NATIONAL COMPANY LAW APPELLATE TRIBUNAL, PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 742 of 2020

[Arising out of order dated 15.07.2020 in Company Petition (IB) No. 2817/ND/2019 passed by the Adjudicating Authority (National Company Law Tribunal, New Delhi Bench Court-V)]

IN THE MATTER OF:

Trafigura India Private Limited
Having its registered office at:
D/64, Defence Colony
New Delhi 110024
And its corporate office at:
11th Floor, A Wing, ONE BKC
Bandra Kurla Complex, Bandra East
Mumbai, Maharashtra.

..... Appellant.
(Operational Creditor)

Versus

TDT Copper Limited
Having its registered office at:
Tolstoy House 512-512A
Tolstoy Marg, Connaught Place New Delhi 110001.
And its corporate office at:
94C Mittal Towers, 210,
Nirman Point, Mumbai 400021.

..... Respondent.
(Corporate Debtor)

Present:

For Appellant: **Mr. Krishnendu Datta, Sr. Advocate with Ms. Anjali Anchayil, Ms. Avni Sharma and Ms. Mehak Khurana, Advocates.**

For Respondent:- **Mr. Mayan Prasad, Advocate.**

J U D G M E N T

(15th September, 2022)

Justice Anant Bijay Singh;

The Appellant preferred this Appeal under Section 61 of the Insolvency and Bankruptcy Code, 2016 ***(for short IBC)*** being aggrieved and dissatisfied by the order dated 15.07.2020 passed by the Adjudicating Authority (National Company Law Tribunal, New Delhi Bench Court-V) in Company Petition (IB) No. 2817/ND/2019, by which the Adjudicating Authority passed the following orders:

> ***"14.*** *So far the contention of the Corporate Debtor that the matter may be referred to the Arbitration under Section 8 of the Arbitration and Conciliation Act is concerned, as we have already stated in the afore-stated para that the role of National Company Law Tribunal is very limited, while exercising its power under Section 7, 9 and 10 of the IBC, 2016. While exercising its power under Section 9, the Adjudicating Authority is required to see only there is a default in payment of debt or any dispute has been raised by the Corporate Debtor or not, so far refer the matter to the Arbitration is concerned, it is beyond the scope of Section 9 of the IBC, 2016. Therefore, we are unable to consider the prayer of the Corporate Debtor to refer the matter*

before the arbitration. However, the Corporate Debtor is at liberty to move before the Proper and Competent Court. As per the submissions of Corporate Debtor, Commercial Civil Suit No. 2/2020 pending for consideration, therefore, Corporate Debtor is at liberty to raise this issue before that Court.

15. *Accordingly, it is therefore,*

ORDERED

*that the application is hereby DISMISSED.***"**

2. The facts giving rise to this Appeal are as follows:

i) The Appellant is a private company incorporated under the provisions of the Companies Act, 1956 and having its registered office at D/64 Defence Colony, New Delhi-110024. The Appellant is engaged in the business of *inter alia,* trading in non-ferrous metals including copper, zinc, tin, aluminium, iron ore, coal and other refined metals and concentrates of such non-ferrous metals in various forms.

ii) The Respondent is a public Company Limited by shares, incorporated under the provisions of the Companies Act, 1956 and having its registered office at Tolstoy House, 512-512A, Tolstoy Marg, Connaught Place, New Delhi 110001. The Respondent is engaged in the business of manufacture and supply of a wide range of copper products using copper cathodes.

iii) Further case is that the parties entered into the Master Sale Agreement (*for short MSA)* dated 27.01.2016 under which the Respondent agreed to buy and the Appellant agreed to sell on the terms and conditions set out in the MSA, a

specified quantity of copper cathodes (defined as 'Material'). The rights and obligations of the parties were governed by the terms of the MSA. In accordance with the provisions of the MSA, the Respondent was required to place purchase orders for the supply of Material upon the Appellant on a regular basis between 27.01.2016 and 27.01.2016. The Appellant was required to supply the Material to the Respondent as specified in such purchase orders.

iv) Further case is that in relation to each purchase order for the supply of the Material, the Appellant would raise invoices on the Respondent in respect of the INR amount of the provisional price payable by the Respondent with respect to deliveries of Material under such purchase order. In accordance with the terms of the MSA, such invoices issued by the Appellant for the supply of Material were required to be paid by the Respondent no later than 30 days from the date of the relevant invoice.

v) Further case is that under the terms of the MSA, the Respondent was required to pay interest on the invoice amount at the rate of 7.5% per annum (compounded monthly) for the period starting from and including, the relevant delivery date and including the date on which the invoice amount was paid. If any invoice amount or part thereof was not paid by the Respondent within the timelines set out in the preceding paragraph, the Respondent was liable under the terms of the MSA to pay default interest on the unpaid amount at the rate of 4% per annum from (and including) the due date for payment to (and including) the date of receipt of such unpaid amount by the Appellant.

