

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) (Ins) No.538 of 2020

[Arising out of Order dated 4th March, 2020 passed by National Company Law Tribunal, Ahmedabad Bench, Ahmedabad in C.P. No.(IB) 204/9/NCLT/AHM/2019]

IN THE MATTER OF:

Before NCLT

Before NCLAT

Vimal Coal Pvt. Ltd.
T. Hiranand Estate
Naroad Road
Ahmedabad,
Gujarat 380 025

Petitioner/
Operational Creditor

Appellant

Versus

Apna Paper Mills Pvt. Ltd.
Plot No.782 40 Shed
IInd Phase, GIDC,
Vapi, Gujarat

Respondent
Corporate Debtor

Respondent

For Appellant:

Shri Mohit K. Bafna and Shri Pulkit Tare, Advocates

For Respondent:

**Shri Mandeep Kalra and Shri Suresh Kumar,
Advocates (R-1)**

ORAL JUDGEMENT

(Per - Justice A.I.S. Cheema)

(Virtual Mode)

16.10.2020 The Appellant – Operational Creditor filed Application under Section 9 of Insolvency and Bankruptcy Code, 2016 (IBC – in short) before the Adjudicating Authority (National Company Law Tribunal, Ahmedabad Bench, Ahmedabad) in C.P. (I.B) No.204/NCLT/AHM/2019 against the Respondent – Corporate Debtor. The Appellant claimed that it had supplied imported steam coal to the Respondent between 1st April, 2015 to 31st March, 2016 and delivered the same to the Respondent as per invoices. Amount of Rs.14,09,449/- was due and outstanding from the Corporate Debtor which amount included interest as

on 15th March, 2018. The Appellant claimed that as the operational debt was outstanding and not paid, the Application under Section 9 of Insolvency and Bankruptcy Code, 2016 (IBC – in short) deserves to be admitted. The Appellant claims that before filing Application under Section 9 on 5th March, 2019, Notice under Section 8 of IBC was sent on 10th January, 2019 (Copy of which is at Page – 66).

2. The Respondent filed Affidavit in Reply before the Adjudicating Authority and claimed that the amount claimed was barred by limitation as the Application was filed beyond period of three years of default. The claim of the Appellant that on 28th July, 2016, ledger account of the Operational Creditor with regard to the Corporate Debtor was acknowledged by the authorized representative of the Corporate Debtor, was disputed. The Respondent claimed that the signature claimed on the ledger account was not done by any authorized signatory of the Respondent. Respondent also claimed that Police Complaint dated 20th June, 2019 was filed making allegations of forgery.

3. The Adjudicating Authority after hearing the parties, observed in Para – 12 of the Impugned Order as under:-

“12. On perusal of the records it appears that the operational creditor intentionally filed this application with some malicious intent so as to pressurise the corporate debtor, where the legislation intention is purely based on the resolution of the company. That, the operational creditor failed to show that the corporate debtor is insolvent. That, all the invoices are time barred. That apart, no documents like purchase orders, delivery challans, lorry receipt etc. are produced in order to show that the goods were delivered.”

4. The Adjudicating Authority went further and made reference to Section 65 of IBC and observed that the Operational Creditor had misused the I&B Code and imposed a penalty of Rs.1 Lakh on the Appellant - Operational Creditor. The Application thus came to be dismissed.

5. The Operational Creditor thus filed this Appeal and has raised issues with regard to the Impugned Order.

6. The learned Counsel for the Appellant states that the Corporate Debtor did not dispute that the coal was supplied and that there was no dispute raised with regard to the quality of the coal. The learned Counsel states that the Respondent before the Adjudicating Authority claimed that it had made some payment to one Mr. Rajiv - the Agent of the Appellant, in cash. The learned Counsel referred to e-mail dated 22nd July, 2016 (Appeal Page – 62) to say that the Corporate Debtor informed by this e-mail that the Operational Creditor should contact Mr. Rajiv as the payment has been released to him. It is argued that no such payments were released and the amounts were outstanding. It is argued that there is no proof regarding making of such payments. The Counsel for the Appellant referred to Annexure – A/4 (Appeal Page – 63) which is ledger account kept by Operational Creditor opened in the name of Corporate Debtor - Apna Paper Mills Pvt. Ltd. The Counsel referred to the figures in this account to show that the amounts stated therein were due and outstanding. It is argued that when the Corporate Debtor did not pay, the Operational Creditor's Representative had gone to the Corporate Debtor and the Official of the Corporate Debtor asked the Office to put an acknowledgement on the document and accordingly the amount was acknowledged.

