NATIONAL COMPANY LAW APPELLATE TRIBUNAL AT CHENNAI

(APPELLATE JURISDICTION)

Company Appeal (AT) (CH) (Ins) No. 476/2024

IN THE MATTER OF:

M/s. Shrushti Contech Private Limited
Represented by Guduru Srinivas,
Assistant General Manager
Having registered office at HIG–49, A
PHB Colony, Proddatur, YSR District Kadapa,
Andhra Pradesh – 516 360. **… Appellant**
V
M/s. V A Tech Wabag Limited
No. 17, 200 Feet Thoraipakkam Pallavaram
Main Road, Sunnambu Kolathur
Chennai – 600 117. **… Respondent**

Present:

For Appellant	**:**	Mr. KK Vijay Vigneshwar, Advocate
For Respondent	**:**	Mr. Neeraj Kumar & Ms. Meenakshi Jha, Advocates

JUDGMENT
(Hybrid Mode)

[Per : Justice Sharad Kumar Sharma, Member (Judicial)]

Brief facts of the case are that, the Appellant, who happens to the Operational Creditor, was awarded a work contract by the Corporate Debtor M/s. VA Tech Wabag Ltd., by the name of civil works for Plant Water system for APGENCO-KTPP project vide Order No. MBG-PO-15481/10P5M dated 06.06.2014 that later on, the said work order stood amended, vide work Order No.MBG-PO-17110/ 10P80 dated 12.02.2015, that on 23.04.2015 Completion Certificate was issued by APGENCO, that after bifurcation of the state of Andhra

Pradesh, APGENCO become TSGENCO for the state of Telangana, that certain amount fell due to be paid by the Respondent V A Tech WABAG, and that the Appellant moved a section 9 application before Learned NCLT which got dismissed on 20.03.2024.

2. It is contended by the Operational Creditor, the Appellant herein, that as per the terms of the work contract dated 06.06.2014 to be read with the amended contract dated 12.02.2015, he has carried out the work as it stood awarded to them with utmost care and diligence. As a consequence to its satisfactory completion, a Completion Certificate was issued too in favour of the Respondent on 23.04.2016. The Corporate Debtor, however is said to have restricted the Appellant from having access to the site, where the work was executed. There are various other works on the ground level, which were left, and were required to be completed, which had marginally created an impediment in the execution of the work, but since the satisfaction of the work was already recorded it is not needed to be discussed further, because of the Completion Certificate. Owing to the Completion Certificate, which was issued by TSGENCO on 23.04.2016, the Appellant contended that, they would be entitled for the settlement of the entire dues, which would be payable under the terms of the contract. He submitted that despite of various correspondences made by him for the remittance of the amount due to be paid, the Corporate Debtor failed to pay outstanding dues to Appellant, despite conducting of a number of meetings,

including the one that was held on 08.03.2017, wherein it is contended that, the parties have agreed to settle the issue with regards to the payment for the work done, but however no payment was made.

3. This alleged meeting of the settlement dated 08.03.2017, which was held for the purposes of settlement of dues, is only a fact pleaded, without there being any material as such placed on the records to show that the meeting was actually conducted and the meeting were drawn up containing the version of the Appellant with regard to agreement as claimed above.

4. The Appellant further contends that there was a second phase of settlement, which was entered into on 13.06.2019, in the meeting of the Corporate Debtor, as well as the Operational Creditor (the Appellant herein), wherein the Corporate Debtor is said to have agreed to pay 6.5 crores, as a full and final settlement for the work done. But the same was not paid. Yet again, the minutes of the said alleged second settlement of 13.06.2019 is not on record except, for the fact that the Appellant attempts to draw his inferences from an undated correspondence (Page 306 of Volume II) which is placed on record, based on which the Appellant contends that establishes that the Corporate Debtor in fact has confirmed a payability of a sum of Rs.37,13,22,209/- as falling due to be paid as on 31.03.2022 for the work done till that date and in support thereto, he refers to the statement of account which was also submitted by him.

