
[2020] 121 taxmann.com 254 (NCL-AT)/[2021] 164 SCL 333 (NCL-AT)/[2020] 222 COMP
CASE 182 (NCL-AT)[27-07-2020]

IBC : Where as per mutual arrangement entered between parties, dispute relating to payment against supply and adjustment of advance loan existed much prior to issuance of demand notice, CIRP application was to be dismissed

■■■

[2020] 121 taxmann.com 254 (NCL-AT)

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

A.K. Alloys

v.

Emrise Engineering (P.) Ltd.

A.I.S. CHEEMA AND A.B. SINGH, JUDICIAL MEMBER
AND KANTHI NARAHARI, TECHNICAL MEMBER
COMPANY APPEAL (AT) (INSOLVENCY) NO. 1171 OF 2019[±]
JULY 27, 2020

Section 5(6), read with section 9, of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Dispute - Operational creditor, a manufacturer, supplied valve casting products to corporate debtor who was a supplier - Operational creditor stated that corporate debtor failed to make payment and a demand notice was issued to corporate debtor, in reply to which corporate debtor had not denied liability - Corporate debtor contended that it gave Rs. 25 lakh as advance loan to operational creditor with a condition to repay when operational creditor would be successful to recover same from one FVLP which defaulted in payment - An email dated 12-11-2016 issued by director of corporate debtor to operational creditor showed that there were arrangements or agreements between operational creditor, corporate debtor and FVLP, which was continuing from 2016 - Corporate debtor pointed out that entry regarding payment of Rs. 25 Lakhs to operational creditor by corporate debtor was reflected in account of operational creditor - There was a letter dated 10-3-2017 which referred to dues of FVPL, had been sent by corporate debtor with regard to how amounts paid were to be adjusted - Whether e-mail dated 12-11-2016 and letter dated 10-3-2017 showed that there was dispute much prior to issuance of demand notice dated 22-8-2018 - Held, yes - Whether, therefore, CIRP application filed by operational creditor against corporate debtor was to be dismissed - Held, yes [Para 20]

CASE REVIEW

A.K. Alloys v. Emrise Engg. (P.) Ltd. [2020] 121 taxmann.com 253 (NCLT - Ahd.) (para 20) *affirmed* [See *annex*].

JUDGMENT

A.B. Singh, Judicial Member. - The instant Appeal has been filed against the order dated 23rd September, 2019 passed by the Adjudicating Authority, National Company Law Tribunal, Ahmedabad Bench, whereby the petition under section 9 of the Insolvency and Bankruptcy Code, 2016 filed by Appellant (Operational Creditor) has been dismissed.

2. The Appellant (Operational Creditor) a sole proprietorship firm is Manufacturer and Supplier of Iron & Steel Castings in India and has supplied the goods being the Valve Casting products to the Respondent

(Corporate Debtor) who is a supplier of Gate Valves, Globe Valves in India.

3. The said goods were received and accepted by Corporate Debtor and there was no dispute at the time of delivery of the goods or thereafter relating to the Quantity and Quality of goods but subsequently the Respondent (Corporate Debtor) has failed to make the payment for the outstanding dues of the invoices from August 4, 2016 till December 9, 2017 amounting to Rs. 15,57,708/- (Rupees Fifteen Lakh Fifty Seven Thousand Seven Hundred Eight Only). The Corporate Debtor never refused its liability to make payment of outstanding amount but did not make any payment and thus it fell in default of total amount of Rs. 18,58,101/- payable to the Operational Creditor which includes an interest @ 18% p.a.

4. Further case is that the Appellant (Operational Creditor) had served upon the Respondent (Original Corporate Debtor) a Demand Notice in Form 3 along with Form 4 as required under section 8 of the I&B Code, 2016 dated 22-8-2018 which was duly replied by the Respondent. The liability was not denied and further urged in the said email dated 19-9-2018 as under:—

"please note that we have come up to this due to certain financial slowdown in our cashflow. Never the less we are committed to repay dues at the earliest and we are working on this."

5. That *vide* subsequent email dated 27-9-2019, the Respondent (Corporate Debtor) again acknowledged and admitted its liability to make payment to the Appellant and also furnished the repayment plan in instalments. The contents of email dated 27-9-2018 sent by the Respondent to the Appellant is reproduced hereunder for ready reference:—

"Dear Prakash Bhai & Saurabh Bhai, As per our telephonic discussion here with we are Proposing payment plan as below:

3,66,095.00 -	25-Dec-2018
3,75,061.82 -	20-Jan-2019
3,07,756.98 -	20-Feb-2019
5,07,956.20 -	20-Mar-2019

We request you with humble to accept above payment plan. If required I propose to meet at your office and conclude if you have any suggestions or modifications.

