

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL,  
PRINCIPAL BENCH, NEW DELHI**

**Company Appeal (AT) (Insolvency) No. 34 of 2023**

[Arising out of order dated 28.11.2022 passed by the Adjudicating Authority (National Company Law Tribunal), Jaipur Bench, Court-V in CP (IB) No. 81/9/JPR/2021]

**IN THE MATTER OF:**

**Hindustan Zinc Limited**

Yashad Bhawan  
Swaroop Sagar, Udaipur  
Rajasthan 313 004.

**...Appellant**

**Vs.**

**Mahindra Susten Pvt. Ltd.**

having its registered office at:  
Mahindra Towers  
Dr. GM Bhosale Marg  
P. K. Kume Chowk, Worli  
Mumbai - 400 018.

**...Respondent**

**Present:**

**For Appellant: Mr. Krishnan Venugopal, Sr. Advocate with Mr. U. N. Tiwary, Mr. Akshat Tiwary, Advocates.**

**For Respondents: Mr. Paras Kuhad, Sr. Advocate with Mr. Jitin Chaturvedi, Mr. Rahul Sinha, Advocates.**

**J U D G M E N T**

**ASHOK BHUSHAN, J.**

This Appeal has been filed challenging the order dated 28.11.2022 passed by the Adjudicating Authority (National Company Law Tribunal), Jaipur Bench on an application filed under Section 9 filed by the Respondent–

*Cont'd.../*

Mahindra Susten Pvt. Ltd. in C.P. No. (IB)-81/9/JPR/2021. The Adjudicating Authority by the impugned order directed as follows:

*“Heard Mr. Paras Kuhad, Sr. Adv. appearing on behalf of the Petitioner/ Operational Creditor and Mr. M.S. Singhvi, Sr. Adv. for the Respondent/ Corporate Debtor. This Order was reserved on 11.10.2022. Additional written submissions have been filed vide Diary No. 3437/2022 dated 23.11.2022 by the Respondent/Corporate Debtor before pronouncement of the Order.*

*Learned Senior Counsel appearing on behalf of the Respondent submits that on 14.11.2022, entire claim amount of Rs. 16,41,96,213.38/- Principal amount and applicable GST making a total amount of Rs. 18.68,55.290.82/-has been paid by the Respondent/ Corporate Debtor.*

*In view of the payment made, the present petition must be rejected under Section 9(5)(ii)(b) of IBC, 2016. Learned Senior Counsel appearing on behalf of the Petitioner/ Operational Creditor submits that the entire amount has not been paid by the Respondent/ Corporate Debtor. Interest amount is also to be paid by the Respondent/ Corporate Debtor. A total Amount of Rs. 10,59,37,689/- is yet to be deposited by the Corporate Debtor. In view of the recent development in the matter, both parties are permitted to settle the matter amicably within one week.”*

2. The Appellant who was Respondent in the Section 9 application impleaded as Corporate Debtor has come up in this Appeal challenging the

order dated 28.11.2022. Brief facts of the case necessary to be noticed for deciding this Appeal are:

- i. The Respondent – Operational Creditor entered into an agreement for supply and installation of Solar Photovoltaic Power Generation System with the Appellant - Hindustan Zinc Ltd. dated 30.04.2018. Supplier was to carry out work as per the Contract. Schedule IV of the Contract dealt with Contract Price and payment terms. As per Clause 4.2, the owner i.e. the Appellant was to pay Anti-dumping Duty and Safeguard Duty, if applicable.
- ii. At the time of entering into contract Safeguard Duty was not imposed. Vide Notification dated 30.07.2018, Safeguard Duty was imposed for the period 30.07.2018 to 29.07.2020. Prior to issuance of Notice dated 30.07.2018, the Operational Creditor has already placed orders for Solar Modules required for the project from China.
- iii. The Corporate Debtor vide email dated 03.08.2018 sought to terminate the contract on the ground that amount of Safeguard Duty exceeded Rs.5 Crore.
- iv. Challenge to Safeguard Duty was made before the Orissa High Court. The Appellant also filed Writ Petition being DB CWP No. 12346/2018 before the Rajasthan High Court against levy of Safeguard Duty. Order was passed by Orissa High Court, in

pursuance of which, the Government of India issued an instruction dated 13.08.2018 deciding not to insist for payment of Safeguard Duty. The Instruction directed that the Safeguard Duty be assessed provisionally on furnishing of simple letter of undertaking/bond by the concerned person.

