NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 213 of 2023

(Arising out of Impugned Order dated 20.02.2023 passed by the Adjudicating Authority/National Company Law Tribunal, Chandigarh Bench, Chandigarh in CP(IB) No. 296/Chd/Hry/2019 under Section 9 of the Insolvency and Bankruptcy Code, 2016)

In the matter of

Feng Ji
R/o L 203, Park Place,
Sector 54, Gurgaon. ..... Appellant

Versus

Giesecke & Devrient MS India Pvt. Ltd.,
Plot No. 218, Block A,
Okhla Industrial Area,
Phase-I, New Delhi-110020. ..... Respondent No. 1

ZTE Telecom India Private Limited,
Through the IRP
Mr. Naresh Kumar Aggarwal,
Coworks, 5th Floor,
Building No. 10, Tower A,
DLF Cyber City, phase-II,
Gurgaon, Haryana-122002. .... Respondent No. 2

Present

For Appellant: **Mr. Arun Kathpalia, Sr. Advocate with Mr. Abhijeet Sinha, Mr. Vijay Kaundal, Mr. Nitish K. Sharma, Ms. Nandini Aishwarya, Advocates**

For Respondent: **Mr. Samudra Sarangi, Ms. Saloni Jain, Ms. Alisha Luthra, Advocates for R-1.**

Judgment
(Date: 11.08.2023)

{Per: Dr. Alok Srivastava, Member (T)}

1. This appeal has been preferred by the Appellant under section 61 of the IBC, who is aggrieved by the order dated 20.2.2023 (in short "Impugned Order") passed by the Adjudicating Authority (NCLT, Chandigarh Bench) in CP(IB) No. 296/Chd/Hry/2019, whereby an application under section 9 of the Insolvency and Bankruptcy Code, 2016 (in short "IBC") filed by the Respondent/Operational Creditor has been admitted thereby initiating Corporate Insolvency Resolution Process (in short "CIRP") of the corporate debtor. The Appellant is a suspended Director of the Corporate Debtor ZTE Telecom India Private Limited.

2. In brief, the facts of the case, as stated by the Appellant, is that a Master Service Agreement ("MSA") was signed between the corporate debtor and the operational creditor on 17.9.2015 with the validity of five years upto 16.9.2020. In accordance with the MSA, the Respondent as "Sub-Contractor" or "Service Contractor" was expected to execute the Works as stated in the MSA, which included Site Construction, Network Planning and Optimization,

Telecom Implementation, and Final Acceptance, as covered in the "Scope of Works" in the MSA. Subsequently, supplementary agreements were executed between the corporate debtor and operational creditor/respondent in continuation of the MSA which covered various aspects of the Works and certain other provisions.

3. The Appellant has further stated that in accordance with the work completed by the respondent, invoices were raised by the respondent from time to time and due payments were made by the corporate debtor to the operational creditor. He has added that four invoices relating to the period starting from 26.12.2016 upto 25.1.2017 were issued by the respondent, but they were not found in order by the corporate debtor since there was change from Service Tax regime to Goods and Services Tax regime (GST). Therefore, the corporate debtor raised the issue of the four "Vouchers Rejected by the Project", namely NV No. 3189000123 dated 26.12.2016 for Rs. 5,752,713.00, NV No. 3189000140 dated 28.12.2016 for Rs. 5,572,713.00, NV No. 3189000143 dated 28.12.2016 for Rs. 5,572,713.00 and NV No. 3189010008 dated 25.01.2017 for Rs. 5,572,713.00 and communicated to the respondent/operational creditor about the rejected invoices and

later, in accordance with discussion between the parties, the four issued invoices were cancelled and new purchase orders were issued by the corporate debtor. Thereafter fresh invoices were sent by the operational creditor to the corporate debtor incorporating the GST on the basis of new purchaser orders. The Appellant has further stated that it transpired during discussion between the two parties that the operational creditor had already deposited with the government 15% service tax for the four invoices raised earlier, and now that new invoices again required payment of 18% GST, the operational creditor was not comfortable with taking a fresh hit of another 18% when it had already deposited 15% service tax on account of GST. He has further stated that as per the new invoices, payments were made by the corporate debtor to the operational creditor. He has further added that the issue of refund/credit of service tax already paid was discussed between the two parties, but no satisfactory resolution of the issue could be found.