vi) The Appellant discharged its obligations under the MSA by supplying copper cathodes to the Respondent in accordance with terms of the MSA. Invoices were raised by the Appellant for the same from time to time. However, the Respondent failed to make payment to the Appellant in accordance with the terms of the MSA. Since the amounts payable by the Respondent under the MSA in respect of the supply of copper cathodes remained unpaid for a substantial period of time, the parties entered into discussions regarding payment of amounts due and payable to the Appellant for the supply if copper cathodes. Accordingly, the parties entered into the Settlement Agreement on 20.11.2018, *inter alia,* extended the Terms of the MSA to 31.12.2018 and provided for the full and final settlement of the amounts due and payable by the Respondent to the Appellant for the supply of copper cathodes.

vii) Further case is that under the terms of the Settlement Agreement, the Respondent has unequivocally acknowledged and admitted that an amount of Rs. 63,81,63,368/- was due and payable as on 31.12.2018 by the Respondent to the Appellant. The Respondent agreed to pay the same together with interest thereon at the rate of 10.9% per annum compounded monthly, to the Appellant pursuant to the payment schedule set out therein. The entire outstanding amount was to be paid by the Respondent to the Appellant by 30.04.2019

viii) Further case is that after 31.08.2018 and till 10.12.2018, an amount of Rs. 12,30,59,615/- was paid to the Appellant by the Respondent towards the outstanding amounts due and payable to the Appellant for the supply of copper

cathodes under the MSA and as further acknowledged and admitted in the Settlement Agreement. However, the Respondent failed to pay the remaining amount due and payable by it to the Appellant for the supply of copper cathodes under the terms of the MSA. Pursuant to further discussions between the parties and following a request made by the Respondent to give additional time until 15.05.2019 to pay the entire outstanding amount, the Appellant agreed to give to the Respondent such additional time until 15.05.2019. Thus, by way of the extension notice dated 30.04.2019 addressed by the Appellant to the Respondent, the deadline of 30.04.2019 provided under clause 5(c) of the Settlement Agreement was extended to 15.05.2019. However, the Respondent failed to make payment of the outstanding amounts to the Appellant for the supply of copper cathodes in accordance with the terms of the extension notice.

ix) Further case is that on 24.09.2019 (Annexure A/6 of the Appeal), the Appellant through its advocates, issued a demand notice under the Code on the Respondent calling upon it to pay the Appellant an amount of Rs. 64,13,59,330/. This amount consisted of the total outstanding amount under the MSA as on 15.05.2019 and interest on the aforesaid amount for the period from 16.05.2019 to 24.09.2019, the total some of which was acknowledged to be due and owing by the Respondent to the Appellant under the Settlement Agreement. Thereafter, in the reply the Respondent denied that it owed any amount to the Appellant. This was in complete contradiction to the Respondent's own position in the /settlement Agreement and its correspondence with the Appellant. The

Respondent had as late as 09.05.2019 itself acknowledged, as per its calculation that an amount of Rs. 40.24 crores were due and payable by it to the Appellant.

x) Further, the Appellant filed the Application under Section 9 of the IBC against the Respondent seeking the initiation of the CIRP in respect of the Respondent as on 24.10.2019 an amount of Rs. 59,72,40,162/- was due and payable by the Respondent to the Appellant, this amount took into account, in addition to the adjustments made earlier. After hearing the parties, the Adjudicating Authority dismissed the Application filed by the Appellant under Section 9 of the IBC. Hence this Appeal.

3. The Ld. Sr. Counsel for the Appellant during the course of argument and in his Momo of Appeal along with written submissions submitted that cause of action for the Section 9 arises on account of the Respondent's default in making payments under a MSA dated 27.01.2016 entered into between the parties for the supply of copper cathodes and further, a Settlement Agreement dated 20.11.2018 between the parties whereby the Respondent acknowledged and admitted that such sums were owed by it to the Appellant under the MSA.

4. It is further submitted that the Settlement Agreement clearly acknowledged its liability to pay an amount of INR 63.81 crores and agreed to pay the same along with 10% interest per annum compounded annually by 30.04.2019 (extended to 15.05.2019. Between 31.08.2018 and 10.12.2018 the Respondent paid an aggregate amount of INR 12.30 crores (approx.), but has not paid the remaining till date.

5. It is further submitted that the MSA is for the supply of copper cathodes and is clearly a contract for the provisions of goods and services. Therefore, claims arising under the MSA are covered under the definition of 'operational debt' under Section 5(21) of the IBC. The Settlement Agreement is simply an acknowledgement / admission by the Respondent of its liability arising under the MSA. An operational debt under the MSA for provision of goods and services does not lose its character as such simply because a Settlement Agreement was entered into in relation thereto.