- v. The Corporate Debtor issued a letter of undertaking dated 21.08.2018 in favour of Operational Creditor wherein Corporate Debtor expressly undertook to forthwith pay the Operational Creditor the amount of safeguard duty levied by the Customs Authority. The Operational Creditor carried out the custom clearance of Solar Modules imported from China through provisional assessment.
- vi. The order passed by the Orissa High Court was stayed by Hon'ble Supreme Court vide its order dated 10.09.2018. In view of the interim order passed by the Hon'ble Supreme Court, an instruction was issued by Government of India dated 13.09.2018, withdrawing earlier instruction dated 13.08.2018 with immediate effect. As per Instruction dated 13.09.2018, all the provisional assessments done were directed to be finalized by the Customs Authority and safeguard duty be assessed and collected.
- vii. The Operational Creditor issued Debit Note on Corporate Debtor for an amount of Rs.18,86,68,519/- on 18.09.2018. The Corporate Debtor did not made payment of Safeguard Duty.

- viii. The Customs Department issued notice dated 30.11.2018 to the Operational Creditor for finalization of assessment and payment of safeguard duty.
- ix. The Operational Creditor issued a Demand Notice dated 06.11.2020 demanding total amount of debt of Rs.18,86,68,519/-. The Corporate Debtor replied to the Demand Notice denying its liability to pay the outstanding amount.
- x. The Operational Creditor filed Section 9 application claiming an amount of Rs.17,24,06,024/-. Section 9 application was filed on 16.07.2021. Parties were heard on issuance of notice by the Adjudicating Authority on 10.11.2021. The Adjudicating Authority, however, directed the Corporate Debtor to file its reply by order dated 10.11.2021.
- xi. On 07.09.2022, the Senior learned counsel for the Corporate Debtor submitted that once assessment of safeguard duty is done by the competent authority, the Appellant will make the payment of the same within the stipulated period and matter was adjourned to 11.10.2022.
- xii. The Customs Department issued a final assessment of Safeguard Duty on 04.10.2022 to the Operational Creditor demanding Safeguard Duty + GST + Interest.
- xiii. The Adjudicating Authority heard the parties and on 11.10.2022 reserved the orders. Additional written submission was filed on

behalf of the Appellant where it was stated that on 14.11.2022, M/s Hindustan Zinc Ltd. has paid the entire claim amount of Rs.16, 41,96,213.38/- (principal amount) and further GST amount of Rs.18,68,55,290.82/-. It was stated that payment has been made under protest towards the principal amount based on the invoice dated 28.10.2022 issued by the Operational Creditor in favour of the Corporate Debtor.

- xiv. On 28.11.2022, the Adjudicating Authority passed the order noticing that default amount of Rs.18,68,55,290/- has been paid by the Corporate Debtor. Adjudicating Authority also noticed the submission of the Operational Creditor that interest amount has also to be paid by the Corporate Debtor. The Adjudicating Authority observed that in view of the recent development in the matter, both parties are permitted to settle the matter amicably within one week. The Appellant aggrieved by the said order has come up in this Appeal.

3. We have heard Shri Krishnan Venugopal, learned senior counsel for the Appellant and Shri Paras Kuhad, learned senior counsel appearing for the Respondent – Operational Creditor.

