

Vinod Mittal vs Rays Power Experts Pvt. Ltd. & Anr on 18 November, 2019

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) (Ins) No.851 of 2019

[Arising out of Order dated 26.07.2019 passed by National Company Law Tribunal, Chandigarh Bench, Chandigarh in CP (IB) No.169/Chd/Hry/2018]

IN THE MATTER OF:

Before NCLT

Before NCLAT

Vinod Mittal
The Palm Spring,
D-1502, Sector 54,
Golf Course Road,
Gurugram - 122001,
Haryana

Appellant
(Shareholder/Director
of Corporate Debtor)

Versus

1. Rays Power Experts
Private Limited
Through Managing
Director, 4th Floor,
Sheel Mohar Plaza,
Yudhisthir Marg,
C-scheme,
Jaipur - 302001

Operational Creditor

Respondent No.1

2. Siwana Solar Power
Project Pvt. Ltd.
Through Mr. Mukesh
Kumar, Interim
Resolution Professional,
Having his office at
436, 3rd Floor,
Sector - 7, HUDA,
Near Tau Devilal
Park Panipat,
Haryana - 132103

Corporate Debtor

Respondent No.2

2

For Appellant:

Shri Raju Ramachandran, Sr. Advocate,
Shri Arun Kathpalia, Sr. Advocate with
Shri T. Sundar Ramanathan and

Ms. Kumudavalli, Advocates

For Respondents: Shri Pulkit Deora, Advocate (Resolution Professional) and Shri Kamal Kant Chhabra, Advocate

Shri Pawan Sharma, Shri Arpit Yadav and
Shri Krishna Dutta, Advocate (Respondent No.1)

JUDGEMENT

(18th November, 2019) A.I.S. Cheema, J. :

1. Respondent No.1 - Rays Power Experts Private Limited (Operational Creditor) filed CP (IB) No.169/Chd/Hry/2018 under Section 9 of the Insolvency and Bankruptcy Code, 2016 (IBC - in short) against Respondent No.2 - Siwana Solar Power Project Pvt. Ltd. (Corporate Debtor) before the Adjudicating Authority (National Company Law Tribunal, Chandigarh Bench, Chandigarh). The Application came to be admitted on 26th July, 2019. Hence, the present appeal by shareholder/Director of suspended Board of Corporate Debtor.

2. The Operational Creditor claimed that the Corporate Debtor had awarded the work order for supply, commissioning and service of Solar Power Project for its commercial exploitation. The parties entered into an "Engineering Procurement and Construction (EPC) Agreement" (EPC Agreement - in short) dated 1st May, 2014 for execution of the project.

Company Appeal (AT) (Ins) No.851 of 2019 Operational Creditor received part of the amount due for invoices raised for part payment and was in default. Notice under Section 8 was issued on 8th March, 2018 (Page - 233) and was served by speed post on the Corporate Debtor on 13th March, 2018. Operational Creditor claimed before the Adjudicating Authority that the Corporate Debtor gave no Reply to the Demand Notice and also claimed that there was no dispute of unpaid operational debt raised by the Corporate Debtor. The Operational Creditor claimed debt of Rs.2,82,48,963/- along with interest to be in default.

3. Impugned Order shows that the Adjudicating Authority directed Operational Creditor on 09.07.2018 to put on record documents to reconcile the amount of the invoices enclosed with the petition with the amount of the invoices shown in the demand notice. The Operational Creditor placed on record Completion Certificate with financial statements of Operational Creditor for the purpose and claimed that there was no mismatch of the amount. The Adjudicating Authority by Order dated 26th October, 2018 issued Notice of the Petition (Application) to the Corporate Debtor. Subsequently, Rahul Gupta, Authorized Representative of the Operational Creditor filed Compliance Affidavit dated 29th December, 2018 to show service of Notice on the Corporate Debtor on address mentioned as per master data and that Notice was also sent by e-mail address as reflected in the master data of the Corporate Debtor. The Adjudicating Authority proceeded ex-parte against the

Corporate Debtor and held that the Notice under Section 8 was served on the Corporate Debtor but not Company Appeal (AT) (Ins) No.851 of 2019 responded to, and that no pre-existing dispute had been shown and it proceeded to admit the Section 9 Application and initiated Corporate Insolvency Resolution Process (CIRP - in short). The Interim Resolution Professional (IRP - in short) was appointed and further consequential directions were also given.

