NATIONAL COMPANY LAW APPELLATE TRIBUNAL
AT CHENNAI
(APPELLATE JURISDICTION)

COMPANY APPEAL (AT) (CH) (Ins) No. 234/2022
(IA Nos. 501 & 502/2022)

(Filed under Section 61 of the Insolvency and Bankruptcy Code, 2016)

(Arising out of the Impugned Order dated 19.04.2022 in CP (IB) No. 493/9/HDB/2018, passed by the National Company Law Tribunal, Hyderabad Bench)

In the matter of :

SRINIVAS REDDY YADIKI
(Shareholder, Promoter and Erstwhile
Director of
M/s. Bevcon Wayors Private Limited),
Resident of H.No. 1-2-99/c, Street, No.2,
Kakateeya Nagar, Habsiguda, Hyderabad-7.
Telephone/Mobile: 9848054004
Email: srinivasreddy.yadiki@gmail.com,
ysr@bevconwayors.com **…Appellant**

Versus

1. M/s. Ardee Hi-Tech Private Limited
Residential Office:-
9-30-4, Balaji Nagar, Siripuram,
Visakhapatnam,
Andhra Pradesh – 530 003.
ramana.goda@gmail.com **…Respondent No.1**

2. Ms. Sistla Manjula
(Interim Resolution Professional for Corporate Debtor)
Having Office at:-
Akasam, 2nd Floor, 10-1-171/1/1,
Masab Tank, Hyderabad,
West Marredpally,
Telangana – 500 004.
E-mail:- sistlamanjula@gmail.com,
cirp.bevconwayors@gmail.com **…Respondent No.2**

Present:

For Appellant	:	Mr. Y. Suryanarayana, Advocate
For Respondent	:	Dr. SV. Ramakrishna, Advocate for R1 Mr. Raja Shekar Rao Salvaji, Advocate (for Impleadment)

O R D E R
Pronounced on 28.03.2024
(Hybrid Mode)

[Per: Justice Sharad Kumar Sharma; Member (Judicial)] :

1) Briefly, stated facts are that the Appellant herein, in this Company Appeal preferred under Section 61 of the Insolvency and Bankruptcy Code, 2016 (herein after to be called as 'Code of 2016'), pleads his grievances as against the Impugned Order dated 19.04.2022 as it has been rendered by the Learned Adjudicating Authority, Hyderabad Bench in CP(IB) No. 493/9/HDB/2018, consequential by virtue of the Impugned Order rendered the Application preferred by the Respondent/Operational Creditor under Section 9 of the Code of 2016 has been admitted, to be proceeded with further as per law.

2) The Appellant who claims himself as to be the Shareholder, Promoter and erstwhile Director of M/s Bevcon Wayors Pvt. Ltd., the Corporate Debtor. He has submitted that initially in the year of 2012, the Corporate Debtor, Operational Creditor and a Company called as M/s. GTL Limited had entered into Consortium Agreement dated 10.04.2012, which was later further sought to be qualified by Addendum Consortium Agreement dated 11.04.2012. It was submitted, that a tender was awarded by one M/s. GVK Coal (Tokisud) Company Pvt. Ltd. to the Consortium for the purposes of planning, designing, engineering, procuring, construction, fabrication, supply, erection and commissioning of the processing plant and consequent to this, a contract

agreement bearing number GVK/Tokisud Coal/CHP/CA No.004 and dated 05.09.2012 was entered between the aforesaid concern M/s. GVK Coal (Tokisud) Company Pvt. Ltd. and the partners of the Consortium.

3) The Appellant further submits that in the aforesaid Consortium, the Corporate Debtor i.e., M/s. Bevcon Wayors Pvt. Ltd., became the lead member of the Consortium because owing to certain developments M/s. GTL Ltd. had opted to withdraw itself from the Consortium and as such M/s. GVK Coal (Tokisud) Company Pvt. Ltd. had given the entire contract to the Corporate Debtor being the lead Member for an amount of Rs. 26.46 crores. The aforesaid order was subdivided between the partners to be utilized into various parts of area of Operation of the Consortium i.e., supply of machinery, erection, commissioning and Construction of Civil Works, etc.

