

NATIONAL COMPANY LAW APPELLATE TRIBUNAL PRINCIPAL BENCH,
NEW DELHI

Comp. App. (AT) (Ins) No. 1063 of 2023 & I.A. No. 3673, 3674, 4537 of
2023

IN THE MATTER OF:

1. SURESH KHOLA

s/o Shri Phool Singh
Aged about 58 years
r/o House No. 57 Sector -1
Rewari, Haryana - 123401

...Appellant

Versus

1. ABDULHADI ALMAILEM TRADING COMPANY

W.L.L

Regd. Office PO Box 4692
Safat 13047
Safat Kuwait

Also at

A-1013, Tower - 3
AshianaUpvan, Ahinsa Khand - 2
Indrapuram, Ghaziabad
Uttar Pradesh - 201014

...Respondent No. 1

2. MR. NAZIM KHAN

Interim Resolution Professional
G-41 Ground Floor,
West Patel Nagar,
New Delhi - 110008.
Email : nazim@mnkassociates.com

...Respondent No. 2

Present:

For Appellants : Mr. Krishnendu Datta, Sr, Adv. with Mr. Abhijeet Sinha, Mr. Kaushal Gautam, Mr, Vivek, Mr. Rahul Arya, Ms. Snehpreet Kaur, Mrinal Sharma, Varshika Singh, Akash Chatterjee, Advocates

For Respondent : Ms. Ritu Goyal, Mr. Awanish Srivastava, Deepanshi Sharma, Advocates for R1
Mohd. Nazim Khan, Adv. for R2

J U D G M E N T

Per: Justice Rakesh Kumar Jain:

This appeal is directed against the order dated 31.07.2023 passed by the Adjudicating Authority (National Company Law Tribunal, New Delhi, Court No. III) by which an application bearing I.A. No. IB 1140/ND/2020

filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 (In short 'Code') and Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority), Rule 2016 (in short 'Rules') for the resolution of an amount of Rs. 303,320,671/- has been admitted, moratorium was declared and Nazim Khan was appointed as the Interim Resolution Professional.

2. At the time of preliminary hearing held on 11.08.2023, the parties were directed to maintain status quo. The said interim order is continuing till today.

3. The brief facts of this case are that the Appellant (Corporate Debtor) appointed the Respondent (Operational Creditor) as sale distributor through a distribution agreement dated 01.02.2018 to market and distribute JATL Branded products – ACE, XTRALAST, QUICKSTART and M-RUN branded products in Kuwait, Oman, Bahrain and Kingdom of Saudi Arabia (hereinafter referred to as 'Territory'). For this purpose, the Appellant engaged the Respondent as its exclusive distributor for its brands for a period of 60 months (renewable after every year) in the Territory and as per clause 1.2 of the said agreement, granted right to the Respondent to purchase for resale of the aforesaid batteries in the territory (Brands products). Clause 2.3.3. of the said agreement further provided that JATL may decide to send quality person to check the failures if it crosses 5% or above and that JATL shall replace all model wise defective batteries above 5% which is received by AATC in the next consignment. Clause 7.2 of the said agreement further provided that should the defaulting party fail to remedy the breach within such period, the other party shall have the right either to claim specific performance or to terminate the agreement forthwith, in whole or in part, and to claim damages without prejudice to any other rights and remedies which it may have in terms of this agreement or in law.

4. Case of the Operational Creditor is that there were complaints about the quality of the batteries sold to it by the Appellant, therefore, in terms of Clause 2.3.3 a physical inspection was conducted and minutes of that meeting were recorded on 03.09.2019. The said minutes are reproduced as under:-

ABDULHADI ALMAILEM TRADING CO.W.L.L

03.09.2019

Minutes of Meeting

JATL & ABDULHADI ALMAILEM TRADING CO.

1. Almailem claims all the Din types supplied by JATL have leakage problem and cannot be sold in the market.
2. In JIS type's leakage was found in transit and post fitment also there is leakage in that batteries from top and the sides.
3. OCV falls from 12.80 to 12.50 within one month from the date of manufacturing.
4. There are other complaints related to aesthetics and Cosmetics of the batteries.

