NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH: NEW DELHI

Company Appeal (AT) (Ins) No. 1445 of 2024

[Arising out of the Order dated 17.05.2024, passed by the 'Adjudicating Authority' (National Company Law Tribunal, New Delhi Bench-IV), in Company Petition No. (IB)-236(ND)/2021.]

IN THE MATTER OF:

BELGOTEX INDIA PRIVATE LIMITED
CIN: U17120DL2015FTC286701
REGISTERED OFFICE AT:
U-22, GROUND FLOOR, GREEN PARK EXTENSION,
NEW DELHI-110016
CORPORATE OFFICE AT:
1, UNIT NO. 152, JMD MEGAPOLIC, SOHNA ROAD, SECTOR - 48, GURUGRAM, HARYANA-122018
EMAIL:
PANKAJ.TALREJA@BELGOTEX.CO.ZA **...Appellant**

Versus

PUNEET INDIA PRIVATE LIMITED
REGISTERED OFFICE AT:
23, YASHWANT PLACE, CHANAKYAPURI
NEW DELHI-110021
EMAIL:PUNEETINDIA@PUNEET-INDIA.COM **..Respondent**

Present:

For Appellant	:	Mr. Sumesh Dhawan, Ms. Vatsala Kak, Mr. Sagar Thakkar & Ms. Khyati Khemka, Advocates.
For Respondent	:	Mr. Manorjun Sharma, Advocate for Intervener Ms. Shweta & Mr. Najreena Sheikh, Advocate for R-2.

J U D G M E N T
(Hybrid Mode)

[Per: Justice Mohd. Faiz Alam Khan, Member (Judicial)]

1. The instant appeal has been preferred on behalf of the appellant-Belgotex India Pvt. Ltd. (Appellant) Under Section 61 of the Insolvency and Bankruptcy Code, 2016 ('Code') assailing the order dated 17.05.2024, (impugned order) passed by Ld. Adjudicating Authority, New Delhi whereby the petition filed by the appellant being CP (IB) No. 236 of 2021 under Section 9 of the Code has been dismissed.

2. The brief facts necessary for the disposal of the instant appeal are that the operational creditor is engaged in the business of floor coverings such as nylon and polypropylene modular carpet tiles and planks, carpet rolls etc. and in order to run its business effectively, the operational creditor appoints dealers and distributors.

3. It is reflected that the Corporate Debtor (CD) and Appellant entered into a dealership/distribution agreement dated 15.10.2019, whereby the CD/Respondent was appointed as the authorised dealer/distributor of the operational creditor on an exclusive basis for Delhi-NCR Region for a period of three years. As per the terms of the agreement the CD was required to clear the invoices drawn by the Operational Creditor as per the credit period as mentioned in the purchase order. However, it was specifically provided in the agreement that in no case the credit period shall exceed 40 days from the date of dispatch of goods made from Indian Warehouse and in case of dispatch of goods being made post import of the products from outside India which shall not exceed 90 days from the date of bill of lading (BOL).

4. It is further reflected that the CD issued several purchase orders to the operational creditor and also made requisites payment against the goods purchased by it.

5. The case of the operational creditor is that several invoices were raised by it for the payment of the amount pertaining to the goods supplied to the CD and out of the total outstanding amount of Rs. 2,41,30,811/- the CD has only made a payment of Rs. 95,71,865/- and thus a sum of Rs. 1,45,58,946/- remains due and payable by the CD/Respondent to the Operational Creditor/Appellant.

6. It is further the case of the appellant that in view of the outstanding liability towards the operational creditor the CD issued 4 cheques to operational creditor however all these cheques were dishonoured as there was in sufficient funds in the bank account of the CD and in this regard operational creditor issued demand notice under Section 138 of the Negotiable Instruments Act, 1881 to the CD on 30.04.2020 and 05.05.2020.