4. Against such Impugned Order dated 26.07.2019, present Appeal has been filed by the Appellant - Shareholder/Director of the Corporate Debtor. The Appeal states and it has been argued for the Appellant, taking up cause of the Corporate Debtor that the Operational Creditor had incorrectly and by misrepresentation claimed before the Adjudicating Authority that there was no dispute between the parties. The learned Sr. Counsel on behalf of the Appellant pointed out that there are numerous documents available with the parties which show that there were serious disputes with regard to the installation and commissioning of the project as well as operation and maintenance. The Counsel referred to the EPC Agreement (Annexure 3 -Page 101) to state that there was Agreement with the Operational Creditor for erection, procurement and installation/commissioning of the project as well as to operate and maintain the project for 25 years. It is argued that although the Corporate Debtor issued Completion Certificate, there is voluminous record showing faulty erection of the project and various other defects in the execution of installation as well as defects relating to installation and functioning of the project which was not giving the targeted output. There were frequent Company Appeal (AT) (Ins) No.851 of 2019 breakdowns and disputes had arisen between the parties which is evident from so many e-mails exchanged between the parties.

5. Learned Counsel for the Appellant referred to Annexure 44 (Page

- 485) where the Adjudicating Authority directed the Operational Creditor to disclose correspondence with regard to the document at Page - 183 of the Paper Book as was placed before the Adjudicating Authority. The learned Counsel stated that the page referred by the Adjudicating Authority is at Page - 431 of the present Appeal and submitted that this document itself showed that the Corporate Debtor had on 20th October, 2016 conveyed to the Operational Creditor that although the Corporate Debtor appreciated the fast work done to complete by the deadline of 31st December, 2014 but later on it had found that there were other pending works including bad quality of work done by the Operational Creditor to complete the project, which were pending and were to be completed by 31st December, 2014. The e-mail gave details in this regard. Learned Sr. Counsel for the Appellant submitted that when such document was already before the Adjudicating Authority, it was apparent that there was prior existing dispute and the Application should have been rejected. The learned Sr. Counsel also referred to Order dated 9th July, 2018 of the Adjudicating Authority (copy of the which is at Annexure - 46) which reads as under:-

"Learned counsel for petitioner seeks time to place on record completion certificate and also to submit further clarification regarding the amount of Company Appeal (AT) (Ins) No.851 of 2019 sundry creditors shown by the respondent in Balance Sheet. The above affidavit with documents to be filed by the petitioner shall also state whether there is any other correspondence between the parties relating to the completion of the project apart from the documents annexed with the petition and

also to reconcile the amount of the invoices enclosed with the petition with the amount of the invoices shown in the demand notice.

List the matter on 31.07.2018 for arguments."

[Emphasis supplied] It is argued that in response to such query by the Adjudicating Authority, Shri Rahul Gupta, the Authorized Representative of the Operational Creditor filed Affidavit (copy of which has been pointed out at Page - 494) and the learned Sr. Counsel submitted that although all the correspondence was available with both the parties, Mr. Rahul Gupta in para - 4 of the Affidavit claimed that the burden of proving the dispute was on the Corporate Debtor and that since relations of the parties were strained, Operational Creditor could not call upon the Corporate Debtor to furnish details. It is pointed out that although such statement was made in the Affidavit by Mr. Rahul Gupta, same Mr. Rahul Gupta even after filing of the Section 9 proceedings had on 15th June, 2018 sent e-mail (Annexure 45 - Page 486) referring to the discussions between the parties and the breakdown of the plant and, inter alia, sought meeting for discussion and closure of accounts. The learned Sr. Counsel submitted that although such e-mail was being sent on the e-mail address of the Corporate Debtor (balajiimports@yahoo.com), the Operational Creditor did Company Appeal (AT) (Ins) No.851 of 2019 not disclose pendency of such Application under Section 9 since 11th May, 2018. It is further argued that in para - 5 of the Affidavit dated 25th July, 2018 filed in compliance of the Order dated 9th July, 2018, the Authorized Representative of the Operational Creditor had unequivocally mentioned in para - 5 as under:-

"5. The deponent submits that with respect to further/additional correspondence, if, any, between the parties relating to the completion of the project, it is stated that presently no further communication is retrievable specially on account of grievances, if, any towards the commissioning of the project. However, as a bona fide conduct the Operational Creditor had already annexed readily available communications exchanged between the parties with the application on the subject. It is further stated that since the completion certificate has been issued with due satisfaction and even 84.21% of the payment towards completion of the plant had already been made by the Corporation Debtor to the Operational Creditors. The particulars of which are detailed at page no.21 of the application, the raising of discontent by the Corporate Debtor against the commissioning of project is purely an afterthought and a spurious plea. In order to substantiate the view of the operational creditor put on reliance the Apex Court Judgement in the matter of Mobilox Innovations Private Ltd. Vs. Kirusa Software Private Ltd. relevant Para being 19 & 37. Copy of the said judgement is annexed herewith and is marked as ANNEXURE A-3."