4. Learned counsel for the Appellant submits that the Section 9 application was filed for Safeguard Duty reserving right to claim future interest or penalties or delay charges. Entire Safeguard Duty having been paid on 14.11.2022, the petition under Section 9 deserved to be rejected

under Section 9(5)(ii)(b) of the I&B Code. The Adjudicating Authority committed error in refusing to exercise its jurisdiction in rejecting the application and have directed the parties to settle amicably between themselves, which order is not in accordance with law. It is submitted that the debt having been paid, the Adjudicating Authority had to reject the application. It is submitted that claim of interest was not subject matter under Section 9 Application before the Adjudicating Authority and the Adjudicating Authority erred in directing the parties to amicably settle the issue of interest within one week. The claim must be crystalized and quantified to become an operational debt. The subsequent quantification of amounts by the Customs Authorities is irrelevant because the relevant date to determine maintainability of the claim is the date on which the Section 9 application was filed. The Statement made by Learned Senior Counsel for the Appellant on 07.09.2022 was only with regard to payment of safeguard duty, which payment having been made, the same counsel requested the Adjudicating Authority to dismiss the application. Continuation of Section 9 application for interest is not maintainable. The payment of interest has been disputed by the Appellant. The Appellant has requested the Respondent to challenge the demand by filing an appropriate appeal. Under the Contract between the parties, the Operational Creditor was required to indemnify the Appellant against all claims in connection to the Government taxes, duties, etc. Challenge to the safeguard duty itself is sub-judicate before the Hon'ble Supreme Court and Hon'ble High Court including Writ Petition filed by the Appellant. Appellant is a fully solvent company with a net worth of Rs.34,281

crores in the year 2021-22 with profit after tax of Rs.9,629 crores. There is no justification of initiating any insolvency proceeding against the Appellant.

5. Shri Paras Kuhad, learned senior counsel appearing for the Operational Creditor vehemently opposed the submissions of learned counsel for the Appellant. It is submitted that as per clause 4.2 of the Contract dated 30.04.2018, it is liability of the Appellant to pay the Safeguard Duty. The Appellant has undertaken to pay amount of Safeguard duty levied by the Government Authorities for import of solar modules including the interest thereon. In the Writ Petition filed by the Appellant before the Rajasthan High Court, no protective order has been passed. As per Section 47 of the Customs Act, 1962, imported goods were liable to be cleared for home consumption only upon payment of import duty. Import duty is liable to be paid on the date of presentation of the bill of entry. Failure to pay the duty within the time specified would attract interest on the duty. The Appellant who is owner was fully liable to pay the Safeguard Duty as well as interest. Only payment of Safeguard Duty on 14.11.2022 shall not absolve the Appellant from its liability to pay the Safeguard Duty and interest. Section 9 application has to be treated as an application Safeguard Duty alongwith up to date interest. Hence, the payment of interest is also matter of Section 9 application. It is submitted that learned senior counsel for the Appellant made statement that “once assessment of safeguard duty is done by the competent authority, he will make payment of the same”, which clearly meant that entire payment i.e. Safeguard Duty and interest shall be paid by the Appellant. Appellant cannot go back from its statement made on 07.09.2022 before the Adjudicating

Authority. Appellant failed to make payment of Safeguard Duty, hence is fully liable to pay the interest also. Assessment order dated 04.10.2022 crystalized the interest which is now liability of the Appellant to clear. Demand made by the Operational Creditor is founded on documents relating to contract for supply of goods.