4. The Appellant has further stated that the operational creditor issued a demand notice under section 8 demand notice dated 14.2.2019 and the Appellant specifically stated all the facts

relating to the four invoices which were rejected by the corporate debtor's payment system and which were later issued after cancelling the earlier purchase orders issued under the service tax regime. He has added that the operational creditor acknowledged payment of the invoices issued with GST included vide e-mail dated 30.4.2018 and therefore, against the four new invoices, there is no debt owed to the operational creditor by the corporate debtor and therefore, the section 9 petition should not be admitted since the said operational debt is disputed.

5. We heard the arguments advanced by the Learned Senior Counsels for both the parties and perused the record with their able assistance.

6. The Learned Senior Counsel for Appellant has argued that four invoices were issued incorporating the service tax, which were not acceptable to the corporate debtor, and therefore, these invoices were rejected by the payment system, and after mutual discussion between the corporate debtor and operational creditor, four fresh invoices incorporating GST were issued, which were fully honoured and paid by the corporate debtor. He has further

argued that with regard to 15% service tax paid by the operational creditor, he (operational creditor) could seek refund from the tax authorities, but instead of doing so the operational creditor is insisting that the corporate debtor makes good the amount of extra service tax paid by the operational creditor by giving him a set-off. He has referred to a series of e-mails exchanged between the corporate debtor and operational debtor, starting with e-mail dated 25.9.2017 wherein the fact that four vouchers dated 26.12.2016, 28.12.2016, 28.12.2016 and 25.1.2017 were rejected by the Project were communicated, and thereafter in accordance with the provisions of MSA and supplementary agreements, the operational creditor issued four fresh invoices incorporating GST, which were duly paid by the corporate debtor. He has pointed out that "operational debt" as defined in section 3(11) of the IBC is a debt which is a liability or obligation in respect of a claim due from any person and in the present case the debt claimed is not an operational debt. He has further pointed out that section 8 of the IBC gives an opportunity to the corporate debtor to bring the fact of existence of dispute, if any, in relation to the operational debt which was present prior to the issue of demand notice under section 8 of the IBC.

7. In his arguments relating to pre-existing dispute, the Learned Senior Counsel for Appellant has referred to the string of e-mails between the corporate debtor and the operational debtor starting with e-mail dated 25.9.2017 to point out that it was in accordance with the requirement of the Project and the MSA that the fact of rejection of four invoices was brought to the notice of the operational creditor, who issued four fresh invoices incorporating the GST. He has further submitted that the corporate debtor has made full payment with regard to the four fresh invoices which related to the work done and this fact was brought to the notice of the operational creditor vide his reply dated 1.4.2019 to the section 8 demand notice.

8. Finally, the Learned Senior Counsel for Appellant has brought to our attention to paragraph 11 of the Impugned Order to point out that even though the Hon'ble NCLT has noticed the e-mails exchanged between the parties in respect of payment of service tax amount, these e-mails have not been discussed and dealt with in the Impugned Order, and just on the basis of clause 3.2 of the Supplementary Agreement, it has held that since the corporate debtor was under obligation to pay service tax and GST

dues, therefore dues of Rs. 40,37,816/- are liable to be paid by the corporate debtor to the operational creditor under the terms of the contract. He has emphasized that merely stating the conclusion cannot constitute a reason and therefore, the Impugned Order which lacks any reasoning regarding pre-existence or otherwise of dispute ought to be set aside. The Learned Senior Counsel for Appellant has also pointed out that the corporate debtor is a solvent company and going concern with a sizeable number of employees and has discharged its liabilities, including other liabilities owed to the operational creditor, and it is not a fit case for resolution of insolvency merely on a disputed claim of non-payment of certain amount made by the operational creditor without considering the presence of a pre-existing dispute.

9. The Learned Counsel for Respondent No. 1 has argued that the Adjudicating Authority has duly noted the e-mail communication between the two parties in paragraph 7 of the Impugned Order and has given its findings in paragraph 11 by considering at the clauses of MSA and Supplementary Agreements and the liability of the corporate debtor. He has further argued that the reason that the corporate debtor is a healthy and solvent

company cannot be the sufficient reason for not admitting section 9 petition, which should be admitted if the requirements under section 9 is fulfilled. He has further argued that the existence of a dispute relating to non-payment of service tax amount by the corporate debtor is a hypothetical and illusory dispute, which has been raised by the corporate debtor to avoid payment the liable dues and it cannot be reason for not admitting section 9 petition. Lastly, he has argued that the Adjudicating Authority has looked at the fact that there is an unpaid operational debt and default in payment and there is no pre-existing dispute, which is a 'real' dispute, and thus correctly admitted the section 9 application.

10. The main issue that arises in this appeal is whether the dispute relating to the operational debt as claimed by the operational creditor is a pre-existing dispute?