Verify our claims Mr. Tripathi, Mr. Sen & Mr. Manas representing JATL visited Almailem from 31st Aug 19 to 3rd Sept 19.

1. Inspection was carried out by Mr. Sen, Mr. Tripathi and it was found that entire quantity of Din series have leakage problem and cannot be sold to customers. Stock of DIN types as on date 10000 no's.
2. JATL will replace entire quantity of DIN batteries with new batteries. Before dispatching, JATL will do all the necessary testing's to ensure that the problems will not get repeated. Dispatch dates will be communicated by Mr. Sen on or before 15th Sept 19.
3. Almailem has a stock of 52000 no's in JIS types and it was agreed after inspection that 15% of the stocks will be considered as transit leak, so cannot be sold in the market. (Revised % age will be 10% as on date and JATL &

Almailem have agreed to revise the % age if the quantity of leaked batteries is found more or less)

4. This 10% (5200 no's) will be replaced by JATL in two lots starting Oct-19. Other than this, post fitment leaked batteries will be replaced by JATL on one to one basis.
5. Signatures of Mr. Manas other than concerned persons should be there to ensure PDI has been done before shipping out the new material.
6. Upon receipt of the first lot of new batteries from JATL, Almailem will transfer part of the payment after inspecting and observing performance of the rectified product.
7. Almailem has also requested a visit to ALMAILEM by Mr. Ashwini Minda to take note of the current situation.
8. JATL will take back all the defective batteries to India on their own risk and through their own channel. Almailem will not get involved in this process as law of the country does not allow shipments of defective batteries to any other country. JATL should take back all the batteries by 25th of Sept 19 after that the batteries will be put in dump yard.

Signed By

For JATL.

For Abdulhadi
Almailem Trading Co.

Mr. Shuvashish Sen

Rajan Tickoo

Mr. Shalesh Tripathi

Wajid Shaikh

Mr. Manas Das

5. According to the Respondent, the Appellant failed to replace the batteries despite its promise, therefore, it chose to file an application under Section 9 of the code and in Part IV of the said application, the following averments have been made: -

Part IV
Particulars of Operational Debt

<p>1. TOTAL AMOUNT OF DEBT, DETAILS OF TRANSACTIONS ON ACCOUNT OF WHICH DEBT FELL DUE, AND THE DATE FROM WHICH SUCH DEBT FELL DUE</p>	<p>Total amount of Debt:</p> <p>Rs. 30,33,20,671/- (Rupees Thirty Crore Thirty Three Lakhs Twenty Thousand Six Hundred Seventy One only) along with pendent lite interest @ 18% p.a. since 18.02.2020 till actual date of payment</p> <p>Detail of Transactions:</p> <p>1. A Distribution Agreement was executed between Corporate Debtor and Operational Creditor on 1st February 2018, whereby Operational Creditor was appointed as exclusive Distributor of Corporate Debtor for a period of 60 months for the specified Territory.</p> <p>2. It was further agreed under Clause 2.3.3 of the Distribution Agreement, that in case of quality failure above 5%, Corporate Debtor shall replace all model wise defective batteries.</p> <p>3. In pursuance of this Agreement, 33 transactions were made between the Parties through the proper invoices. However, over a period of time the Batteries sold to Operational Creditor were returned from market being defective.</p> <p>4. The representatives of Parties held a meeting and Corporate Debtor agreed that batteries were defective and shall be replaced and a Minutes of Meeting got executed and duly signed on 3rd September 2019 by</p>
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	<p>both the parties.</p> <p>5. However, despite several reminders, Corporate Debtor failed to replace the batteries agreed to be replaced at MOM. Thereafter, over a period of time, entire stock of batteries was returned as defective. Operational Creditor sent various reminders to Corporate Debtors for replacement of batteries. However, Corporate Debtor did not reply to the requests of Operational Creditor. As per provisions of Distribution Agreement, Corporate Debtor is under obligation to replace the defective batteries. However, despite several reminders, Corporate Debtor has failed to replace the defective batteries worth Rs.303,320,671 (Rupees Thirty Crore Thirty Three Lakhs Twenty Thousand Six Hundred Seventy One only) and now the amount is outstanding against Corporate Debtor for payment. Details of transactions on account of which debt fell due with dates from which this amount fell due is enclosed.</p> <p>Date from which such Debt fell due: The amount of Debt is pending from payment since 3rd of September 2019 when Corporate Debtor agreed to replace the defective batteries.</p>
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6. Reply to the application was filed by the Appellant before the Adjudicating Authority. However, on the basis of the evidence brought on record, the Adjudicating Authority came to a conclusion that the Appellant has failed to replace the batteries or refund the amount, therefore, the Respondent fall within the definition of Operational Creditor and admitted the application. The relevant part of the impugned order is also reproduced for a quick reference: -

