

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) (Ins) No.661 of 2020

[Arising out of Order dated 16.7.2020 passed by National Company Law Tribunal, Court No.V, Mumbai Bench in C.P. (IB) No.2361/NCLT/MB/2019]

IN THE MATTER OF:

Before NCLT

Before NCLAT

Rajratan Babulal
Agarwal
Gokul – Flat No.4,
Geet Gopal Apartment
Opp Laxmi Process,
Ichalkaranji – 416115,
Dist. Kolhapur,
Maharashtra

...

Appellant

Office: 10/868,
Koik Building,
Vardhaman Chowk,
Shahpur Road,
Ichalkaranji,
Dist. Kolhapure 416115
Maharashtra

Vs.

1. Agarwal Coal Corporation
India Pvt. Ltd.
2, Matra Kripa
Chameli Park
Near Goyal Nagar,
Indore – 452016

Petitioner

Respondent No.1

2. Shri Tradco Deesan
Private Limited
6, Anantwadi,
4th Floor,
Bhuleshwar,
Mumbai 400 002

Respondent/
Corporate Debtor

Respondent No.2

Through Interim
Resolution Professional
101, Monoplex Plaza,
Deep Bungalow Chowk,
Model Colony,
Pune 411 016

3. Fanendra **(Deleted)** IRP Respondent No.3
Harakchand Munot
Interim Resolution
Professional for
Shri Tradco
Deesan Private Limited
6th Floor,
Mafatlal House
Building,
HR Parekh Marg,
Backbay Reclamation,
Mumbai 400 020

For Appellant: Shri Anish Agarwal, Shri Mayur Khandeparkar,
Shri Tejas Agarwal and Vanshia Gupta, Advocates

For Respondents: Shri Vivek Kohli, Senior Advocate with Shri
Abhishek Swaroop, Advocate (Intervener on
behalf of COC)
Shri V.N. Dubey, Advocate (R-1)
Shri Kunal Chheda, Advocate (IRP – R2)
Shri Fanendra Munot, Erstwhile IRP
Shri Ayush J. Rajani, PCA (RP)

J U D G E M E N T

(15th March, 2021)

A.I.S. Cheema, J. :

1. The Appellant is Director of Respondent No.2 – Shri Tradco Deesan Private Limited – the Corporate Debtor. The Appeal has been filed by the Appellant against Impugned Order dated 16th July, 2020 passed by the Adjudicating Authority (National Company Law Tribunal Court No.V, Mumbai Bench) in C.P. (IB) No.2361/ NCLT/MB/2019 (Annexure A-1 Page

- 57). By the said Impugned Order, the Adjudicating Authority admitted the Application filed under Section 9 by the Respondent No.1 - Agarwal Coal Corporation India Pvt. Ltd. (ACCPL). Thus, this Appeal is against the admission Order.

2. The Appellant claims and it is argued that the Corporate Debtor required high grade imported coal for its boilers and the Operational Creditor was the supplier. The appeal mentions particulars with regard to earlier transactions between the parties and how there was short supply. The Appellant claims that because of short supplies, business of the Corporate Debtor has suffered. It is claimed that there was correspondence in this regard and the Operational Creditor gave vague responses. As per the Appellant due to short supplies, the business of Corporate Debtor suffered and had quantified the losses at Rs.95,70,000/-. It is claimed that the Operational Creditor had assured to make good the losses. The Appeal refers to the payments made and it is claimed that the Operational Creditor failed to honour the Agreement and when negotiations broke down, to pressurize Corporate Debtor, sent the Notice dated 9th April, 2019 (Annexure A-11 – Page 77). The Appellant claims that with the Notice, two tax invoices were attached STC-01-18/4042 and STC/01-18/4135. According to Appellant, Corporate Debtor never received these invoices dated 22nd January, 2018 and 31st January, 2018, before the Notice under Section 8 was sent. The Invoices bear component of GST which when verified by the Corporate Debtor, the GSTIN portal of the Central/State

Government did not show any such invoices. The Appellant claims that these were false and fabricated invoices and with such invoices, no goods were ever supplied or received. Copy of the GSTIN portal had been filed at Annexure A-14.

3. Appellant claims that the Notice dated 9th April, 2019 was replied vide Annexure A-15 dated 18th April, 2019 (Page – 88). According to the Appellant, the Adjudicating Authority vide Order dated 9th September, 2019, directed the Operational Creditor to amend the Petition and produce copy of Statement of Accounts. When amended copy was filed and ledger relating to Corporate Debtor maintained by the Operational Creditor was sent, it showed that entries relating to Agarwal Trading Corporation Pvt. Ltd. had been shown fraudulently in the account of the Corporate Debtor. The original amended Petition has been pointed out at Page – 95 (Annexure A-18) and the amended Petition is pointed out as Annexure A-19 (Page – 102).