5. In the absence of there being any other supporting corresponding document on record to establish the settlement of 13.06.2019, where the amount of Rs.6.5 crores, was agreed to be paid, the Learned Counsel for the Appellant has drawn attention to the correspondence, which was sent by way of an email dated 03.06.2022, wherein it was mentioned that, as per the confirmation of the balance amount due, it was limited to the extent of the amount payable, as referred to in the undated correspondence. The Appellant has contended that no fruitful result could be achieved at and no amount despite of the aforesaid settlement, which has been orally pleaded, was paid and therefore, later on he issued a letter of demand by way of issuance of Form 3 for the first time on 14.12.2020, where in accordance with the entries, that were made in Column 2, the Appellant himself has stated that the amount which has fallen due to be paid is Rs.18,75,96,057/- *and the date of default is 01.05.2016.* This demand notice issued on 14.12.2020, was yet again reiterated by issuance of a second demand notice by issuance of Form 3 on 10.09.2022, where yet again in its Column 2, the amount shown to be falling due to be paid till 10.09.2022 was expressed to be Rs.25,84,17,857/- and *the date of default was shown to be 01.05.2016*. Admittedly, after issuance of the demand notice on the aforesaid dates i.e., 14.12.2020 & 10.09.2022, there cannot be any iota of doubt that the date of default as expressed by the Appellant in his notice of demand, was shown to be 01.05.2016 (being a date common in both demand notices).

6. The proceedings under Section 9 of I & B Code, was shown to have been drawn by filing the Application only on 15.06.2023. The said Application has been rejected by the Learned Tribunal, while dismissing the proceedings under Section 9 of the I & B Code, on the ground that the claim raised was barred by limitation and besides that, there was already a pre-existing dispute, the proceedings under Section 9 of I & B Code, would not be maintainable.

7. In the proceedings that were held under Section 9 of I & B Code, the Registry of Learned NCLT had sought queries from the Appellant, to explain the differences in the claim amount as given in the Application and the demand notice, and the reason for the issuance of two demand notices, and to clarify about the limitation and as to whether the Corporate Debtor has acknowledged the outstanding dues.

8. The grievances of the Appellant are that the manner in which the question of limitation has been considered by the Learned Tribunal would be absolutely contrary to the supporting documents he had placed on record, showing the admission of default of the amount, in various correspondences that were issued by the Corporate Debtor. Besides that, he has contended that the Company Petition itself was considered and decided on 20.03.2024, when the Company Petition was registered only with the diary number, and that the same could not have been decided on its merits without the Company Petition itself having being registered after assignment of the regular number.

9. As far as the aforesaid technical objection taken by the Appellant pertaining to the assignment of the diary number and later on giving it with the regular Company Petition number and deciding the same on the same day by the Impugned Order of 20.03.2024 is concerned, it would be a minor procedural anomaly, which cannot be taken as a ground to challenge a decision that has been taken on merits by Learned Tribunal in the said Company Petition. The Learned Counsel for the Appellant has submitted that when the Company Petition was taken up for consideration, it was for establishing whether Company Petition was maintainable, based on 4 sets of defects raised by the Registry with respect to 2 demand notices, whether application has been filed within limitation, whether there is acknowledgement and clarification with respect to difference in amount due as per demand notice and section 9 application. The Appellant has alleged that the application was decided based on clarification he has furnished on the above defects without examining some of the documents he had submitted, such as the reference to the Statutory Auditor report of the Corporate Debtor, showing confirmation of balance in the prescribed format as it was issued on 31.03.2021, 31.03.2022 & 31.03.2023, which he had placed on record, and the email communication of the affirmation of the balance dated 31.03.2021. He has contended that if the affirmation of balance in the email dated 31.03.2021, is taken into consideration, it will be considered as an acknowledgment of debt and therefore even though the default date, as it was mentioned in the notice, remains to be of 01.05.2016, the Company Petition having been preferred on 15.06.2023

should have been construed to be within limitation being within 3 years of date of such acknowledgement which is 31.03.2021. He contends that the merits of these documents as above ought to have been considered by the Tribunal before deciding on the maintainability of the Application preferred by him.