6. It is further submitted that while passing the impugned order, the Adjudicating Authority did not consider various decisions of this Appellate Tribunal and National Company Law Tribunal where debts arising under Settlement Agreement have been treated as 'operation debt' and initiated Corporate Insolvency Resolution Process.

7. It is further submitted that the Respondent has clearly and unequivocally acknowledged its liability to pay the amount of INR 63.81 crores as on 31.08.2018 in the Settlement Agreement. The Respondent has subsequently in an email dated 09.05.2019 (Annexure A8, Vol- II of the Appeal), acknowledged that as per its own calculations, an amount of INR 40.25 crores is due and payable by it to the Appellant.

8. It is further submitted that the Adjudicating Authority while dismissing the Application filed by the Appellant under Section 9 on the simpliciter ground that unpaid amounts under a Settlement Agreement do not constitute

'operational debt' under Section 5(21) of the IBC is erroneous. Based on these submissions the impugned order is fit to be set aside and the Appeal be allowed.

9. The Ld. Counsel for the Respondent during the course of arguments and in his reply along with written submissions submitted that the Appellant has filed the Section 9 Application in respect of claims arising under the Settlement Agreement dated 20.11.2018 and not under the MSA dated 27.01.2016. As per the pleadings of the Appellant before the Tribunal the cause of action for the application arose on the Corporate Debtor's alleged default in making payments under the Settlement Agreement. In this connection referred to part-IV of the Section 9 Application filed by the Appellant before the Adjudicating Authority relevant portion at page 265 of the Appeal which deals with particulars of 'operational debt' wherein total amount of debt due as on 24.10.2019 is Rs. 59,72,40,162/- and the Appellant has relied upon the terms of settlement agreement dated 20.11.2018, executed between the Corporate Debtor and the Operational Creditor and as amended by the Notice of Extension dated 30.04.2019 addressed by the Operational Creditor to the Corporate Debtor.

10. It is further submitted that the Settlement Agreement dated 20.11.2018 does not provide for payment of outstanding amounts allegedly due under the MSA but only seeks to reduce the outstanding exposure to Rs. 52.50 crores by 30.11.2018 and for execution of supply contracts for the year 2019. In fact, there is no schedule for payment of outstanding amount in the same. Further, the Respondent has not acknowledged any liabilities to pay the purported dues

under the MSA by 30.04.2019 in the Settlement Agreement or email dated 09.05.2019. Therefore, clearly the Settlement Agreement is not in respect of the payment of any 'operational debt' arising under the MSA and as such the Section 9 Application filed by the Appellant was rightly dismissed by the Adjudicating Authority. The claims arising under the Settlement Agreement are not 'operational debt'.

11. It is further submitted that Section 9 not triggered as the debt did not become 'due' and consequently there has been no 'default'. The Settlement Agreement provided that the Respondent shall reduce the outstanding amount from Rs. 63,81,63,368/- to 52,50,00,000/- by 30.11.2018 failing which the entire outstanding amount shall become due and payable immediately further, in the event the parties fail to conclude a further contract for supply of material for 2019 by 21.12.2018, the Respondent shall make payments to the Appellant as necessary to reduce the outstanding liability to zero by 30.04.2019 [clause 5(c) of the Agreement]. Admittedly, an amount of Rs. 12.3 crores were paid by the Respondent to the Appellant reducing its exposure to less than INR 52,50,00,000/- by 30.11.2018.

12. It is further submitted that an email dated 25.04.2019, the Appellant has stated that "*TDT will reduce the exposure to 7.5mm USD by 15.05.2109"* which bolsters the contention of Respondent that only exposure amount was to be reduced by 30.04.2019 and the amount did not become due and payable. Pertinently, the Appellant has not demanded the payment of the outstanding

amount by the said email. It is an admitted position that as on 15.05.2109, the credit exposure was not beyond USD 7.5 million. Therefore, the Appellant has defaulted on 15.05.2019 is without merit.