4. The learned Counsel for the Appellant referred to such documents from the record and pointed out that the Impugned Order admitting the Petition should not have been passed as there were pre-existing disputes and the fact that the invoices raised, on the basis of which Section 8 Notice was sent and the Petition under Section 9 was filed, were suspect. It is stated that the Appellant did demonstrate to the Adjudicating Authority that under the said invoices (Annexure A-12 and Annexure A-13 – Pages 81 and 82), no goods were sent to raise the said invoices.

5. According to the Counsel for the Appellant, the Application under Section 9 should have been dismissed considering the unreliable records on the basis of which the Petition was being tried to be maintained.

6. Mr. Fanendra Harakchand Munot is IRP who was appointed by the Impugned Order. He was arrayed as Respondent No.3 in this Appeal but when the matter came up before this Tribunal on 4th August, 2020, it was stated that the Appellant has already settled the claim of Respondent – Operational Creditor. However, Counsel for Respondent No.3 stated that COC (Committee of Creditors) is already constituted. This Tribunal had on that date observed that Respondent No.3 is in-charge of affairs of the Corporate Debtor - Respondent No.2 and as such, Respondent No.3 being IRP (Interim Resolution Professional), he need not be arrayed as party Respondent. Thus, his name came to be struck off.

7. The IRP has, however, filed Reply to the Appeal and stated that he had no comments with regard to the question of law raised and grounds raised by the Appellant in the Appeal. He referred to how he has made efforts to take over the charge and has stated further particulars with regard to the CIRP (Corporate Insolvency Resolution Process).

8. The Appellant in Rejoinder (Diary No.21659) has argued that the Respondent No.1 – Operational Creditor had not filed Reply as the claim is already settled. This was noted in our Order dated 11th November, 2020 as Counsel for Respondent No.1 stated that claim of Respondent No.1 –

Operational Creditor is already settled. The matter proceeded as it was stated that COC has been formed. In the Rejoinder, the Appellant has referred to various particulars and events after the admission order was passed to show that the IRP - Mr. Fanendra Harakchand Munot hurriedly formed COC to scuttle settlement taking place. We will refer to those facts later. At present, we are looking into only the merits of the Appeal.

9. The learned Counsel for the Appellant submits that in the background of the Petition as referred above and Reply filed by the Corporate Debtor (Page – 111), the Adjudicating Authority referred to the same in short and made observations as under:-

“4. Heard the Counsel on either side. This Bench has gone through the pleadings of both sides. The following are the observations of this Bench:-

- a. The claim in this petition arises out of supply of goods by the petitioner to the corporate debtor and hence debt claimed in this petition in an operational debt as defined under section 5(21) of the Code.
- b. The contention of the Corporate debtor that the loss suffered by them to the extent of Rs.95,70,000/- on account of short supply of goods has to be taken into account while deciding this petition and in such a eventuality the Petition has to be dismissed is a far fetching argument considering the fact that the proceedings under the Code is of summary nature.
- c. Even though the Corporate Debtor submits that there are pre existing disputes, no record/material has been produced by the Corporate Debtor in support of his contention and hence the submission in this

aspect cannot be accepted and the same is rejected.

- d. Mere short supply of goods will not fall within the definition of dispute as provided under Section 5(6) of the Code which reads as below:

‘dispute’ includes a suit or arbitration proceedings relating to –

- a. The existence of the amount of debt;
 - b. The quality of goods or services; or
 - c. The breach of a representation or warranty;
- e. The petitioner explained that the debiting of account to the extent of Rs.12,32,816/ on 29/06/2017 was on account of some debit notes raised by the petitioner for certain payments made by a sister concern of the petitioner, namely Agarwal Transport Corporation Private Limited, cannot be accepted as the said amount is not agreed by the Corporate Debtor, which was also missing in the statement of account sent by the petitioner to the Corporate Debtor previously and hence the said amount has to be deducted from the amount claimed of Rs.21,82,821/- and after this adjustment the claim has to be scaled down to Rs.9,50,005/-.
- f. The submission of the Corporate Debtor that the abovesaid debit entry to extent of Rs.12,32,816/ made on 29/06/2017 by the petitioner should be a credit entry instead of debit, is wholly baseless and is rejected.
- g. The submission of the Corporate Debtor that the two invoices claimed in the demand notice / petition were not received by them is unacceptable for the following reasons:

