NATIONAL COMPANY LAW APPELLATE TRIBUNAL
CHENNAI BENCH

Company Appeal (AT) (CH) (Ins.) No. 359 of 2022
&
I.A. No. 822, 823 & 824 of 2022

[Arising out of Order dated 16.09.2022 passed by the Adjudicating Authority/National Company Law Tribunal, Hyderabad Bench in CP (IB) No. /35/9/HDB/2021]

IN THE MATTER OF:

Mr. Babu Rao Kodali,
Member of Suspended Board of Directors,
Navayuga Infotech Pvt. Ltd.
Flat No. 502, Vijaya Krishna Residency
F-32, Madhura Nagar, Ameerpet
Sanjeev Reddy Nagar, Hyderabad- 500038 **...Appellant**

Versus

1. **Vajra IOT Pvt. Ltd.**
4th Floor, Vijaya Towers,
D.No. 2-56/2/19, 100 Ft. Road,
Madhapuram, Hi Tech City,
Hyderabad-500081. **...Respondent No. 1**

2. **Navayuga Infotech Pvt. Ltd.**
Represented by its Resolution Professional
1st Floor, 8-2-293/82/A/379 & 379A,
Plot No. 379, Road No. 10, Jubillee hills
Hyderabad- 500033. **...Respondent No. 2**

Present:

For Appellant	:	**Mr. E. Om Prakash, Senior Advocate** **For Mr. Adithya Reddy, Advocate.**
For Respondents	:	**Mr. P.H. Arvindh Pandian, Senior Advocate For R-1/ Caveator.** **For Mr. Avinash Krishnan Ravi, Advocate For R-1/ Caveator.**

J U D G M E N T
(Virtual Mode)
(18.11.2022)

NARESH SALECHA, MEMBER (TECHNICAL)

The Present Appeal is filed against the 'impugned order' dated 16.09.2022 passed in CP (IB) No. 35/9/HDB/2021 by the 'Adjudicating Authority' (National Company Law Tribunal, Hyderabad Bench-I), whereby, the 'Adjudicating Authority' dismissed the Petition filed under the Insolvency & Bankruptcy Code, 2016 (in short '**I &B Code, 2016**).

Brief Facts:

2. Mr. Babu Rao Kodali, Appellant herein, was a Member of Suspended Board of Directors, Navayuga Infotech Pvt. Ltd. Navayuga Infotech Private Limited is the 'Corporate Debtor' (CD) who is 2nd Respondent herein, had placed the Purchase Orders on the Vajra IOT Pvt. Ltd. (formally known as 'Green Ark Enersol Pvt. Ltd.') is the 'Operational Creditor'/ 1st Respondent herein. On 03.11.2015 , 2nd Respondent placed 2 Purchase Orders on 1st Respondent for the supply and installation of 20,000 AMR modems (including installation, commissioning, integration and service for 63 months) required for a project by 'Tamil Nadu Generation and Distribution Company' (in short "TANGEDCO").

3. The 1st Respondent could, however supply only 16140 modems against 20000 modems as per purchase orders. Moreover, the 1st Respondent has completed installation of only 2945 modems as opposed all 20000 modems which were to be installed. In addition, the 1st Respondent did not give integration and Facility Management Services as expected from them as per contract.

4. It has been alleged that the supply of the modems was badly delayed in spite of the purchase order stipulating that all supplies need to be made within 60 days. Therefore, the 1st Respondent failed to perform its obligations under the purchase orders and thus allegedly not entitled to any payment and accordingly, debt was not due and 2nd Respondent had no liability to pay any debt.

5. It has been brought out that in accordance with request made by the 1st Respondent that the 2nd Respondent transferred the right to claim performance from the beneficiary third party, 'TANGEDCO' to the 1st Respondent and hence claims of the 1st Respondent, if any, are only against 'TANGEDCO' and not against the 2nd Respondent.

6. The 2nd Respondent herein had initiated arbitration proceedings as against the 'TANGEDCO' for recovery of dues. However, 'TANGEDCO' raised an issue on the non- completion of the project and the 'Arbitral Tribunal' appointed an independent body to evaluate the project. The implementation of the project was within the scope of the 1st Respondent as per the purchase order. Therefore, it has been pointed out that there is a pre-existing dispute between the parties.

7. The 'impugned order' dated 16.09.2022 admitted the Section 9 application under I & B Code, 2016 and hence, the present appeal before this Appellate Tribunal.