“5. The Operational Creditor's claim is based on the facts that as per the distribution agreement was executed between the parties. The Applicant was appointed as exclusive Distributor of Corporate Debtor for a period of 60 months. In pursuance of the Distribution Agreement total a 33 transactions were made between the parties and proper invoices were raised by the Applicant upon the Corporate Debtor. It was agreed under clause 2.3.3 of the Distribution Agreement that in case of quality failure above 5%, Corporate Debtor shall replace all model wise defective batteries. However, as on date, the payments towards the remaining invoices stands due. It is stated by the Applicant that since the Corporate Debtor did not make the due payment of the Operational Debt, the Applicant had issued Demand Notice dated 06.03.2020 under section - 8 of IBC, 2016 and served at the registered office of the Corporate Debtor. The Corporate Debtor vide letter dated 18.03.2020 replied to the Demand Notice and submitted that the amount of Rs.28,32,26,420/- along with interest Rs. 20,094,251/- totalling to Rs30,33,20,671/- as a claim against the Corporate Debtor is unlawful and irrational and hence falls under the definition of Pre-existing dispute within the meaning of the IBC, 2016.

6. The Corporate Debtor raised the issue of 'Pre-existing Dispute' as its main defence and submitted that the Operational Creditor itself agreed while signing the Minutes Of Meeting on 03.09.2019 that there are no more than 15200 (10000 units of DIN Batteries and 5200 units of JIS batteries) units of batteries and also raised a counter claim on Operational Creditor for unpaid invoices. It is pertinent at this stage to refer to the Minutes of Meeting dated 03.09.2019, relevant extracts are reproduced below for reference: -

1. Almaillem claims all the DIN types supplied by JATL have leakage problem and cannot be sold in the market.

To verify the claims Mr. Tripathi, Mr. Sen & Mr. Manas representing JATL visited Almaillem from 31st August 2019 to 3rd September 2019.

1) Inspection was carried out by Mr. Sen, Mr. Tripathi and it was found that the entire quantity of DIN series have leakage problem and cannot be sold to customers. Stock of DIN types as on date 10000 in no's.

2) JATL will replace entire quantity if DIN batteries with new batteries. Before dispatching, JATL will do all the necessary testing's to ensure that the same problems will not get repeated. Dispatch date will be communicated by Mr. Sen on or before 15th September 2019.

3) This 10 % (5200 no's) will be replaced by JATL in two lots starting Oct-19. Other than this, post fitment leaked batteries will be replaced by JATL on one to one basis.

4) Upon receipt of the first lot of new batteries from JATL, Almaillem will transfer part of the payment after inspecting and observing performance of the rectified product.

5) JATL will take back all the defective batteries to India on their own risk and through their own channel. Almaillem will not get

involved in this process as law of the country does not allow shipments of defective batteries to any other country. JATL should take back all the batteries by 25th September after that the batteries will be put in dump yard.