[Emphasis supplied] It is argued that hiding behind words like "presently not retrievable", the Operational Creditor suppressed the correspondence showing pre-existing dispute, which was available in computers.

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6. It is argued by the learned Sr. Counsel for the Appellant that the e-mail (Annexure - 15 Page - 152 at 153) shows that on 16th March, 2015 itself, the Corporate Debtor had conveyed to Rahul Gupta and others that the Operational Creditor had failed to fulfil its commitments and there was very poor work done at the site and that the main cause is not grid issue but the issue was everywhere and that the Operational Creditor was running away from its responsibilities. Such e-mail was sent on 16th March, 2015 at 1.34 PM and the Operational Creditor sent Reply at 8.36 PM (Page - 152). It was mentioned in the e-mail:-

"We are trying to complete all open issues at the plant. In order to ensure that all quality issues are closed I am personally visiting the site every 4-5 days and we have closed a lot of matters also.

It is unfortunate when you say you made a mistake by betting on us, I feel highly unfortunate. I don't understand what such thing happened which made you feel so. Its just the delay in handing over the plant to you. There are several reasons for this, most of those happened on our account and we take the responsibility for the same. For example we have changed a lot of structures and our teams are working on it. At no point we have run from the plant or are giving an excuse of not doing work on the plant. In the below mail we are pointing out the loss we are again and again facing because of grid fail and fluctuations. An inverter burnout is a clear example for this."

Thus, the learned Sr. Counsel submitted that apparently and clearly, there were pre-existing disputes pending with regard to the structures which were put up and failure of grids and there were other issues also, which were admitted by the Operational Creditor. The learned Company Appeal (AT) (Ins) No.851 of 2019 Sr. Counsel referred to list of dates and events tendered at Bar with various page numbers from the file to show that there is host of correspondence showing various disputes and in spite of the same, the Operational Creditor suppressed the same from Adjudicating Authority and even when specifically asked, the Affidavit filed was intentionally vague with the only object of getting CIRP initiated.

7. It is argued by the learned Sr. Counsel for the Appellant that Section 8 Notice was not sent to the registered Office of the Corporate Debtor but was sent to another address as mentioned in the Demand Notice. The Notice was sent to e-mail address of then Director of Corporate Debtor. The Appeal claims that partnership firm - Haryana Paper Card Industries in which the then Director of Corporate Debtor was partner, was dissolved on 31.03.2018 and the assets of said firm went to continuing partner - Mr. Dushyant Kumar Tyagi. The other three partners retired from the firm and the premise - Plot No.109, Sector 27/28, Hissar, Haryana, was still shown in the record of ROC as registered Office of Corporate Debtor which was asset of the said firm which stood transferred to Dushyant Tyagi. The Appeal claims that relationship between Mr. Jagdish Parshad Singal and Mr. Tyagi strained. It is claimed that the Notice under Section 8 was served on e-mail of then Director. The Operational Creditor did not serve the Petition and Paper Book on said e- mail address. It is mentioned that the Operational Creditor served papers Company Appeal (AT) (Ins) No.851 of 2019 on the registered address of the Corporate Debtor but the same was no longer being used under the control of Corporate Debtor.

8. Against the claims made by the Appellant, the learned Counsel for Operational Creditor referred to invoices raised (as at Page - 331 and 332 of the Appeal) and argued that the installation project has been completed. The learned Counsel referred to the Completion Certificate issued by Operational Creditor (Page 501) and submitted that on 19th April, 2015, the Certificate of Appreciation was issued by the Corporate Debtor. Argument is that within the time frame as per the Agreement, the installation of the project had been completed and the promoters and management of Corporate Debtor had appreciated the services rendered by the Operational Creditor for timely completion of the project. The argument is that the Agreement dated 1st May, 2014 has two parts. For supply and installation of machinery, Article 5.1 prescribed the price and for operation and maintenance for 25 years, the price was specified in Article 5.2. The learned Counsel for Operational Creditor argued that it showed that the supply and installation were complete and the amounts on that count were due and the Section 9 Application was filed for those amounts only and not for operation and maintenance of the project. Thus, according to the learned Counsel, the correspondence referred to by the Appellant was not relevant as Completion Certificate had been issued and regarding the completion, there was no dispute.

