

National Company Law Appellate Tribunal,
Principal Bench, NEW DELHI
Company Appeal (AT) (Ins) No. 723 of 2021

Arising out of the order dated 09.02.2021 passed by National Company Law
Tribunal, Ahmedabad Bench, Ahmedabad, Court - 2 in CP (IB) No.
118/NCLT/AHM/2020.

IN THE MATTER OF:

Agarwal Coal Corporation Pvt. Ltd.,
(CIN: U23109MP2000PTC014351)
Registered Office Situated at: "2,
Matra Kripa" Chameli Park,
Near Goyal Nagar, Indore- 452016 (MP)
Through its Director Mr. Pramod Kishore
Shrivastava
"Agarwal House" "2nd Floor, 5 Yashwant Niwas
Road, Indore – 452001 (MP)
Email: cs@agarwalcoal.com

...Appellant

Versus

Nilkanth Concast Pvt. Ltd.,
(CIN: U27106GJ2003PTC042778)
Registered Office Situated at: Block A, Office No.
401, Mondeal Hights, Nr. Panchratna Party Plot,
S.G. Highway Ahmedabad, 380051 Gujarat
Email: ncplfinance08@gmail.com

...Respondent

Present:

For Appellant:	Mr. Sumesh Dhawan, Ms. Vatsala Kak, Mr. Praveen M Surange, Mr. Shaurya Shyam, Advocates
For Respondent:	Mr. Abhijit Sinha, Ms. Aastha Mehta, Mr. Aditya Shukla, Mr. Saikat Sarkar, Ms. Prerana Mohapatra, Advocates.

J U D G M E N T

[Justice Rakesh Kumar, Member (Judicial)]

The Present Appeal has been preferred under Section 61 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as 'Code') against an order dated 09.02.2021 passed by the National Company Law Tribunal, Ahmedabad Bench, Ahmedabad Court-2 (hereinafter referred to as 'Adjudicating Authority') in CP (IB) No. 118/NCLT/AHM/2020. By the said order the Ld. Adjudicating Authority was pleased to dismiss the application filed under Section 9 of the Code primarily on the ground of maintainability. It would be apt to reproduce the impugned order dated 09.02.2021 passed by the Adjudicating Authority as follows:

"1. Ms. Mona Rawat, authorized signatory, on behalf of M/s. Agarwal Coal Corporation Pvt. Ltd. filed this Petition under Section 9 of the Insolvency and Bankruptcy Code, 2016 [hereinafter referred to as "the Code"] read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 [hereinafter referred to as "the Rules"], as operational creditor/applicant.

2. The applicant/operational creditor, a Pvt. Ltd. company having identification No. U23109MP2000PTC14351, and having its registered office at Indore, Madhya Pradesh, engaged in the business of Import and trade of coal, has submitted that the Respondent is indebted a total sum of Rs. 78,79,452/- (Rupees seventy-eight lakhs seventy-nine thousand four hundred fifty-two only) to the applicant towards the supply of goods. That, the aforesaid debt has fallen due on 06.05.2019.

3. In support of its claim, the applicant has annexed to the application copy of the documents like; affidavit in support

of the application in accordance with I & B Code, Board Resolution dated 24.10.2019, ledger account of operational creditor, demand notice in form 3, bank certificate in compliance of Section 9 (3) © etc.

4. The applicant has stated that despite repeated reminders the respondent has not paid the outstanding operational debt, therefore, the applicant was compelled to issue demand notice under Section 8 of the I & B Code in form 3 on 29.11.2018 and on 10.10.2019 calling upon the Respondent to clear the operational debt.

5. The Respondent/Corporate Debtor is a limited company registered under the provisions Companies Act, 1956, having identification No. U27106GJ2003PTC042778 and having registered office at Gandhidham, Gujarat State. Authorised share capital of the Respondent Company is Rs. 4,00,00,000/- and paid up share capital is Rs. 3,38,78,950/-.

