

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL**  
**AT CHENNAI**

**(APPELLATE JURISDICTION)**

**Company Appeal (AT) (CH) (Ins) No.299/2024**  
**(IA Nos.792 & 793/2024)**

**(Arising out of the 'Impugned Order' dated 09.07.2024 in**  
**CP/IB/173(CHE)/2023, passed by the 'Adjudicating Authority',**  
**(National Company Law Tribunal', Chennai Bench)**

**In the matter of:**

Mr. KN Devdass,  
Son of KK Narayanan,  
Suspended Director of Cema Electric  
Lighting Products India Pvt Ltd.,  
Residing at A10, Dev Heritage,  
Pij Cross Road, near Reliance Petrol  
Pump, Nadiad – 387 002.

.... Appellant

v.

M/s. Overdrive Electronics (P) Ltd.,  
CIN: U72200DL2005PTC136715,  
C-2/2621, Vasantkunj,  
New Delhi – 110 070.

... 1<sup>st</sup> Respondent

Mr. Sushil Kumar Singhal,  
Registration No. IBBI/IPA-001/IP-P-01655/2019-2020/12536,  
IRP of Cema Electric Lighting Products India Pvt. Ltd.,  
Basement C-10, Lajpat Nagar – III, New Delhi – 110 024.

... 2<sup>nd</sup> Respondent

**Present:**

For Appellant : Mr. P.J. Sriganesh, Advocate

For Respondent No.1 : Mr. Anuj Solanki, Advocate

**JUDGMENT**  
**(Hybrid Mode)**

**[Per : Justice Sharad Kumar Sharma, Member (Judicial)]**

It is settled principle that, when the Respondent in a judicial proceedings makes a statement at bar that he does not intend to file the Counter Affidavit to controvert pleading of the appellant, in that eventuality, the pleadings raised by

the adversary i.e., the appellant herein would be treated to be admitted and the aforesaid principle has been settled by the Hon'ble High Court of Delhi, in a Judgment as reported in **1993 Volume 25 DRJ230, Naresh Kumar Bansal Vs G.S. Kalra & Ors.**, wherein Para 3 which is extracted hereunder: -

*“3. The petition was admitted by this Court on 31<sup>st</sup> October, 1998. In spite of the service nobody has come forward on behalf of the respondents to defend the case nor any counter affidavit has been filed. In the absence of the counter affidavit, the averments made by the petitioner has to be accepted as correct, as the averments remain unrebutted”.*

The Hon'ble High Court of Delhi in matters of Naresh Kumar (Supra) has held that, in the absence of the Counter being filed in that eventuality, the averments remain unrebutted and the same has to be accepted, as it is on the record.

Almost a similar view was taken by the Hon'ble High Court of Judicature at Allahabad in Writ Petition No.1141 (S/S) of 1998 as reported in **2002 Volume 4 AWC 3093**, Allahabad in the matters of **Dhani Ram Verma Vs Ganna Ayukta and Ors.** In Para 9 of the said judgment, a similar view has been taken by the coordinate bench with regards to the judicial implications of non filing of a Counter. The relevant paragraph is extracted hereunder: -

*“9. In absence of the counter-affidavit in spite of more than adequate opportunity afforded by the Court to the respondents, the facts pleaded in the writ petition remains unrebutted and the Court to accept the same particularly when there is no circumstances or material to urge the Court to disbelieve or suspect the correctness thereof and there is no option but*

*to decide the case on the basis of the pleadings. In the writ petition, and the uncontroverted affidavits of the petition on record”.*

In view of the aforesaid settled proposition of law, despite of repeated request made to the Counsel for the respondent by this Tribunal, calling upon him to file a Counter Affidavit to the pleadings of appeal and he persisting that, he does not intend to file a Counter Affidavit and that, according to his perception which he maintained throughout in his submission that since the Judgment does not suffer from any apparent error, no Counter Affidavit, would be required to be filed as such requiring to call for any interference, owing to the said plea and for the reasons above, we are constrained to decide the appeal on merits, in the absence of Counter Affidavit which was denied to be filed by the Respondent and to proceed to decide the appeal based on its pleading.

The Appellant who happens to be a Suspended Director of M/s. Cema Electric Lighting Products India Private Limited the Corporate Debtor has submitted that, he had filed a Memo before the Learned Adjudicating Authority, in CP/IB/173(CHE)/2023, raising various contentions before NCLT, qua aspects pertaining to the drawing of the proceedings as against the Corporate Debtor and holding it to be vitiated on the grounds mentioned, particularly that as contained in Para 5 & 6 of the said objection. Para 5 & 6 of his affidavit are extracted hereunder:-

*“5. As per the practice prevailing in the lighting industry, collecting and claiming credit from the manufactures for defective that were under warranty would be as follows:*

- a) *On the defective lamps/bulbs being returned by the end use customers and/or retailers during the warranty period, the same would be forwarded to the Corporate Debtor's distributors.*
  - b) *The distributors collect the defective lamps/bulbs so returned and present it for inspection to the Corporate Debtor's quality team on a monthly basis, and upon inspection the said defections would be sent to the Corporate Debtor's warehouse by the distributor.*
  - c) *From warehouse, located in different states, the said defective products are in the normal course required to be inspected from time to time by the Operational Creditor's personnel while raising a GST invoice, which will be accounted in the accounts of both parties and credits accordingly provided to the Corporate Debtor for the value of the said defectives*
6. *In the absence of any response from the Operational Creditor to its requests for inspection of the said defectives based on the order passed by this Hon'ble Tribunal, the Corporate Debtor had assumed the responsibility of aggregating these defectives and has brought it to its warehouses for the Operational Creditor to inspect and thereafter provide credit, which despite the Order dated 30<sup>th</sup> January, 2024 passed by this Hon'ble Tribunal has not fructified, owing to the Operational Creditor's failure to abide by the directions issued by this Hon'ble Tribunal".*

The appellant pleads inaction on the part of the Learned Adjudicating Authority. He has submitted that, in the light of the objection filed by him on 14.03.2024, he submitted that unless the Operational Creditor extends his cooperation and complies with the direction of the Tribunal, by inspecting of the defective liquidation estate, and given credit to the extent of the value of the said defective article, which has been received within the voluntary period. The claim is to be reconciled from the books of accounts of the Corporate Debtor, and if the

same is not done after consideration of objection and recording findings on it, the impugned order and consequential action would be devoid of any merits.