7. It is also the case of the appellant that as the payment was not made by the CD a notice under Section 8 of the Code was served on the CD on 08.05.2020 however despite duly served the CD neither replied the notice nor has repaid the debt and consequently, a petition under Section 9 of the Code was filed by the appellant before the Ld. Adjudicating Authority which has been dismissed by passing the impugned order.

8. Ld. Counsel for the appellant submits that the Ld. Adjudicating Authority has passed the impugned order without appreciating the facts, and record and contention of the appellant were not discussed in right perspective and Section 9 petition filed by the appellant has been dismissed

on the ground that an amount of Rs. 53,86,399/- with regard to various invoices falls under the exclusion period of Section 10A of the Code and also that there are pre-existing dispute existing between the parties and further there is inconsistency in the amount of debt as stated in the notice under Section 8 of the Code and the amount shown in Part –IV of the petition.

9. It is further submitted that so far as the finding of the Ld. Adjudicating Authority with regard to the part of the default amount barred by Section 10 A of the Code is concerned the same has been arrived by adding a 90 day credit period to each invoice while this approach is manifestly erroneous and contrary to clause 14(f) of the distribution agreement (executed between the parties on 15.10.2019), which clearly stipulates that the credit period shall not exceed 40 days in case of goods dispatched from Indian Warehouse and 90 days in case of dispatch from outside India, International Warehouse.

10. Ld. Counsel for the appellant has relied on the following table (part of the written submissions filed by the appellant) in order to show that the various invoices pertaining to which the credit period was 40 days has been wrongly shown as the period of 90 days and that the chart prepared by the Ld. Adjudicating Authority in para no. 16 of the impugned order is not correct.

S. No.	***Date of Invoice***	***Payment Due Date (+40 days)***	***Invoice Amount (in Rupees)***	***Date of Payment***	***Amount Paid (in Rupees)***	***Pending Amount (in Rupees)***
1)	*28.11.2019 @pg. 122*	*07.01.2020*	*22,13,220/-*	*08.09.2020*	*3,56,605/-*	*18,56, 615/-*

2)	*10.12.2019*	*19.01.2020*	*1,18,998/-*	*-*	*-*	*1,18,998/-*
3)	*17.12.2019 @pg.123*	*26.01.2020*	*17,12,706/-*	*31.12.20 20*	*3,93,015/-*	*13,19,691/-*
4)	*21.12.2019 @pg. 124*	*30.01.2020*	*58,53,408/-*	*-*	*-*	*58,53,408/-*
5)	*26.12.2019 @pg. 125*	*04.02.2020*	*12,28,517/-*	*-*	*-*	*12,28,517/-*
6)	*26.12.2019 @pg. 126*	*04.02.2020*	*9,82,912/-*	*-*	*-*	*9,82,912/-*
7)	*30.12.2019 @pg. 127*	*08.02.2020*	*5,953/-*	*-*	*-*	*5,953/-*
	Total		***1,21,15,71 4/-***		***7,49,620/-***	***1,13,66,094 /-***

11. While drawing our attention towards the table prepared by the Ld. Adjudicating Authority at para 16 of the impugned order it is further submitted that only two invoices which have been shown at Serial no. 10 and 11 of the table of date 02.01.2020 and 20.03.2020 amounting to Rs. 1,434,921/- and Rs. 1,734,096/-, respectively were having a credit time of 90 days and therefore only these two invoices were falling under the period excluded vide Section 10A of the Code and if this amount is deducted from the cumulative amount of all the invoices the balance amount of the rest of the invoices would come to Rs. 12,115,714/-. Therefore, the Ld. Adjudicating Authority has completely miscalculated the amount.