7. We have perused the Minutes of the Meeting very minutely thus, it is clear from the Meeting held between the parties that all DIN series batteries have leakage problem and cannot be sold to customers, so this fact is undeniably admitted by the Corporate Debtor itself. The Ld. Counsel appearing for the Corporate Debtor has vehemently argued that, as per the minutes of meetings dated 03.09.2019, it was mutually agreed between representatives of Corporate Debtor and Operational Creditor that Corporate Debtor will replace the entire 10,000 JIS type of batteries and Corporate Debtor shall replace 10% of DIN type of batteries out of total number of DIN batteries, i.e. 52000 units. Therefore, total numbers of batteries which are to be replaced were 15,200 units, consisting 10,000 units JIS type and 5200 units DIN type of batteries but we are not convinced by this argument as it was found in inspection that all DIN batteries have leakage and Clause no. 2 of the Minutes of the Meeting very specifically mentions that JATL (Corporate Debtor) will replace entire quantity of DIN batteries. Further, Clause no. 3 mentions that 10 % (5200 no's) will be replaced by JATL in two lots and other batteries will be replaced on one to one basis. The argument made by the Ld. Counsel also raised an important question: when all the DIN batteries have leakage problem, there is no reason as to why would the Operational Creditor want a small lot of batteries to be replaced? It was also mutually agreed between the parties that JATL will take back all the defective batteries to India but it failed to lift the defective batteries. It was also mutually agreed between the parties that the Operational Creditor would only transfer the part payment after inspecting and observing the performance of the rectified product, but no evidence was placed on record by the Corporate Debtor about the delivery of the rectified product.

7. Being aggrieved against the order dated 31.07.2023, the present appeal has been filed in which Counsel for the Appellant has argued that the Adjudicating Authority has committed a patent error in mis-appreciating the facts for the purpose of holding that the Respondent is an Operational Creditor and passed the impugned order. In this regard, he has referred to various provisions of the said agreement but more particularly Clause 7.2 which we have already reproduced in the early part of this order. According to the Appellant, the Respondent cannot file an application for recovery. The

agreement between the parties was that in case there is a breach in the agreement then the party to the agreement shall have a right either to claim specific performance or to terminate the agreement forthwith in whole or in part and to claim damages. It is submitted that the claim of damages does not fall within the purview of debt, therefore, the application under Section 9 is not maintainable. He also argued that in the minutes of the meeting there is a reference for replacement of batteries to the extent of 10000 of Din series and in so far as JIS types is concerned there was replacement only of 5200 batteries but in the application filed under Section 9 of the Code, the Respondent has claimed the replacement of entire stock which is stated to have been sold by way of 29 invoices which was not disputed between the parties. He has also referred to Para 6 of the minutes of meeting in which it is recorded that the Appellant shall make the payment of the batteries only after the defect is rectified and since no payment has been made by the Respondent so far in respect of defective batteries, therefore, there is no question of any debt being owed by them and to be paid.

8. On the other hand, Counsel for the Respondent has submitted that there is no error in the impugned order which calls for any interference by this Tribunal. It is submitted that the relationship between the parties came into being by virtue of the agreement dated 01.02.2018 in which it was stipulated in Clause 2.3.3 that in case the failure crosses 5% or above the inspection shall be done and it has been found by the representative of the Appellant that there has been defects in the batteries, therefore, it was mentioned by them in Clause 1 of minutes of meeting that entire quantity of Din series have leakage problem and cannot be sold to customers. Stock of Din types as on date was 10000 in number. It is also submitted that the same thing applies to the Jis types batteries because only 10% of the

batteries were taken up as sample. In regard to Paragraph 6, it is submitted that part payment is referable to four unpaid invoices. It was agreed to make the payment thereof only when the Appellant rectify the defect in the entire product sold to it. It is submitted that neither the products have been replaced by the Appellant nor the money has been returned, therefore, the application has rightly been filed under Section 9 of the Code and admitted by the Adjudicating Authority. She further submitted that the Hon'ble Supreme Court in the case of Consolidated Construction Consortium Limited Vs. Hitro Energy Solutions Pvt. Ltd., Civil Appeal No. 2839 of 2020 decided on 04.02.2022 has held that the purchaser also falls within the definition of operational creditor and it is not always necessary that the operational creditor shall be a person who has either supplied the goods or rendered the services. In this regard, she has referred to Para 41, 42 and 43 of the said judgment which are also reproduced as under:-

“41 We have to now consider the ‘debt’ in the present appeal. According to the appellant, it is the advance payment CMRL made on their behalf to the Proprietary Concern, which was encashed even though the project between CMRL and the appellant was terminated. On the other hand, the respondent has attempted to urge that there was no privity of contract between the appellant and the respondent, and that CMRL had not transferred the debt to the appellant. We reject both these submissions. It is amply clear from the facts that the debt arises from purchase orders between the appellant and the Proprietary Concern (which is the underlying contract), regardless of whether CMRL may have made the payment on behalf of the appellant. Thus, the ultimate dispute still remains between the appellant and the Proprietary Concern, and the debt arises from that