6. We have considered the submissions of learned counsel for the parties and perused the record.

7. Before we enter into respective submissions of learned counsel for the parties, it is relevant to notice the particulars of operational debt as claimed in Part IV of the Section 9 application. Part IV of the Section 9 application is as follows:

<b>PARTICULARS OF OPERATIONAL DEBT</b>					
1	<b>TOTAL AMOUNT OF DEBT</b>	<i>Total Amount of Debt Rs. 17,24,06,024.33 (Rupees Seventeen Crores Twenty Four Lakhs Six Thousand and Twenty Four and Thirty Three Paise only).</i>			
		<b>Comprising:</b>			
		<b>Principal</b>	<b>CGST @ 2.50%</b>	<b>GST @ 2.50%</b>	<b>Total Outstanding</b>
		16,41,96,213 .65	41,04,905 .34	41,04,905 .34	17,24,06,024 .33
		<i>The Applicant reserves the right to claim further interest, penalties and/or delayed charges on the aforesaid amounts, which may be levied by the Customs department and/or incurred by the Applicant, thereon as on the Insolvency Commencement Date of the Corporate Debtor.</i>			

8. In Part IV, under the heading 'Details of transactions on account of which debt fell due', in Para 26 and 27 following has been pleaded:

“26. It is submitted that pursuant to the above, while finalizing the present petition, the Operational Creditor observed that an amount of Rs. 1,62,62,495.29/- has inadvertently been included in excess in the Demand Notice. Therefore, the actual amount of the demand towards Safeguard Duty is Rs. 17,24,06,024.33 (Rupees Seventeen Crores Twenty Four Lakhs Six Thousand and Twenty Four and Thirty Three Paise only) instead of Rs. 18,86,68,519.62/-.

27. The Applicant reserves the right to claim further interest, penalties and/or delayed charges on the aforesaid amounts, which may be levied by the Customs department and / or incurred by the Applicant, thereon as on the Insolvency Commencement Date of the Corporate Debtor.”

9. In last part of the Part-IV, which deals with ‘Amount claimed to be in default and date on which the default occurred’, following has been stated:

“Total Amount of Debt Rs. 17,24,06,024.33 (Rupees Seventeen Crores Twenty Four Lakhs Six Thousand and Twenty Four and Thirty Three Paise only).

**DATE ON WHICH THE DEFAULT OCCURRED:-**

September 18, 2018

**Comprising:**

<b>Principal</b>	<b>CGST @ 2.50%</b>	<b>GST @ 2.50%</b>	<b>Total Outstanding</b>
16,41,96,213 .65	41,04,905 .34	41,04,905 .34	17,24,06,024 .33

*The Applicant reserves the right to claim further interest, penalties and/or delayed charges on the aforesaid amounts, which may be levied by the Customs department and/or incurred by the Applicant, thereon as on the Insolvency Commencement Date of the Corporate Debtor.*

10. When we look into the Section 9 application filed by the Respondent, the Operational Debt claimed was Rs.17,24,06,024.33 and the column in Part IV specifically reserves right of the Operational Creditor in following words:

*“The Applicant reserves the right to claim further interest, penalties and/or delayed charges on the aforesaid amounts, which may be levied by the Customs department and/or incurred by the Applicant, thereon as on the Insolvency Commencement Date of the Corporate Debtor.”*

11. Admittedly, the levy by the Custom Department is by Assessment Order dated 04.10.2022 by which finalization of duty on the bill of entry was made. In the Safeguard Duty, on the date when application was filed, interest could not have included as the amount of interest has been crystalized only subsequently when provisional assessment has been finalized by letter dated 04.10.2022. We, thus, are of the view that claim of interest levied by order dated 04.10.2022 cannot be said to be included in the debt as claimed by the Applicant under Section 9.

12. The impugned order records that Appellant has deposited on 14.11.2022, entire claim amount of Rs.16,41,96,213.38/- Principal amount and applicable GST making a total amount of Rs.18.68,55.290.82/-. On deposit of the aforesaid amount, thus, the debt as was claimed in the application stood paid. The order further notice that submission was made on behalf of the learned senior counsel for the Appellant that in view of the aforesaid deposit, the application should be rejected, which was opposed by learned counsel for the Respondent stating that interest is also to be paid by the Corporate Debtor.