6. The Respondent/Corporate Debtor filed affidavit in Reply inter alia raising various objections like;

- That, the petition is defective and therefore, not maintainable in the eye of law;*
- Operational creditor has not produced purchase order or any delivery challan in respect of supply of goods;*
- The goods supplied by the applicant were of low quality;*
- Both the parties had entered into a settlement in May, 2019 and according to the Settlement agreement Rs. 20.00 lacs were paid to the petitioner, therefore, issuance of demand notice is in breach of settlement;*
- There is existing dispute between the applicant and respondent;*

Findings:

7. Heard Ld. Counsels appearing for both the sides and perused the documents annexed to the application/reply.

8. On perusal of the record it is found that the petitioner had issued two demand notices, the first one dated 29.11.2018 and the second one dated 10.10.2019. Both the demand notices under Section 8 of the I & B Code which is a pre-requisite for initiation of CIRP proceedings, is signed and issued by one Mr. Surendra Prasad Shukla, in the capacity of Whole-time Director and authorized signatory of the applicant company, without there being any authorization. Admittedly, the petitioner has filed a copy of the resolution passed on 24th October, 2019, much after the issuance of demand notice, authorizing Mr. Mohd Nazim Khan and Ms. Mona Rawat to initiate CIRP against the respondent company. In short, at the time of issuing demand notices dated 29.11.2018 and 10.10.2019, Mr. Surendra Prasad Shukla, claiming to be the authorized signatory of the operational creditor company, in fact, had no authority to issue demand notice and the demand notice so issued by him is invalid in the eye of law.

9. Notwithstanding above, the documents so filed by the corporate debtor (page 14-31 to reply) show that there is/was pre-existing dispute between the parties with regard to quality of the goods supplied by the petitioner. It is found that vide offer date 05.07.2018 (page 15 to reply) the petitioner had offered to supply Indonesian Coal High Gross Calorific value (GCV)- GAR-5200 Kcal/Kg to the corporate debtor. The operational creditor assured to supply specified coal having specified GCV value and GAR to the corporate debtor and that the inspection report of independent agency in respect of quality, shall be final and binding to both the parties. Further, the corporate debtor had specifically pointed out that the corporate debtor will raise debit note on pro-rata basis in case the GCV (ARB) falls below 5100 and in case there is rise in TM above 29%, IM above 15%, Ash above 7%, VM above 42% and Sulphur above 0.50% with such covenant/understanding”.

2. Short fact of the case as enumerated in the Memo of Appeal is that in the year 2018 the Appellants had offered Respondent (Corporate Debtor) for supply of Indonesian imported coal from Kandla Port, vide its two offers dated 05.07.2018 for supply of Indonesian Coal of 2000 MT at the price of Rs. 5620/-

PMT plus taxes and other charges and offer dated 10.07.2018 for supply of Indonesian Coal of 9000 MT at the price of Rs. 5620/- PMT plus taxes and other charges from the Kandla Port on certain terms and conditions with clear understanding regarding the quality analysis report, non- deduction after supply the material etc. It is further case of the Appellant that in the light of aforesaid two offers the Respondent provided two purchase order dated 07.07.2018 for supply of 1000 MT Coal at the agreed price of Rs. 5520/- PMT plus taxes and other charges and another purchase order dated 10.07.2018 for supply of 5000 MT Coal at the agreed price of Rs. 5520/- PMT plus taxes and other charges.

3. It is the case of the Appellant that Respondent categorically agreed with the quality of the Indonesian Imported Coal being supplied by the Appellant in terms of the offer (including the Calorific Value of the coal of Rs. 5200/- with plus/minus 100) and compliance to that the Appellant provided the certificate of sampling and analysis of the coal (from the port of discharge- Kandla Port), issued by the Independent Surveyors (Elegant Surveyors) dated 11.06.2018. Subsequently, the Appellant supplied 999.920 MT of coal vide to 30 trucks for the value of Rs. 61,95,504/- between the period from 07.07.2018 to 10.07.2018 and the payment of Rs. 61,95,000/- on account thereof was made by the Respondent on 07.07.2018.