- The petitioner's explanation that the GSTIN portal of the central/state government, as shown in exhibit J of the reply filed by the corporate debtor, that the split invoices for serial number 254 to 267 relates to the consolidated invoice dated 22.01.2018 bearing number STC/01-18/4042 and the split invoices for serial number 268 to 284 relates to the consolidated invoice dated 31.01/2018 bearing number STC/01-18/4135, is quite convincing and the same is accepted.
- Further the Corporate Debtor has made payments to the petitioner to the extent of Rs.1,90,69,826/- (Rs. 25 Lakhs on 23/1/2018, Rs.25 lakhs on 6/3/2018, Rs.25 lakhs on 5/4/2018, Rs.26,17,272/- on 5/5/2018, Rs.19,28,400/- on 24/5/2018, Rs.40,24,154/- on 18/6/2018, Rs.10,00,000/- on 19/7/2018, Rs.10,00,000/- on 21/1/2018, Rs.10,00,000/- on 21/9/2018.), as reflected in the ledger account, after raising the abovesaid two invoices. If the contention of the Corporate Debtor that the two invoices are not really there, it will lead to a situation where the Corporate Debtor has made substantial excess payment to the petition over and above the balance due. Hence on this count also, the contention of the corporate debtor that two invoices were not issued, fails.

5. The above discussion clearly shows that the Corporate Debtor is liable to pay sum of Rs.9,50,005/- to the petitioner in view of the fact that the amount debited to the extent of Rs.12,32,816/- has to be excluded from the claimed amount of Rs.21,82,821/-. The corporate debtor defaulted in making payment to the petitioner.”

10. The Counsel for Respondent No.1 – the original Operational Creditor in response to the Appeal has simply stated that the Operational Creditor has received its dues and has not traversed the contentions raised by the learned Counsel for the Appellant. Apart from Respondent No.1 not challenging the averments made on merits of the Appeal, we have gone through the record. It is apparent from record that the Operational Creditor sent Notice under Section 8 of IBC, dated 9th April, 2019 (Annexure A-11) claiming amount in default of Rs.21,82,821/- and annexed two invoices (Annexures A & B). The Corporate Debtor responded with a Reply dated 18th April, 2019 (Annexure A-15 - Page 88) and, inter alia, claimed that the demand made in the Notice was with a view to extract money and to harass the Corporate Debtor and there was creation of false record. Corporate Debtor claimed that against the said invoices which were sent, no coal was supplied or received and that the amounts as claimed in the invoices were not due or payable.

11. The Operational Creditor still went ahead to file Application under Section 9 of IBC and when the parties appeared before the Adjudicating Authority, the Operational Creditor was required to file amended Petition. The original Petition is at Annexure A-17 and amended Petition is at Annexure A-18. We agree with the learned Counsel for the Appellant that the Adjudicating Authority erred in sitting down to scale down the amount due from Rs.21 Lakhs to Rs.9.5 Lakhs when the record showed that the accounts of the Operational Creditor showed dues of sister concern of the

Operational Creditor namely – Aggarwal Transport Corporation Pvt. Ltd., put against the Corporate Debtor. The learned Counsel for the Appellant rightly submits that before the Adjudicating Authority, it became clear that against the two invoices, no goods had been supplied or received. The Operational Creditor had to concede that GSTIN portal did not reflect the invoices because the invoices sent with the Notice were now claimed to be consolidated invoices. It is rightly argued that the claims made in Notice under Section 8 were on the basis of false accounts and the invoices sent on the basis of such accounts, were seriously suspect and the existence of dispute raised on this count by the Corporate Debtor, could not have been ignored. We find that in the facts of the present matter, it was not correct on the part of the Adjudicating Authority to sit down and settle the accounts like a Civil Court and that the Application should not have been admitted considering the fact that accounts on the basis of which Section 8 Notice was sent were apparently unreliable, having huge disparity. This is case of debt not due being claimed. Had right amount been claimed Corporate Debtor would have immediately paid as subsequent events show.

12. For such reasons, in the facts, particular to this matter, the Appeal deserves to be allowed and the Impugned Order deserves to be quashed and set aside.

