

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
CHENNAI BENCH

(APPELLATE JURISDICTION)

Company Appeal (AT) (CH) (Ins.) No. 381/2023

IN THE MATTER OF:

**M/s. Mamtha Steels Corporation,
A proprietary concern, represented by its
Proprietor-Mr. Vasanram,
Having its Registered Office at: New No.21/15,
Mogappiar Road, Padi, Chennai-600 015**

... Appellant

**V
Yosmite Engineering Pvt. Ltd.,
Having office at: No.5,
New St. Balaji Industrial Estate,
Ambattur, Chennai-600 053**

... Respondent

Present:

For Appellant : Mr. Ramesh Kumar Chopra, Advocate

For Respondent : Mr. Pradeep Jayaraman, Advocate

JUDGMENT
(Hybrid Mode)

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

The issue, in the instant company appeal, preferred under Section 61 of I & B Code, has its birth from the Order dated 27.07.2023, as it was rendered by the Ld. NCLT Special Bench-I Chennai, in Company Petition IB No. (IBA)115/CHN/2019, whereby an application filed by the Appellant company M/s. Mamtha Steels Corporation, which is represented by its proprietor, Mr. Vasanram, in the capacity of being an Operational Creditor, for drawing the CIRP

proceedings as against M/s. Yosmite Engineering Private Limited, the Corporate Debtor under Section 9 of I & B Code has been rejected.

2. The facts which arise for consideration in the instant appeal, and as portrayed by the Appellant, in the appeal was that, a business relationship subsisted between the Appellant (i.e., the Operational Creditor) and, the Respondents (the Corporate Debtor) herein, for supply of stainless steel sheets, rods and pipes etc. And the said business transactions persisted between the Appellant and the Respondent (Corporate Debtor), which in the instant case as alleged pertained to the period from March 2018 to June 2018. The Appellant contends that, he has supplied the material to the Corporate Debtor and a total transaction which has been ultimately carried and quantified between the parties during this aforesaid period was determined by the Appellant, as to be Rs. 1,14,70,735.98/-. It is an admitted case of the Appellant that the Corporate Debtor till 18.06.2018 had made the payment of Rs. 60,00,000/-, with an addition of Rs. 5,00,000/- as an interest towards it, out of the total principal amount due to be payable. And after the aforesaid payment and having deducted the same from the principal amount due, it was contended by the Appellant (Operational Creditor) in his application preferred under Section 9 of I & B Code, that as on the date, prior to initiation of the proceedings by issuing notice under Section 8 of I & B Code, the total amount of debt remaining outstanding due to be paid stood to be Rs. 57,16,918.10/-.

3. Raising its demand, the Appellant had issued notice under Section 8 of I & B Code on 05.12.2018. The same was returned, as it remained unclaimed. But the case of the Appellant is that, in its all prior communications, particularly those which were made through the WhatsApp messages, even much prior to the issuance of notice under Section 8 of I & B Code on 05.12.2018, the amount thus claimed, has been admitted to be paid by the Respondent (Corporate Debtor) rather, at certain point of time was apparent from the communications, the Corporate Debtor had also assured to remit the amount. He contends that owing to the contents of the WhatsApp communication on which reliance has been placed by him, it showed that the debt remained payable and thus Section 9 proceedings ought not to have been dismissed by the Adjudicating Authority on the ground that there existed a pre-existing dispute. The Appellant's case before the Ld. Adjudicating Authority was that the Corporate Debtor prior to the issuance of notice under Section 8 of I & B Code on 05.12.2018, had issued an acknowledgement on 01.12.2018, acknowledging the debt due to be paid to the Appellant.

4. When, despite of the assurance extended by the Corporate Debtor, and vide the acknowledgment of due, made on 01.12.2018, the amount was not remitted, the demand notice under Section 8 of I & B Code dated 05.12.2018, was issued by the Appellant under Form-3 and Form-4, to the registered office of the Corporate Debtor raising a demand of the aforesaid amount of debt, that was due

to be paid, which yet again was, like the notice of 27.11.2018, remained not acted upon due to which the necessity arose for the Appellant to initiate Section 9 of I & B Code proceedings.

5. To the notice of demand dated 27.11.2018 and 05.12.2018, the Corporate Debtor did submit a reply on 06.12.2018, when he made an attempt to deny the demand, raised by the appellant for payment of due amount, as per the demand notice under Section 8 of I & B Code, contending thereof that there is no amount due to be paid, and therefore the demand notice under Section 8 of I & B Code was bad in the eyes of the law.