4) As per the Consortium Agreement, the Appellant (M/s. Bevcon Wayors Pvt. Ltd.) had issued a Purchase Order on 01.11.2012 and 01.12.2012 to the Respondent No. 1 (Operational Creditor) for supply of items as detailed in the Purchase Order for a sum of Rs. 5,62,00,000/- which was later on revised by the subsequent Purchase Order dated 22.03.2014 for a sum of Rs. 5,18,20,000/. It is contended by the Appellant, that the Purchase Order of 01.11.2012 and the revised Purchase Order dated 22.03.2014, provided for **BACK-TO-BACK payment** transaction with M/s. GVK Coals (Tokisud) Company Pvt. Ltd. In order to substantiate his argument, the Counsel for the Appellant heavily relies

upon the aforesaid Purchase Order, and contends that as per the terms of payment, there is **BACK-TO-BACK payment arrangement** between the Corporate Debtor and the Operational Creditor. In other words, it means to say that it was rather the Appellant's case, that the Corporate Debtor would make the payment of balance dues to the Operational Creditor only after the receipt of payment from the aforesaid M/s. GVK Coal, against the equipment supplied. It was contended that accordingly based upon the aforesaid **arrangement of BACK-TO-BACK payment**, the Corporate Debtor used to make the payments to the Operational Creditor, immediately as soon as the payments were received by it from M/s. GVK Coals for the equipment supplied.

5) In order to show his bonafide it is the case of the Appellant that due to the aforesaid **BACK-TO-BACK payment arrangement**, the Corporate Debtor had made the payments, as detailed in the pleadings raised in the Memorandum of Appeal which he contends were supported by the Ledger entries maintained by the Operational Creditor.

6) In order to carve out an exception for inability to pay, the Appellant contends that the allotment of certain Coal blocks which was given during 1993 to 2010, were cancelled in pursuance to the Hon'ble Apex Court Judgment dated 24.09.2014, as it stood rendered in Writ Petition (Criminal) No. 120/2012. Consequent to the aforesaid cancellation of the Coal Block, the Appellant contends that the Coal Blocks allotted to M/s. GVK Coals, (Tokisud) Pvt. Ltd.,

was also cancelled and thus the aforesaid M/s. GVK Coal, is said to have invoked the contract Clause pertaining to the act of force majeure vide its letter dated 06.10.2014.

7) M/s. GVK Coals participated in subsequent invitation of Bids, which were invited by Ministry of Coal, the Government of India & participated in the 'e-auction' but they lost their Bids, the fact of which was conveyed to the Corporate Debtor by the letter of M/s. GVK Coals dated 20.02.2015.

8) The Appellant contends that owing to the cancellation of the Coal Blocks, the payments against the work done from M/s GVK Coals was delayed and ultimately was withheld due to which admittedly the Corporate Debtor failed to pay its dues of Rs. 1,92,31,130/- to Respondent No. 1 / Operational Creditor.

9) The Appellant contends that the Corporate Debtor had raised invoices for the work done on the M/s. GVK Coal, but owing to the cancellation of the contract of the Coal Block, full amount was not remitted by the latter and that accordingly the Corporate Debtor has passed on to Respondent No. 1/Operational Creditor only that amount that was received from M/s. GVK Coals based on the condition of **BACK-TO-BACK payment arrangement** of the Purchase Order and therefore there was delay in remittance of the dues to Respondent No. 1/Operational Creditor and hence Section 9 application under

Insolvency and Bankruptcy Code, 2016, which stood initiated at the behest of the Respondent, ought not to have been invoked and proceeded with.

10) The Defence taken by the Appellant was also to the effect that he had taken all steps to recover the dues from M/s. GVK Coals & that he had submitted claims to the Ministry of Coals, Government of India of an amount of Rs. 1,93,78,069/- on 10.06.2016 against the notice of Government of India dated 02.06.2016 inviting claims in respect of companies who were allotted Coal Blocks which were later cancelled. It is submitted by the Corporate Debtor, that he had received the claim for Rs. 1,93,78,069/- which was liable to be paid by M/s. GVK Coals, then only he could have paid the same to the respondents, the Operational Creditor.