11. The issue of pre-existing dispute in relation to the payment of Rs.40,37,816/- claimed as operational debt by the operational creditor has been dealt in paragraphs 7 and 11 of the Impugned Order. These paragraphs are reproduced below for ease of reference:-

"7. ……. The emails exchanged between the parties were in respect of concern raised by the operational creditor regarding payment of service tax amount. The e-mails dated 30.11.2017, 01.02.2018, 02.02.2018 and 09.08.2018 by the corporate debtor clearly infer that the corporate debtor were confirming the liability of service tax due on them and also suggested issued GST invoices be released and pending service tax amount be adjusted by the corporate debtor. Though there was no liability of the operational creditor to charge the GST amount but the operational creditor has to issue the GST invoices in order to recover the amount due on account of service tax which was already deposited in the government account but in vain, since the corporate debtor neither adjusted the amount of service tax amount by issuing PO for service tax nor released the service tax amount and the operational creditor had to deposit the amount of GST to the government department since received otherwise huge penalty could be levied upon non-deposition of GST amount by GST department. The corporate debtor had not paid the entire amount of service tax raised on invoices generated which were due and the same is admitted by the corporate debtor vide their series of e-mails.

xx xx xx xx

11. The next issue for consideration is whether the operational debt was disputed by the corporate debtor. It is deposed by the petitioner by way of affidavit that the operational creditor had received baseless, bogus and sham notice of dispute under Section 8(2) relating to the Operational Debt. The corporate debtor had rejected the demand of the operational creditor raising the false dispute of incorrect invoices and refused to make the payment of the Operational Debt against the pending invoices."

12. It is noted that a demand notice dated 14.2.2019 under section 8 of the IBC (attached at pp.246-319 of appeal paperbook, Vol.II), was sent by the operational creditor to the corporate debtor.

The demand notice notes in Sr. No. 7 of the "Particulars of the Operational Debt" as follows:-

> *"7. The Operational Creditor, vide an email dated November 20, 2017, informed the Corporate Debtor that the Operational Creditor has already deposited the Service Tax amount with the tax authorities for the invoices raised by the Operational Creditor, on or before June 30, 2017.*
>
> *Hereto annexed and marked as Annexure "A3" is a print of email dated November 20, 2017 addressed by the Operational Creditor to the Corporate Debtor."*

13. The demand notice further notes that vide e-mail dated 9.8.2018, the corporate debtor admitted its liability to bear the service tax amount of Rs.30.01 lakhs. Sr. Nos. 9, 10 and 11 of the 'Particulars of Operational Debt' given in the demand notice under section 8 are also reproduced below:-

> *"9. Thereafter, vide an email dated August 9, 2018, the Corporate Debtor, admitted its liability to bear the Service Tax amount to the tune of Rs 30.01 lakhs, subject to certain conditions as detailed thereunder.*
>
> *10. In any event as per the contract the liability to pay service tax was of the Corporate Debtor and therefore the entire amount is due and liable to be paid by them*
>
> *Hereto annexed and marked as Annexure "A5" is a print of the email dated August 9, 2018.*
>
> *11. It is pertinent to note that despite acknowledging its liability to pay the Service Tax, the Corporate Debtor has till date has not released any payments towards the same. Consequently, as on date an amount of Rs.40,37,816/- (Forty Lakhs Thirty-Seven Thousand Eight Hundred and Sixteen*

only). is due and payable by the Corporate Debtor towards Service Tax."

14. The reply of the corporate debtor to the demand notice dated 1.4.2019 (attached at pp.321-333 of the appeal paperbook, vol.II) in paragraph 6 notes the invoices against which the payment was sought by the operational creditor and further in paragraphs 7,8 and 9, it is stated that fresh purchase orders in relation to the invoices, namely NV No. 3189000123 dated 26.12.2016 for Rs. 5,752,713.00, NV No. 3189000140 dated 28.12.2016 for Rs. 5,572,713.00, NV No. 3189000143 dated 28.12.2016 for Rs. 5,572,713.00 and NV No. 3189010008 dated 25.01.2017 for Rs. 5,572,713.00 were issued under the GST regime, (which had come into force in July, 2017), and thus a liability of 18% GST was included in these invoices. It is the case of the operational creditor as stated in the demand notice under section 8, that since it had already paid service tax @ 15%, it should not be made to pay an additional amount of 18% GST, which got attached with the fresh invoices only on account of the fact that the corporate debtor did not make due payments within 45 days of the issue of four old invoices due to problems the corporate debtor's payment system.

