

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT)(Insolvency) No. 1161 of 2022 &
I.A No.4940 of 2022 & 2552, 2733 of 2023

[Arising out of order dated 12.09.2022 passed by the Adjudicating Authority, National Company Law Tribunal, New Delhi Bench, Court-II in CP (IB) No. 603(ND)/2020]

IN THE MATTER OF:

Rakesh Kumar
(Suspended Director of
Suchi Paper Mills Ltd.)
735, Third Floor, Shaktikhand-3,
Indirapuram, Shipra Sun City,
Ghaziabad, Uttar Pradesh – 201 014

...Appellant

Versus

Flourish Paper & Chemicals Ltd.
Village Bhagwanpur, Barwal Road,
Derrabassi, Dist. SAS Nagar,
Mohali, Punjab- 140 507

...Respondent No.1

Poorit Goyal
(Interim Resolution Professional of
Suchi Paper Mills Ltd.)
62, New Lajpat Nagar,
Pakhawal Road,
Ludhiana, Punjab – 141 001

...Respondent No.2

Present:

For Appellant: **Mr. Nilesh Sharma, Mr. Hemant Sharma, Mr. Karan**
Valecha, Ms. Aditi Sharma, Advocates.

For Respondents: **Mr. Vinod Chaurasia, Advocate**
Mr. Anuj P Agarwala, Mr. Aayush Agarwala, Mr.
Siddhen Nahata, Advocates for IRP.
Mr. Abhijeet Sinha, Mr. Ashish Verma, Mr. Salonee
Keshwani, Advocates for Bank of Baroda.

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 12.09.2022 (hereinafter referred to as “**Impugned Order**”) passed by the Adjudicating Authority (National Company Law Tribunal, New Delhi Bench, Court-II) in CP (IB) No.603(ND)/2020. By the impugned order, the Adjudicating Authority has admitted the application under Section 9 of the IBC filed by Flourish Paper & Chemicals Ltd. - Respondent No.1 and initiated Corporate Insolvency Resolution Process (“**CIRP**” in short) of the Corporate Debtor-Suchi Paper Mills Ltd. Aggrieved by this impugned order, the present appeal has been filed by the suspended director of the Corporate Debtor.

2. Putting across the concise factual matrix, goods were supplied by the Operational Creditor-Respondent No.1 to the Corporate Debtor against which bills were raised by the Operational Creditor against invoices from 08.10.2016 to 17.12.2016. Since the outstanding debt purportedly stood at Rs. 20,91,690/- which included an interest amount of Rs.7,49,460/-, the Operational Creditor had issued a demand notice to the Corporate Debtor under Section 8 of IBC on 02.01.2020. The Corporate Debtor had replied to the said demand notice on 13.01.2020 demanding payment of Rs 25,00,000/- towards compensation for loss and damages suffered due to poor quality of goods supplied by the Operational Creditor. Prior to the Section 8 demand notice, the Operational Creditor had issued a legal notice to the Corporate Debtor on 05.12.2019

seeking recovery of Rs 13,42,230/- from them. This was replied to by the Corporate Debtor on 16.12.2019 in which the Corporate Debtor demanded payment of Rs 25,00,000/- towards compensation for loss suffered due to poor quality of goods supplied by the Operational Creditor. The debt having continued to remain unpaid, a Section 9 application was filed by the Operational Creditor before the Adjudicating Authority. The Adjudicating Authority on 12.09.2022 allowed the Section 9 application and admitted the Corporate Debtor into the rigours of CIRP. Aggrieved with the impugned order this appeal has been preferred by the Appellant.

3. It is equally relevant to note the subsequent developments after issue of the impugned order. This Tribunal vide interim order dated 27.09.2022 had allowed the Corporate Debtor on their request to deposit Rs.13,42,230/- in the name of the Corporate Debtor without prejudice to its rights and contentions. The IRP was directed not to take further steps in pursuance of CIRP. Resultantly, CoC has not been constituted. A subsequent offer was made on 22.08.2023 by the Corporate Debtor to pay Rs.24.50 lakh to the Operational Creditor but not accepted by the Operational Creditor as it demanded reasonable interest on the operational debt from the date of CIRP commencement.