Best Regards,

Vipul K. Parekh"

Thus the Respondent (Corporate Debtor) admitted its liability to make payment to the Appellant in writing and also gave payment plan. The Respondent also paid Rs. 1,50,000/- to the Appellant on 5-11-2018 but failed to make payment even after its own admission and written promise.

6. The Respondent failed to adhere to its promise to make payment and did not make any payment as per the payment schedule given by itself (except Rs. 1,50,000/- paid on 5-11-2018). The appellant (Operational Creditor) filed application in Form 5 as envisaged under section 9 of the I&B Code, 2016 before the Ld. NCLT, Ahmedabad to initiate Corporate Insolvency Resolution Process against the Respondent (Corporate Debtor).

7. The Respondent (Corporate Debtor) appeared and file its Reply Affidavit interalia stated as follows:—

- (i) That the Operational Creditor has manipulated its ledger account at page 59 of the petition wherein the entry of the receipt of Rs. 25,00,000/- dated 2-09-2016 have been shown with a *mala fied* intention.
- (ii) Copy of email dated 23-1-2017 by the Operational Creditor to the Corporate Debtor with ledger account of 2016-17 is annexed at Annexure R-1 (Page No. 163 of the Appeal Paper Book relevant as page No. 164).

8. It is further submitted by the Respondent (Corporate Debtor) that the amount of Rs. 25,00,000/- as advance loan from the Appellant (Operational Creditor) with a condition to repay when the Appellant (Operational Creditor) is successful to recover the same from the Flovel Valves P. Ltd. with default in payment.

9. It is further submitted by the Respondent (Corporate Debtor) that one Company Petition No. (IB) 444 of 2019 before the NCLT, Ahmedabad was filed by the Operational Creditor against Flovel Valves P. Ltd. which was dismissed as withdrawn.

10. It is submitted by the Respondent (Corporate Debtor) that the Appellant (Operational Creditor) tampered with the ledger account which was produced before the Ld. Adjudicating Authority and further committed fraud not disclosing the arrangement made between the parties.

11. It is further submitted that amount under the petition as per the condition is recovered, the Operational Creditor has to return the amount of Rs. 25,00,000/- to the Respondent (Corporate Debtor).

12. Learned counsel for the Appellant during the course of argument submitted that the Adjudicating Authority have failed to considered the facts that the Appellant herein send a Demand Notice under section 8 of the I&B Code, 2016 on 22-8-2018 and the Respondent (Corporate Debtor) in its reply to email dated 24-10-2018 admitted its liability and further its email dated 27-9-2019 address to the Appellant (Operational Creditor) has given proposal to repay this amount in instalment, so Ld. Adjudicating Authority has not considered this facts in proper prospective and mechanically rejected the application filed under section 9 of the I&B Code, 2016.

13. The Ld. Adjudicating Authority after perusal of records has given a finding there is some mutual understanding between both the parties and in view of that the Corporate Debtor paid an amount of Rs. 25,00,000/- to the Operational Creditor as an advance with a condition to repay said amount as and when the Operational Creditor is successful to recover the same from M/s Flovel Valves Private Limited who has defaulted in payment. The said fact is revealed from the email letter dated 12th November, 2016 to the reply issued by Mr. Vipul Parekh being the Director of the Corporate Debtor Company to Mr. Paresh Thakkar of M/s A.K. Alloys (Operational Creditor) which reads as under:—

"The e-mail I am writing herewith to clarify regarding the payment commitment (approx. 22.00 lacs) that was made on behalf of Flovel by EmRise.

We hereby confirm to AK Alloys to formally hold Rs. 22.00 lac from EmRise account against outstanding of Flovel that was for EmRise order. AK Alloys shall hold this amount until Flovel pays this Rs. 22 lacs to AK Alloys. This is required to be done to straighten accounting entries.

Further, Flovel has accepted that said amount of 22 lacs paid/committed by EmRise is from the advance of next EmRise PO (DODSAL order) to Flovel. Flovel shall try and clear the outstanding to AK Alloys during the course of execution of order so that AK Alloys can pay back/release hold payment to EmRise.

I Hope all points are clear to all parties involved. If any doubts or disagreement kindly revert back on timely manner."

14. So, taking the facts emerging the records and also the provision of law the Ld. Adjudicating Authority have given the finding that in reply issued by Mr. Vipul Parekh being the Director of the Corporate Debtor Company to Mr. Paresh Thakkar, Appellant (Operational Creditor) to show that there are some arrangement/understanding and/or agreement between the Operational Creditor, Corporate Debtor and Flovel Valves which is continuing from 12-11-2016. This itself shows that there is dispute much prior to the issue of Demand Notice which was received on 22-8-2018 dismissed the application.