The Learned Counsel for the Appellant submits that in the light of what has been pleaded in the objection which was filed on 14.03.2024, the Learned Adjudicating Authority did take cognizance on it pertaining to the plea of amount which was detailed in Para 7 of the submission filed by the Corporate Debtor, pertaining to the total claim amount of Rs.2,20,03,735/- and the resultant reduced claim amount by a sum of Rs.4,53,941/-. In fact, vitiated the impugned decision due to non-consideration of the material, which were relied for the purpose of resolving the disputes, filed by the Operational Creditor, in relation to its notional expected value, which has to be taken as to basis for deciding the claim.

He submitted that aforesaid contention found part in the written submission which was filed on 14.03.2024 in relation to the credit to a sum of Rs.4,53,941/- for the defective products which had been specific plea considered by the Learned Adjudicating Authority in Para 26 of the Impugned Judgment, but his grievances is that, when the Learned Adjudicating Authority was drawing its conclusion for considering the proceedings under Section 9 of the I & B Code, his grievance remains that, the pleading raised on 14.03.2024 if it is to be read with the observation made in Para 26 of the impugned Judgment, the Tribunal was apparently conscious of the issue raised by the appellant, in that eventuality, the Tribunal was duty bound, that while drawing its observation as made in the Impugned Judgment it ought to have considered the pleading raised on

14.03.2024 by the appellant, while recording a contrary finding in Para 39 Sub Para (c), observing thereof that, the Corporate Debtor has neither shown any proof of pre-existing dispute nor had denied the existence of debt towards the Operational Creditor, coupled with the fact that, it was observed in the Judgment that it was only upon the receipt of demand notice under Section 8 of the I & B Code, the Corporate Debtor has raised his defense only of a pre-existing dispute. Relevant Para 39(c) is extracted hereunder.

*“c) Thirdly, The Corporate Debtor has neither shown any proof of preexisting dispute nor denied the existence of debt towards the operational creditor. It was only upon receipt of demand notice under Section 8 of IBC, 2016, the Corporate Debtor raised a spurious defense of preexisting dispute”.*

The Appellant contends that observation made in Para 39(c) as above, by the Learned Adjudicating Authority in fact, has not been based on a finding recorded in the light of the objection raised by the Appellant, with regards to the claim and therefore, allowing of Section 9 Application for initiation of the CIRP Proceedings, stands vitiated, since being perverse and contrary to the evidence on record. The Appellant further contends that the Respondent has failed to give credit to the tune of Rs.4.53 Lakhs even while accepting the return of defective goods during the period of Jan/Feb 2024, which was subsequent to filing of Section 9 Application, and that the Respondent No.1 should have been asked to reconcile the accounts prior to passing of the Impugned Order, initiating proceedings under Section 9 of the I & B Code.

Section 424 of the Companies Act lays down the basic underlying principle, that the parties to the proceedings who are likely to be affected by any orders, are required to be heard and their pleading are to be considered while passing the order, by the Tribunal and that they have to be given sufficient opportunity during the proceedings to defend, themselves, and that it should not be a mere superficial opportunity to raise their defense but an opportunity, where at the minimum, the defense raised by the party concerned are to considered and in a fair manner by the Tribunal, before drawing any conclusion to the contrary.

In the instant case, since in Para 26 of the Impugned Order, NCLT has recorded that it was conscious of the objection raised by the Appellant in the objection, failure to consider the same and to record specific finding on it, that is, on the facts as pleaded by the Appellant in the Memo of Objection, would render Judgment being perverse and without application of mind especially when the pleadings of the Appellant remain undenied by the Respondent's Counsel having denied to file a Counter Affidavit, qua the pleadings. Accordingly, the Judgment dated 09.07.2024 as rendered in CP/IB/173(CHE)/2023 would be held to be vitiated, owing to the ground which has been taken by the appellant that even after taking note of the Appellant's contention raised in his objection dated 14.03.2024, and referring to the same in the body of the Judgment, the Learned Adjudicating Authority has not recorded any, no finding on the same in its judgment. Thus even in the light of the Judgment of Mobilox Innovations Private Limited, where the guidelines have been framed therein for the purposes of

determining an application under Section 9 based on the criteria prescribed therein prior to the imposition of moratorium under Section 14, since the aforesaid factors have not been considered while passing the final judgment, the judgment Impugned will be held as being not in consonance to the provisions contained under Section 424 of the Companies Act and therefore, the initiation of the Section 9 proceedings would be bad and without application of mind.

Consequently, the Impugned Judgment dated 09.07.2024 as rendered by the National Company Law Tribunal, Chennai Bench in CP/IB/173(CHE)/2023, would hereby stand quashed.

The proceedings are remanded back to the Learned National Company Law Tribunal, Chennai Bench, to redecide the matter afresh after considering the rival contentions and particularly in the context of the pleading which has been raised qua the claim which is subject matter of consideration and decide the same on its merit. However, there will be no order as to cost.

**[Justice Sharad Kumar Sharma]**  
**Member (Judicial)**

**[Jatindranath Swain]**  
**Member (Technical)**

24.09.2024  
VG/TM