42 It is then that we come to the core of the dispute – while the appellant has argued that the debt is in the nature of an operational debt which makes them an operational creditor, the respondent has opposed this submission. The respondent’s submission, which was accepted by the NCLAT, seeks to narrowly define operational debt and operational creditors under the IBC to only include those who supply goods or services to a corporate debtor and exclude those who receive goods or services from the

corporate debtor. For reasons which shall follow, we reject this argument.

43 First, Section 5(21) defines ‘operational debt’ as a “claim in respect of the provision of goods or services”. The operative requirement is that the claim must bear some nexus with a provision of goods or services, without specifying who is to be the supplier or receiver. Such an interpretation is also supported by the observations in the BLRC Report, which specifies that operational debt is in relation to operational requirements of an entity. Second, Section 8(1) of the IBC read with Rule 5(1) and Form 3 of the 2016 Application Rules makes it abundantly clear that an operational creditor can issue a notice in relation to an operational debt either through a demand notice or an invoice. As such, the presence of an invoice (for having supplied goods or services) is not a sine qua non, since a demand notice can also be issued on the basis of other documents which prove the existence of the debt. This is made even more clear by Regulation 7(2)(b)(i) and (ii) of the CIRP Regulations 2016 which provides an operational creditor, seeking to claim an operational debt in a CIRP, an option between relying on a contract for the supply of goods and services with the corporate debtor or an invoice demanding payment for the goods and services supplied to the corporate debtor. While the latter indicates that the operational creditor should have supplied goods or services to the corporate debtor, the former is broad enough to include all forms of contracts for the supply of goods and services between the operational creditor and corporate debtor, including ones where the operational creditor may have been the receiver of goods or services from the corporate debtor. Finally, the judgment of this Court in Pioneer Urban (supra), in comparing allottees in real estate projects to operational creditors, has noted that the latter do not receive any time value for their money as consideration but only provide it in exchange for goods or services. Indeed, the decision notes that “examples given of advance payments being made for turnkey projects and capital goods, where customisation and uniqueness of such goods are important by reason of which advance payments are made, are wholly inapposite as examples vis-à-vis advance payments made by allottees”. Hence, this leaves no doubt that a debt which arises out of advance payment made to a corporate debtor for supply of goods or services would be considered as an operational debt”

9. In reply to this argument, Counsel for the Appellant has submitted that the decision in the case of Consolidated Construction Consortium

Limited (Supra) is on its own facts and does not help the Respondent because the case of Respondent is that of a purchaser of the goods which have been found to be defective and for that matter the Respondent should have resorted to Clause 7.2 of the agreement dated 01.02.2018 instead of resorting to Section 9 of the Code. In this regard, he has submitted that it was not the case of defective goods rather it was a case where money advanced was not returned. He drew our attention to Paragraphs 2, 3, 5 to 8 which read as under:-

“2. By its judgment and order dated 6 December 2018, the NCLT admitted an application⁴ filed by the appellant, Consolidated Construction Consortium Limited, under Section 9 of the IBC for the initiation of the Corporate Insolvency Resolution Process against the respondent, Hitro Energy Solutions Private Limited. While admitting the application, the NCLT held that the respondent’s Memorandum of Association⁸, without evidence to the contrary, proved that it took over a proprietary concern, Hitro Energy Solutions⁹, and that the Proprietary Concern did owe the appellant an outstanding operational debt. Further, the NCLT declared a moratorium under Section 14 of the IBC and appointed an Interim Resolution Professional.

3. In appeal, the NCLAT set aside the NCLT’s decision, dismissed the application of the appellant under Section 9 of the IBC and released the respondent from the ongoing CIRP. In support of its conclusions, it held: (i) the appellant was a ‘purchaser’, and thus did not come under the definition of ‘operational creditor’ under the IBC since it did not supply any goods or services to the Proprietary Concern/respondent; (ii) there is nothing on record to suggest that the respondent has taken over the Proprietary Concern; and (iii) in any case, the appellant cannot move an application under Sections 7 or 9 of the IBC since all purchase orders were issued on 24 June 2013 and advance cheques were issued subsequently.