15. The learned counsel for the Appellant further, during course of argument referred to Page Nos. 163 and 164 of the Appeal Paper Book which is the Account ledger of AK Alloys the Appellant (Operational Creditor) sent through email dated 23-1-2017 submitted that the ledger attached to the email Page no. 164 of the Appeal Paper Book shows that entry dated 2-9-2016 that the Corporate Debtor have paid Rs. 25,00,000/- to Operational Creditor and it's reflected in the Account of Operational Creditor.

16. The learned counsel for the Respondent (Corporate Debtor) on the other hand, referred to Page no. 164 of the Appeal Paper Book pointed out that the aforesaid entry regarding payment of 25,00,000/- to the Operational Creditor by the Respondent (Corporate Debtor) is reflected in the Account of Operational Creditor. But during course of argument, learned counsel for the Appellant (Operational Creditor) produced one letter dated 10th March, 2017 sent by the Respondent (Corporate Debtor) referred dues of Flovel Valves Pvt. Ltd. said to have been sent by the Corporate Debtor with regard to how the amounts paid are to be adjusted. This document was taken on record and marked as 'X'.

17. After hearing the parties and going through the order of the Ld. Adjudicating Authority, we are of the considered view that Annexure - 2 at Page no. 107 of the Appeal Paper Book statement does not show dues payment of Rs. 25,00,000/- by the Appellant (Operational Creditor).

18. Further, Annexure R-1 of the Written Submissions filed by the Respondent (Corporate Debtor) which is the e-mail ledger account of the Appellant (Operational Creditor) relevant at page no. 164 of the Appeal Paper Book dated 2-09-2016 shows receipt of Rs. 25,00,000/- first time during the course of argument before this Appellate Tribunal. This document has been marked as 'X'.

19. In the above circumstances, as letter sent by the Respondent (Corporate Debtor) to the Appellant (Operational Creditor), this document 'X' was not placed before the Adjudicating Authority. So Ld. Adjudicating Authority rightly came to the conclusion that prior to filing of the application on 14th November, 2018, there is/are pre-existing dispute raised by the Respondent in respect of container detention charges. In the result, Company Petition (IB) No. 2 of 2019 filed by applicant M/s A. K. Alloys stands dismissed.

20. We also find that there was a pre-existing dispute and the Ld. Adjudicating Authority rightly dismissed the application filed under section 9 of IBC.

21. We do not find any reason to interfere with the impugned order. There is no substance in the Appeal.

The Appeal is dismissed. No order as to costs.

ANNEX

[2020] 121 taxmann.com 253 (NCLT - Ahd.)

NATIONAL COMPANY LAW TRIBUNAL, AHMEDABAD BENCH

A.K. Alloys v. Emrise Engineering. (P.) Ltd.

Ms. MANORAMA KUMARI, JUDICIAL MEMBER
AND CHOCKALINGAM THIRUNAVUKKARASU, TECHNICAL MEMBER
C.P. (IB) NO. 2/9/NCLT/AHM/2019
SEPTEMBER 23, 2019

Dr. Kamlesh Vaidankar, Adv. for the Petitioner. **Pratik Thakkar**, Adv. for the Respondent.

ORDER

Ms. Manorama Kumari, Judicial Member. - Mr. Prakash Doshi, on behalf of the operational creditor M/s. A.K. Alloys filed this Petition under section 9 of The Insolvency and Bankruptcy Code, 2016 [hereinafter referred to as "the Code"] read with rule 6 of The Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 [hereinafter referred to as "the Rules"].

2. The applicant/operational creditor is a proprietorship firm having registered office at Plot No. 512/7, GIDC Estate, Kathwada, Ahmedabad 382 415, Gujarat State is engaged in the manufacture and supply of iron and steel castings.

3. The respondent/corporate debtor is a company registered under the Companies Act, 1956 incorporated on 10-2-2010 having identification No. U29199GJ2010PTC059535 having registered office at Grain Market Road, Jamnagar 361 005, Gujarat State. Authorised share capital of the respondent company is Rs. 1,00,000/- and paid up share capital is Rs. 1,00,000/-.