11) He has also stated that he has issued a Notice on 10.12.2016, calling upon M/s. GVK Coals to pay the outstanding amount, that the aforesaid notice was followed by yet another notice which was issued by Corporate Debtor, on 10.04.2017 and the consequential Legal Notice to the M/s. GVK Coals but, M/s. GVK Coals had not responded to the aforesaid Notices and had not remitted the outstanding amount due to be paid to the Corporate Debtor and therefore the amount due to Operational Creditor could not be paid.

12) For the purposes of redressal of the grievances on account of the failure of M/s. GVK Coals to pay its outstanding amount, the Corporate Debtor had also initiated the proceedings before the Hon'ble Telangana State Micro and

Small Enterprises Observations Council, Hyderabad on 10.11.2017, which is informed to be presently pending. The Corporate Debtor contends that he also issued Notice of Demand under Section 8 of Insolvency & Bankruptcy, Code, 2016 to M/s. GVK (Coals) Ltd., but it yielded no result. To sum up, the Corporate Debtor has stated that he has tried all methods to realise pending payment from M/s. GVK Coals, but since the payments were not released, he was unable to pay the Respondent No. 1/Operational Creditor in full in view of the alleged conditions of the **BACK-TO-BACK payment arrangements** and that he is not liable to pay the same.

13) The Appellant who was the erstwhile Director of M/s. Bevkon Wayors Pvt. Ltd., states that the Corporate Debtor and the Respondents are Consortium Partners and as per the terms of the participation a clear understanding was said to have been made that from the receivables from M/s. GVK Coals, is to be shared among them in order to meet out the outstanding payments. Further, the documents which have been brought out from the proceedings before the Adjudicating Authority, reveal the fact that the correspondences were being made for the payments only after the receipt of payment from M/s. GVK Coals. Hence, the Corporate Debtor has submitted, that he is not liable to pay any further amount to the Operational Creditor as no payment was made to them by M/s. GVK Coals and this he has intimated to Operational Creditor. The Appellant further challenged the decision taken by the Adjudicating Authority,

on the basis that he, the Corporate Debtor has utterly failed to prove the issuance of the Reply Notice, by him to the Demand Notice issued under Section 8 of Insolvency and Bankruptcy Code, by the Operational Creditor, and states that he has filed reply to the Notice issued by the Operational Creditor.

14) On the other hand, Respondent states that the Appellant has not refuted the observations of the Adjudicating Authority that the Corporate Debtor has failed to produce any proof of service of the said Reply Notice, and the Reply Notice produced before the Adjudicating Authority, does not refute the contentions raised in the application under Section 9 of the Insolvency & Bankruptcy Code, 2016. The Respondent / The Applicant to Section 9 Application had further contended that since the Appellant had defaulted in the repayment of Operational debt to the Respondent No.1, they have moved Section 9 Application under due procedure and process laid down by the Code of 2016.

15) It is upon the consideration of the facts under Section 9 of the Insolvency & Bankruptcy Code, that the Hon'ble NCLT, Hyderabad Bench after considering the facts and evidence brought on record admitted the Corporate Debtor into Corporate Insolvency Resolution Process (CIRP) as on 19.04.2022. The Applicant to Section 9 proceedings i.e. the Respondent, had contended that the Appellant in this case had dragged the proceedings on one pretext or the other and got the matter delayed.

