

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

**Company Appeal (AT) (Insolvency) No. 105 of 2021**

[Arising out of orders dated 18.12.2020 in C.P. No. (IB) 784/9/NCLT/AHM/2019 passed by the Ld. Adjudicating Authority (National Company Law Tribunal), Ahmedabad Bench, Ahmedabad.]

**IN THE MATTER OF:**

**Neelkanth Medicare Private Limited,  
S-1, Ground Floor,  
Okhla Industrial Area Phase-II,  
New Delhi**

**..... Appellant.  
(Operational Creditor)**

**Versus**

**M/s ICI Healthcare Private Limited,  
504, 5<sup>th</sup> Floor, Indraprast Apartment,  
Dilip Nagar, Nani Daman,  
DAMAN - 396210  
Also at;  
P-18/26, Uppal Southend,  
Sector – 49, Nr. Scottish Mall,  
Sohna Road,  
Gurgaon – 122018.**

**..... Respondent.  
(Corporate Debtor)**

**For Appellant: Mr. Shubham Paliwal and Mehul Dhingra, Advocates.**

**For Respondents: Ms. Manisha C Shah and CA Anjali Choksi, Advocates.**

**J U D G M E N T**  
***(09<sup>th</sup> March, 2022)***

**Justice Anant Bijay Singh;**

The Appellant has preferred this Appeal under Section 61 of the Insolvency and Bankruptcy Code, 2016 (***for short IBC***) being aggrieved and

dissatisfied by the order dated 18.12.2020 in C.P. No. (IB) 784/9/NCLT/AHM/2019 passed by the Ld. Adjudicating Authority (National Company Law Tribunal), Ahmedabad Bench, Ahmedabad whereby and where under the Application under Section 9 of the Insolvency and Bankruptcy Code, 2016 filed by the Appellant herein was dismissed.

2. The facts giving rise to this Appeal are as follows:

i) On 10.11.2017, an agreement (Annexure A-2 at page 46 to 52 of the Appeal) was executed between the Appellant / Operational Creditor and Respondent / Corporate Debtor whereby the Appellant was appointed on commission basis, as the clearing and forwarding agent for the products was distributed and marketed by the Corporate Debtor.

ii) In terms of the aforesaid agreement the Appellant was required to deposit with the Corporate Debtor an amount of Rs. 1,00,00,000/- in two equal instalments of Rs. 50,00,000/- as Refundable Security Deposits carrying simple interest @ 9% per annum payable on quarterly basis by the Corporate Debtor to the Appellant.

iii) Further case of the Appellant is that on 13.11.2017 an amount of Rs. 50,00,000/- was deposited by the Appellant vide Cheque No. 107746 in terms of the Agreement as part of the aforesaid refundable security deposit. The balance security deposit of Rs. 50,00,000/- was deposited on 30.01.2018 by the Appellant with the Corporate Debtor vide Cheque No. 143033.

iv) The Appellant rendered the services to the Corporate debtor in terms of the said Agreement. As per the Agreement the Corporate Debtor was bound to pay the commission amount as well as the interest on security deposit in

the agreed manner. The Appellant raised various monthly invoices from time to time demanding the agreed commission (Annexure A-3 Colly at page 53 to 75 of the Appeal).

v) Further case of the Appellant is that the Respondent / Corporate debtor made a small part payment against the various invoices raised by the Appellant / Operational Creditor. Till date a total payment of Rs. 9,05,526/- has been made by the Corporate Debtor and the net outstanding due is Rs. 1,21,55,928/- which the Appellant is entitled for.

vi) The various emails and reminders were sent by the Appellant to the Corporate debtor demanding payment towards the agreed commission for the services rendered by the Appellant. However, despite several requests and reminders, the Corporate Debtor did not adhere to the same. Pertinently, the Corporate debtor neither replied to the said emails nor denied its liability for the said outstanding amount.

