

P.M. Mahendran vs Tharuvai Ramachandran Ravichandran & ... on 22 November, 2019

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI
Company Appeal (AT)(Insolvency) No. 642 of 2019

[Arising out of order dated 28th May, 2019 passed by the
Adjudicating Authority, National Company Law Tribunal, Division
Bench, Chennai in IBA/202/2019]

IN THE MATTER OF:

Mr. P.M. Mahendran,
(Shareholder/Director)
No. 3/237, Kovur-Pattur Road,
Chinapanichery, Paraniputhur,
Mangadu,
Chennai- 600 122

.. Appellant

Versus

1. Mr. Tharuvai Ramachandran Ravichandran,
(Resolution Professional)
G-3, Block-2,
Shivani Apartments,
40, East Coast Road,
Thiruvanmiyar,
Chennai - 600 041

2. M/s ETA Engineering Pvt. Ltd.
Regd. Office at
No. 5, Moores Road,
Chennai - 600 006.

Manufacturing Unit at
K-6, SIPCOT Industrial Estate,
Phase-II, Mampakkam,
Sriperumbudur,
Kancheepuram District
Tamil Nadu- 602 105

3. M/s AM Clean Air Engineering Pvt. Ltd.
(Through Resolution Professional)
No. 3/237, Kovur-Pattur Road,
Chinapanichery, Paraniputhur,
Mangadu,
Chennai - 600 122.

.. Respondents

Present:

For Appellant: Appeared but did not give appearance

For Respondent: Mr. Ajay Kohli, Advocate

JUDGMENT

(22nd November, 2019) KANTHI NARAHARI, MEMBER(TECHNICAL) The appeal is arising out of the impugned order dated 28th May, 2019 passed by the Adjudicating Authority (National Company Law Tribunal, Division Bench), Chennai admitting the application filed by the 2nd Respondent herein under Section 9 read with Rule- 6 of Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as 'IBC').

2. Learned Counsel for the Appellant challenged the said order on the ground that the application filed by the 2nd Respondent herein is not maintainable in view of the reason that there is existence of dispute prior to issuance of Demand Notice by the 2nd Respondent.

3. Learned Counsel for the Respondent submitted that the 2nd Respondent supplied and delivered the materials in pursuance to the Purchase Orders made by the 3rd Respondent and the 3rd Respondent had defaulted in making payments.

4. Both the Counsel put forth their arguments extensively.

5. Heard learned Counsel appearing for the respective parties. Perused the pleadings and documents. The Adjudicating Authority admitted the application, vide order dated 28th May, 2019 with the following observations:

...

7. For there being material aplenty reflecting the contract is in between the Operational Creditor and the Corporate Debtor and the supplies were made by the Operational Creditor to the Corporate Debtor basing on the purchase orders raised by the corporate debtor and the Corporate Debtor in turn made part payments to the Operational Creditor without raising any defence as stated now, we hereby hold that it is a fit case for admission, therefore this Company Petition is hereby admitted by appointing Dr. L. Natarajan as Interim Resolution professional, looking at the consent given by him with directions as follow:

(I) That Moratorium is hereby declared prohibiting all of the following actions, namely,

(a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of

law, Tribunal Arbitration panel or other Authority;

(b) Transferring encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or benefits interest therein;

(c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act)

(d) The recovery of any property by an owner or lessor where such property is occupied by or in the possession of the Corporate Debtor. (II) That the supply of essential goods or services to the corporate debtor, if continuing, shall not be terminated or suspended or interrupted during moratorium period.

(II) That the provisions of sub-section (1) of Section 14 shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator. (IV) That the order of moratorium shall have effect from 28.05.2019 till the completion of the corporate insolvency resolution process or until this Bench approves the resolution plan under sub section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, as the case may be.

(V) That the public announcement of the Corporate Insolvency Resolution Process shall be made immediately as specified under Section 13 of the Code.