13. Before parting, it would be appropriate in the facts of the present matter to refer to the dispute raised by the Appellant with regard to the

conduct of the Respondent No.3 – IRP. The learned Counsel for the Appellant referred to Rejoinder (Diary No.21659) to submit that when Adjudicating Authority passed Impugned Orders dated 16.07.2020 as admitting the Application under Section 9 after scaling down the debts claimed from Rs.21,82,821/- to Rs.9,50,005/-, the Corporate Debtor immediately offered the said amount to the Operational Creditor which was also accepted by the Operational Creditor. The Counsel referred to WhatsApp messages exchanged between the Appellant and the IRP - Fanendra Harakchand Munot, copies of which have been filed as Annexure A-31 with the Rejoinder. The Counsel pointed out that when particulars of the settlement were conveyed to the IRP, the IRP stated that his fees may be considered as of Rs.3 Lakhs (Rejoinder Page 21). It is argued and Rejoinder shows that after the Impugned Order dated 16.07.2020, the Appellant and Respondent No.1 – Operational Creditor entered into written Agreement (Annexure A-27 – Page 14) to pay 100% of the amount recorded by the Adjudicating Authority plus fees of the IRP. According to the Appellant on 31.07.2020 itself, Rs.9,50,005/- were paid to the Respondent No.1 by online transaction, the particulars of which are given in Rejoinder para – 4.1. It is stated that even the IRP was paid online an amount of Rs.2,36,000/-. The learned Counsel pointed out that copy of settlement was also forwarded to the IRP as can be seen from WhatsApp message, copy of which is at Page – 22 of the Rejoinder. Learned Counsel submitted that the IRP gave his bank account number to receive the amount and also received the amount and copy of settlement as is apparent from Annexure

A-31. The learned Counsel referred to particulars of the conversation between Corporate Debtor and the IRP and added that although the Corporate Debtor took desperate steps to settle the claim of Operational Creditor and entered into settlement with the Operational Creditor and although the IRP received the fees he demanded on 31.07.2020 but still IRP went ahead to form COC. The Counsel referred to the Settlement Agreement dated 31.07.2020 as at Annexure A-27 and the e-mail sent to the IRP vide Annexure A-28. The Appellant claims that the IRP was informed on 01.08.2020 about the fact of filing of the present Appeal and that it was listed on 4th August, 2020 (the next working day, as 1st was Bakrid and 2nd and 3rd were holidays). Copy of the letter in this regard, is pointed out at Annexure A-30. When the matter came up on 4th August, 2020 before this Tribunal, the IRP claimed before the Tribunal that COC is already constituted. According to the learned Counsel for the Appellant, the action of IRP was with the object of scuttling the possibility of settlement which had already taken place and in which even the Operational had already been paid. The learned Counsel submits that the object of IBC is to see that there should be resolution of Corporate Debtors if they are unable to pay debt. When in the present matter, the Corporate Debtor has already paid, the Corporate Debtor has been forced into a process of CIRP because of the act of the IRP.

14. At the time of arguments, we have also heard Counsel for IRP - Fanendra Harakchand Munot, although he had been deleted earlier. The

written submissions have been filed with Diary No.25488. In the written submissions, the IRP has tried to justify his actions on the basis of showing calculation of time/period as per the Regulations to claim that within two days of verification of claims, he was required to form the COC. He has indicated that claims of Rs.173 Crores were verified by him on 01.8.2020 and hence, COC had to be formed by 03.08.2020.

15. We feel sad to see such conduct of the IRP. Heavens would not have fallen if when the matter came up before this Tribunal on 4th August, 2020, COC had not yet been formed. It was a matter of just one day and such behavior of the IRP we are unable to appreciate. Such conduct is not conducive to the aims and objects with which IBC has been enacted.

16. It will be open for the Appellant to convey the facts to IBBI (Insolvency and Bankruptcy Board of India) for suitable consideration.

17. Coming back to the merits of the matter, as we have held that the Application under Section 9 should not have been admitted, we pass the following Order:-

ORDER

(A) For above reasons, the Appeal is allowed. The Impugned Order is quashed and set aside. The Application under Section 9 of IBC filed by Respondent No.1 – Operational Creditor before the Adjudicating Authority is dismissed.

(B) Actions taken by IRP/RP in consequence of the Impugned Order are quashed and set aside. The Corporate Debtor is released from the rigour of law and is allowed to function independently through its Board of Directors. The IRP/RP will hand back the records and management of the affairs of Corporate Debtor, to the Board of Directors.

(C) The IRP/RP will place particulars regarding CIRP costs and fees before the Adjudicating Authority and the Adjudicating Authority after examining the correctness of the same, will give directions regarding payment, as per provisions existing under IBC.

The Appeal is disposed accordingly. No costs.

[Justice A.I.S. Cheema]
Member (Judicial)

[Mr. V.P. Singh]
Member (Technical)

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