4. The applicant/Petitioner submitted that the applicant had supplied goods to the respondent during the period from 4th August, 2016 to 9th December, 2017 as per the invoices/delivery challans copy of which are placed at page No. 31 to 56 to the application totally amounting to Rs. 15,57,708/-. That, the corporate debtor is also liable to pay interest @ 18% per annum on the outstanding due amounting to Rs. 3,00,394/- as interest, as per the terms of the invoices from their due date of invoices, till 22nd August, 2018 as per the computation placed at page No. 60 to the application. That, statutory demand notice in form 3 along with form 4 dated 22nd August, 2018 as required under section 8 of the IB Code issued by the operational creditor is placed at page No. 72-79 to the application. That, copy of the statement of bank account of the Ahmedabad Mercantile Co.op. Bank Ltd. for the months August and September, 2018 where deposits are made or credits are received

normally by the operational creditor in respect of corporate debtor, is available at page No. 57-59 to the application.

5. It is further submitted by the operational creditor that despite reminders the outstanding dues remain unpaid till date. That as on date the corporate debtor is liable to pay the operational creditor a total sum of Rs. 18,58,101/- (Rupees eighteen lacs fifty-eight thousand one hundred and one only) which include interest @ 18% per annum amounting to Rs. 3,00,394/- as per the terms of the invoices from the due date of invoices till the date of 22nd August, 2018.

6. In support of its claim, the petitioner has submitted copy of all the documents referred to in this application.

7. The respondent/corporate debtor filed affidavit in reply *inter alia* stating as under:—

- ◆ The operational creditor has manipulated its ledger account at page 59 of the petitioner wherein the entry of the receipt of Rs. 25,00,000/- dated 2-9-2016 and had with *mala fide* intention, tampered its ledger account. Copy of e-mail dated 23-1-2017 by the operational creditor to the corporate debtor with ledger account of 2016-17 is annexed at Annexure R-1.
- ◆ The entire proceeding is being planned and framed by a recovery agent Mr. Saurabh Khandelwal who runs a website being www.business-doctors.in for such recovery on behalf of the operational creditor.
- ◆ That the operational creditor has produced the e-mails from the recovery agent Mr. Saurabh Khandelwal and operational creditor by threatening the corporate debtor for CIRP and further for punishment of concealment of property, punishment for transaction defrauding creditors, punishment for misconduct in the course of CIRP, punishment for falsification of books of corporate debtor and under other provisions of IBC.
- ◆ That, further instructions to file present petition is only given to Mr. Vaibhav Mohnot, while the demand notice form-3 and form-4 are issued by Mr. Jayesh Dwivedi who as per the records produced till now does not have any authority to issue such demand notice on behalf of the operational creditor.

8. It is further alleged by the respondent that the operational creditor had received advance loan from the corporate debtor of Rs. 25,00,000/- with a condition to repay as and when the operational creditor is successful to recover the same from the Flovel Valves P. Ltd. who has defaulted in its payment and criminal proceedings are in progress.

9. It is further submitted by the respondent that the operational creditor tampered with the ledger account produced before the Tribunal and thus committed fraud not disclosing the arrangements between the parties. That, if the amount under the petition is recovered, the operational creditor has to return the amount of Rs. 25,00,000/- to the corporate debtor. That, copy of e-mail dated 12-11-2016 being a triparty understanding is placed at page No. 10 to the reply. That, with regard to the invoices produced with the instant petition, the corporate debtor has already paid an amount of Rs. 1,50,000/- to the operational creditor.

10. The corporate debtor has further submitted that the corporate debtor had to pay Rs. 42,480/- to the recovery agent by way of RTGS on 29-11-2018 and the recovery agent had issued tax invoice against such payment, copy of such invoice is placed at page No. 10.

Findings:

11. Heard the learned counsels for both the sides and perused application, written objections and the documents submitted by the parties.

12. On perusal of the records it is found that there is some mutual understanding between both the parties and in view of that the corporate debtor paid an amount of Rs. 25,00,000/- (Rupees twenty-five lacs only) to the operational creditor as an advance with a condition to repay said amount as and when the operational creditor is successful to recover the same from M/s. Flovel Valves Private Limited who has defaulted in payment. The said fact is revealed from the e-mail letter dated 12th November, 2016 placed at page No. 10 and marked as Annexure R-2 to the reply issued by Mr. Vipul Parekh being the director of the corporate debtor company to Mr. Paresh Thakkar of M/s. A.K. Alloys (Operational Creditor) which reads as under: —

"The e-mail I am writing herewith to clarify regarding the payment commitment (approx. Rs. 22.00 lacs) that was made on behalf of Flovel by EmRise.

We hereby confirm to AK Alloys to formally hold Rs. 22.00 lac from EmRise account against outstanding of Flovel that was for EmRise order. AK Alloys shall hold this amount until Flovel pays this Rs. 22 lacs to AK Alloys. This is required to be done to straighten accounting entries.

