

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 134 of 2021

[Arising out of order dated 31.12.2020 in C.P. (IB) No. 349/NCLT/AHM/2019 passed by the Adjudicating Authority (National Company Law Tribunal), Ahmedabad Bench, Ahmedabad, Court 2.]

IN THE MATTER OF:

BSE LIMITED,

Having its Registered office at

25th Floor, P.J. Towers,

Dalal Street Fort,

Mumbai-400001

Through its Assistant Manager.

.... Appellant.

(Operational Creditor)

Versus

KCCL PLASTIC LIMITED,

(earlier known as Kosha Cubidor Containers Limited)

Having its registered office at A/6, Nasib Apartments,

Ambawadi (Ellisbridge), behind Apollo Hospital,

Near Parimal under bridge,

Ahmedabad, Gujrat – 380006.

..... Respondent.

(Corporate Debtor)

Present:

For Appellant: Ms. Surekha Raman, Advocate.

For Respondent: None.

J U D G M E N T

(17th December, 2021)

Justice Anant Bijay Singh;

This instant Appeal i.e. Company Appeal (AT) (Insolvency) No. 134 of 2021 was heard together with Company Appeal (AT) (Insolvency) No. 133 of 2021.

2. This Appeal has been preferred by the Appellant (Operational Creditor) through its Assistant Manager aggrieved and dissatisfied by the order dated 31.12.2020 passed by the Ld. Adjudicating Authority (National Company Law Tribunal), Ahmedabad Bench, Ahmedabad, Court 2 in C.P. (IB) No. 349/NCLT/AHM/2019 whereby and where under the Application filed by the Appellant herein (Operational Creditor) under Section 9 of the Insolvency and Bankruptcy Code, 2016 (***for short IBC***) was dismissed.

3. The facts giving rise in the instant Appeal are as under:

i) The Appellant (Operational Creditor) is a Company incorporated under the provisions of the Companies Act, 1956 and is a recognized stock exchange duly recognised by the Central Government/Securities and Exchange Board of India (“SEBI”) under the provisions of the Securities Contracts (Regulations) Act, 1956 (“SCRA”). The appellant is constituted for the purpose of assisting the business of buying, selling or dealing in securities of the companies which has been granted listing permission by the Appellant.

ii) The Appellant as well as the companies listed on the Appellant and the constituents/investors dealing in the said listed companies through member brokers are governed by Securities Contracts (Regulation) Rules, 1957, SERI (Listing Obligations and Disclosure Requirements) Regulations, 2015 (“LODR

Regulations”), the Rules, Bye-laws and Regulations, 1957 of the Appellant (“Exchange”) (as amended from time to time) and circulars/notices issued by SEBI/the Exchange from time to time.

iii) Further case is that as per Section 21 of the SCRA and as per the requirements of the Appellant, a Listing Agreement was executed between the Appellant and the Respondent (who then operated under the name M/s Kosha Cubidor Containers Ltd.) on 10.09.1993. The Respondent holds Registration No: 155188 and its Corporate Identification Number as: L67120MH2005PLC155188. The Respondent subsequently changed its name to ‘KCCL Plastic Limited’. The Appellant vide its notice bearing no. 20120224-27 dated 24.02.2012 notified that the Respondent had advised the Appellant about change in its name from Kosha Cubidor Containers Ltd. to KCCL Plastic Ltd. w.e.f. 29.09.2012.

iv) Further case is that pursuant to the execution of Listing Agreement that permitted listing and trading of Respondent’s securities on the Appellant’s trading platform, the securities of the Respondent were listed on the trading platform provided by the Appellant on or about 27.10.1993 (Annexure A-2 at page 56 to 63 of the Appeal Paper Book).

v) As per the Listing Agreement, more particularly Clause 38 of the said Agreement, in clear and unequivocal terms casts an obligation upon the Respondent to pay the requisite Annual Listing fees (“ALF”) on or before the 30th day of April, every year.

vi) Further case is that the Respondent made payments of the ALF till Financial Year 2013-2014, last of which was paid on 31.05.2013 when the

Respondent paid an amount of Rs. 44,944/- as ALF. Thereafter, the Respondent, even while being listed on the Appellant's trading platform, failed to make any further payments towards the obligatory ALF.

vii) Further case is that the Appellant raised several invoices periodically calling upon the Respondent to pay to the Appellant in compliance with the clauses of the Listing Agreement and listing requirements, the ALF with arrears and such invoices that were duly served upon the Respondent. The Respondent despite receiving such invoices, wilfully neglected to remit the pending ALF and arrears thereof to the Appellant whilst continuing to avail the listing services on the trading platform of the Appellant.