7. It would be appropriate to photocopy the Annexure - A/4.

Annexure - A/4
(63)

VIMAL COAL PVT LTD.
T.HIRANAND ESTATE, NARODA ROAD, AHMEDABAD 380025.

Year : 2015-2016 Page # 1
ACCOUNT LEDGER Period 01-04-2015 to 31-03-2016
Our Income Tax No. : AABCV4259J

DATE	REF. DOCUMENT NO.	ACCOUNT NAME DESCRIPTION	DEBIT in Rs.	CREDIT in Rs.
22-09-15	A/c : [APM02] SALE 1650	APNA PAPER MILLS PVT.LTD., VAPI SALES A/C	114704.00	
* MONTH September 2015	Balance C/F		114704.00 Dr	0.00
11-10-15	SALE 1887	SALES A/C	166698.00	
31-10-15	SALE 2177	SALES A/C	56989.00	
31-10-15	SALE 2178	SALES A/C	50454.00	
* MONTH October 2015	Balance C/F		274141.00 Dr	0.00
08-11-15	SALE 2282	SALES A/C	274141.00	
23-11-15	SALE 2409	SALES A/C	60419.00	
11-15	SALE 2451	SALES A/C	50506.00	
2-11-15	SALE 2494	SALES A/C	52655.00	
			53185.00	
* MONTH November 2015	Balance C/F		216765.00 Dr	0.00
13-12-15	SALE 2735	SALES A/C	216765.00	
28-12-15	SALE 2977	SALES A/C	266573.00	
			119142.00	
* MONTH December 2015	Balance C/F		385715.00 Dr	0.00
Period 01-04-2015 to 31-03-2016	Balance C/F		991325.00	0.00
325.00	991325.00			991325.00

APNA PAPER MILLS PVT. LTD.
RS
Authorized Signatory
ok 28/7/16

Regarding such endorsement on this Annexure – A/4, the learned Counsel for the Appellant referred to the written submissions, which were filed by the Appellant before the Adjudicating Authority (copy of which is at Annexure – A/12 – Page 112 @ 116). The Paragraphs – 12 and 13 of that written submissions may be reproduced:-

- “12. The Respondent Company has filed an objection raising an Issue of Limitation. It is respectfully submitted that the Applicant has supplied material during the period from 22-09-2015 to 28.12.2015. It is submitted that as per the terms, the amount is to be paid after Fifteen (15) days from the date of respective invoice. It is submitted that the last date of invoice is 28-12-2015. It is submitted that the Respondent Company has acknowledged its liability on 28-07-2016. It is submitted that one Shri Dipen Mukharjee, an employee and representative of the Applicant went to the Office of the Respondent Company at Vapi. The said Representative met Mr. Faruk Qureshi. He gave instruction to his Office to acknowledge the outstanding and the same was done. It is submitted that the period of limitation would start from 28-07-2016 and the present Petition is filed on 05-03-2019. It is respectfully submitted that the present Petition is within the limitation.
13. It is further submitted that the Respondent Company is now disputing the acknowledgement dated 28-07-2016 stating that the signature in the said confirmation does not belong to Authorized Signatory of the Respondent. It is submitted that the Applicant is not in a position to ascertain whether the person signing on the instruction of Mr. Faruk Qureshi is authorized or not. It is very much clear that this is modus operandi of the Respondent Company to get the signature from the person who is not authorized and raised the said objection.”

[Emphasis supplied]

8. Referring to such argument raised before the Adjudicating Authority, the Counsel for the Appellant submits that the amount was acknowledged. The written submissions in Para – 3 claim that the Coal vide several invoices starting from 22.09.2015 to 28th December, 2015 totalling the amount of Rs.9,91,325/-, was supplied. The written submissions claim that the payments were to be made within 15 days from date of invoice and in default of which interest @ 18% per annum was liable to be paid. Thus, the time would start from 15 days after the last invoice which is stated to be of 28th December, 2015. The Section 9 Application was filed on 5th March, 2019 and thus, for saving a limitation which is of three years, the only document relevant is account ledger which is reproduced (supra).