(VI) That this Bench hereby appoints Dr. L. Natarajan, as Interim Resolution Professional (Registration No. IBBI/IPA-001/IP-PO0614/2017-18/11108, having office at No. 21, Jambulingam Street, Nungambakkam, Chennai - 600 034 E-Mail:

natrajan1@yahoo.com with his consent to carry the functions as mentioned under The Insolvency & Bankruptcy Code.

(Emphasis Supplied) ...

6. From the perusal of the impugned order, learned Adjudicating Authority relied upon the Purchase Orders and a Memorandum of Understanding (in short 'MOU') entered between the Operational Creditor and the Corporate Debtor on 08.09.2018. From the perusal of the Form-V filed by the Operational Creditor, i.e., 2nd Respondent herein a claim of an amount of Rs. 41,94,575/- along with interest of Rs. 3,97,742/- was made. The transactions as per the Form is that Operational Creditor had supplied 64 nos. of Roof Top Units (in short "RTU") vide Purchase Order dated 06.09.2018 and additional materials were supplied vide another Purchase Order dated 08.09.2018. Pursuance to the Purchase Orders, invoices were raised to the tune of Rs. 6,06,00,347/-. Further the Operational Creditor and the Corporate Debtor had entered into an MOU dated 08.09.2018. In terms of this MOU, Operation Creditor supplied 57 nos. RTU and in terms of the said MOU,

Corporate Debtor should have completed the payment of Rs. 4,84,80,278/- before dispatch of 32 units of RTU. However, the Operational Creditor received only Rs. 3,68,34,560/-. Hence the parties have entered this MOU dated 08.09.2018 to confirm the clear understanding between them. Further, it is seen that the Corporate Debtor issued post-dated cheque dated 20.09.2018 for Rs. 2,37,65,787/-.

7. The contention of the Operational Creditor is that the cheque which was issued by the Corporate Debtor bounced on 26.09.2018. The Operational Creditor in their e-mail dated 04.10.2018 addressed to the Corporate Debtor stated that they have received a sum of Rs. 102.50 lakhs and requested the Corporate Debtor to clear the amount by RTGS.

8. The Operational Creditor issued Demand Notice dated 04.12.2018 to the Corporate Debtor claiming an amount of Rs. 72,53,278/- relying on the Purchase Orders and the MOU dated 08.09.2018. The only issue is whether there is a pre-existing of dispute prior to issuance of the Demand Notice dated 04.12.2018 or not? From the perusal of the correspondence between the Operational Creditor and the Corporate Debtor, it is evident that the Corporate Debtor raised the dispute with regard to the quality of the material prior to the issuance of Demand Notice dated 04.12.2018. A. Now we deal with the issue with regards to the pre-

existence of dispute.

9. From the documents at page 128, Annexure-A7, a letter from Factum Law Advocates to King and Partridge, Advocates dated 13.11.2018 whereby the Lawyers of Corporate Debtor i.e., M/s A.M. Clean Air Engineering Private Limited replied to the notice dated 25.10.2018 issued by the Operational Creditor under Section 138 of the Negotiable Instruments Act. However, from the letter dated 13.11.2018 at paragraph-7, it is stated that the Operational Creditor did not complete the supply of RTU as agreed. It is further stated that even as on date, 22 RTU are to be supplied to the Corporate Debtor failing to supply it has caused great hardship to the Corporate Debtor. Further at paragraph-9 of the letter it is stated that Operational Creditor yet to complete supply all 65 RTU as ordered by the Corporate Debtor, although the Corporate Debtor had been diligently making payments to the Operational Creditor for the work done.

10. Further from the perusal of e-mail dated 31.10.2018 from the Corporate Debtor to the Operational Creditor wherefrom it is evident that "From: "AM CLEAN AIR ENGINEERING PVT. LTD."