vii) Due to various defaults in payments by the Corporate Debtor, the Appellant was also compelled to terminate the Agreement dated 10.11.2017 and accordingly the Appellant sent an email on 18.12.2018 (Annexure A-4 at page 76 of the Appeal) to the Corporate Debtor, *inter alia*, again demanding the outstanding payment/amounts from the Corporate Debtor and also intimating the termination of the Agreement.

viii) Further case is that the Appellant / Operational Creditor sent a Demand Notice on 21.08.2019 (Annexure A-6 at page 78 to 80 of the Appeal) to the Corporate Debtor under Section 8 of the IBC. Thereafter, on

31.08.2019, the Appellant received an undated reply issued by the Corporate debtor to the aforementioned Demand Notice. In the said reply no existing disputes between the parties were not pointed out (Annexure A-7 at page 81 to 83 of the Appeal). Thereafter, the Appellant preferred Application under Section 9 of the IBC before the Ld. Adjudicating Authority and after hearing the parties, the said Application was dismissed. Hence this Appeal.

### **Submissions on behalf of the Appellant**

3. The Learned Counsel for the Appellant during the course of argument and in his memo of Appeal along with Written Submissions submitted that the Ld. Adjudicating Authority has dismissed the Application under Section 9 of the IBC filed by the Appellant herein on two grounds one the Demand Notice (Annexure A-6 at page 78 to 80 of the Appeal) was not supported with Board Resolution and therefore, due to want of proper authorization, supported with Board Resolution, demand notice and subsequent filing of the Application under Section 9 of the IBC is bad in eye of law and not maintainable and second Agreement dated 10<sup>th</sup> November, 2017 contains an arbitration clause (para 32 at page 51 of the Appeal) therefore filing Petition under Section 9 of the Code is gross violation of the agreement entered into between the parties and bad in the eye of law.

4. It is further submitted that the Ld. Adjudicating Authority has failed to consider that the Board Resolution dated 02 July 2019 by the Appellant Company whereby one Mr. Jatinder Kumar was authorized to initiate proceedings under the Code against the Respondent.

5. It further submitted that neither the Ld. Adjudicating Authority nor the Respondent ever raised any objection at the time of Pleadings with respect to absence of Board Resolution or doubted the authority of the signatory of the Operational Creditor.

6. It is further submitted that the proviso of Section 9 of the IBC provides that the Adjudicating Authority, shall before rejecting an application under sub-clause (a) of clause (ii) give a notice to the applicant to rectify the defect in his application within seven days of the date of receipt of such notice from the Adjudicating Authority. In this respect, reference may be drawn to the Judgment of this Appellate Tribunal in the matter of Palogix Infrastructure Private Limited Vs. ICICI Bank Limited, Company Appeal (AT) (Insolvency) No. 30 of 2017 at para 37 wherein the Tribunal has held that in case if there is a defect in Application then the Applicant is to be granted seven (7) days' time to remove the defect, this has not been followed. Based on these submissions the impugned order is fit to be set aside and the Appeal be allowed.

#### **Submissions on behalf of the Respondent**

7. Learned Counsel for the Respondent during the course of argument and in his Reply Affidavit submitted that an agreement dated 10.11.2017 executed between the Appellant and Respondent clause No. 32 of the said agreement which reads hereunder:

*“This agreement shall be governed by Indian Laws, if any question of dispute shall at any time during the term or thereafter arise between the parties with respect to the*

*validity, interpretation, implementation or alleged material breach of any provision of this agreement or the rights or obligations or the parties hereunder or regarding any question including the question as to whether the termination of agreement by either party has been legitimate, then the parties shall attempt to settle such dispute amicably between them, in the event that **such dispute has not been amicably settled within 90 days, then such a question or dispute shall be referred to any finally resolved by arbitration with arbitration rules of arbitration and conciliation act 1996. For time being in force** which rules are deemed to be incorporated by reference in the clause. The precise location of the arbitration shall be Gurugram. All proceedings of such arbitration, including without limitation, any agreement or awards, shall be in the English language.”*

