediately in accordance with the law as per the Impugned Order dated 21.02.2022.

55. We have also taken into consideration submissions of the Corporate Debtor that the Appellant has already deposited the amount of Rs. 1,06,31,219/- vide two demand drafts as detailed by Mr. Adarsh Tiwari, Advocate for the Appellant in his letter dated 21.03.2022 (noted earlier), the Appellant is entitled to claim this money back based on this order from the Pay and Accounts Officer, Ministry of Corporate Affairs, New Delhi after following due process with Pay and Accounts Officer. The Pay and Accounts Officer, Ministry of Corporate Affairs, shall satisfy himself regarding earlier receipt of the said money from the Appellant before refunding the same to the Appellant.

**[Justice Rakesh Kumar Jain]
Member (Judicial)**

**[Naresh Salecha]
Member (Technical)**

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