To amcaesales@gmail.com
"S. Balaji balaji@eta-engg.com,
"Radhakrishnan GN

radakrishnangan@etc.engg.com "Raman G"

ramang@eta-engg.com Date: Wed. 31 Oct 2018 21:15 Subject: Re: Deficient materials and balance payment ____ Dear Sir, From the KIA site, we received an information that Medium-filters of 440 nos. and some fan meshes (11 Nos.) are not supplied from

your side as per the requirement for all the RTU's till date. Also the extra materials (i.e.) extra aluminium profiles, Fittings, Scraps, Spider for lifting RTU's and extra Control Panel which belongs to us have not been returned to us so far. We have not received the 100% materials so far and they are not paying us due to the delay in the delivery of these materials. They are also insisting us that they are going to charge us for the delay in the supplies. If they charge anything for us the same will be implemented on your company and it is because you have not supplied 100% of the materials as per our agreed Purchase order. And if you have supplied 100% materials on time we might have made your 100% payment. Due to the insufficient materials the commissioning is also delaying and because of that our customer is unable to get the money from their client. Our customer is ready to pay 10% for us if you have supplied on time (Meshes and Filters) but you haven't done it so far. So, we are unable to pay to you on time as per the MOU also.

Moreover, according to our PO (AMCA/KIA/18 dated 7th May 2018) for supply of 64 units (100%) we have to complete 80% of the RTU'S PAYMENT. We have paid you nearly about 86%, but still some materials are pending from your side. Without 100% supply, we are unable to get the balance payment from our customer Wuhyun tech India. We have issued a cheque without writing, date only for guarantee purpose and trust. But, your company didn't honor it. Rather you deposited it. How can your company expect us to honor our cheque for 100% materials without delivering the 100% supply? Inspite of our mail to hold the cheque, ETA Engg Pvt. Ltd., deposited it without honouring our mail. Consequently it has been returned twice. So, our Companies name and bank credibility has been damaged.

Confirm us whether the Fan meshes and filters are ready or not and when will your company able to deliver them?

Will your company able to make the filter delivery within 10 days to 14 days or we shall proceed with it? We will deduct the charges (i.e.) INR 1652/filter including GST for the filters from ETA Engg Pvt. Ltd. as per the PO terms which we released. Kindly, let us know about these information within a day as the materials are very urgent at site. If we haven't received any return mail regarding the filters, we will proceed with the purchasing of filters. Thank you Regards, Naveen Kumar. M"

[Emphasis supplied]

11. From the above e-mail dated 31.10.2018 it is clear that the Corporate Debtor raised a dispute prior to issuance of Demand Notice dated 04.12.2018. The Operational Creditor did not deny the receipt of the mail and its contents. However, vide their e-mail dated 02.11.2018 the Operational Creditor simply stated "we do not accept the contents of your mail". One WuHyun Tech India Private Limited to whom Purchase Orders were placed by the Corporate Debtor to supply the material to the said WuHyun Tech India Private Limited, the WuHyun Tech India Private Limited in their letter dated 06.11.2018 addressed to the Corporate Debtor submitted a claim for delay in

delivery and quality defect. In paragraph-2 of the said letter, it is clearly stated that the RTU which provided by the Corporate Debtor created leaking problem, the Corporate Debtor's staff arrived on 28.09.2018 but did not bring any solution or measure.

B. Provision of Law The law relating to filing of application by Operational Creditor:

Provision under Section 8 of the IBC which reads as follows;

8. Insolvency resolution by operational creditor (1) An operational creditor may, on the occurrence of a default, deliver a demand notice of unpaid operational debtor copy of an invoice demanding payment of the amount involved in the default to the corporate debtor in such form and manner as may be prescribed.

(2) The Corporate Debtor shall, within a period of ten days of the receipt of the demand notice or copy of the invoice mentioned in sub-section (1) bring to the notice of the operational creditor--

(a) existence of a dispute, if any, and record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoice in relation to such dispute;

(b) the repayment of unpaid operational debt--

(i) by sending an attested copy of the record of electronic transfer of the unpaid amount from the bank account of the corporate debtor; or

(ii) by sending an attested copy of record that the operational creditor has encashed a cheque issued by the corporate debtor.

Explanation.--For the purposes of this section, a "demand notice" means a notice served by an operational creditor to the corporate debtor demanding repayment of the operational debt in respect of which the default has occurred." Section 9(5) (ii) (d) of the IBC reads as follows:

..