15. Clauses 5.2, 5.5, and 5.7 of the MSA dated 17.9.2015 which relate to the payment terms and issuing of invoices are reproduced below:-

> *"5.2 The price in accordance with, "Pricing & Payment Terms" in the SOW is all-inclusive and the maximum price payable by the Contractor and no additional payments will be made for work carried out in the execution of the Works other than reward and penalty as defined in "Contract Metrics" mentioned in the Supplementary TI/RF/MS/TSP/OFC and all other Service Agreement of this MSA. In addition, and without limiting the generality of the foregoing itis expressly stated that the said price is fully inclusive of all Works described according to "Scope of Works" and "Responsibility. Matrix," and elsewhere in this Agreement and comprises all costs and expenses incurred in the provision of the Works such as all personnel, costs, overheads, profit ,supervision, social costs, Products, personal and work-related transport, communication costs, duties, freight, insurance, packing, storage, unpacking and removal of waste, positioning, installation, commissioning, testing and preparatory work as well as all other charges, expenses whether direct or indirect and whether they are expressly defined or specified in this Agreement as discrete tasks and/or items as well as any and all taxes with the exception of applicable value added tax or other such similar tax which will be added at the rate in force at the time such tax.is chargeable.*
>
> *xx xx xx xx*
>
> *5.5 It is expressly agreed and understood that the Subcontractor shall be liable for all taxes, duties and charges of similar nature imposed against the Works including (but not limited to)the following: company and individual tax, income tax, withholding tax, all other applicable taxes, duties and levies imposed in respect of the Works.*

xx xx xx xx

5.7 Invoices shall be submitted by the Subcontractor on the basis of completed milestones in arrears for the completion defined in this Agreement and/or in accordance with the process described as per" Acceptance Procedure" mentioned in the Supplementary TIRF/MS/TSP/OFC and all other Service Agreement of this MSA. The Contractor shall pay the invoices subject to terms mentioned in the "Pricing & Payment Terms" mentioned in the Supplementary TIRF/MS/TSP/OFC and all other Service Agreement of this MSA."

16. Further, clause 9.2 of the MSA is reproduced below which relates to the resolution of dispute in connection with the agreement:-

"9.2 Any dispute arising from, or in connection with the Agreement shall be first settled through friendly negotiation by both Parties. In case no settlement to disputes can be reached through amicable negotiation by both Parties, the disputes shall then be submitted to INDIA International Economic and Trade Arbitration Commission INDIA Sub-commission for arbitration in accordance with its Arbitration Rules in force at the time of application for arbitration. The arbitration shall proceed in India. The arbitral award is final and binding upon both Parties. The arbitration fees shall be borne by the losing party except otherwise awarded by the arbitration commission."

17. We now consider the e-mails exchanged between the corporate debtor and operational creditor regarding rejection of four invoices issued in December, 2016 and January, 2017.

Admittedly, the four invoices (as stated earlier in this judgment), whose details are also included in section 8 demand notice were issued on 26.12.2016, 28.12.2016, 28.12.2016 and 25.1.2017, which were uploaded in due time on ZTE Information System by the operational creditor. The MSA and Supplementary Agreement stipulate that payments against invoices should be made within 45 days from the date of issue of invoices. This stipulation is also stated explicitly in each of the invoices. It is noted that when by e-mail dated 25.6.2017, the operational creditor enquired about the status of payment, he was intimated by e-mail dated 26.5.2017 that the system was in maintenance and will take one more week to be set right (both these e-mails are attached at pgs.964-966 of the appeal paperbook, vol.II). We find that later vide e-mail dated 25.9.2017 (attached at pg.175 of the appeal paperbook, vol.I) and thereafter, by e-mail dated 20.11.2017, the operational creditor raised the issue of his having paid service tax once and, therefore, not being liable to take hit of another 18% service tax.

18. It is noted that by e-mail dated 27.11.2017 addressed by the operational creditor to the corporate debtor, the operational creditor communicated his Tax Consultant PWC's opinion regarding taking credit for the service tax already deposited by the

operational creditor, which stated that the credit note cannot be claimed by the operational creditor, since the time for filing revised service tax return has already lapsed. The e-mail further stated that the operational creditor may have to, however, consider the option of including tax cost in the value of service and raise invoice accordingly. (e-mail attached at pp. 242-243 of appeal paperbook, vol.I). In response, the corporate debtor vide e-mail dated 20.12.2017 (attached at pp. 244-245 of the appeal paperbook, vol.I) informed the operational creditor that Input Tax Credit can be availed by the operational creditor by filing Tran-1 and/or Tran-2 form by December, 2017. From the pleadings submitted in the application before NCLT, it appears that neither the operational creditor nor the corporate debtor filed any return to avail of the Input Tax Credit or for refund, as may have been applicable, as the dispute regarding the service tax already paid on account of four old invoices remained unresolved.