Appellant's Submission

8. The Learned Counsel for the Appellant stated that the '2nd Respondent' had placed the Purchase Orders Nos. 106A (2015) and 106B (2015) dated 03.11.2015 on 1st Respondent for the supply & installation of AMR based modems, for the R-APDRP project for 'TANGEDCO' (Tamil Nadu Generation and Distribution Company). The Scope of Work was as under:-

(a) Supply of 20,000 number of AMR based Modems, Antenna with Cable & Communication with Cable
(b) Installation & commissioning of Modems
(c) Integration of Modems with MDAS Software
(d) Facility Management Service (FMS) for a period of 63 months from the date of go-live.

9. The Learned Counsel for the Appellant stated that as against installation requirement of 20,000 modems along with antennas and cables, 1st Respondent supplied only 16,140 modems and further installed only 2945 modems.

10. The Learned Counsel for the Appellant assailed the conduct of the 1st Respondent having filed Section 9 Application under I & B Code, 2016 though it has installed only 2945 modems out of the supplied 16,140 modems, whereas the '1st Respondent' was to supply and install full 20,000 modems.

As per the clause No. 6 of the Purchase Orders, the 1st Respondent is entitled to raise its invoices only after completion of installation of modems in each 'TANGEDCO' operating circle in Chennai and not based on the phase-wise delivery of modems.

11. The Learned Counsel for the Appellant contended that no payment was due and Section 9 application was not maintainable and the 1st Respondent claim is not untenable.

12. The Learned Counsel for the Appellant further stated that as per payment terms contained in clause 2 of Purchase Orders, the 1st Respondent is entitled to only 40% of the cost if 1st Respondent had supplied only modems and was not entitled for payment based on pro-rata number of modem supplied i.e. 100% upon for supply. Accordingly, Rs. 2,77,27,15/- has been paid to 1st Respondent.

13. The Learned Counsel for the Appellant clarified that this reflects that out of the aforesaid sum of Rs. 2,77,27,150/- paid to the '1st Respondent, main component i.e. Rs. 2,52,56,800/- represents 40% of the value of supplies and Rs. 23,04,253/- represents payment of further 20% towards the installation of 2945 modems in terms of clause 2 of Purchase Orders. The Learned Counsel for the Appellant emphasised that hence the payment has strictly been paid in accordance with Purchase Orders.

14. The Learned Counsel for the Appellant assailed the 'impugned order' of the 'Adjudicating Authority' treating this payment as "Part payment" of the debt whereas the debt claimed by the 1st Respondent is for entire value of supplies made which is not in accordance with terms of Purchase Orders, whereas payment made by 2nd Respondent is in accordance with the ratios mentioned in Purchase Orders. Therefore, the said payment cannot be construed as "part payment" of the 1st Respondent claim under the I & B Code, 2016 application .

15. The Learned Counsel for the Appellant elaborated that the 'TANGEDCO' sought written undertaking from the 1st Respondent directly before commencement of work by 1st Respondent and it was only on TANGEDCO's written acceptance that 1st Respondent was chosen as Vendor**.**

16. The Learned Counsel for the Appellant also stated that as per the clause No. 6 of the Purchase Orders, the 1st Respondent is required to submit its Invoices only on completion of each milestone at each Circle to the satisfaction of 'TANGEDCO' and as per clause 5, each of the aforesaid invoice had to be accompanied by acceptance letter of 'TANGEDCO'. However, 1st Respondent had submitted its entire Invoices after the supply of 16,140 modems, without completion of installation and integration with MDMS software.

17. The Learned Counsel for the Appellant emphasised that as per clause 2 of Purchase Orders, the 1st Respondent was entitled to payment of 40% only and the 2nd Respondent paid the amount representing 40% value. In fact, out of Rs. 2,77,27,150/- paid to 1st Respondent, Rs. 1,65,14,510/- was paid by 'TANGEDCO' directly and any further payment beyond the 40% of supplies, could be done only on fulfilment of the conditions in clause 5, 6 and 7 of the Purchase Orders.

18. The Learned Counsel for the Appellant pointed out that having accepted the involvement of 'TANGEDCO' and acted on the same, the 1st Respondent cannot claim the alleged dues from the 2nd Respondent independent of 'TANGEDCO'. The Learned Counsel for the Appellant cited two judgments to buttress his case passed by the Hon'ble Supreme Court of India in the matter of ***Kapur Chand Godha vs Mir Nawab Himayatalikhan Azamjah*** [1963 AIR 250] and Judgment passed by the Hon'ble Andhra Pradesh High Court in the matter of ***Hindustan Shipyard Limited vs Essar Oil Limited And Ors*** 2005 (1) ARBLR 454 AP.

19. The Learned Counsel for the Appellant pointed out that since clauses 5, 6 and 7 of Purchase Orders were never complied with by 1st Respondent, as a result of which 2nd Respondent cannot pay the amounts towards mere supply of modems.

