

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT)(Insolvency) No. 39 of 2023
& I.A. No.137 of 2023

[Arising out of order dated 03.11.2022 passed by the Adjudicating Authority, National Company Law Tribunal, Mumbai Bench-IV in CP(IB) No. 1057 MB-IV/2021]

IN THE MATTER OF:

**Naresh Choudhary
(Suspended Director of NIK-SAN
Engineering Company Ltd.)
19, RC Patel Industrial Estate,
Akota, Vadodara,
Gujarat - 390007**

...Appellant

Versus

**Sterling Enamelled Wires Pvt. Ltd.
Shed No.48, Okhla Industrial Area,
New Delhi - 110020**

...Respondent No.1

**Rakesh Kumar Tulsyan
Interim Resolution Professional
of NIK-SAN Engineering Company Ltd.
B-4, Vinay Tower, Kranti Nagar, Lokhandwala,
Kandivali East, Mumbai - 400101**

...Respondent No.2

Present:

**For Appellant: Mr. Milan Negi, Mr. Nikhil Jha, Mr. Prateek Gupta,
Advocates**

**For Respondent: Mr. Sandeep Grover, Mr. Tarang Agarwal, Ms. Aashna
Agarwal, Advocates for R1**

Mr. Vivek Sharma, Advocate for R-2/RP

J U D G M E N T

[Per: Barun Mitra, Member (Technical)]

The present appeal filed under Section 61 of Insolvency and Bankruptcy Code, 2016 (“**IBC**” in short) by the Appellant arises out of the Order dated 03.11.2022 (hereinafter referred to as “**Impugned Order**”) passed by the Adjudicating Authority (National Company Law Tribunal, Mumbai Bench -IV) in CP(IB) No. 1057 MB-IV/2021. By the impugned order, the Adjudicating Authority has admitted the petition under Section 9 of the IBC and allowed the initiation of Corporate Insolvency Resolution Process (“**CIRP**” in short) of the Corporate Debtor. Aggrieved by this impugned order, the present appeal has been preferred by the suspended Director of the Corporate Debtor.

2. Briefly put, the Corporate Debtor - Nik-San Engineering Company Ltd., which is the present Appellant was engaged in a business relationship with Sterling Enamelled Wires Pvt. Ltd. - Operational Creditor, the present Respondent No.1. The Operational Creditor supplied material to the Corporate Debtor for manufacture of transformers and raised several invoices upon the Corporate Debtor during February 2020. The Operational Creditor having not received his outstanding dues issued a demand notice under Section 8 of the IBC on 14.08.2021 claiming an amount of Rs. 2,07,11,209/-. This was followed by filing of Section 9 application before the Adjudicating Authority leading to the impugned order which has been challenged by the Corporate Debtor.

3. The Learned Counsel for the Appellant admitting that Section 8 demand notice had been received by the Corporate Debtor, it was further submitted that a reply notice of dispute was sent to the Operational Creditor but the receipt thereto was falsely denied. It was also submitted that the Corporate Debtor had

raised several disputes regarding sub-standard quality of goods from time to time which were communicated to the Operational Creditor before the issue of the demand notice. Though these disputes were subsisting, the Adjudicating Authority failed to take cognizance of these pre-existing disputes and erroneously admitted the Section 9 application. It was also submitted that the Adjudicating Authority had wrongly treated a communication dated 23.07.2021 sent by the Corporate Debtor to Citi Commercial Bank as an acknowledgment of debt. It was also pressed that the date of default in respect of the debt claimed by the Operational Creditor fell during the period 25.03.2020 to 24.03.2021 which attracted Section 10A of the IBC and therefore stood barred. Submission was also made that there was no indication of date of default in the demand notice or in the Section 9 application. This constituted sufficient reason for non-admission of the Section 9 application.

4. Submitting the rival contentions, the Learned Counsel for the Respondent No.1 vehemently contended that the letter addressed to the Citi Commercial Bank by the Corporate Debtor amounts to be a clear and unconditional acknowledgment of the debt. The debt so acknowledged having not been repaid by the Corporate Debtor amounts to default and there being clear debt and default, the Adjudicating Authority had rightly admitted the Section 9 application. Moreover, since the communications by which disputes were allegedly raised being anterior to the date on which the Corporate Debtor had unconditionally acknowledged the debt, these disputes have rightly been held by the Adjudicating Authority as not sustainable.