19. It is admitted by the parties that the four fresh invoices raised by the operational creditor, which are mentioned in para 12 of the reply dated 1.4.2019 to section 8 demand notice, were fully paid in accordance with the new GST regime. Details of these invoices are as under:-

S. No.	Invoice No.	Date	Amount (Rs.)	GST (Rs.)	Total (Rs.)
1.	DL4170200136	26.02.2018	5,002,358.75	900,424.57	5,902,783.00
2.	DL4170200138	05.03.2018	5,002,358.75	900,424.57	5,902,783.00
3.	DL4170200139	05.03.2018	5,002,358.75	900,424.57	5,902,783.00
4.	DL4170200140	05.03.2018	5,002,358.75	900,424.57	5,902,783.00

20. From the detailed discussion above, it is clear that the four new invoices which relate to the work done as covered in the four old invoices issued in December, 2016 and January, 2017 were fully paid by the corporate debtor and these were in accordance with the GST regime. Therefore, it stands to reason that the operational debt with regard to the work done, which was the subject matter of four old invoices, namely NV No. 3189000123 dated 26.12.2016 for Rs. 5,752,713.00, NV No. 3189000140 dated 28.12.2016 for Rs. 5,572,713.00, NV No. 3189000143 dated 28.12.2016 for Rs. 5,572,713.00 and NV No. 3189010008 dated 25.01.2017 for Rs. 5,572,713.00, were paid by the corporate debtor, and the operational creditor has not raised any issue about the non-payment of related operational debt. It is thus, clear that there is no operational debt due to be paid by the corporate debtor to the operational creditor, but the disputed amount is only regarding the service tax amounting to Rs. 40,37,816/-, which was paid by the operational creditor to the Government.

21. It is thus clear that there is a dispute in relation to the service tax paid by the operational creditor. Clearly, this was a dispute between the operational creditor and the corporate debtor regarding how credit or refund service tax amount could be claimed and by whom. We are, therefore, of the view that this dispute existed before the issue of statutory demand notice under section 8 and the corporate debtor had clearly mentioned this dispute in its reply dated 1.4.2019 to the section 8 demand notice.

22. Regarding the necessary condition for examining the presence of a pre-existing dispute in relation to an operational debt, we refer to the judgment of Hon'ble Supreme Court in the matter of **Mobilox Innovations Private Ltd. v. Kirusa Software Private Ltd., [(2018) 1 SCC 353],** wherein it is held as follows:-

> *"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."

23. From the above extracted part of the cited judgment, it is clear that it would be sufficient that a dispute that is not hypothetical, illusory or moonshine dispute exists and such a dispute should have arisen on a date prior to the date of issue of section 8 demand notice. In the present situation, we find that the Adjudicating Authority has erred by not considering the various e-mails communication exchanged between the corporate debtor and operational creditor as evidence of a pre-existing dispute, but vide paragraph 11 of the Impugned Order has gone ahead to adjudicate the said dispute on merits even though the Adjudicating Authority was only required to see whether a dispute existing prior to the issue of section 8 Demand Notice.

24. We also note that clause 9.2 of the MSA provides for resolution of disputes in any matter arising between the two

parties viz. corporate debtor and operational creditor in a friendly manner and if it is not possible to go for arbitration. The two parties could have taken recourse to this provision in the MSA for resolution of the dispute, and if it is not clear, why the parties have not thought fit to do so.

25. In the light of detailed discussion in the afore-mentioned paragraphs, we are of the clear view that a dispute regarding credit/refund of the service tax amount which is claimed to have been paid by the operational creditor to the government existed prior to the issue of demand notice under section 8 and further that such a dispute was a "real" dispute and not merely an assertion or ploy of the corporate debtor to avoid taking care of his liability.

26. In the situation as analysed above, we find the Impugned Order to be erroneous and, therefore, set it aside. The Corporate Insolvency Resolution Process which was initiated against the corporate debtor as a result of the Impugned Order will abate forthwith and the corporate debtor shall be released from the rigours of CIRP and other effects of moratorium under section 14

of IBC with immediate effect. The appeal is allowed and disposed of accordingly. There is no order regarding costs.

(Justice Rakesh Kumar)
Member (Judicial)

(Dr. Alok Srivastava)
Member (Technical)

New Delhi
11th August, 2023

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