20. The Learned Counsel for the Appellant also stated that the 1st Respondent has not produced a single document showing that it demanded earlier the amount claimed in Section 9 Application filed under I & B Code, 2016 from the '2nd Respondent, prior to Form 3 notice dated 30.11.2020. The Learned Counsel for the Appellant stated that there was no claim against the 2nd Respondent as there was pre-existing dispute. The Learned Counsel for the Appellant emphasised that the 'NOC' dated 08.12.2018 to approach 'TANGEDCO' was given on 1st Respondent's request without mentioning any specific amount due and merely certifying that 1st Respondent had supplied 16,140 modems and installed around 3000 modems.

21. The Learned Counsel for the Appellant admitted that the first demand raised by the 1st Respondent is by way of Form 3 to which the 2nd Respondent unfortunately could not reply but mere failure to reply to demand notice is not sufficient to admit application under Section 9 of the I & B Code, 2016. In this regard the Learned Counsel for the Appellant cited judgment of this Appellate Tribunal in the matter of ***Neeraj Jain Vs. Cloudwalker Streaming Technologies Private Limited*** (Company Appeal (AT) Ins. No. 1354 of 2019).

22. The Learned Counsel for the Appellant assailed the 'impugned order' which according to him is Non-speaking order as the 'Adjudicating Authority', in its findings, did not mention anything about the disputes raised by the 2nd Respondent and wrongly presumed payments made by 2nd Respondent in accordance with Purchase Orders as "part payment" towards 1st Respondent's claims which are far beyond Purchase Orders terms. Also, the 'Adjudicating Authority' ignored the settled law that mere failure to reply to demand notice is not conclusive to determine existence of dispute for an Application filed under Section 9 of the I & B Code, 2016 and finally the 'Adjudicating Authority' made no reference to the terms of the contract i.e. Purchase Orders, correspondence between parties or amounts paid and quantified.

23. The Learned Counsel for the Appellant, therefore urged that the 'impugned order' be set aside.

<u>Respondent's Submission :</u>-

24. The Learned Counsel for the Respondent stated that the 1st Respondent i.e. Vajra IOT Pvt. Ltd. was earlier known as 'Green Ark Enersol Pvt Ltd', is one of the leading players involved in the field of energy, telecom, healthcare, Aqua, automotive, smart cities and information technologies. The 1st Respondent offers high performance GSM/ GPRS, GPS, RF, Wi-Fi, Bluetooth, IoT, and customized products based on the state of art technology meeting toughest operating conditions, and customer satisfaction.

25. The Learned Counsel for the Respondent mentioned that the 2nd Respondent approached the 1st Respondent for supply of modems along with antenna, and communication cables, and has raised two purchase orders dated 03.11.2015 and after due performance of its obligations under purchase orders, the 1st Respondent raised invoices on the 2nd Respondent for purchasing and availing services pertaining to 16,130 AMR modules along with antenna and communication cables. 2nd Respondent failed to pay the amount due under the said invoices, and therefore, committed defaults in respect of the payments due under the said invoices.

26. The Learned Counsel for the Respondent stated that the 1st Respondent on various occasions approached the 2nd Respondent for clearing the dues but the 2nd Respondent despite assuring the 1st Respondent regarding the payment of the dues repeatedly failed to do so.

The Learned Counsel for the Respondent further submitted that the 2nd Respondent vide letter dated 10.04.2017 has acknowledged and confirmed the supplies made by the 1st Respondent to the tune of 16,130 AMR modems and also in respect of modems which had been installed and integrated with the services of the 'TANGEDCO' which is the employer of the 2nd Respondent. Further, it is relevant to note that the 2nd Respondent has acknowledged its liability to pay the 1st Respondent by issuing 'NOC' dated 08.12.2018 wherein it has admitted to the supply of 16,130 modems and installation specified modems as per the contract and is further requested that the 1st Respondent to directly deal with the 'TANGEDCO'. The Learned Counsel for the Respondent stated that it is relevant to note that in terms of the said 'NOC' the 2nd Respondent has also affirmed that in case no money has been received from the 'TANGEDCO' in respect of the said invoices, the 2nd Respondent shall remain liable, and has further clarified that it is the debt of the 2nd Respondent that the 'TANGEDCO' was called upon to clear. However 'TANGEDCO' citing the lack of privity between the 1st Respondent and itself rejected the request of the 1st Respondent and further stated that it had disputes with the 2nd Respondent for which -arbitral proceedings had been pending since 2017. The Learned Counsel for the Respondent emphasised that there was no dispute between the 1st Respondent and the 2nd Respondent and therefore question of existence of any pre-existing dispute did not arise.