8. It is further submitted that as there were serious disputes regarding notice of termination of agreement was given by the Appellant by e-mail dated 18.12.2018 (Annexure-2 of the Reply) which is not in accordance with the agreement. The Respondent did not accept this resignation. After sending mail, the Appellant accepted goods and sales are made and also payments are received. The agreement is in force and continuous till dated 21.08.2019. The stock received by the Appellant and sales made by the Appellant post this date. The Respondent produced the total statement of sales made by the

Appellant starting from the date of contract i.e. 10.11.2017 till 21.08.2019 (Annexure-3 of the Reply). The Appellant received stock from Respondent from January, 2019 to August, 2019 and the Appellant sold goods from January, 2019 to August, 2019. The Respondent adjusted amount of commission against stock which is in the possession of the Appellant. The Appellant suppressed material facts and after resignation dated 18.12.2018 the contract was continued. The agreement is in force till 21.08.2021.

9. It is further submitted that the Appellant is concealing aforesaid transactions and received the stock in the godown and sales made by him from 01.04.2019 to 21.08.2018 (Annexure-5 of Reply). The notice of termination of agreement was given by the Appellant by e-mail dated 18.12.2018 which is not in accordance with the agreement as per the clause No. 27 of the agreement. As per the agreement the Appellant has not given notice in writing, not by registered post or by courier at the address of Respondent. The Appellant has concealed aforesaid facts and not come with clean hands. The invoices produced by the Appellant are totally false. Invoices shows only minimum sale guarantee. Such clause is not in agreement. As per the agreement 1.5% commission on value of goods sold by Appellant. The Appellant did not produce any invoices of sale of goods supported by all invoices of commission due from Respondent and also commission entries with respect to some third party viz Curamed rupees found in the ledger which is produced by the Appellant. This shows the wrong amount debited by the Appellant in this account. The Respondent has paid Rs. 29,70,524/- against interest and commission which is shown in the Bank statement (Annexure-4

of the Reply). The statement of the Appellant attached with the demand notice shows receipt of only Rs. 16,50,160/- this shows the claims are manipulated which is reflected in false and misleading evidence and the account is not true and not accepted by the Respondent. The statement of commission and interest received by the Appellant from the date of the contract i.e. 10.01.2017 till today (Annexure-6 of the Reply).

10. It is further submitted that the stock lying at Appellant's godown worth Rs. 90,55,105/- (Annexure-7 of the Reply) and the Appellant has not handed over the stock to the Respondent till today.

11. It is further submitted that all the payment towards commission on sales and interest on security deposit are paid to the Appellant. The Respondent produced a summary of stock transferred to the Appellant, onwards sales by Appellant, calculation of commission and interest, payment of commission and interest and reconciliation of all accounts (Annexure-8 of the Reply).

12. It is further submitted that the deposit shall carry simple interest at the rate of 9% per annum payable on quarterly basis. The deposit amount shall be paid by Neelkanth (Appellant) in two equal parts of Rs. 50,00,000/- in November, 2017 and Rs. 50,00,000/- in January, 2018 (Annexure-6 of the Reply).

13. It is further submitted that the notice is a prerequisite under Section 8 of the IBC, before filing the petition under Section 9 of the IBC, there is no legal notice served with profound respect to the alleged notice dated



23.08.2019. The Respondent given reply of the notice on 02.09.2019 (Annexure-9 of the Reply), there is a pre-existing dispute. The notice of termination of agreement was given by the Appellant by e-mail dated 18.12.2018 which is not in accordance with the agreement and it was not accepted by the Respondent. Based on these submissions, the Appellant has not come with clean hands, therefore, the Appeal of the Appellant is not maintainable in law and the same deserves to be dismissed with costs.

### **FINDINGS**

14. After hearing the parties and having gone through the pleadings, we are of the considered view that the following facts are admitted in the instant Appeal.