6. It is observed that the acknowledgement of debt, by the Corporate Debtor, had been given quite regularly, in its various communications placed by the Appellant on record and particularly that of 18.12.2018, where the Corporate Debtor has acknowledged the issuance of demand notice and further in response thereto as made on 20.12.2018 the Corporate Debtor had rather promised that, he is going to make good the payment of the amount thus claimed to be paid by issuance of notice under Section 8 of I & B Code. After the issuance of demand notice under Form-3 under Section 8 of I & B Code, an email communication was also sent to the Corporate Debtor, which was responded by the Corporate Debtor, though purportedly attempting to raise a concocted dispute which was not even subsisting before, raising a dispute that there was no question of liability and that the same cannot be determined on the basis of the WhatsApp

communications and the messengers conversation, in order to establish that there was an existing financial debt, which could have been said to have fallen due to be paid by the Respondent (Corporate Debtor) to the Appellant (Operational Creditor). Based on the aforesaid factual rival contentions, the issue was carried before the Ld. Adjudicating Authority and the same was answered against the Operational Creditor by the Impugned order of 27.07.2023, observing thereof that, there is no due which was payable and as there was no existing financial debt, the application preferred, under Section 9 of I & B Code, deserves to be rejected.

7. The Ld. Counsel for the Appellant, in extension of his argument as pleaded in the memo of appeal and the communications, placed therein, has submitted that, if the communications, which were made by the Corporate Debtor on the WhatsApp numbers are taken into consideration, this will itself amount to be an admission of a financial debt, which will fall to be payable as per the provisions of the I & B Code, by initiation of proceedings under Section 9 of I & B Code. In the communication placed on record i.e., dated 04.06.2018, the Respondent (Corporate Debtor) had dropped a message thereby admitting the liability and also ensuring to pay the first installment of the amount due to be paid to the tune of Rs. 20,00,000/-. This communication, as it has been argued by the Ld. Counsel for the Appellant, would amount to be an admission of debt, because in the communication dated 05.06.2018, the Corporate Debtor has submitted that

“please give me some time to get off the ailment” as referred to in the communication, so as to enable him to pay the amount which was due to be paid, and for which the Corporate Debtor on 06.06.2018, in his WhatsApp communication had prayed for, a forgiveness in making the delayed payment of the amount, which was being demanded to be paid, by the Appellant.

8. The Ld. Counsel for the Appellant, has drawn the attention of this Appellate Tribunal to various other communications, which were made from time to time between the parties in the relevant period on 11.06.2018, the Corporate Debtor has submitted that since presently he was in hospital due to his mother's ailment, he could not meet the Appellant personally so as to clear the dues, as assured by his earlier communications. In one communication which has been referred to, the Corporate Debtor had stated as under, ***“I spoke to bank trade manager, tomorrow before lunch time amount would be credited to your account without fail”. “Im in hospital for my mom operation. I cannot come to office today.”*** This communication as recorded will amount to be an admission of debt and as an assurance too, to remit the amount and it will also amount to admitting the default. In yet another WhatsApp communication dated 10.07.2018, the Corporate Debtor through his mobile number has dropped a message to the effect that ***“tomorrow evening hopefully, your payment will be initiated”***. Almost a similar nature of correspondences was made by the Corporate Debtor on 16.07.2018, where the Corporate Debtor has submitted that, ***“tomorrow***

evening some amount will make you in cash". Lastly, as it has been submitted by the Appellant that, the Corporate Debtor on 05.12.2018 had made a communication that by Saturday, he will be ensuring to release the entire amount, referring the demand of Rs.54,70,735/- as raised in the demand notice. All these aforesaid communications, and the ultimate communication which was made on 18.12.2018, wherein the Respondent Corporate Debtor has submitted that *"tomorrow we will try to get your payment"*, point to the fact that there was an apparent and admitted, default because of non-compliance with the conditions of notice of demand issued to him under Section 8 of I & B Code and further because of the evidence of an admission of the default having been committed.