13. It is further submitted that under Section 9 of the Code, an Application can be filed only upon the occurrence of a default. Section 3(21) of the Code defines "default" to mean *non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not paid by the debtor or the corporate debtor, as the case may be.*

14. The Ld. Counsel for the Respondent relying on the judgment of Hon'ble Supreme Court in the case of ***"Kesoram Industries & Cotton Mills Vs. Commissioner of Wealth Tax, reported in (1966) 2 SCR 688".*** In para 20, explains as follows:

> **"***..... Standing alone, the word 'debt' is as applicable to a sum of money which has been promised at a future day as to a sum now due and payable. If we wish to distinguish between the two, we say of the former that it is a debt owing and of the latter that it is a debt due. In other words, debts are of two kinds: solvendum in praesenti and solvendum in future.***"**

15. It is further that as per Section 3(12) of the Code, a default can occur only when there is failure to pay a debt which has become now due i.e. payable in praesenti. A debt become due when it is payable unless it is interdicted by some law or has not yet become due in the sense it is payable at some future date. In this context referred para 30 of the judgment of Hon'ble Supreme Court in the

case of ***"Innoventive Industries Ltd. vs. ICICI Bank and Anr. (2018) 1 SCC 407".*** Therefore, The Adjudicating Authority has rightly rejected the Application filed under Section 9 of the Code, when the debt is payable in praesenti i.e. on the date of demand notice and filing of Section 9 Application can the insolvency resolution process be triggered.

16. It is further submitted that since the Respondent had complied with the terms of the Settlement Agreement, the amounts claimed by the Appellant did not become due and payable as on 30.04.2019. Further, no request was made by the Respondent to extend the deadline under clause 5(c) and the extension notice relied upon by the Appellant is absolutely baseless and was issued with a malafide intention to cause prejudice to Respondent, Therefore, the Application filed under Section 9 of the Code was not maintainable in respect of such claims. Based on these submissions there is not merit in the instant Appeal, the Appeal may be dismissed.

FINDINGS

17. After hearing the parties and having gone through the pleadings made on behalf of the parties, particularly the Settlement Agreement dated 20.11.2018 (Annexure A3 at page 99 to 108 of the Appeal) arrived between the parties in Clause 3 and 5 read as hereunder:

> ***"****3. As at August 2018, the Parties agree that the outstanding liabilities owed by TDT to Trafigura under the MSA is INR 63,81,63,368/- (the "Outstanding Principal"). The Outstanding*

Principal comprises of all sums owed and unpaid by TDT in respect of the Purchase Price only for purchases done under the MSA up to 28th February 2018 and does not include any contractual interest and/or MTM. In the event that it is confirmed that GST is to be levied on certain purchases of Material by TDT (as previously discussed between Parties), then the Outstanding Principal stands revised to INR 67,43,99,745/- as at 31 August 2018. It is further clarified that any purchases of material made by TDT after 28th February 2018 up until the date of this Settlement Agreement have been on a non-credit basis only.

5. TDT shall make payment of the Outstanding Principal together with the interest (set out at Clause4 above) and/or MTM (together the "Outstanding Amount") to Trafigura into its designated bank account as follows:

a. TDT shall make any and all payments to Trafigura as necessary in order to reduce the Outstanding Amount to INR 52,50,00,000/- by 30 November, 2018 (the "First Instalment"); and

b. In the event that TDT fails to make the First Instalment within the timeframe set out above, the entire outstanding portion of the Outstanding Amount shall become immediately due ad owing, and Trafigura shall have the right to pursue TDT for that debt and Trafigura shall not be obliged to make any further supply of Material under the MSA; and

c. In the event that the Parties fail to conclude a further contract for the supply of material for 2019 by 21 December 2018, TDT shall make any and all payments to

*Trafigura as necessary in order to reduce the Outstanding amount to zero balance by 30 April 2019.***"**

- The Adjudicating Authority has considered the Settlement Agreement and rightly come to the conclusion that default of instalment of Settlement Agreement does not come within the definition of 'operational debt' as it does not fall within the definition of additional debt as per Section 5(21) of the IBC and further prayer made by the Corporate Debtor that the matter be referred to the Arbitration under Section 8 of the Arbitration and Conciliation Act, the Adjudicating Authority has also rightly held that the role of National Company Law Tribunal is very limited while exercising its power under Section 7, 9 and 10 of the IBC, 2016, it is beyond the scope of Section 9 of the IBC.
- The Adjudicating Authority has taken note of the submissions of Corporate Debtor that the Commercial Civil Suit No. 2/2020 is pending for consideration before the Court of competent jurisdiction and rightly rejected the claim of the Appellant.
- With these reasons assigned by the Adjudicating Authority, we do not find any merit in the instant Appeal. The impugned order dated 15.07.2020 passed by the Adjudicating Authority (National Company Law Tribunal, New Delhi Bench Court-V) in Company Petition (IB) No. 2817/ND/2019 is hereby affirmed. The Appeal is hereby dismissed.

18. Registry to upload the Judgment on the website of this Appellate Tribunal and send the copy of this Judgment to the Adjudicating Authority (National Company Law Tribunal, New Delhi Bench Court-V), forthwith.

[Justice Anant Bijay Singh]
Member (Judicial)

[Ms. Shreesha Merla]
Member (Technical)

New Delhi

15th September, 2022

R. Nath.