NATIONAL COMPANY LAW APPELLATE TRIBUNAL
CHENNAI BENCH

COMPANY APPEAL (AT) (CH) (INSOLVENCY) NO. 307 of 2021

(Arising out of the Order dated 27th April, 2021 passed by the Learned Adjudicating Authority (National Company Law Tribunal, Division Bench – II, Chennai, in IBA No.1053/C-II)/ID-682/2019/TN/KER.)

IN THE MATTER OF:

Agarwal Coal Corporation Private Limited,
(CIN: U23109MP2000PTC014351)
Registered Office situated at:
"2, Matra Kripa" Chameli Park,
Near Goyal Nagar, Indore – 452016 (MP)
Through its Director
Mr. Pramod Kishore Shrivastava
"Agarwal House", 2nd Floor,
5 Yashwant Niwas Road,
Indore – 452001 (MP)
Email: cs@agarwalcoal.com **...Appellant**

Versus

Nizam Energy Private Limited
(CIN: U23101TN2009PTC072798)
Registered Office situated at:
Room No. 2 & 3, 7th Floor,
Seethakanthi Business Centre 684-690,
Anna Salai,
Chennai TN – 600006 IN
Email: yasinagencies@gmail.com **...Respondent**

Present

For Appellants: **Mr. Rohit Dubey, Advocate**
For Mr. V.N. Dubey, Advocate.

For Respondents: **None.**

O R D E R

[Through Virtual Mode]

(21st December 2023)

[Per: Justice Rakesh Kumar Jain (MJ)]

1. This Appeal is filed by the unsuccessful Operational Creditor whose Application filed under Section 9 of the Insolvency and Bankruptcy Code,

2016, (Code) against M/s. Nizam Energy Private Limited (Corporate Debtor) has been dismissed by the Tribunal (National Company Law Tribunal, Division Bench -II, Chennai) vide its Order dated 27.04.2021.

2. In brief, the Appellant is engaged in the business of import and trading of coal whereas the Corporate Debtor is having its plant near Tuticorin, Tamil Nadu. The Appellant has been supplying coal to the Respondent either as high sea sale or sale after import. According to the Appellant, the coal is supplied with or without paying TCS (by submitting Form 27C) and the payment of consideration with respect of it, is made sometimes through cheques and sometimes through RTGS. According to the Appellant, the Respondent issued Purchase Order dated 27.12.2017 to it for delivery of 2000 MTs of coal at the rate of Rs. 5,700 PMT plus taxes and levies. The Purchase Order was accompanied by declaration under Section 206(c)(1A) of the Income Tax Act in Form 27C provided by the Respondent for supply of coal without collection of tax. It is further alleged that the Respondent issued another Purchase Order on the same date i.e., 27.12.2017 for supply of 2000 MTs of coal at the rate of Rs. 5,700 PMT for an amount of Rs.1,14,00,000/- plus taxes and levies. The revised Purchase Order was accepted by the Appellant with new rate. It is alleged that the other terms and conditions of the Pruchase Order were *`basic price of Rs.5700/- (inclusive of duties, CVD, stevedoring and handling loaded into trucks) on stocks on sales, Ex-C.O. Chidambaranar Port at Tuticorin, basic price of Rs.5700/- (exclusive of GST @ 5% CESS on coal PMT Rs.400/-) and TCS @ 1% not applicable already submitted Form 27C'.*

3. It is alleged that on 30.01.2018, in furtherance of the aforesaid Purchase Order, in order to get the coal supplied to the Respondent without TCS, the Respondent provided declaration under Form 27C. It is further

alleged that between 08.01.2018 to 10.02.2018, the Appellant supplied 1536.44 MTs of coal to the Respondent at Rs.5700/- PMT plus taxes and levies, total amounting to Rs.98,10,169.22/-, which was lifted by the Respondents from Chidambaranar Port at Tuticorin in trucks provided by them. It is alleged that as per the Purchase Order, the Appellant was required to make sales Ex-V.O. Chidambaranar Port at Tuticorin i.e., the coal was required to be handled and loaded into trucks of the Respondents and the same was duly honoured by the Appellant by making supplies of 1536.44 MTs of coal on 08.01.2018 (60.36MT), 09.01.2018 (57.10MT), 10.01.2018 (23.42MT), 17.01.2018 (78.68MT), 21.01.2018 (40.44MT), 23.01.2018 (135.90MT), 24.01.2018 (61.14MT), 25.01.2018 (77.82MT), 27.01.2018 (53.70MT), 30.01.2018 (123.44MT), 31.01.2018 (51.06MT), 02.02.2018 (214.52MT), 03.02.2018 (203.34MT), 05.02.2018 (55.48MT), 06.02.2018 (26.10MT), 07.02.2018 (144.82MT), 09.02.2018 (103.24MT) & 10.02.2018 (25.88MT).