4. The Appellant made further supplies of 1000.600 MT of coal vide through 29 trucks for the value of Rs. 61,99,718/- in between the period from

14.07.2018 to 17.07.2018 and receipt payment of Rs. 61,96,000/- on 13.07.2018.

5. The Appellant further claimed in its Memo of Appeal that it made the supplies of 1770.340 MT of coal vide 48 trucks for the value of Rs. 1,05,35,307/- in between the period from 21.07.2018 to 25.07.2018. There was outstanding balance of Rs. 1,05,39,528/- on 25.07.2018.

6. Even thereafter the Appellant made supply which is under dispute i.e. to the tune of 1384.680 MT of coal through 39 trucks for the value of Rs. 85,79,477/- in between the period from 26.07.2018 to 30.07.2018 and again supplied 347.070 MT of coal vide 10 trucks for the value of Rs. 21,50,445/- in between the period from 01.08.2018 to 02.02.2018, total aggregating quantity of Rs. 1731.750 MT for the value of Rs. 1,07,29,923/-. There was total outstanding balance of Rs. 2,12,69,451.56 as on 02.08.2018.

7. It is further the case of the Appellant that after lifting the materials to the tune 5432.61 MT between 07.07.2018 to 02.08.2018 for an amount of Rs. 2,12,69,451/- and even after making full and final payment for the first trench supplies of Rs. 999.920 MT between 07.07.2018 to 10.07.2018 of Rs. 61,95,000/- and further after making the payment of Rs. 61,96,000/- for the supplies of 1000.600 MT, the Respondent sent a mail dated 04.08.2018 raising certain irrelevant quality issues including insisting for further sampling testing of the coal at Respondent's premises which was objected by the Appellant vide its mail dated 04.08.2018. Subsequently, the Respondent (Corporate Debtor) got a report dated 06.08.2018 in respect of the coal lying at its own plant.

8. Even thereafter, the Appellant has received a payment of Rs. 61,95,000/- on 10.08.2018 and further Rs. 61,95,000/- on 18.09.2018 aggregating to Rs. 1,23,90,000/- against the outstanding dues of Rs. 2,12,69,451/-.

9. It is further case of the Appellant that subsequently the Respondent started evading the balance payment of Rs. 88,79,452/- by raising irrelevant issues in respect of supplies accepted by the Respondent without any demure and protest.

10. It is further case of the Appellant that despite multiple and repeated reminders the Respondent did not pay the said outstanding dues nor the Appellant received any response from the Respondent. The Appellant thereafter issued a demand notice under Section 8 of the code demanding payment of Rs. 88,79,452/-.

11. In the Memo of Appeal it has been stated by the Appellant that after receiving the first demand notice the Respondent accepted the aforesaid outstanding dues without raising any dispute and assured the Appellant for making the payment as per the demand notice. Since, there was long term business relation with the Respondent the Appellant allowed some time to the Respondent to make payment of said outstanding amount.

12. It is further case of the Appellant that the Respondent on 06.05.2019 through a Cheque made payment of Rs. 10,00,000/- against the same outstanding dues of Rs. 88,79,452/- and further assured to the Appellant regarding payment of balance amount shortly.

13. It has also been stated in the Memo of Appeal that despite assurance given by the Respondent he failed to make payment and breached the settlement talk. The Appellant thereafter on 10.10.2019 issued second demand notice under Section 8 of the code for payment of Rs. 78,79,452/- to the Respondents and since no response was received, the Appellant filed an application under Section 9 of the code before the Adjudicating Authority however, the Adjudicating Authority dismissed the application primarily on the ground that it was not maintainable since pre-existing dispute was there.