27. The Learned Counsel for the Respondent mentioned that the 1st Respondent issued a demand notice dated 30.11.2020 to the 2nd Respondent. However, the 2nd Respondent had chosen not to reply to the said notice. The Learned Counsel for the Respondent submitted that until the filing of a counter in the application under Section 9 of the I & B Code, 2016 before the 'Adjudicating Authority', no dispute was ever raised either on account of non-crystallization of debt or on account of quality of goods. The Learned Counsel for the Respondent further stated that it is settled law that in terms of Section 9 of the I & B Code, 2016 the dispute has to be pre-existing in nature. The term pre-existing in this regard requires that the dispute be prior to the date of issuance of notice under Section 8 of the I & B Code, 2016. The Learned Counsel for the Respondent emphasised that in the present case it is admitted that the notice issued under Section 8 was dated 30.11.2020 and as such there is no material on record to show that any dispute has been raised before mentioning in the counter prior by the 2nd Respondent

28. The Learned Counsel for the Respondent emphasised that there was no default in compliance of the purchase orders and the debt became due and payable. The Learned Counsel for the Respondent submitted that the Proceedings between the 2nd Respondent and 'TANGEDCO' have no bearing on the 1st Respondent as there is no privity of contract. In view of the above, it is submitted that the 'Adjudicating Authority' has rightly admitted the application under Section 9 of the I & B Code, 2016 and the instant appeal is devoid of any merit, and deserves to be dismissed.

Findings

29. Heard Learned Counsel for the 'Appellant' and the 'Respondents' and also perused record made available to us. Several issues have been raised in the Appeal which are required to be deliberated upon before coming to final conclusion.

(I) Whether there exists debt which is due and payable and has not been paid?

(II) Whether the 'Corporate Debtor' is liable to pay for the debts or not?

Issue No. (I) **Whether there exists debt which is due and payable and has not been paid?**

- Sub-sections 10, 11 and 12 of Section 3 of the I & B Code, 2016 prescribes definitions of 'creditor' (including Financial Creditor), 'debt' and 'default' as follows:-

(a) To understand better we must refer to the rule position regarding this issue in I & B Code 2016.

(b) The debt has been defined in Section 3 (11) of I & B Code, 2016 which is as under:-

> *"3(11). "**debt**" means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt;"*

(c) Since, the term claim is mentioned in above definition of debt, there is a need to refer to definition of claim under Section 3(6) of IBC which is as under:-

> *"3(6). "**claim**" means-*
>
> *(a) A right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured or unsecured;*
>
> *(b) Right to remedy for breach of contract under any law for the time being in force, if such breach gives rise to a right to payment, whether or not such right is reduced to judgment, fixed, matured, unmatured, disputed, undisputed, secured or unsecured;"*

(d) The `Financial Creditor' and `Financial Debt' is also defined under Section 5(7) & Section 5(8) of the I & B Code, 2016, which as under:-

> *"(7) "**financial creditor**" means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to;*
>
> *(8) "**financial debt**" means a debt alongwith interest, if any, which is disbursed against the consideration for the time value of money and includes—*
>
> *(a) money borrowed against the payment of interest;*
>
> *(b) any amount raised by acceptance under any acceptance credit facility or its de-materialised equivalent;*
>
> *(c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;*

(d) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;

(e) receivables sold or discounted other than any receivables sold on nonrecourse basis;

(f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing; [Explanation. -For the purposes of this sub-clause,-

(i) any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and

(ii) the expressions, "allottee" and "real estate project" shall have the meanings respectively assigned to them in clauses (d) and (zn) of section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016);]

(g) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;

(h) any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;

(i) the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h) of this clause;

- The other relevant definition of I & B Code, 2016 with reference to this Appeal are 'Operational Debt' and 'Operational Creditor' which are as under:-

> *"5(21).* ***operational debt****" means a claim in respect of the provision of goods or services including employment or a debt in respect of the [payment] of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority;*
>
> *"5(20). "****operational creditors****" means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred;"*

- These definitions make the distinction between Operational Debt and Financial Debt. As seen from above, 'financial debt' is an inclusive and non-exhaustive definition given under Section 5(8) of the I & B Code to mean "*a debt alongwith interest, if any, which is disbursed against the consideration for time value of money. F*inancial creditors have relationship with the entity as financial contract, like loan or security etc. Whereas, an operational debt as defined under section 5(21) of I & B Code, 2016 signifies a claim in respect of the provisions of goods or services.