12. It is vehemently submitted that conclusions of the Ld. Adjudicating Authority with regard to the pre-existing dispute are also not correct as the impugned order holds that there exists a pre-existing dispute between the parties arising out of the tripartite agreement dated 27.04.2020 which is not tenable either factually or legally. Elaborating further it is submitted that invoices forming the subject matter of petition were raised between November, 2019 and March 2020 the default date pleaded in the petition is

21.03.2020 and the tripartite agreement was executed on 27.04.2020, thus, the tripartite agreement was executed on a day when the default had already occurred and therefore this agreement does not form the basis of the operational debt claimed in the petition. Moreover, this agreement would tantamount to be an acknowledgment of the in 'debtness' of the CD/Respondent to pay Rs. 16,171,305/- to the appellant.

13. It is also submitted that even after receipt of the demand notice dated 08.05.2020 (under Section 8 of the Code), no dispute of any kind was raised and to the contrary the Respondent made some payments aggregating to Rs. 1,693,015/- which would also be deemed as acknowledgment of the liability of the CD and the CD further vide its email dated 27.05.2020 and 04.06.2020 specifically acknowledged its liability towards the appellant, as it sought time to clear the dues.

14. It is submitted that reliance of the Ld. Adjudicating Authority on an email dated 06.04.2021 in order to assume a pre-existing dispute between the parties is without any basis as the same is of the date after the demand notice was issued by the appellant (08.05.2020) and therefore there was no pre-existing dispute as assumed by the Ld. Adjudicating Authority.

15. It is further submitted that in fact there is no inconsistency in the amount shown in the demand notice dated 08.05.2020 and Part IV of the petition. Elaborating further it is submitted that in the demand notice amount of Rs. 16,171,305/- has been claimed but after the issuance of notice the Respondent has made part-payments to the tune of Rs. 1,693,015.17/- in the month of June to December, 2020 and these payments were adjusted in the Section 9 petition and consequently the

principal outstanding amount was recalculated to Rs. 14,558,946/- and the amount became Rs. 18,630,116/- by adding contractual interest as provided in clause 16 of the distribution agreement. Therefore, the mismatch in the amount mentioned in demand notice and Part –IV of the petition is on account of the payment made by the Respondents after issuance of Section 8 notice and this mismatch may not be sufficient to reject the application of the appellant. Reliance in this regard is laid on ***Rajendra Bhai Panchal vs. M/s Jay Manak Steels and Anr., CA (AT) (Ins) No. 592 of 2020 decided on 20.10.2020.***

16. Ld. Counsel for the Respondent though even after sufficient time provided did not file any written submissions however in oral submissions it is submitted that there is no illegality in the impugned judgment as it has been correctly held by the Ld. Adjudicating Authority that part of the debt was barred by Section 10 A of the Code and due to this the remaining debt could not reach the threshold limit and thus the application has been rightly rejected.

17. It is further submitted that the demand notice allegedly given by the appellant under Section 8 of the Code is illegal and there is also mismatch in the amount mentioned in the notice given under Section 8 of the Code and the amount mentioned in the application given under Section 9 of the Code.

18. It is further submitted that there was prior dispute between the parties with regard to the debt in question and pertaining to which an agreement dated 27.04.2020 was also executed between Belgotex Floor Coverings Ltd., Belgotex India Pvt. Ltd. (appellant) and Puneet India Pvt. Ltd.

(CD) which was pertaining to a joint venture project to install flooring with an Ernst and Young in India Ltd. and the dispute emerged between the parties was also communicated through an email written by the CD dated 06.04.2021 which has been rightly relied on by Ld. Adjudicating Authority.

19. It is further submitted that there is no illegality in the impugned judgment pertaining to the amount of the invoices barred by Section 10A of the Code and the submissions which has been advanced by the appellant are per se illegal and therefore the appeal preferred by the appellant is liable to be dismissed.