5. The genesis of the appeal arises from a project which was being executed by the appellant with Chennai Metro Rail Limited, in the course of which the latter placed an order for supply of light fittings. In turn, the appellant placed orders with the Proprietary Concern, which was the supplier of Thorn Lighting India Private Limited¹³, through three purchase orders dated 24 June 2013. It was noted in these purchase orders that the delivery of the light fittings would strictly be in accordance with the schedule provided by the appellant.

6. The Proprietary Concern requested the appellant for an advance payment of Rs 50,00,000. CMRL issued a cheque of Rs 50,00,000 in favor of the respondent, with the condition that the

delivery of the light fittings should be in compliance with the schedule provided by the appellant.

7. On 2 January 2014, CMRL informed the appellant that the project they had been working on stood terminated. According to the appellant, this information was communicated to the Proprietary Concern on the same day. However, this has been denied by the respondent.

8. Thereafter, the Proprietary Concern deposited the cheque issued by CMRL and withdrew the amount of Rs 50,00,000. Since the project had been terminated, CMRL informed the appellant that the amount would be deducted from the dues payable to it unless the amount was returned. The appellant paid the amount of Rs 50,00,000 to CMRL and intimated this to the Proprietary Concern and requested them to make the payment.”

10. He has thereafter referred to Para 39 of the said judgment which deals with the part of the analysis of the Hon'ble Supreme Court which read as under:-

“39. In the present case, there are few undisputed facts: (i) the appellant and the Proprietary Concern entered into a contract for supply of light fittings, since the appellant had been engaged for a project by CMRL; (ii) CMRL, on the appellant's behalf, paid a sum of Rs 50 lakhs to the Proprietary Concern as an advance on its order with the appellant; (iii) CMRL cancelled its project with the appellant; (iv) the Proprietary Concern encashed the cheque for Rs 50 lakhs anyways; and (v) the appellant paid the sum of Rs 50 lakhs to CMRL.”

11. Counsel for the Appellant has thereafter referred to Para 46 of the said judgment which is reproduced as under:-

“46. In doing so, we are cognizant of the observations of this Court in judgments such as *Swiss Ribbons* (supra), that IBC proceedings should not become recovery proceedings. However, in the present case, the dispute is not in relation to the quality of the services provided by the Proprietary Concern but is entirely about the repayment of the advance amount paid to them, upon the cancellation of the underlying project.”

12. We have heard Counsel for the parties and perused the record with their able assistance.

13. The bedrock of relationship between the parties is the distribution agreement dated 01.02.2018 as per which Respondent No. 1 was appointed

as the distributor of various brands of batteries in the specified territory. The Corporate Debtor granted rights to Respondent No. 1 to purchase their branded products for resale in the territory. It is also agreed that the Corporate Debtor shall send quality person to check the failure if it crosses 5% or above and shall replace all model wise defective batteries.

14. The case set up by Respondent No.1 is that batteries purchased by it from the Corporate Debtor through 29 invoices were defective in one way or other. They made a complaint about it to the Corporate Debtor and in view of Clause 2.3.3 of the agreement, the Corporate Debtor deputed the inspection team. The inspection carried out was recorded in the minutes of meeting held on 03.09.2019. According to the Appellant, the inspecting team found that entire quantity of the Din series had leakage problem and cannot be sold to the customers and the stock of Din type was 10000 in number at that time. As per minutes of meeting, the Corporate Debtor was to replace the entire quantity of DIN batteries with new batteries. Similarly, there was a stock of 52000 of JIS type at the time of inspection and it was agreed, after inspection, that 15% of the stocks shall be considered as transit leak which cannot be sold in the market. 10% (5200) was decided to be replaced by the Corporate Debtor in two lots. It was also decided that post fitment leaked batteries will be replaced by the Corporate Debtor on one to one basis.

15. It is the case of the Respondent that it stopped the payment of four invoices which has though not been recorded as such in minutes of meeting but as per the averment made in Para 6 of the minutes the Respondent No. 1 was to make the payment after receipt of the first lot of the new batteries from the Corporate Debtor.