- It will be pertinent to refer to judgments pronounced by the Hon'ble Supreme Court of India on this aspect.
- In ***Mobilox Innovations Private Limited Vs. Kirusa Software Pvt. Ltd.,*** (2018) 1 SCC 353 Hon'ble Supreme Court of India held:-

  "Therefore, the adjudicating authority, when examining an application under Section 9 of the Act will have to determine: (i) Whether there is an "operational debt" as defined exceeding Rs.1 lakh? (See Section 4 of the Act) (ii) Whether the documentary evidence furnished with the application shows that the aforesaid debt is due and payable and has not yet been paid? and (iii) Whether there is existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before the receipt of the demand notice of the unpaid operational debt in relation to such dispute?"

- In ***M/s Innoventive Industries Vs. ICICI Bank & Ors.*** MANU/SC/1603/2017 Hon'ble Supreme Court of India held

  "On the other hand, as we have seen, in the case of a corporate debtor who commits a default of a financial debt, the adjudicating authority has merely to see the records of the information utility or other evidence produced by the financial creditor to satisfy itself that a default has occurred. It is of no matter that the debt is disputed so long as the debt is "due" i.e. payable unless interdicted by some law or has not yet become due in the sense that it is payable at some future date. It is only when this is proved to the satisfaction of the adjudicating

authority that the adjudicating authority may reject an application and not otherwise."

- After going through the relevant provisions under I & B Code, 2016 and cited judgment as discussed in above mentioned paragraphs, in the present appeal, the 2nd Respondent (Corporate Debtor) has clearly acknowledged the supply of 16130 AMR modems and installation of 2945 modems that have been installed and are integrated with the servers and being used in 'TANGEDCO'.
- This 'Appellate Tribunal' further observes that the 2nd Respondent (Corporate Debtor) has also acknowledged payment already made the 40% of the cost i.e Rs. 2,50,52,800/ out of Rs.6,26,32,001/- and another Rs 22,85,641/-on installation of 2945 modems. This itself proves the existence of remaining unpaid dues. Hence, it is clear that there exists debt which was due and was not paid by 2nd Respondent (Corporate Debtor) to 1st Respondent (Operational Creditor).
- This Appellate Tribunal notes that no concrete evidence has been brought out or documentation has been produced to establish that there existed any pre-existing disputes between the parties. The Arbitration proceedings that the 2nd Respondent is trying to portray as a pending dispute is infact not between the 2nd Respondent (Corporate Debtor) to 1st Respondent (Operational Creditor) and is rather between 2nd Respondent and his principal employer for the supply services i.e. 'TANGEDCO'.

- This Appellate Tribunal, therefore, in the present appeal do not find any error in the 'impugned order' passed by the 'Adjudicating Authority' and notes that the 'Adjudicating Authority' followed all the steps laid down in **Mobilox** while ascertaining the application under Section 9. Therefore, this Appellate Tribunal holds that the 'Adjudicating Authority' has correctly examined the existence of debt which was not paid and there was no pre-existing dispute between the 2nd Respondent (Corporate Debtor) and the 1st Respondent (Operational Creditor).

Issue No. (II) **Whether the 'Corporate Debtor' is liable to pay for the debts or not?**

- The claim of the 'Appellant' that the application filed by the 1st Respondent is not maintainable since the 'Appellant' assigned the debt to 'TANGEDCO' seems erroneous. The 'Appellant' claims that 2nd Respondent had issued the 'NOC' with regard to the pending payments, therefore the claims of the 1st Respondent lies only as against 'TANGEDCO' since the 1st Respondent has agreed to accept performance from a third party.
- However while looking into details of the appeal and from the averments made before this Appellate Tribunal, it is seen that, though an 'NOC' was issued by the 2nd Respondent however they did not seek prior approval from 'TANGEDCO' that such payments would be made by 'TANGEDCO'. Therefore, there does not exist any valid contract

between 2nd Respondent (Corporate Debtor) and 'TANGEDCO' stating that payment to 1st Respondent (Operational Creditor) would be made by 'TANGEDCO'. Therefore, in such a scenario the onus/ liability comes back to the 2nd Respondent (Corporate Debtor) to ensure that amounts are paid to the 1st Respondent (Operational Creditor), and as such all the claims made against the '2nd Respondent (Corporate Debtor) are valid.

30. Therefore, this 'Appellate Tribunal' is of the considered opinion that there is no error in the 'impugned order' dated 16.09.2022 passed by the 'Adjudicating Authority'. Appeal devoid of any merit is therefore is set aside and stand dismissed. No costs. The connected pending `Interlocutory Applications', if any, are Closed.

[Justice M. Venugopal]
Member (Judicial)

[Naresh Salecha]
Member (Technical)

Simran