4. It is further alleged that the supply or delivery of coal amounting to Rs.98,10,169.22/- made by the Appellant to the Respondent was clearly appearing at the GSTN Portal of the Appellant, for which the Respondent must have availed the input tax credits of the GST charged by the Appellant. It is further alleged that as on 08.01.2018 (the date on which first supply or delivery of coal under aforesaid Purchase Order dated 27.12.2017 was made), the Respondent had Operational Debt of Rs.23,98,333.70/- towards the Appellant in respect of supplies made prior in time, therefore, the total outstanding of the Operational Debt after supplies came to be Rs.1,22,08,502.92/-. But the Respondent issued LC of Rs.25,00,000/- on 17.02.2018 which was discounted by the Appellant on 08.03.2018 and the

proceeds were credited against the total outstanding debt which was brought down to Rs.97,70,147/-.

5. It is further alleged that the Respondent also issued two cheques bearing nos. 003313 & 003306 dated 22.06.2018 & 28.06.2018 amounting to Rs.7,08,504/- and Rs.15,00,000/-. The Appellant brought to the Notice of the Respondent on 07.07.2018 towards the aforesaid cheques but the said cheques were dishonoured.

6. The Appellant thereafter sent a Demand Notice under Section 8 on 26.02.2019, but the Respondents did not raise any objection to the Demand Notice and did not pay the amount mentioned therein as well and as a result of which the Appellant filed the Application under Section 9 on 20.05.2019.

7. The Respondent in Reply to the Application filed under Section 9, for the first time, alleged to have raised objection that the goods were not delivered, therefore, there is no question of the amount being pending against the Respondent which may be termed as a `debt' and of non-payment of the same could be termed as a `default'.

8. The Learned Tribunal has though referred to the list of documents filed by the Appellant with the Rejoinder etc., but has rejected the Application only on the ground that the Appellant has failed to prove the lorry details of the consignment, delivery challan in proof that the goods were actually delivered to the Respondent.

9. Counsel for the Appellant has vehemently argued that the Tribunal has committed an error in dismissing the Application without taking into consideration the fact that the dispute has been raised by the Respondent for the first time in the Reply filed to the Application and there was no Reply even to the Notice issued under Section 8. It is further submitted that the Tribunal

has erred in ignoring the other evidence on record, which includes various emails exchanged between the Parties and has not even made a reference about them in the Impugned Order and dismissed the Application solely on the ground that the delivery of the goods is not proved whereas the case of the Appellant is that the goods have been taken away by the Respondent by their own trucks, about which the detail has been given from 08.01.2018 to 10.02.2018 alongwith the weight of the coal which was loaded in the truck as it was the duty of the Respondent to take the consignment in their own trucks from the Chidambaranar Port, Tuticorin.

10. No one has put in appearance on behalf of the Respondents.

11. We have heard Counsel for the Appellant and perused the record.

12. The Tribunal appears to have been swayed only by a submission made by the Respondent that the Appellant has failed to give the proof of the delivery of goods. There is no discussion in the entire Judgement as to whether the goods were actually taken by the Respondent in its own trucks as stated by the Appellant because it is alleged by the Appellant that the Respondent lifted the goods from the Port to its Plant. Furthermore, various other evidence which may prove the transactions having been taken place between the Parties have not been discussed at all by the Learned Tribunal much less the fact that if no contest is made till the filing of the Petition, whether it can be raised for the first time in the Reply filed to the Application under Section 9 is also a question which requires to be answered.

13. Thus, in view of the aforesaid facts and circumstances, we are of the considered opinion that this is one such case in which interference is required for the purpose of looking into the entire evidence by the Tribunal and

recording a finding thereafter as to whether the Application has to succeed or to fail.

14. The Appeal is thus allowed. The Impugned Order is set aside. The matter is remanded back to the Learned Tribunal to decide the Application again after taking into consideration the entire evidence on record and giving a finding as to how the evidence which has been brought on record is not sufficient for the purposes of holding that the Application does not deserves to be admitted.

The Parties are directed to appear before the Learned Tribunal on 05.01.2024.

[Justice Rakesh Kumar Jain]
Member (Judicial)

[Shreesha Merla]
Member (Technical)

21st December 2023

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