14. Mr. Sumesh Dhawan, Ld. Counsel appearing on behalf of the Appellant assailing the impugned order has primarily argued that the Adjudicating Authority has failed to exercise its jurisdiction and primarily rejected the application filed by the Appellant under Section 9 of the Code on the ground that there were pre-existing disputes in between the parties. He submits that it is true that in a case of pre-existing dispute application under Section 9 of the Code may not be maintained but at the same time if the Adjudicating Authority was satisfied that without any reasonable pre-existing dispute for the purposes of raising question of maintainability a so called dispute is raised, in such situation the application filed under Section 9 of the Code was not required to be rejected merely on the ground of pre-existing dispute.

15. He further submits that before filing application under Section 9 of the Code demand notice under Section 8 of the Code was issued duly supported with the authorization by the Board. The Ld. Adjudicating Authority has incorrectly recorded in its order that no proper authorization was filed along

with the application filed under Section 9 of the Code to show authorization to one Mr. Surendra Prasad Shukla, in the capacity of a Whole Time Director and authorized signatory of the Applicant Company.

16. Mr. Dhawan by way of referring to certain documents which have been brought on record has argued that there was no actual pre-existing dispute in between the parties. By way of referring to purchase order dated 05.07.2018 which is at running page 54 (Annexure –A2), he has argued that in the purchase order it was indicated that “for quality purpose the analysis report issued by an independent inspection agency at discharge port will be final and acceptable by both the parties”. He submits that the Respondent had raised a dispute regarding quality of the coals supplied by the Appellant. The said objection was raised on the basis of an inspection report which itself indicates that the coal was inspected at the plant of the Appellant not at discharge port. He further submits that the so called inspection report further reflects that it was prepared only in the presence of Respondent not in presence of the Appellant or his representative. According to Mr. Dhawan, Ld. Counsel for the Appellant the dispute raised by the Respondent is nothing but a ploy to defeat the right of the Appellant to initiate CIRP proceedings against the Respondent under Section 9 of the code.

17. He with a view to substantiate the claim regarding unsustainable dispute being raised on the basis of certificate of a stack sampling and analysis, Ld. Counsel has drawn our attention to running page 66 which is a certificate

dated 06.08.2018. He has shown from this report that sampling place was “At the plant of M/s. Nilkanth Concast Pvt. Ltd., Bhadrashwar”.

18. He has also drawn our attention to third column of remarks i.e. “sampling and analysis was carried out in presence of representative of M/s. Nilkanth Concast Pvt. Ltd., Gandhidham”. Ld. Counsel tried to persuade the court that such report was nothing but it was brought on record to raise frivolous dispute.

19. Ld. Counsel for the Appellant has also drawn our attention to email dated 04.08.2018 sent by the Respondent to the Appellant at running page 64.

It would be appropriate to reproduce the contents as follows:

“This is in reference to our purchase order of 8000 mts coal 5200 gar in this connection we want you to carry out joint sampling for the material we were lifting from Kandla port. From day one we are receiving low GCV coal around 4600 gar so we want you to carry out joint sampling and whatever report comes will be binding to both of the parties. Joint sampling will be carried out by appointing 2 sampling agency one from your side and other from our side and both will test the coal in their own lab whatever results comes will be average out by calculating it and report will be binding to both the parties”.

20. By way of referring to contents of the aforesaid email he has argued that the Respondent had admitted that without any objection they had lifted the coal from Kandla Port and thereafter proposed for sampling. In sum and substance it has been argued that the impugned order is erroneous on two grounds. Firstly, the Ld. Adjudicating Authority has incorrectly mentioned that the demand notice under Section 8 was issued by a person who was not authorized by the Board and secondly, the dispute was insignificant to be

treated as pre-existing dispute. According to him the Ld. Adjudicating Authority has grossly erred in rejecting the application filed by the Appellant under Section 9 of the code.