viii) Further case is that the continuing and recurring defaults committed by the Respondent in payment of the operation debt of Rs. 10,66,886/- [Rs. 10,12,336/- (amounting to principal due and payable as on 03.04.2018) + 54,550/- (computed as interest payable as on March, 2019)], the Appellant issued a Demand Notice dated 15.03.2019 to Respondent under Rule 5 of the IBC, 2016 calling upon the Respondent to make good the said operational debt and in the event of existence of dispute with respect to the amount of the unpaid operational debt, required the Respondent within 10 days of receipt thereof, to intimate the Appellant regarding pendency of any proceedings in relation to such dispute filed before the receipt of the Demand Notice failing which Corporate Insolvency Resolution Process would be initiated.

ix) The aforesaid Demand Notice dated 15.03.2019 was dispatched vide speed post service and addressed to the registered address of the Respondent and also sent through email as available on the website of the MCA as well

submitted by the Respondent originally to the Appellant, for payment of Rs. 10,66,886/-. However, the Respondent refused to acknowledge such service and the Demand Notices that were sent to both the aforesaid addresses were returned undelivered bearing endorsements '*not delivered refused*' and '*not delivered addressee left without instructions*'. The Appellant, due to the fact that the Respondent failed to satisfy and submit to the Appellant debt that was duly payable and continuing, instituted a Petition under Section 9 of the Code read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 being C.P.(IB) No. 349/NCLT/AHM/2019 before the Adjudicating Authority and after hearing, the Ld. Adjudicating Authority dismissed the same. Hence this Appeal.

Submissions on behalf of the Appellant

4. The Learned Counsel for the Appellant during the course of arguments and his memo of Appeal along with Written Submissions and while assailing the impugned order have formulated the question of law as hereunder:

“Whether the right to apply under Section 9 should be subject to limitation when it is apparent that the Respondent’s continuous default is not merely restricted to the initial date of default but on every subsequent occasion when the Respondent was obliged to make payments but failed to pat ALF?”

5. The Learned Counsel for the Appellant submitted that the Ld. Adjudicating Authority failed to appreciate that the default was not a ‘one off’ occurrence that happened three years prior to the date of filing of the application, or on 01.04.2015 alone in which case the application would be

barred under Article 137 of the Limitation Act but the default was in respect of ALF payable under separate invoices raised for each of the years post 2015 together with arrears of the previous years and interest accrued thereupon and which fact was rightly mentioned in Form 3 (at page 81 of the Appeal Paper Book) as also in Form 5 Part IV (at page 105 of the Appeal Paper Book) under date of default as 01.04.2015 till as of date.

6. It is further submitted that the Ld. Adjudicating Authority failed to appreciate that failure to pay ALF by itself constitutes a continuous cause of action and is intrinsically linked to the services enabled and provided by Appellant and continuously availed by Respondent till 2019 despite such defaults.

7. It is further submitted that the Ld. Adjudicating Authority failed to appreciate that the Respondent has acknowledged the debt payable to the Appellant since the Respondent continued to avail the listing service on continuous basis which stands undisputed before the Adjudicating Authority.

8. It is further submitted that the Ld. Adjudicating Authority has wrongly cast doubts on the correctness of the information contained in Form-5 as also on the documents filed therewith.

9. It is further submitted that the Ld. Adjudicating Authority has while observing that date of default in Form-5, Part IV in clause 2 is not reflected making the Form-5 incomplete, proceeded to calculate due date as per the said Form to be 01.04.2015, thereby ignoring the categorical mention of the same under date of default as 01.04.2015 till as of date in the Form 3 as also in Part IV of the Petition. However, the Ld. Adjudicating Authority has further

cast doubts on the Listing Agreement entered into between the Appellant and Respondent on account of change of name of Respondent from M/s. Kosha Cubidor Containers Ltd. to M/s. KCCL Plastic Ltd. in the year 2012 and held it not to be a valid agreement without appreciating the fact that M/s. Kosha Cubidor Containers Ltd. and M/s. KCCL Plastic Ltd. were undoubtedly the same entity and Respondent continued to make payments Towards ALF under the new name and the CIN remained unchanged as L67120MH2005PLC155188.

10. It is further submitted that the Appellant relied on an order of this Appellate Tribunal in **Company Appeal (AT) (Insolvency) No. 472 of 2018 'B.S.E. Ltd. Vs. Neo Corp International Ltd. dated 05.04.2019'** wherein paragraphs 2 to 6 are read as hereunder:

“2. Learned counsel for the Appellant relied on Form-5, the application under Section 9 of the I&B Code wherein particulars of operational debt of Rs.5,57,959/- have been shown due since 1st April, 2014 till the date of filing.

3. From the record we find that invoices were also issued on 1st April, 2017, which shows the total amount payable including service tax for the year 2017- 18, Swachh Bharat Cess and Krishi Kalyan Cess, totalling Rs.5,57,959/-. It appears that the Adjudicating Authority failed to consider the aforesaid documents attached with Form-5 and came to a wrong conclusion that the application under Section 9 is barred by limitation.