Further, Flovel has accepted that said amount of 22 lacs paid/committed by EmRise is from the advance of next EmRise PO (DODSAL order) to Flovel. Flovel shall try and clear the outstanding to AK Alloys during the course of execution of order so that AK Alloys can pay back/release hold payment to EmRise.

I Hope all points are clear to all parties involved. If any doubts or disagreement kindly revert back on timely manner."

13. This correspondence goes on to show that there are some arrangement/understanding and/or agreement between the operational creditor, corporate debtor and Flovel Valves which is continuing from 12-11-2016. This itself shows that there is dispute much prior to the issue of demand notice which was received on 22-8-2018.

14. It is further alleged that the operational creditor had tampered with ledger account produced before the Adjudicating Authority. On perusal of the ledger account produced by the applicant at page No. 59 and the ledger account produced by the corporate debtor at page No. 8 of the objection, it is found that both are not same. There is a variation at entry dated 2-9-2016 in ledger statement produced by the corporate debtor and that of the operational creditor. As per ledger of corporate debtor Rs. 25,00,000/- has been paid to the operational creditor. This entry of Rs. 25,00,000/- has not been shown in the ledger of operational creditor. To come to such finding, whether the corporate debtor has actually paid or not is the matter which requires testimony of the documents by way of evidence which is not possible here before the Adjudicating Authority.

15. On further perusal of the record it is found that the operational creditor has annexed the bank statement from 1-8-2018 to 30-9-2018, whereas invoices are from 4-8-2016 to 9-12-2017. Thus it is not possible to find out if there is any payment made in between. However, one document which is relied by the operational creditor at page No. 57 (Ex."C") goes on to show that there was payment of Rs. 15,57,708.80 on 21-4-2018.

16. From the above discussions it is found that the documents attached to the application itself shows that there exists pre-dispute regarding the claim amount. The e-mail communication from the respondent company, placed at page No. 10 to the reply clearly shows that there is/was pre-existing dispute.

17. Since the very objective of the Code is re-organisation and insolvency resolution of corporate persons, no objective will be served by subjecting a solvent company to insolvency resolution process. Further, recovery is an individual effort by a creditor to recover its dues through a process that has debtor and creditor on opposite sides. When creditors recover their dues - one after another or simultaneously from the available assets of the firm, nothing may be left in due course. Thus, while recovery bleeds the corporate debtor to death, resolution endeavours to keep the corporate debtor alive. In fact, the I & B code prohibits and discourages recovery in several ways. In the matter of *"Arcelor Mittal India (P) Ltd. v. Satish Kumar Gupta* [2019] 2 SCC 1 the Hon'ble Supreme Court observed that "corporate debtor" consist of several employees and workmen whose daily bread is dependent on the outcome of the CIRP. If there is a resolution applicant who can continue to run the corporate debtor as a going concern, every effort must be made to try and see that this is made possible".

18. Further, IB Code provides that while admitting an application for initiation of corporate insolvency resolution process, in addition to fulfilling other requirements, it must be supported by documentary proof of undisputed debt. The Supreme Court in *IBA Health (I) (P) Ltd. v. Info Drive Systems Sdn. Bhd.* [2010] 8 taxmann.com 1/104 SCL 367 has held that a company court should act with circumspection, care and caution must be taken and examine as to whether an attempt is made to pressurize the company to pay a debt which is substantially disputed. IB Code is not a recovery agent and it is not reasonable to permit a party to set the law in motion and thereby bring the death of a going concern, upon which the livelihood of number of employees are dependant. That apart, it may have adverse effect on the economy, when for some individual grievances the appropriate forums are available, more so, when dispute requires trial to ascertain the entitlement of right to recover the amount as claimed or otherwise. For certain individual grievances or grudges a sound and a going concern cannot be brought to death, when livelihood of hundreds of employees is concerning. This Tribunal cannot be allowed as a recovery forum or court.

19. In view of what is discussed above, the Adjudicating Authority is of the considered view that the instant petition is not maintainable on the ground that prior to filing the application on 14th November, 2018, there is/are pre-existing dispute raised by the respondent in respect of container detention charges. In the result, Company Petition (IB) No. 2 of 2019 filed by applicant M/s. A.K. Alloys stands dismissed. No order as to costs. The findings or observations, if any, made in this order may not come in the way of the Petitioner establishing its claim or for the Respondent to establish its defence before any other Forum.

20. Communicate a copy of this order to the Applicant/Financial Creditor and to the respondent/Corporate Debtor.

SB

‡ Arising out of Order of NCLT *A.K. Alloys v. Emrise Engineering (P.) Ltd.* [2020] 121 taxmann.com 253 (NCLT - Ahd.).