13. Operational Debt as was claimed in the application under Section 9 which is apparent from Part IV of the Application which clearly states that the Operational Debt was only Rs.17,24,06,024/- and Applicant has reserved its right to claim further interest, penalties or delayed charges, etc. We, thus, are of the view that on payment of entire Operational Debt as was claimed in the application, there was no occasion to continue the Section 9 application any further.

14. We also notice submission of learned counsel for the Respondent that the Appellant through its senior counsel has made categorical statement on 07.09.2022 that once assessment is made they shall make the payment, which statement clearly means that Appellant undertake to make the payment of assessed amount which includes Safeguard Duty and interest.

15. We may first notice the order dated 07.09.2022 passed by the Adjudicating Authority recording the aforesaid statement of learned senior counsel for the Appellant, which order is as follows:

**“ORDER**

*“Heard Mr. Paras Kuhad, learned Senior Counsel appearing on behalf of Petitioner/ Operational Creditor. Mr. M. S. Singhvi, learned Senior Counsel appearing for the Respondent/ Corporate Debtor submits that once assessment of safeguard duty is done by the competent authority, he will make the payment of the same within the stipulated period. This matter is adjourned to 11.10.2022.”*

16. Mr. M. S. Singhvi, learned counsel appearing for the Appellant had on 07.09.2022 made statement as recorded above. The statement stated that once assessment of safeguard duty is done by the competent authority, he will make the payment of the same within stipulated period. The statement can be read as statement for payment of Safeguard Duty, which is clear from the use of word ‘same’ in the same sentence. Furthermore, on 28.11.2022, when the matter was heard again by the Adjudicating Authority, Mr. M. S. Singhvi, the same counsel appeared for the Appellant and prayed that in view of the payment of Safeguard Duty, the application be rejected. We are, thus, unable to read the statement of Mr. M. S. Singhvi, learned counsel for the Appellant that he made statement to make payment of Safeguard Duty with interest.

17. Learned counsel for the Respondent submits that now in view of the Assessment Order, the liability has come on the Operational Creditor to make the payment of Safeguard Duty + Interest. Only payment of Safeguard Duty shall not absolve the Corporate Debtor from its liability to make payment of interest and the Customs Department may take coercive action against the Operational Creditor. It is submitted that it is obligatory on behalf of the Appellant to make payment of interest which was its liability as per the contract of supply.

18. Learned counsel for the Appellant submits that Appellant has made the payment of Safeguard Duty under protest and has further requested the Operational Creditor to challenge the interest.

19. We are of the view that it is open for the Appellant to challenge the levy of interest, if they are so aggrieved to liability of interest which ultimately will come on them as per the supply agreement. Appellant cannot get away from liability of interest by saying that it has requested the Operational Creditor to challenge the levy of interest since if the liability of the interest is of the Appellant as per the Supply Agreement, it was open for the Appellant to take such recourse in accordance with law challenging the levy of interest.

20. In view of the foregoing discussion, we, thus, are of the view that Section 9 application which was filed by the Operational Creditor, the entire Operational Debt having been paid by the Corporate Debtor, there is no useful purpose in continuing the Section 9 proceeding any further. The Adjudicating Authority ought to have closed the matter and the observation that the parties

are permitted to settle the matter amicably within one week, was uncalled for. Thus, we are of the view that Appeal deserves to be allowed closing the application under Section 9 filed by the Operational Creditor being CP (IB) No. 81/9/JPR/2021. We, however, are also of the view that it is open for the Appellant to take such legal proceeding as he may be advised, challenging the levy of interest. The dismissal of Section 9 application filed by the Operational Creditor being CP (IB) No. 81/9/JPR/2021 shall not preclude the Operational Creditor to take such proceedings in law against the Corporate Debtor in event the liability of interest is not discharged by the Corporate Debtor. The Appeal is disposed of accordingly.

**[Justice Ashok Bhushan]  
Chairperson**

**[Barun Mitra]  
Member (Technical)**

**NEW DELHI**

**29<sup>th</sup> May, 2023**

*Archana*