4. It is true that Limitation Act, 1963 is applicable in terms of Section 238A of the I&B Code. For the purpose of filing application under Section 9, Part II of the Schedule of Limitation Act, 1963 will apply, which reads as under:-

PART II – OTHER APPLICATIONS

Description of application	Period of Limitation	Time from which period begins to run
137. Any other application for which no period of limitation is provided elsewhere in this division.	Three years	When the right to apply accrues.

5. As in the present case, the right to apply accrues on 1st April, 2017, we hold that the application under Section 9 was not barred by limitation.

6. Part I of the Schedule relates to filing of suits, money suits, etc. If the claim is barred by limitation then a person can take plea that “there is no debt payable in law”. In the present case, as we find that the invoice raised on 1st April, 2017 is more than Rupees One Lakh and a suit if filed will not be barred by limitation, the Corporate Debtor cannot take plea that the amount is barred by limitation.”

11. It is further submitted that the Ld. Adjudicating Authority in the present matter passed the impugned order which is not accordance with law, so, based on these submissions the impugned order is fit to be set aside and the Appeal be allowed.

12. Despite valid service of notice the Respondent failed to appear before this Appellate Tribunal nor filed any reply, as such, paper publication was also effected. Since the service is complete, the matter has been heard in absence of the Respondent (Corporate Debtor) and judgment was reserved.

13. After hearing the Learned Counsel for the Appellant and going through the pleadings of the case and from the perusal of the impugned order, the Respondent (Corporate Debtor) also not appeared before the Ld. Adjudicating Authority.

14. The Ld. Adjudicating Authority has taken note of the fact that the Demand Notice issued under Section 8 of the IBC on 15.03.2019 which was sent through Registered post on 19.03.2019. However, the same was returned with a postal remark "Not Delivered Addressee Left without instructions". The Applicant/Appellant has also issued Demand Notice through email on the same date demanding the arrears of the Annual Listing Fee. However, no dispute is raised by the Respondent.

15. Further, impugned order it transpires that admittedly, the Appellant received the last payment on 31.05.2013 amounting to Rs. 44,944/- for the Financial Year 2013-2014. However, the Appellant in Form -5 has stated that debt fell due on 01.04.2015. Further, the Ld. Adjudicating Authority has also perused page 12, at para-2.10 of the petition wherein the Respondent has made payment of Annual Listing Fee to the Applicant/Appellant till Financial Year 2013-2014 only and the last payment was received on 31.05.2013 for an amount of Rs. 44,944/-. Thereafter, the Respondent (Corporate Debtor) did not pay any amount in respect of Annual Listing Fee.

16. The Ld. Adjudicating Authority have giving finding that debt failed due on 01.04.2015 as admitted by the Petitioner, hence the Application filed under Section 9 of the IBC barred by limitation.

17. The Ld. Adjudicating Authority also takes note of the fact at para 13 of the impugned order the agreement between the parties, it is found that some of the pages/places are found blank and no remarks is given to that effect. However, the agreement contains the initial of the parties only in the last page and none of the pages of agreement contains the signature of the parties and it also found that the agreement entered between “Kosha Cubidor Containers Ltd.” with The Stock Exchange of Bombay. However, there is no seal and signature for and on behalf of The Stock Exchange of Bombay. Admittedly, the name of ‘Kosha Cubidor Containers Ltd.’ changed to KCCL Plastic Ltd., but to that effect no agreement has been entered by the petitioner with that of KCCL Plastic Ltd. As such, there is no agreement between the Appellant and present Respondent.

18. We are of the considered view that the Ld. Adjudicating Authority has rightly come to the conclusion that the agreement so filed cannot be relied upon, as the same is not a valid agreement in the eye of law, so Learned Counsel for the Appellant relied on an order passed by this Appellate Tribunal in **‘B.S.E. Ltd. Vs. Neo Corp International Ltd. dated 05.04.2019’** (*supra*) is not applicable in this matter.

19. Moreover, Listing Fees comes under the ambit of ‘Regulatory dues’ which SEBI is entitled to recover. The Respondent being an entitly registered under SEBI, is under an obligation to follow the Regulations prescribed by

SEBI for recovery of its dues. The dues so said are not 'Operational Dues' but 'Regulatory Dues'. The Insolvency Law Committee suggests that Regulatory Dues are not to be recovered under 'Operational Debt'.

20. We have carefully examined the pleadings of the case and came to the conclusion that no interference is required in the impugned order. Hence, the impugned order dated 31.12.2020 passed by the Ld. Adjudicating Authority (National Company Law Tribunal), Ahmedabad Bench, Ahmedabad, Court 2 in C.P. (IB) No. 349/NCLT/AHM/2019 is hereby affirmed. The Appeal is dismissed. No order as to costs.

21. Registry to upload the Judgment on the website of this Appellate Tribunal and send the copy of this Judgment to the Ld. Adjudicating Authority (National Company Law Tribunal), Ahmedabad Bench, Ahmedabad, Court 2 forthwith.

[Justice Anant Bijay Singh]
Member (Judicial)

[Ms. Shreesha Merla]
Member (Technical)

New Delhi

17th December, 2021

R. Nath.