20. We have heard Ld. Counsel for the parties and have perused the record.

21. It is reflected that by passing the impugned judgment the application of the appellant filed under Section 9 of the Code has been dismissed by the Ld. Adjudicating Authority on the grounds (i) that default date of various invoices filed by the applicant/appellant is falling within the period highlighted under Section 10A of the Code (ii) a pre-existing dispute was existing between the parties with regard to the material supplied to Ernst and Young in India Ltd. and also that (iii) a tripartite agreement dated 27.04.2020 was executed between the appellant, CD and Belgotex Floor Coverings Ltd. pertaining to the same debt before issuance of notice by the appellant under Section 8 of the Code and also on account of the fact that Principal amount of debt in the demand notice dated 08.05.2020 and the Principal amount of debt as shown in application under Section 9 of the Code are different.

22. We recall that the appellant/operational creditor is engaged in the business of trading floor coverings and having its operation in various countries and it appoints dealers and distributors on exclusive and non-exclusive basis. The CD and the appellant/operational creditor entered into an agreement dated 15.10.2019, whereby the CD was appointed as the authorised dealer/distributor of the operational creditor on an exclusive basis in Delhi-NCR Region for three years and as per the terms of the agreement the CD was required to clear the invoices of the operational creditor within the credit period as mentioned in the purchase order, not exceeding 40 days from the date of dispatch of goods made from Indian warehouse and within 90 days in case of dispatch of goods being made post import of the products from outside India.

23. The case of the appellant is that several invoices were raised by the appellant and out of the total outstanding amount of Rs. 24,130,811/- the CD has made a payment of only Rs. 9,571,865/-, thus a sum of Rs. 14,558,946/- remained due and payable by the CD to the appellant.

24. It is also the case of the appellant that in view of the outstanding liabilities towards the operational creditor the CD also issued 4 cheques to operational creditors however all these cheques were dishonoured and in this regard the appellant issued legal notice under Section 138 of the Negotiable Instrument Act, 1881 to the CD on 30.04.2020 and 05.05.2020 and thereafter on 08.05.2020, the notice under Section 8 of the Code was given to the CD and despite being served no reply was given to the CD with regard to this notice and thereafter the application under Section 9 has been

filed which has been dismissed by the Ld. Adjudicating Authority in the manner stated herein before.

25. The first submission of Ld. Counsel for the appellant is that despite there being a specific provision in the agreement dated 15.10.2019, executed between the parties with regard to the credit period of 40 days and 90 days in case of goods supplied from Indian warehouse and goods supplied after being imported from Internationals warehouse, the Ld. Adjudicating Authority has counted 90 days for ascertaining default in order to hold that the default period has fallen within the period provided under Section 10A of the Code.

26. Ld. Counsel for the appellant has drawn our attention to various invoices placed at Page no. 122, 123, 124, 125, 126 and 127 of the appeal paper book in order to show that the amount with regard to these invoices was due after 40 days and has been wrongly held by the Ld. Adjudicating Authority as due after 90 days.

27. We have perused para no. 16 of the impugned judgment and have found that the Ld. Adjudicating Authority has taken the date of default as 90th day from the date mentioned in the invoices. While as per the invoices available on record the invoice dated 28.11.2019 (pg. 122), dated 10.12.2019, 17.12.2019 (pg. 123) 21.12.2019 (pg. 124), invoice dated 26.12.2019 (pg. 125), invoice dated 26.12.2019 (pg. 126) and invoice dated 30.12.2019 (pg. 127) totalling invoice amount Rs. 12,115,714/- were pertaining to the 40 days' period and out of these invoices Rs. 749,620/- have been paid thus the total amount of Rs. 11,366,094/- had remained to be paid by the CD to the appellant.