- On 10.11.2017, an agreement (Annexure A-2 at page 46 to 52 of the Appeal) was executed between the Appellant / Operational Creditor and Respondent / Corporate Debtor whereby the Appellant was appointed on commission basis, as the clearing and forwarding agent for the products distributed and marketed by the Corporate Debtor.
- In terms of the aforesaid agreement the Appellant was required to deposit with the Corporate Debtor an amount of Rs. 1,00,00,000/- in two equal instalments of Rs. 50,00,000/- as Refundable Security Deposits carrying simple interest @ 9% per annum payable on quarterly basis by the Corporate Debtor to the Appellant.
- On 13.11.2017 an amount of Rs. 50,00,000/- was deposited by the Appellant vide Cheque No. 107746 in terms of the Agreement as part of the aforesaid refundable security deposit. The balance security deposit

of Rs. 50,00,000/- was deposited on 30.01.2018 by the Appellant with the Corporate Debtor vide Cheque No. 143033.

- As per case of the Appellant, some of Rs. 9,05,526/- has been made by the Corporate Debtor and the net outstanding due is Rs. 1,21,55,928/- which the Appellant is entitled for. The Appellant was also compelled to terminate the Agreement dated 10.11.2017 and accordingly the Appellant sent an email on 18.12.2018 (Annexure A-4 at page 76 of the Appeal) to the Corporate Debtor, *inter alia*, again demanding the outstanding payment/amounts from the Corporate Debtor and also intimating the termination of the Agreement. By the said email one Jatinder Kumar addressed to Naveen Jain informing that he has decided to resign as C&F agent of ICI Healthcare Pvt. Ltd. as there is kind of working environment makes it difficult for me as well as my team and further requested to accept my resignation with effect from today that is 18<sup>th</sup> December 2018 and clear the dues of approx. Rs. 20 Lacs in next 5 days.
- The Appellant / Operational Creditor sent a Demand Notice on 21.08.2019 (Annexure A-6 at page 78 to 80 of the Appeal) to the Corporate Debtor under Section 8 of the IBC claiming outstanding due of Rs. 1,21,55,928/-. The Respondent replied on 02<sup>nd</sup> September, 2019 in which it has been categorically stated that the Demand Notice does not depict the correct financial position of the transactions between the Appellant and the Respondent and further it has been stated that the payment of Rs. 33,65,465/- has already been made against the invoices

raised by the Appellant and further 'Medicine' stock of Rs. 88,67,000/- is lying in the warehouse of the Appellant Company.

- The Adjudicating Authority dismissed the Application filed by the Appellant herein under Section 9 of the IBC merely on two grounds; firstly, that without authorization the Appellant had sent the demand notice under Section 8 of the IBC and secondly without authorization the Appellant has filed the Application under Section 9 of the IBC.
- It is also an admitted fact that clause 32 of the Agreement dated 10.11.2017 arrived between the parties, shows that **such dispute has not been amicably settled within 90 days, then such a question or dispute shall be referred to any finally resolved by arbitration with arbitration rules of arbitration and conciliation act 1996.**

Instead of invoking Arbitration, the Appellant has filed this Application under Section 9 of the IBC.

- After going through the record, we find that the Board Resolution passed by the Board meeting of ICI Healthcare Pvt. Ltd on 31.02.2020 (page 142 of the Appeal) authorizes Mr. Naveen Jain to represent the Company and take necessary action before the Hon'ble Court of Ahmedabad. The demand notice under Section 8 of the IBC sent by the Appellant to the Respondent on 21.08.2019 and further Application under Section 9 of the IBC was filed on 01.10.2019 much before the Board Resolution.

**ORDER**

15. Taking all these facts and circumstances of the case, we are of the considered view that there is no illegality in the impugned order while dismissing the Application filed by the Appellant under Section 9 of the IBC, therefore, the impugned order dated 18.12.2020 passed by the Ld. Adjudicating Authority (National Company Law Tribunal), Ahmedabad Bench, Ahmedabad in C.P. No. (IB) 784/9/NCLT/AHM/2019 is hereby affirmed. There is no merit in the instant Appeal, the Appeal is hereby dismissed. No order as to costs.

16. 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 forthwith.

**[Justice Anant Bijay Singh]  
Member (Judicial)**

**[Ms. Shreesha Merla]  
Member (Technical)**

**New Delhi**

**09<sup>th</sup> March, 2022**

*R. Nath.*