16. It is the case of Respondent No. 1 that the Corporate Debtor despite repeated reminders and requests did not honour its words of replacing the entire defective stocks of the batteries nor returned the money, therefore, application under Section 9 was filed for recovery of the amount of Rs. 303,320,671/- which is in respect of 29 invoices.

17. The Respondent has also given the details of the 29 invoices in the reply to the appeal and also pointed out as to how and when the payments were made from time to time.

18. However, the question raised by the Appellant is that the application under Section 9 per se is not maintainable in view of clause 7.2 of the agreement as per which, in case of breach of agreement, the other party can file a claim for specific performance or terminate the agreement forthwith in whole or in part and claim damages but the refund of amount of the goods sold is an act of recovery which is not permissible in the Code but the Respondent has relied upon the decision of Hon'ble Supreme Court in the case of Consolidated Construction Consortium Pvt. Ltd. (CCCL) (Supra) to contend that the Hon'ble Supreme Court has held that even the purchaser can also file an application under Section 9 of the Code.

19. Since, this is the only issue involved in this case as to whether the application under Section 9 of the Code at the instance of the Respondent No. 1 for refund of the amount which was paid for purchase of the batteries is maintainable and the sole reliance has been placed upon a decision of the Hon'ble Supreme Court, therefore, it would be relevant to refer to the facts of the said case. In the case of Consolidated Construction Consortium Limited (in short 'CCCL') (Supra) the application under Section 9 of the Code was filed by Consolidated Construction Consortium Limited against Hitro Energy Solutions Pvt. Ltd.. The Respondent therein took over a proprietary concern,

namely, Hitro Energy Solutions and the said proprietary concern owed to the Appellant therein an outstanding amount. As a matter of fact, there was a project which was being executed by CCCL with Chennai Metro Rail Limited (CMRL). CMRL placed an order for supply of light fittings and in turn the CCCL placed orders with the proprietary concern. The proprietary concern requested CCCL for an advance payment of Rs. 50,00,000 which was paid by CMRL by way of a cheque issued in favour of Respondent i.e. Hitro Energy Solutions Pvt. Ltd.. However, CMRL informed CCCL that the project on which they had been working was terminated. CCCL passed on this information to the proprietary concern on the same day. The proprietary concern deposited the cheque issued by CMRL and withdrew the amount of Rs. 50,00,000/- but since the project was terminated, therefore, CMRL informed CCCL that the amount would be deducted from the dues payable to it unless the amount is returned. CCCL paid the amount of Rs. 50,00,000 to CMRL, intimated this fact to the proprietary concern and requested them to make the payment which was paid as advance but it was not returned and thus, the application under Section 9 was filed. In this context, the matter reached the Hon'ble Supreme Court.

20. However, it has been held by the Hon'ble Supreme Court that "in doing so we are cognizant of the observations of this court in judgments such as *swiss ribbons* (Supra), that IBC proceedings should not become recovery proceedings. However, in the present case, the dispute is not in relation to the quality of the services provided by the proprietary concern but is entirely about the repayment of the advance amount paid to them, upon the cancellation of the underlying project". The present case is not the payment of advance which is sought to be recovered as a debt rather it is a case where the amount paid towards purchase of goods is sought to be

recovered on the ground that the goods supplied were defective in nature whereas there is a specific provision in the agreement itself which binds both the parties, that in case of breach of agreement the aggrieved party shall have the right to claim specific performance or can terminate the agreement forthwith in whole or in part and to claim damages. Clause 7.2 in the agreement itself is sufficient to hold that the remedy has been provided for any kind of breach of agreement and in no case the damages can be recovered in an application filed under Section 9 of the Code, therefore, the judgment relied upon by the Respondent of the Hon'ble Apex Court (Supra) is not on the facts of the present case.

21. No other point has been raised.

22. In view of the aforesaid discussion, we find that the impugned order is illegal, therefore, the same is hereby set aside by allowing this appeal. The parties are directed to bear their own costs.

[Justice Rakesh Kumar Jain]
Member (Judicial)

[Mr. Naresh Salecha]
Member (Technical)

New Delhi

10th October, 2023.

Sheetal