9. On the contrary it has been submitted by the Learned Counsel for the Respondent, that there had been a consistent denial, at their behest with regards to the admission of any financial liability, so as to be considered as a financial debt which is due to be paid, which could have enabled the Appellant to initiate a proceeding under Section 9 of I & B Code. To substantiate his argument, the Ld. Counsel for the Respondent (Corporate Debtor) had submitted that he had given a response to the legal notice given by the Corporate Debtor wherein, in the response dated 04.08.2018, given by him, to the e-mail dated 01.08.2018, he has explicitly admitted the liability but tried to evade it, by contending that, no amount in fact was due to be paid which could be termed as to be a financial debt for drawing the proceedings under Section 9 of I & B Code. The Ld. Counsel

further submitted that, in the other communications, which were made between the parties, it shows that there arose a dispute with regards to the non-supply of the quality and the Material Test Certificates (MTC), in relation to the products which were supplied and its quality. However, it has to be kept in mind that the quality could not be an aspect, which could be agitated at this belated stage and be considered, more particularly, when the material supplied by the Appellant to the Corporate Debtor have been used without the same being got tested at an appropriate stage before its utilization. The utilization of goods supplied by the Operational Creditor, without raising objection, would give rise to presumption that the material supplied was up to the mark, which was utilized by the Corporate Debtor and for, which the Corporate Debtor would be liable to pay the amount.

10. It is argued by the Ld. Counsel for the Appellant, that the contention of the Ld. Counsel for the Respondent, that the reply of the Respondent dated 04.08.2018, contending it to be a reply in response to the demand notice, is not acceptable for the reason being that, the response given on 04.08.2018 by the Corporate Debtor in fact was a reply to the e-mails, but not to the demand notice either of 27.11.2018 or 05.12.2018. However, the Ld. Adjudicating Authority by the Impugned Order dated 27.07.2023, had rejected the application under Section 9 of I & B Code for initiation of the CIRP proceedings, by assigning reasons to the effect, that according to the evidence which has been led by the Operational Creditor, if it is read with the evidence led by the Corporate Debtor, the Tribunal

has recorded a very evasive finding in Para 11 of the Judgment, in relation to the purchase orders issued by the Corporate Debtor to the effect that, the Operational Creditor was required to provide a 'Material Test Certificates (MTC)' along with the dispatched codes and hence in the absence of there being a Material Test Certificate being placed on record, it has to be held that the Operational Creditor has supplied the material of inferior in quality. This argument cannot be accepted by us, because, at no point of time when the business transaction was subsisting between the parties and the material was being supplied by the Appellant and being used by the Respondent (Corporate Debtor), they had ever raised any objection pertaining to the quality of the material supplied, and rather the material supplied was being utilized without objection and material quality test in the operational activities of the Corporate Debtor, even after the test certificates which were issued by the Standard (Madras) Laboratories and Barath Metallurgical Laboratory, alleging that the quality of material was supplied was only SS 316, which was not as per the standard criteria. It was argued that the amount claimed under the demand notice would not be a financial debt, is not acceptable by us, when there had been no material enough on record by the Corporate Debtor of ever raising an objection towards quality of goods supplied, before its utilization by him, in its Operational activity. As per normal business practice, the material quality is required to be checked for quality before it is used in the operation and this has not been done by the Respondent.

11. Primarily the Ld. Adjudicating Authority had referred to the reply, which was submitted by the Corporate Debtor on 04.08.2018, and particularly a wrongful reference has been made by the Ld. Adjudicating Authority to Para 12 which reads about para 3 of the said Rejoinder Affidavit. As regards to the demand notice and for raising of a dispute regarding quality of goods supplied for the first time, they were contrary to the document records and the finding, which has been recorded, and further without considering the admitted WhatsApp communications, made between the parties in relation to the business transactions and the default committed. Thus, the analogy which has been drawn by the Ld. Adjudicating Authority with regards to the pre-existing dispute based upon the Judgment of **Mobilox Innovations Private Limited Versus Kirusa Software Private Limited as reported in 2017 (1) SCC Online SC Page 353**, dealing with aspect about the “**pre-existing dispute**” that cannot be universally made applicable by drawing the inferences from the observations made in Para 33 of the said Judgment and the conclusion drawn in its Para 51, because these observations which were made therein were based upon, altogether on a distinct fact and circumstances, which are not identical to the one at hand in the instant appeal, where in the said Apex Court Judgment, the inference pertaining to the aspect of existence of a dispute has been drawn on the basis of the implication under Section 8 (2)(a) of the Arbitration Act, to the effect that the arbitration proceedings must be pre-existing. Relevant para 33 and its conclusion in para 51 is extracted hereunder: -

“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)1. 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.”