5. It has been further pointed out that the Appellant has raised for the first time before the Appellate Authority a plea that the purchase orders provided for payment to be made by the Appellant through a Letter of Credit ("**LC**" in short)

within a timeframe of 90 days. Using this plea, the Appellant has tried to claim that the date of default of the invoices fell within the period barred under Section 10A of the IBC. Since this plea was not raised by the Appellant before the Adjudicating Authority, and such pleas require investigation into facts, it was contended by the Learned Counsel for the Respondent No.1 that this may not be entertained by the Appellate Court. Additionally, it was stated that such purchase orders which had provision for creation of an LC of 90 days have in any case been excluded by the Operational Creditor and the invoices which have led to the operational debt did not have an LC of 90 days and hence the date of invoice was the date of default and this date did not fall within the window of Section 10A of IBC. It was submitted that these technical objections were being raised by the Corporate Debtor for the first time before the Appellate Authority which was merely a ploy to wriggle out of the liability to pay the outstanding debt. An emphatic assertion was also made that the Appellant did not send any reply to the Section 8 demand notice nor repaid the outstanding dues and hence the Adjudicating Authority rightly admitted the Section 9 application.

6. We have duly considered the arguments advanced by both the parties and perused the records carefully. The short points for determination are whether an amount exceeding Rs.1 crore was due for payment to the Operational Creditor and whether such amount was an undisputed debt which had become due and payable. The other point which deserves consideration is whether the said operational debt was barred by Section 10A of IBC.

7. It is the contention of the Operational Creditor that the Corporate Debtor had unequivocally acknowledged the operational debt of Rs.2,07,11,209/- in their letter dated 23.07.2021 to Citi Commercial Bank. Earlier to this acknowledgment sent to the Citi Commercial Bank, it has also been pointed out that an email dated

13.05.2021 was sent by the Corporate Debtor to the Operational Creditor acknowledging that an amount of Rs.2,15,20,344/- was outstanding and agreeing to make 7.5% extra payment towards these dues.

8. We notice that both these communications have been taken cognizance of by the Adjudicating Authority and reproduced at paras 23 and 24 of the impugned order. Basis the above communications, the findings returned by the Adjudicating Authority is as reproduced below: -

“25. On perusal of the aforesaid email, this Bench observed and have the clear picture in mind that the Corporate Debtor acknowledges the amount due which is to be repaid by the Corporate Debtor to the Operational Creditor. Thus, it clearly shows that there is a clear debt and default by the Corporate Debtor in repaying the outstanding amount with respect to pending invoices (supra) to the Operational Creditor.”

9. From a plain reading of the above communications, there arises no doubt that the Corporate Debtor had acknowledged the outstanding amount which was due and payable to the Operational Creditor. Not only was the outstanding amount acknowledged but an assurance had also been given by Corporate Debtor to clear the said amount and make extra payment towards old outstanding dues.

10. This now brings us to the issue of pre-existing disputes which have been raised by the Corporate Debtor. It is the contention of the Appellant that four emails had been sent to the Operational Creditor on 23.06.2020, 20.07.2020, 18.08.2020 and 17.09.2020 pointing out the defects in the goods supplied by them besides requesting the Operational Creditor to carry out inspection and verification of the sub-standard quality of goods supplied which request had not been complied to. Hence, the disputes raised by the Corporate Debtor remained unresolved. In the light of the fact that disputes continued to subsist, it has been contended that the operational debt claimed by the Operational Creditor was a disputed debt and hence not admissible under Section 9 of IBC.

11. It is an undisputed fact that letters of dispute had been raised by the Corporate Debtor on several occasions. Since these letters pertain to the period June 2020 to September 2020, there is no dispute that these pertain to a period prior to the date of demand notice. The Adjudicating Authority at Para 20 of the impugned order has taken notice of these communications but also noted in Paras 21 and 22 that subsequent to these communications, the Corporate Debtor has acknowledged his liability on 23.07.2021. The relevant paragraphs are reproduced below for easy convenience.

“20. The Corporate Debtor vide their letters dated 24.06.2020, 20.07.2020, 23.07.2020, 18.08.2020 and 17.09.2020 addressed to the Operational Creditor submits that the quality of materials supplied were not good and raised a contention that there is a pre-existing dispute as per section 8 (2) of the Code before filing the captioned company petition.

21. Further, the Corporate Debtor after their letters dated 24.06.2020, 20.07.2020, 23.07.2020, 18.08.2020 and 17.09.2020 regarding inferior quality of goods, sent a letter to the CITI Commercial Bank on 23.07.2021 thereby certified that invoices amounting to Rs.2,07,11,209/- raised by Corporate Debtor are outstanding as per their books.