"(d) notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility; or"

Section 5(6) of the IBC 2016 defines dispute as:

"dispute" includes a suit or arbitration proceedings relating to:-

- (a) the existence of the amount of debt;
- (b) the quality of goods or service; or
- (c) the breach of a representation or warranty

From the reading of Section 8(2)(a) of IBC, it is apparent that the moment there is existence of a dispute, the Corporate Debtor gets out of the clutches of the rigours of the Code. Further it is only to be seen that where the dispute raised by the Corporate Debtor qualifies as a dispute as defined under Section 5(6) of IBC supra.

12. From all the correspondences between the Corporate Debtor and the Operational Creditor it is clear that there is a pre-existing dispute raised by the Corporate Debtor prior to issuance of Demand Notice dated 04.12.2018. It is a settled law that where there is an existence of dispute prior to the issuance of Demand Notice, the Adjudicating Authority must reject the application as held by the Hon'ble Supreme Court in "MobiloX Innovations Pvt. Ltd. Vs. Kirusa Software (P) Limited - 2018 1 SCC Online SC 353"

C) Precedents:

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"The Hon'ble Supreme Court in "MobiloX Innovations Pvt. Ltd. Vs. Kirusa Software (P) Limited - (2018) 1 SCC 353" it is held that the 'existence of dispute' and/or the suit or arbitration proceeding must be pre-existing i.e. it must exist before the receipt of the Demand Notice or Invoice as the case may be and observed "33. The scheme under Sections 8 and 9 of the Code, appears to be that an operational creditor, as defined, may, on the occurrence of a default (i.e. on non-payment of a debt, any part whereof has become due and payable and has not been repaid), deliver a demand notice of such unpaid operational debt or deliver the copy of an invoice demanding payment of such amount to the corporate debtor in the form set out in Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 read with Form 3 or 4, as the case may be [Section 8(1)]. Within a period of 10 days of the receipt of such demand notice or copy of invoice, the corporate debtor must bring to the notice of the operational creditor the existence of a dispute and/or the record of the pendency of a suit or arbitration proceeding filed before the receipt of such notice or invoice in relation to such dispute [Section 8(2)(a)]. What is important is that the existence of the dispute and/or the suit or arbitration proceeding must be pre-existing i.e. it must exist before the receipt of the demand notice or invoice, as the case may be."

At paragraph 51 it is held:

"51. Therefore, all that the adjudicating authority is to see at this stage is whether there is a plausible contention which requires further investigation and that the "dispute" is not a patently feeble legal argument or an assertion of fact unsupported by evidence."

[Emphasis supplied]

13. From the aforesaid correspondences it is clear that there is pre-existence dispute with regard to quality and service prior to issuance of Demand Notice. In view of the decision of the Hon'ble Supreme Court and this Appellate Tribunal in the matter of R.S Cottmark (India) Pvt. Ltd. Vs. Rajvir Industries Ltd. in Company Appeal (AT) (Insolvency) No. 653 of 2018, dated 5th August, 2019 the appeal needs to be allowed.

14. Hence the appeal is allowed and order passed by the Adjudicating Authority dated 28th May, 2019 is quashed and set aside. Steps taken in consequence of Impugned Order and further Orders passed during Corporate Insolvency Resolution Process are all quashed and set aside.

15. We release the Corporate Debtor from rigour of 'Corporate Insolvency Resolution Process. The Interim Resolution Professional/Resolution Professional will hand over the assets and records to the Corporate Debtor/Promoter/Board of Directors.

Henceforth the Corporate Debtor will function independently through its Board of Directors.

16. Operational Creditor is liable to pay the CIRP cost and fees of the Interim Resolution Professional/Resolution Professional. The Interim Resolution Professional/Resolution Professional will file report before the Adjudicating Authority with regard to his fee, CIRP cost and the Adjudicating Authority is requested to pass orders to recover the same from the Operational Creditor.

17. The appeal is disposed of accordingly. No order as to costs.

[Justice A.I.S. Cheema] Member (Judicial) (Kanthi Narahari) Member(Technical) AKC