4. Making his submissions, the Learned Counsel for the Appellant submitted that the Adjudicating Authority while admitting the Section 9 application had failed to take into cognizance pre-existing disputes between the two parties. It was submitted that the Operational Creditor had supplied material of inferior quality during the FY 2015-16 and 2016-17. The

Adjudicating Authority failed to appreciate that besides the credit notes issued by the Operational Creditor which pertained to FY 2015-16, there were other debit notes issued by the Corporate Debtor in respect of defective supplies during FY 2016-17. Furthermore, the Corporate Debtor had supplied some material and made some advance payments to the Operational Creditor and after adjusting these amounts there was nothing due or payable by the Corporate Debtor. Instead, the Operational Creditor had received excess payment and an amount of Rs.16,08,316/- was due to the Corporate Debtor from the Operational Creditor.

5. Adding further that both recovery notice and Section 8 demand notice were issued with mala-fide intention by the Operational Creditor, it was stated that the said notice had also been duly replied to by the Corporate Debtor making a counter claim. It was also added that the demand notice issued by the Operational Creditor included an interest amount which was never agreed upon by the Corporate Debtor.

6. It was therefore contended that the Adjudicating Authority had failed to consider that nothing was due or payable by the Corporate Debtor to the Operational Creditor and that there was a pre-existing dispute subsisting between the two parties. Assailing the impugned order, it was asserted that a viable company which is operating as a going concern with large number of employees has been wrongly pushed into insolvency process.

7. Making their counter submissions, the Learned Counsel for the Respondent No.1-Operational Creditor submitted that the bogey of pre-existing

disputes raised by the Corporate Debtor was a sham and a moonshine defence to evade the liability of payments. As regards the issue raised by the Corporate Debtor that they were supplied poor quality goods which were unusable, it was submitted that the account of the Corporate Debtor had already been credited with Rs.35,91,500/- for such material supplied during 2015-16 and 2016-17. After adjusting the above credit amount, the Corporate Debtor defaulted in discharging operational debt of Rs.20,91,690/. The counter-claim made by the Corporate Debtor was not grounded on facts and the ledger accounts submitted by the Corporate Debtor was false and fabricated which had been created with the ulterior motive of raising disputes to escape the wrath of IBC proceedings.

8. IA No.4272 of 2023 has been filed by Bank of Baroda before this Tribunal seeking impleadment as intervenor in the instant company appeal which has been allowed on 21.10.2022. It has been submitted that the Bank of Baroda is a lead member of the consortium of banks through which made available advances to the tune of Rs.70 crores to the Corporate Debtor. The account of the Corporate Debtor had been declared as NPA on 31.03.2021. The Bank of Baroda having a 44% share in the said consortium has claimed that an outstanding amount of Rs.37,36,32,233/- plus unrealized interest is due to them. It has been submitted that due to debt and default committed by the Corporate Debtor qua the Bank of Baroda, the Corporate Debtor needs to be put into CIRP. It was also submitted that endeavours were being made by the Corporate Debtor to negotiate with the Operational Creditor to pay their dues. However, this should not be allowed as that would tantamount to preferential treatment to one creditor at the cost of being prejudicial to their interest. It has

been prayed that insolvency proceedings take an in-rem nature and the IRP should be permitted to proceed further with the CIRP. IA No. 2552/2023 has also been filed by Bank of Baroda praying for early hearing on the ground that the Corporate Debtor is misusing the protection granted by this Tribunal vide interim order dated 27.09.2022.

9. IA No.4940 of 2022 has been filed by the Appellant seeking directions to be issued to the IRP to run the Corporate Debtor as a going concern with the cooperation of the ex-management and their employees and to make payment to third parties including suppliers/vendors /workmen/employees etc. This prayer had been allowed by this Tribunal on 23.12.2022 and IRP directed to take steps for keeping the Corporate Debtor as a going concern.

10. IRP had been allowed an opportunity to file a reply following which submission has been made by the IRP that an application under Section 19(2) of the IBC has been filed before the Adjudicating Authority for lack of cooperation from the suspended management of the Corporate Debtor which is pending. It is also submitted that the ex-management has been siphoning the revenues of the Corporate Debtor and demanding release of payment to employees/third parties without furnishing necessary details. The IRP has stated that claims of approximately Rs.104 crore has been received from various creditors of the Corporate Debtor and that in the interests of justice CIRP may be commenced without further delay.