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9. The learned Counsel for the Operational Creditor referred to Page

- 446 of the Appeal to say that Section 8 Notice was sent by registered post and track report showed service and that the Appellant has accepted that the Notice was served on the then Directors in their e-mail address. The Operational Creditor referred to Page - 57 of Volume - 1. Regarding service of the Notice of Section 9 proceeding, the Operational Creditor is submitting that the Petition was served on the registered office of the Corporate Debtor, which was allegedly no longer being used by the Corporate Debtor. It is argued that e-mail of the Notice of Adjudicating Authority was sent and that the Appellant had not denied existence of said e-mail ID.

10. In Rejoinder, the learned Sr. Counsel for the Appellant argued that the Agreement was inseparable and the erection and installation of the project was linked with the operation and maintenance by the same Operational Creditor and the correspondence itself shows that there were structural problems as is apparent from (Annexure - 15) e-mail dated 16th March, 2015 (referred supra).

11. Having gone through the matter and on considering record, there remains hardly any doubt that the earlier correspondence shows that between the parties there were disputes regarding installation of the project as well as functioning of the same. Although the project had been commissioned for which Completion Certificate had been issued, still if disputes had arisen between the parties regarding the installation and Company Appeal (AT) (Ins) No.851 of 2019 functioning of the project, the Operational Creditor merely pointed out Certificate of Appreciation dated 19th April, 2015 issued and claims that once Completion Certificate had been issued, Corporate Debtor could not raise issues with regard to the quality of the work done. In fact, the record shows that there had been even a review meeting between Operational Creditor and Corporate Debtor and excerpts of which minutes have been placed on record by the Corporate Debtor at Page - 187 which showed that full

installation was yet to be completed (see Page - 188). There was also discussion regarding Sag Structure Correction Action Plan. In fact, there is Annexure - 24 showing the Experts enquiry on 5th May, 2015 as to when the plant would be declared fully commissioned so that they could start electrical review of the project. Looking to such material on record, it is quite clear that there was pre-existing dispute regarding installation as well as operation of the project. When this is so, the Section 9 Application could not have been admitted. In fact, when e-mail dated 20th October, 2016 (Page - 431) was already before the Adjudicating Authority and it had also noticed the same, the Adjudicating Authority should have found pre-existing dispute and the Section 9 Application should have been rejected. Only by observing that the Respondent - Corporate Debtor have not come forward to dispute the Application would not be sufficient to initiate CIRP, if the record already showed existence of dispute.

12. We do not intend to deliberate on the grievances raised by the Appellant that Section 8 Notice or Notice of Section 9 Application was Company Appeal (AT) (Ins) No.851 of 2019 served in a manner that Corporate Debtor does not come to know about Notice and pending proceeding considering the Appeal pleading as put up by Appellant, especially, para numbered as 'ggg'.

13. However, considering the voluminous records showing pre-existing disputes between the parties, we do find fault with the Affidavit filed by the Authorized Representative of the Operational Creditor as at Page - 495 of which para - 5 we have reproduced earlier. Although the Adjudicating Authority had specifically asked for the correspondence, it can be seen that the Authorized Representative - Mr. Rahul Gupta resorting to articulate wordings avoided placing on record the correspondence claiming that "presently the communication is not retrievable". Starting of CIRP against a functional company is a serious matter and parties cannot be allowed to play hide and seek. We propose to impose heavy costs on Operational Creditor as well as Mr. Rahul Gupta.

14. For above reasons, we set aside the Impugned Order dated 26.07.2019. The initiation of Corporate Insolvency Resolution Process against the Corporate Debtor is quashed and set aside. Steps taken in consequence of Impugned Order and further Orders passed during CIRP are all quashed and set aside.

15. We release the 'Corporate Debtor' from rigour of 'Corporate Insolvency Resolution Process'. The 'Interim Resolution Company Appeal (AT) (Ins) No.851 of 2019 Professional'/Resolution Professional will handover the assets and records to the 'Corporate Debtor'/ 'Promoter'/Board of Directors.

16. We impose costs of Rs.5 Lakhs on Operational Creditor. We impose costs of Rs.2,50,000/- on Mr. Rahul Gupta - son of Rajendra Prasad Gupta - the Director of Operational Creditor which he shall pay from his personal account to the Corporate Debtor. The Corporate Debtor will be at liberty to execute and recover these costs or it may adjust the same from payments, if any, it has to make to the Corporate Debtor.

[Justice A.I.S. Cheema] Member (Judicial) [Kanthi Narahari] Member (Technical) [V.P. Singh] Member (Technical) /rs/md Company Appeal (AT) (Ins) No.851 of 2019