10. He further submitted that the confirmation of balances was also fortified by the document, which he has referred to and annexed as annexure 6 to the Company Appeal, which is an attachment pertaining to the confirmation of balance, and if the said document itself could be taken into consideration, it will prove that the default amount was admitted in 2022 and hence the institution of the proceedings on 15.06.2023 would be falling to be well within the prescribed period of limitation. He has further submitted that the Statutory Auditor of the Corporate Debtor, had also confirmed the balance as it was standing in the books of account, which was to be paid by the Corporate Debtor, as it could be reflected from the email communication from 28.03.2022. Accordingly he has contended that the Impugned Order would be bad in the eyes of law for the reason being that, be what so ever the implication the confirmation of the balances of the Corporate Debtor may have, qua the date of default for the purpose of determining the aspect of limitation, it was incumbent upon the Learned Adjudication Authority to consider its implications and to record its findings on the same as whether to accept the admission of default as reflected in the correspondence and the Auditor's Report, relating to the years 2020-2021 &

2021-2022 and in the absence of any finding being recorded on the same, the Impugned Order rejecting the application under Section 9 of I & B Code, merely on the premises that the date of default referred to in the notice is shown as to be 01.05.2016 would be bad in the eyes of law. He has further contended that though the date of default as given in the notice under Section 8 issued in the shape of Form 3 under Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, is to be taken as the starting point for the purposes of calculating limitation for preferring the proceedings under Section 9 of the I & B Code, the same will get shifted to later dates, in case the debt due is confirmed by balance sheet entries as has been held in a catena of Judgments of Hon'ble Apex Court and this Tribunal, that he had claimed that the Corporate Debtor had acknowledged the debt due in his books of account Debtor, which Learned Adjudicating Authority did not consider at all and therefore, not considering the aforesaid documents of either accepting or denying the same would render the Impugned Order to be bad in the eyes of law. With regard to the pre-existing dispute, the Appellant has contended that Learned Adjudicating Authority has not permitted him to make his submissions, that Learned Adjudicating Authority has arrived on its finding based on the Record of Information Utility Form D only without seeking any clarification and that the findings have been made without any proper appreciation of facts.

11. The Learned Tribunal in the impugned order has clearly recorded that there is a pre-existing dispute, which is evident from the two stages of settlement, which were being attempted to be arrived at that is on 08.03.2017 & 13.06.2019, that the alleged settlement of 13.06.2019 is shown in a document that is unauthenticated, that the arbitration process, is being conducted, by the Hon'ble Supreme Court with respect to the dispute in respect of the receivables from TSGENCO, by appointing sole arbitrator, that in the annual report of the Corporate Debtor, the amount in respect of trade bills is shown to have been disputed and that Record of Default report from NeSL shows the status of 'Default" as disputed all of which point to a pre-existing dispute. Regarding the aspect of limitation, Learned Adjudicating Authority has held that the date of default, which has been mentioned in the notice issued under Section 8 of I & B Code, will have to be taken as a date of default which cannot be altered, that therefore date of default will be 01.05.2016, that letter sent by statutory auditor merely asked for balance confirmation from the Operational Creditor, that the alleged final settlement of 2019 is not authenticated by Corporate Debtor, that limitation period expired on 30.04.2019 and the alleged acknowledgement in form of settlement dated 13.06.2019 and the alleged balance sheet entries are all beyond the said limitation period and the petition has to be taken as to have been filed beyond the limitation period.

12. Thus, the reason which has been assigned in the Impugned Order dismissing the petition under Section 9 of I & B Code because of the aspect of limitation and existence of the pre-existing dispute, since being an admitted fact, which stood established by the documents which were brought on record and more particularly, because of the admission made by the Appellant himself in the proceedings before the Learned Adjudicating Authority, there is no anomaly or any perversity in the Impugned Order which could call for any interference. Hence, the Appeal lacks merit and the same is accordingly dismissed.

[Justice Sharad Kumar Sharma]
Member (Judicial)

[Jatindranath Swain]
Member (Technical)

25.07.2025
VG/MS/RS