11. IA No. 2733/2023 has been filed by the IRP praying for determination and payment of fees and expenses of the IRP in terms of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

12. We have duly considered the arguments advanced by the Learned Counsel for the parties and perused the records carefully.

13. It is the claim of the Appellant-Corporate Debtor that it suffered a loss because the Operational Creditor had supplied poor quality of material during two financial years viz. 2015-16 and 2016-17. It had therefore claimed a compensation of Rs. 25 lakhs from the Operational Creditor. Admitting that with respect to poor quality of material supplied in FY 2015-16, the Operational Creditor had issued credit notes for Rs.17,41,500/- and Rs.18,50,000/- on 30.09.2015 and 31.03.2016 respectively. This led to the wrong conclusion in the impugned order that all pre-existing disputes stood satisfied. Thereafter, for the subsequent period during FY 2016-17 also, defective goods having been supplied, debit notes were issued by the Corporate Debtor for Rs.36,464/- and Rs.25,00,000/- on 18.10.2016 and 31.10.2016. After adjusting these debit notes, the sum payable to the Operational Creditor was only Rs.3,43,845/-. Additionally, thereafter the Corporate Debtor had made payments to the Operational Creditor of Rs.19,52,161/- including advance towards supply of goods during the period 07.07.2017 to 02.08.2017. If these amounts are adjusted then it is the Operational Creditor who has to pay to the Corporate Debtor. The counter-claim made by the Corporate Debtor for FY 2016-17 has been mistakenly ignored by the Adjudicating Authority.

14. The contestation fielded by the Learned Counsel for the Respondent No.1-Operational Creditor is that the Corporate Debtor has tried to create unnecessary confusion by raising frivolous grounds of variance in account reconciliation to create pre-existing disputes. Reiterating that the credit notes amounting to Rs.35,91,500/- issued by them had already satisfied the dispute between the parties it was pointed out that this fact of receipt of credit note amounts has not been controverted by the Corporate Debtor either. In support of their contention, it was vehemently contended that at a time when the Corporate Debtor had admitted that after making adjustment of debit notes amounting Rs.36,464/- and Rs.25,00,000/- on 18.10.2016 and 31.10.2016, the outstanding sum payable to the Operational Creditor is only Rs.3,43,845/- , then it defies logic that a corporate entity in exercise of business prudence would pay to the Operational Creditor an amount of Rs. 19,52,161/- against the amount payable of Rs.3,43,845/-. Further, it has been pointed out that in all earlier correspondences whether it be the reply to the legal notice or reply to the demand notice or even in the reply to the Section 9 petition, the Corporate Debtor had only raised a demand of Rs.25 lakh only as compensation for loss and damages. The issue of further payments of Rs. 19,52,161/- was never raised before the Adjudicating Authority and has only been raised before this Tribunal as an after-thought to avoid being dragged into insolvency proceedings.

15. We find that the Adjudicating Authority has looked into the issue of pre-existing dispute arising out of reconciliation of accounts in the impugned order after taking into account the guiding principles laid down by the Hon'ble Supreme Court in the matter of ***Mobilox Innovations Private Limited Versus***

Kirusa Software Private Limited, Civil Appeal No. 9405 of 2017 dated 21.09.2017 ('**Mobilox**' in short) at para 24 of the impugned order which is as extracted below:

*"40. It is clear, therefore, that once the operational creditor has filed an application, which is otherwise complete, the adjudicating authority must reject the application under Section 9(5)(2)(d) if notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility. It is clear that such notice must bring to the notice of the operational creditor the "existence" of a dispute or the fact that a suit or arbitration proceeding relating to a dispute is pending between the parties. 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. It is important to separate the grain from the chaff and to reject a spurious defence which is mere bluster.** However, in doing so, the Court does not need to be satisfied that the defence is likely to succeed. **The Court does not at this stage examine the merits of the dispute except to the extent indicated above. So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application.**"*

(Emphasis Supplied)

16. Applying the **Mobilox** (supra) test, the Adjudicating Authority has arrived at the following findings after taking note of the reply filed by the Corporate Debtor to the legal notice of 05.12.2019 as well as their reply to the demand notice dated 02.01.2020. The relevant findings of the Adjudicating Authority are as reproduced below: -