28. We also notice that Ld. Adjudicating Authority in the impugned judgment for the purpose of holding that some of the invoices falls within the period provided under Section 10A of the Code as produced a table which we are also producing the same as under:

S. No.	Date of Invoice	Ending of the Period of 90 days	Amount covered under S. 10A in Rupees	Amount beyond S.10A in Rupees
1.	22.11.2019	20.02.2020		4,26,196
2.	27.11.2019	25.02.2020		4,60,378
3.	28.11.2019	26.02.2020		22,13,220
4.	17.12.2019	16.03.2020		17,12,706
5.	21.12.2019	20.03.2020		58,53,408
6.	**26.12.2019**	**25.03.2020**	12,28,517	
7.	**26.12.2019**	**25.03.2020**	9,82,912	
8.	**30.12.2019**	**29.03.2020**	5,953	
9.	**02.01.2020**	**01.04.2020**	14,34,921	
10.	**20.03.2020**	**18.06.2020**	17,34,096	
		Total	**53,86,399**	

A perusal of the above table would reveal that out of 10 invoices referred to in the table relied on by appellant, only 5 invoices have been held to be falling under the period as provided under Section 10A of the Code. We have very carefully perused these 5 invoices which according to the Ld. Adjudicating Authority are falling under the period provided under Section 10A of the Code and have found that these invoices are of date 26.12.2019, 26.12.2019, 30.12.2019, 02.01.2020 and 20.03.2020 amounting to Rs. 53,86,399/- and out of these 5 invoices three invoices of date 26.12.2019 of Rs. 12,28,517/-, date 26.12.2019 of Rs. 9,82,912/- and date 30.12.2019 of Rs. 5,953/- are pertaining to the goods supplied from the Indian Warehouse and therefore having regard to the clause 14 (f) of the Supply agreement the credit period of 40 days would apply to these invoices which according to us have been wrongly applied as 90 days by the Ld. Adjudicating Authority and if a credit period of 40 days is applied to these invoices, none of them would fall under the period provided under Section 10A of the Code and if the cumulative amount of these invoices (Rs. 12,28,517/-+ Rs. 9,82,912/- + Rs. 5,953/- =Rs. 2,217,382/-) is added to the amount of 5 invoices Rs. 1,06,65,958/- (placed at serial no. 1 to 5 of the table) found falling beyond the period of 10A the net figure would arrive (Rs. 1,06,65,908/-+ Rs. 2,217,382/- =Rs. 1,28,83,290/-) at Rs. 1,28,83,290/- which would be above the threshold limit of one crore. Thus, in our considered opinion a patent illegality has been committed by the Ld. Adjudicating Authority in computing the date of default so far as the above invoices are concerned as well in computation of the amount falling under the period as provided under Section 10A of the Code.

29. It is also reflected that only two invoices of date 02.01.2020 (pg. 128) and 20.03.2020 (pg. 131) of date 02.01.2020 and 20.03.2020 amounting to Rs. 1,434,921/- and Rs. 1,734,096/- were falling under the period provided under Section 10A of the Code.

30. Thus in our considered opinion, the Ld. Adjudicating Authority has committed a mistake in treating the default date pertaining to all the invoices after 90 days while the facts are contrary to the conclusions drawn by the Ld. Adjudicating Authority. It is also to be recalled that even after the two invoices of the amount of Rs. 3,169,017/- appears to be barred by the period provided under Section 10A of the Code the remaining amount appears to be above threshold and therefore the application moved by the applicant under Section 9 of the Code could not be dismissed on this ground.

31. So far as the ground of pre-existing dispute is concerned it appears to be an admitted fact that no reply to the demand notice dated 08.05.2020 given by the appellant under Section 8 of the Code, was given by the CD and as per the time period provided in the invoices mentioned herein before the default has already occurred in the month of February, 2020 while the tripartite agreement was executed between the parties on 27.04.2020. A perusal of this agreement would conspicuously reveal that by entering into this agreement provision has been made for the payment of the dues by the Belgotex Floor Coverings Proprietary Ltd. to Belgotex India Pvt. Ltd. on behalf of Puneet India Pvt. Ltd. pertaining to certain commission which was owed by Belgotex South Africa to Puneet India Pvt. Ltd. and by executing this agreement the obligation of paying this commission has been granted in favour of the Belgotex India Pvt. Ltd. and thus the commission which was required to be received by the Puneet India Pvt. Ltd. from Belgotex Floor Coverings Proprietary Ltd. was now to be paid by the Belgotex Floor Coverings Prorietary Ltd. to Belgotex India Pvt. Ltd.