22. The Corporate Debtor vehemently denied the fact that the letter sent to CITI Commercial Bank amount to acknowledgement of debt. On perusal of letter dated 23.07.2021, this Bench observed that the contents written in the letter dated 23.07.2021, clearly shows that the Corporate Debtor acknowledged the invoices as per their books of account as on 23.07.2021 and also promised/confirmed that they will clear the said invoices. Hence, the contention with regard to pre-existing dispute is not sustainable on perusal of letter dated 23.07.2021 and hence rejected.”

12. We are inclined to agree with the findings of the Adjudicating Authority that at the time of acknowledging the outstanding operational debt, the question of any pre-existing dispute having subsisted lacks foundation. This is validated by the fact that the Corporate Debtor has sent a communication dated 29.04.2021 which is seen at page 234 of the Appeal Paper Book (“**APB**” in short) wherein the

Corporate Debtor has clearly admitted their inability to clear the outstanding debt as they were facing difficulties in maintaining their cash flow without any trace or reference to disputes.

13. The only defence which has been raised by the Appellant to contend that there were pre-existing disputes surrounding the outstanding debt is their email dated 13.05.2021 wherein they had agreed to pay 15% extra payment towards old outstanding amount of Rs.2,15,20,344/- to the Operational Creditor by adding a rider “subject to our claim lodged with you”. This defence is prima-facie a weak defence since this rider was in any case admittedly withdrawn in a subsequent email sent on the same date. Furthermore, we find that that the rider “subject to the claims lodged” is a very generic statement without any specific reference to past disputes and thus devoid of plausibility. Objections in terms of “claims lodged”, if relatable to existing disputes, should have been brought to the pointed notice of the Operational Creditor which has clearly not happened in the present case. Reliance also placed on the judgments of this Tribunal in ***Sanjay Bhausaheb Bhange vs. Khushbu Dye Chem Private Limited in Company Appeal (AT) (Ins.) No. 621 of 2022*** and ***XYKno Capital services Pvt Ltd vs Rattan India Power Ltd in Company Appeal (AT) (Ins.) No. 913 of 2022***. However, the facts are distinguishable as in those cases the Corporate Debtor had not acknowledged outstanding amount unlike the present case where the outstanding debt has been clearly admitted. Hence these judgements do not come to the aid of the Appellant.

14. We are of the considered view that when the Corporate Debtor had admitted the outstanding debt and agreed to pay the same, it amounts to clear acknowledgment of debt being due and payable and belies the existence of any dispute.

15. This brings us to the second issue for determination as to whether the debt arising out of the invoices fell during the period which attracts the bar of Section 10A of IBC. It is the case of the Appellant that the Operational Creditor has not provided the date of default either in the Section 8 demand notice or in the Section 9 application. Further, it has been stated that payments were to be made by the Corporate Debtor by way of LC which was to be created within 90 days from each invoice and hence the date of default would be 90 days post the date of each such invoice. Since the Appellant had not created any LC within a period of 90 days the default occurred on the 90th day from the day of invoice. After calculating the 90th day of these invoices, it has been contended that the date of default arises between 01.05.2020 to 29.05.2020 which clearly falls in the ambit of Section 10A and hence barred from being subject to IBC proceedings.

16. Refuting the above, it has been submitted by the Learned Counsel for the Respondent No.1 that the Corporate Debtor had placed four purchase orders which find place at pages 272-275 of APB. Of the four purchase orders, only two purchase orders (3rd and 4th purchase orders) make reference to the creation of LC of 90 days. As regards the other two purchase orders (1st and 2nd purchase orders), there was no such stipulation of 90-day LC. Hence in respect of these two purchase orders, the date of default was the date of invoice. It was stated that the invoices raised under the 4th purchase order were anyways already excluded. It was further submitted that even if the 3rd and 4th purchase orders are excluded, the first two purchase orders cumulatively amount to default which is above the threshold limit of Rs.1 crore necessary for filing an insolvency application. We are satisfied with the reasoning offered by the Operational Creditor and do not find any force in the contention of the Appellant.

17. We have no hesitation in observing that in the present case, all requisite conditions necessary to trigger CIRP under Section 9 stands fulfilled with operational debt having been acknowledged and default committed thereto and there being no real pre-existing disputes discernible from given facts. For the foregoing reasons, we are of the view that the Adjudicating Authority has rightly admitted the application of the Operational Creditor filed under Section 9 of IBC. We are satisfied that the impugned order does not warrant any interference. There is no merit in the Appeal. The Appeal is dismissed. No order as to costs.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

Place: New Delhi

Date: 16.08.2023

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