21. Mr. Abhijit Sinha, Ld. Counsel for the Respondent supporting the impugned order has argued that it was out and out a case of pre-existing dispute and as such Ld. Adjudicating Authority has rightly dismissed the application filed by the Appellant. Mr. Sinha, has also relied on the same document which was referred to by Ld. Counsel for the Appellant i.e. purchase order dated 05.07.2018 and he has referred to paragraph 1 of the note in the bottom of Pg- 54 i.e. part of the purchase order dated 05.07.2018 which incorporates “We will not accept any deduction after supply the material, but we (Suppliers) are bound to supply the same Grade which specification we have offered”. He submits that despite specific agreement for supply of the same grade of coal, the supplied coal by the Appellant was not as offered by him. And this was the reason that finally the Respondent was constrained to get the coal inspected by the Independent Inspecting Agency. Even, the Appellant was request to get the same inspected which is evident from email dated 04.08.2018.

22. He further submits that once test report was brought to the notice of the Appellant by the Respondent showing deficiency in the quality of the coal, the Appellant never questioned the said report nor did he ever challenge the report on earlier occasion and as such at belated stage the Appellant may not be

permitted to take advantage that the inspection was conducted not at port but at the place of the Respondent.

23. He has also argued that demand notice under Section 8 of the Code by an unauthorized person is having no entity and as such without compliance of Section 8 of the code there was no reason for filing application under Section 9 of the code. According to Mr. Sinha, there is no reason for interference with the impugned order.

24. Besides, herein Ld. Counsel for the parties, we have minutely examined the materials available on record including statement made in the Memo of Appeal by the Appellant himself. Ongoing through the materials on record it is evident that much prior to issuance of so called demand notice dispute was existing in between the parties. It is also not in dispute that initially huge amount was paid to the Appellant on supply of the coal by the Respondent, however, subsequently regarding quality of the coal, dispute was raised. Of course, before this Appellate Tribunal it has been argued that demand notice was issued by a person who was duly authorized by the Board and this statement was also made in the application filed before the Adjudicating Authority by the Appellant under Section 9 of the code which is at running page 111 in paragraph 7 that on 01.10.2019 the operational creditor passed a resolution deciding thereby to initiate necessary proceedings under Insolvency and Bankruptcy Code, 2016 against the Corporate Debtor and appointing thereby Mr. Surendra Prasad Shukla to issue demand notice, the Impugned order reflects that said resolution was not brought on record.

25. On perusal of the paragraph 8 of the impugned order it is evident that the Adjudicating Authority on perusal of the record has recorded that both the demand notices, first dated 29.11.2018 and the second dated 10.10.2019 issued under Section 8 of the code which is pre-requisite for initiation of CIRP proceedings was signed and issued by one Mr. Surendra Prasad Shukla , in the capacity of whole-time Director and authorized signatory of the Applicant company, without there being any authorization. Once, the Ld. Adjudicating Authority had noticed that there was no specific authorization on record authorizing Mr. Surendra Prasad Shukla for issuance of demand notice under Section 8 of the code, such demand notice may not be termed in accordance with Section 8 of the code.

26. We are of the opinion that if the Appellant was not in a position to satisfy the Adjudicating Authority on the validity of the demand notice certainly application filed under Section 9 of the code was required to be rejected. We are of the opinion that in absence of proper authorization for issuance of demand notice under Section 8 of the code such demand notice may not be termed as if it was in accordance with the provision contained in the code for admitting an application under Section 9 of the code, valid and legal demand notice under Section 8 of the code is pre-requisite.

27. Besides this on examination of the materials available on record as well as arguments advanced from both the sides, there is no reason for coming to a different conclusion then I hold that dispute in between the parties was pre-existing. We are not recording any finding either regarding validity of dispute

raised by the Respondent or validity of inspection certificate etc. but those facts are enough to draw an inference that in between the parties there was pre-existing dispute. It was not a created dispute to prevent the Appellant for initiating CIRP against the Respondent, rather those disputes were continuing in between the parties and as such we don't find any error in the impugned order warranting interference by this Tribunal.

28. Accordingly, the order of the Adjudicating Authority is approved and the Appeal stands dismissed.

[Justice Rakesh Kumar]
Member (Judicial)

[Dr. Ashok Kumar Mishra]
Member (Technical)

New Delhi
05.12.2022

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