"23. While going through the replies of the respondent to both the notices together, we observe that the Respondent has raised the same issue of poor quality of goods and claimed compensation of Rs. 25,00,000/- on account of loss claimed to have been suffered by it. It is further observed that the Respondent has stated that it had raised various complaints with the Operational Creditor but the Operational

Creditor failed to address the same. When we re-visit the notice of dispute and reply to the application, we observe that at no occasion, the Respondent has placed or produced any proof on record like e-mail or letter or any other communication in support of its contention or which could depict that it had raised complaints in regard to poor quality of goods in the past with the Applicant/Operational Creditor.

25. In absence of any real/actual communication between the parties with respect to or in support of poor-quality of goods, we are of the considered view that the dispute raised by the Corporate Debtor is a patently feeble argument and is moonshine. Hence, we do not find the alleged dispute to be genuine.

26. It is further contended by the Respondent that it has to recover Rs.16,08,316/- from the Operational Creditor. That on perusal of reply, we find that ledger account of Operational Creditor maintained by Corporate Debtor is annexed. However, no invoices in support are annexed by the Respondent, which could depict any amount due and payable by the Operational Creditor.

*27. Even for a moment, we assume that there is a counter-claim of the Respondent against the Applicant/Operational Creditor, then the same cannot be adjudicated under an application filed under Section 9 of IBC, 2016. Here, it is worthwhile referring to the Judgment of the Hon'ble NCLAT passed in the matter of **Deepak Gupta Vs. Ved Contracts Pvt. Ltd. & Ors. in Company Appeal (AT) (Insolvency) Nos. 1262 of 2019, dated 19.11.2019.***

“3. Learned Counsel for the Appellant submits that in the accounts of three consecutive years, it is shown that the amount is payable to the 'Corporate Debtor' and there are claims and counter claims, which has not been adjudicated by the Adjudicating Authority. However, such ground cannot be accepted as the disputed question relating to claims and counter claims cannot be

determined by Adjudicating Authority in an application under Section 9 of the I&B Code...."

28. Accordingly, in light of the debt being more than the threshold limit and amounting to Rs. 13,42,230/- as on 31.12.2019 plus interest at the rate of 18% due and payable by the Corporate Debtor, we are of the considered view that the Operational Creditor has established the default on the part of Corporate Debtor in payments of the operational debt. The present petition filed under Section 9 fulfills all the requirements of law....."

17. We notice that the Adjudicating Authority has rightly observed after perusing the reply filed by the Corporate Debtor to the legal notice of 05.12.2019 as well as their reply to the demand notice dated 02.01.2020 that at no occasion the Corporate Debtor had raised complaints with regard to poor quality of goods with the Operational Creditor after issue of the two credit notes aggregating Rs.35,91,500/-. Neither any invoices have been furnished in support of their contention that the Corporate Debtor had supplied material to the Operational Creditor. We also do not find any communication which has been placed on record by which the Corporate Debtor had sent any reminder to the Operational Creditor in respect of their outstanding payments. It has also been rightly observed that disputes surrounding claims and counter-claims cannot be adjudicated or determined by the Adjudicating Authority given their summary jurisdiction.

18. We find that the Adjudicating Authority in the present case has carefully considered the reply and submissions made by the Corporate Debtor and has correctly come to the conclusion that there is no ground to establish any real and substantial pre-existing dispute which can thwart the admission of section

9 application against the Corporate Debtor. We have no hesitation in observing that in the present case there is no real pre-existing disputes discernible from given facts and all other requisite conditions necessary to trigger CIRP under Section 9 stands fulfilled.

19. 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. The Appeal is dismissed. The Registry is directed to take appropriate action without any delay to refund the amount which was deposited by the Appellant in pursuance of interim order of this Tribunal dated 27.09.2022. I.A. No.2733 of 2023 is disposed of with the directions that IRP may take necessary action to constitute the CoC forthwith and to take up the matter of CIRP costs including their fees with the CoC in accordance with law. I.A. No. 4272 of 2023 is disposed of by giving liberty to Bank of Baroda to approach the IRP to pursue their claims. All other IAs stand disposed of with the above observations. No order as to costs.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

Place: New Delhi

Date: 27.09.2023

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