32. There is nothing on record which may suggest that any payment in pursuance of this agreement has been made to the appellant and more over this agreement has been executed between the parties after the default had already occurred and therefore like the issuance of some cheques by the CD which have dishonoured the execution of this agreement was only an attempt to clear the dues and the same by any stretch of imagination may not be construed as a prior dispute.

33. It is also reflecting that Ld. Adjudicating Authority in order to substantiate the issue of prior dispute has also relied on an email of date

06.04.2021 written by the CD Puneet India Pvt. Ltd. pertaining to cleaning of carpet and also release of some payment to him for the work order pertaining to Ernst and Young in India Ltd. We notice that this email has been written on 06.04.2021, almost 11 months after the issuance of notice under Section 8 of the Code by the appellant/CD on 08.05.2020 and is pertaining to the commission of the CD withheld by Ernst and Yong in India Ltd. Conspicuously this email has been sent after the receipt of notice under Section 8 of the Code and thus in our considered opinion may not be relevant for the purpose of substantiating the issue of prior dispute as the same is pertaining to the distinct transaction and contract and is after thought.

34. So far as the issue of mismatch of amount as stated in the demand notice dated 08.05.2020 (Rs. 16,171,305/-) and the outstanding amount calculated at Rs. 18,630,116/- is concerned it has been clarified by the appellant that in the demand notice the amount of Rs. 16,171,305/- was stated however after issuance of this notice the Respondent had made part payment aggregating to Rs. 1,693,015.17/- in the months of June-December, 2020 and while filing petition under Section 9 these payments were adjusted rendering the principal outstanding amount as Rs. 14,558,946/- and as per clause 16 of the agreement dated 15.10.2019 the up-to-date interest has been added to this amount and the total claim has arrived as Rs. 18,630,116/-.

35. Ld. Counsel for the appellant has also relied on ***Rajendra Bhai Panchal*** (supra) propounded by a co-ordinate Bench of this Appellate Tribunal wherein para no. 41 it has been held as under:

"41. If there is a mistake in the demand but the creditor is clearly owed the statutory minimum figure or more, the fact that the debt is mis stated may not automatically invalidate the demand as per decision 'Cardiff Preserved Coal & Coke Co.' V. 'Norton 36 LJ Ch 451. Further, the Court will take into account whether any injustice was caused to the 'Debtor' and even a grossly overstated statutory demand may not automatically be set aside as per decision Re a Debtor (No490/SD/1991), (1992) 2 All ER 664 (ChD)".

Thus it is evident that any mismatch in the amount mentioned in the demand notice and petition under Section 9 of the Code may not be sufficient to discard the petition under Section 9 of the Code if the correct amount mentioned in petition under Section 9 of the Code is also above threshold, more so, when the notice given under Section 8 of the Code has not been replied by the CD.

36. Keeping in view all the facts and circumstances of the case and for the reasons mentioned herein before, we are of the considered view that the Ld. Adjudicating Authority has committed manifest illegality in rejecting the application moved by the appellant/applicant under Section 9 of the Code and therefore the impugned judgment may not with stand the test of law and is hereby set aside. Consequently, the appeal is **allowed**. The matter is remanded back to Ld. Adjudicating Authority to pass an order a fresh after providing an opportunity of being heard to the parties. For this purpose, the CP (IB) No. 236 of 2021 is revived on the board of the Ld. Adjudicating Authority. The parties shall appear before the Ld. Adjudicating Authority on 20.04.2026. There is no order as to costs.

37. Pending IA's if any are also closed.

[Justice Mohd. Faiz Alam Khan]
Member (Judicial)

[Naresh Salecha]
Member (Technical)

New Delhi.
30.03.2026.
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