“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.”

12. In fact, in a nutshell if this Judgment is summarized, we are of the view that for the purposes of drawing a proceeding under Section 9 of I & B Code, it has to be seen, that whether it was a due payable as a consequence of the business transactions and the recourse to the process of Section 9 of I & B Code, should not be a way of a debt recovery forum. Thus, the implication of Para 31 and 32, as extracted from the Judgment of **M/s. S.S. Engineers & Ors. Versus Hindustan Petroleum Corporation Limited & Ors.**, as reported in 2022 SCC

online Supreme Court Page 1385, instant case, will not apply, because in accordance with the evidence, which was placed on record by the Appellant in order to substantiate that, there existed a financial debt due to be paid, which was emanating from a contractual obligation, under the facts of the instant case as it stood admitted by the Respondent in their WhatsApp communications that there is an acknowledgement of liability and the so called alleged demand, holding it to be back dated on 20.12.2018 is absolutely a contrary inference drawn in that regard is without any logical basis, as no notice was sent on 05.12.2018. A weak defence has been sought to be raised by the Respondent stating that, no demand notice were sent on 05.12.2018, which is absolutely misconceived, owing to the fact that by the WhatsApp messages, which were exchanged after the date of the notice i.e. 05.12.2018, the Respondent had acknowledged the existence of debt with an assurance to pay, as is evident from the WhatsApp message on 18.12.2018, whereby the Respondent had assured to remit the amount on the next date. Looking to the communications and the admission of liability by the respondent, it is clear that there existed a financial debt arising out of a business transaction, which in spite of raising of the demand, admittedly was not remitted, even after a proper issuance of notice under Section 8 of I & B Code, the factum of which stood admitted by the Respondent in the subsequent communication made on the WhatsApp message. It is a fact which stood established by evidence, and thus the contention raised by the Respondent to the contrary with regards to the reply to the legal notice of 05.12.2018, will not carry much weight.

13. Much stress has been placed by the Ld. Counsel for the Appellant with regards to the legal notice dated 05.12.2018, and the the reply statement which was filed by the Respondent Company on 06.12.2018. If the contents of said legal notice are taken into consideration in its entirety particularly, the conclusion as referred to therein, it does make out a case as argued by the Appellant from the contents of the reply and the Material Test Certificates (MTC), which has been referred to in the response affidavit. Apart from it, even if for the time being we presume that, the legal notice of 05.12.2018, if at all it had any bearing, the Ld. Tribunal ought to have dealt with it and could have made reference to as to how the said legal notice will at all, have been any impact on drawing the proceedings under Section 9 of I & B Code, but there is an absence of there being any specific finding recorded by the Ld. Tribunal with regards to the implication of the contents of the legal notice and the effect of its contents, on the demand notice issued by the Appellant for initiation of Section 9 proceedings. If the Respondent was trying to derive the benefit that Section 8 of I & B Code notice deserved to be turned down owing to the pre-existing dispute, then this should have been established by the Respondent by way of evidence about pre-existing dispute but no attempt was ever made as such nor the said aspect was considered by the Ld. Adjudicating Authority in its true perspective. Since the amount raised by way of a demand was made in the demand notice issued under Form-3 and Form-4 on 05.12.2018, and since in the subsequent communications it has been admitted by the Respondent, it will amount to be a debt due to be paid, and the proceedings

cannot be said to be barred by any law, to hold it back, on the grounds that there was a pre-existing dispute, and hence Section 9 of I & B Code, could not have been initiated. Thus, findings of the Ld. Adjudicating Authority and the conclusion arrived are contrary to the evidence on records.

14. Owing to the aforesaid fact, the very logic which has been assigned in the Impugned Order dated 27.07.2023, as rendered in the Company Petition IB No. (IBA) 115/CHN/2019, is perverse and contrary to the evidence on record. The same would stand ‘quashed’, the Section 9 of I & B Code, application preferred by the Appellant would stand ‘allowed’, directing the Ld. Adjudicating Authority to appoint the Interim Resolution Professional (IRP) and to carry on the CIRP proceedings as per Section 9 of the I & B Code, as per law.

[Justice Sharad Kumar Sharma]
Member (Judicial)

[Jatindranath Swain]
Member (Technical)

16/12/2024
SN/TM/MS