9. With regard to such document, the Respondent appears to have filed Statement of Objections and Affidavit in Reply (Annexure – A/8 – Page 94) and pleaded as under:-

4. It is submitted that the alleged default has occurred on 12.01.2016 and the captioned proceedings have been filed after January 2019 which clearly show that the captioned Application is barred by law of limitation. I further strongly deny that the respondent has acknowledged and confirmed invoices and outstanding payment on 28.07.2016. It is stated that the signatures in the said confirmation does not belong to any of the authorized signatory of the respondent. It is further stated that the signatures does not belong to staff of the respondent herein. I state that the details of authorized signatory has been extracted from MCA website and only the following persons viz Ismail Yasinladu Qureshi, Farooq Haji Yasin Qureshi, Salim Yasin Qureshi are authorized to sign and the purported acknowledgement has not been signed by any of the aforementioned persons. Annexed hereto and marked as **“Annexure – I”** is the copy of the details of authorised signatory extracted from the MCA website. The applicant is put to strict proof thereof. It is stated and submitted that the Applicant has not explained the delay caused in filing the present application and has failed to file

any application for condoning the delay caused in filing the present application. Hence, it is submitted that the captioned application is barred by limitation and is liable to be dismissed.”

10. The Reply also claimed that Complaint had been filed regarding alleged forgery, with the Police.

11. When we consider the Application which was filed under Section 9 which is Annexure – A/7 (Page – 75), in Part – V Column – 8, there is reference to conformation letter dated 28.07.2016. However, in the Affidavit attached with the Application under Section 7 (copy of which starts at Page 83) apparently there is no reference as to how this supposed to be acknowledgement came into existence. It was merely stated in Para – 2.6 of the Affidavit attached with the Form as under:-

“It is respectfully submitted that the said goods were consumed by the Respondent without any complaint. However, no payments were received by the Applicant from the Respondent Company. It is respectfully submitted that the Applicant made several requests by telephonic calls and personal visits and the Applicant was assured that the outstanding invoices shall be paid immediately. It is respectfully submitted that the Respondent has acknowledged and confirmed the invoices and outstanding payment on 28-07-2016.”

12. Thus, only statement made was that the Respondent had acknowledged on 28.07.2016 without any particulars. The Respondent in Affidavit in Reply as per Annexure - A/8 seriously disputed the execution of this document as regards the Part which is claimed by the Appellant to be acknowledgement. It is only a signature with rubber stamp and below the signature (not above), there is an endorsement “ok 28.07.2016”.

13. Section 18 of the Limitation Act, 1963 reads as under:-

“18. Effect of acknowledgment in writing.—(1) Where, before the expiration of the prescribed period for a suit or application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by any person through whom he derives his title or liability, a fresh period of limitation shall be computed from the time when the acknowledgment was so signed.

(2) Where the writing containing the acknowledgment is undated, oral evidence may be given of the time when it was signed; but subject to the provisions of the Indian Evidence Act, 1872 (1 of 1872), oral evidence of its contents shall not be received.

Explanation.—For the purposes of this section,—

(a) an acknowledgment may be sufficient though it omits to specify the exact nature of the property or right, or avers that the time for payment, delivery, performance or enjoyment has not yet come or is accompanied by a refusal to pay, deliver, perform or permit to enjoy, or is coupled with a claim to set off, or is addressed to a person other than a person entitled to the property or right,

(b) the word “signed” means signed either personally or by an agent duly authorised in this behalf; and

(c) an application for the execution of a decree or order shall not be deemed to be an application in respect of any property or right.”

14. It is quite settled that the acknowledgement has to be a conscious acknowledgement of the debt. There could be refusal to pay but it should show that there has been an acknowledgement of the debt outstanding. In the present

matter, the endorsement concerned is seriously disputed and even if we are to accept the case of the appellant [portion of which argument we have reproduced (supra)], what it states is that Mr. Dipen Mukharjee - employee and Representative of the Appellant went to the Office of Respondent and met Mr. Faruk Qureshi and the said Faruk Qureshi gave instructions to his Office to acknowledge the outstanding and the same was done. Thus, even the Appellant is not claiming that Mr. Faruk Qureshi signed it. Who signed, nothing is clear. In the facts of the matter, the contention of the Corporate Debtor that the signature is not of Authorized Representative, cannot be simply brushed aside. From side of Operational Creditor, there is no Affidavit regarding how such endorsement was made. Annexure – A/4 does not inspire confidence.

15. We do not find that the Adjudicating Authority erred when it concluded that the debt claimed was time barred. On this count, we did not find any substance in the Appeal.

16. However, we accept the argument of the learned Counsel for the Appellant that there was no good ground made out to hold that the initiation of the proceedings was fraudulent and malicious as admittedly, there was supply of coal and it was inappropriate to impose the penalty.

17. For the above reasons, we partly allow the Appeal. we set aside the Order passed by the Adjudicating Authority in Paragraphs – 13 and 14 of the Impugned

Order imposing penalty of Rs.1 Lakh on the Operational Creditor/Appellant.

Rest of the Impugned Order of the Adjudicating Authority we maintain.

The Appeal is disposed accordingly.

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

(Justice Anant Bijay Singh)
Member (Judicial)

rs/md