16) The Respondent states that the Resolution Professional took over the Company as an on-going concern and conducted 10 meetings of the COC between 07.06.2022 to 28.04.2023, after the prior Notice to the Appellant and finally as CIRP failed, the Liquidation was Ordered by an order on 22.05.2023. in IA No. 695/2023. The Respondent has further elaborated that the stand taken by the Corporate Debtor is not correct as it has received full amount based on various invoices submitted by the Operational Creditor and that he has not wilfully paid the same in full to the Operational Creditor. In this regard the contents of Para-5 of the Counter Affidavit filed by the Respondent No. 1 before the Appellate Tribunal which is extracted hereunder:

> *"That the impugned orders axe well reasoned order passed by the Hon'ble Adjudicating Authority, NCLT, Hyderabad Bench after thorough examination of the facts and gave number of opportunities to settle the matter (as craved by the Counsel of Corporate Debtor in various hearings) and decided the matter, on merits, as per law and initiated Corporate Insolvency Resolution Process (CIRP) vide impugned orders. That, the Hon'ble Adjudicating Authority, NCLT, Hyderabad Bench decision in its impugned orders under appeal is correct and the alleged back-to-back payment of invoiced amounts is twisted and misrepresented by the Appellant before this Hon'ble Tribunal while the fact on record clearly shows that the invoices of the Operational Creditor (sub-contractor) are padded up with their mark up and submitted onwards by the Corporate Debtor (main contractor) to the principal, M/s. GVK Coal (Tokisud) Company Pvt. Ltd. who awarded the main contract to the*

Corporate Debtor. The Corporate Debtor received payments on the padded up invoices vis-d-vis invoices of the Operational Creditor as may be clearly seen from the documentary evidences particularly shown at pages 125, 126 and l27 of the appeal, which was extracted from the alleged copy of the Statement of Claim dated02.11.2017 filed by it before the Telangana State Micro & Small Enterprises Facilitation Council (TSMSME FC) claiming a principal amount of Rs.1,76,31,130/- (Rupees One Crore Seventy Six Lakhs Thirty One Thousand One Hundred & Thirty only) (pages @ 93-200 - Annexure-4 of the present Appeal)".

17) He has further states that as per the documents submitted by the Appellant (Page 126-127 of the Appeal Book), his total claim from M/s. GVK Coals is Rs. 15,51,19,703/- and he has received Rs. 16,74,88,573/- towards this claim as on 31.07.2015 which includes the dues of Operational Creditor aggregating Rs. 4,21,40,448/- and this shows that all the amount based on invoices of Operational Creditor has been received by Corporate Debtor but not passed on to Operational Creditor in full and therefore the questions of **BACK-TO-BACK payment** has no relevance. He further states that:-

(i) As per contract, there is no base to **BACK-TO-BACK payment** Clause. Since not being major part of the purchase order binding the parties.

(ii) Payments are received from M/s. GVK Coals on running account and not invoices-to-invoices basis.

(iii) Unpaid amount by M/s. GVK coals is for work done by Appellant and not Respondent.

(iv) Unpaid dues to Respondent are clearly a default, and

(v) This has not been disputed anywhere in the forum specified in the contract, that is arbitration.

18) The challenge to the Impugned Order by the Appellant would not be sustainable for the reasons being for since the process of Liquidation, stood initiated as back as on 22.05.2023 by the orders of NCLT, Hyderabad Bench, since without there being any evidence to the contrary the said Order of Liquidation would be deemed to have attained finality, since remained unchallenged. The Appeal against the Impugned Order cannot be sustained owing to the fact that the Liquidation Order has been passed on 22.05.2023 in IA No. 695/2023.

19) Apart from it, in the Rejoinder Affidavit filed by the Operational Creditor before the National Company Law Tribunal, it took a defence that under the contract / purchase order in 17th September 2012, there existed clause 20, which provided for an Arbitration clause for settlement of disputes between the two parties referred to in the purchase order and the same has not been invoked by the Corporate Debtor thus the bonafide are not clear. Further that the alleged payment which the Corporate Debtor contends to have been made

was not admitted by the Operational Creditor and has contended that the payment were made towards the admitted debt of Rs.1,26,70,782/-, not otherwise as claimed by Corporate Debtor.

20) The point to determine is as to whether based on the documentary evidence which were furnished by the Corporate Debtor whether any debt was payable at all and what is the basis on which it has been claimed to have been paid. So far as it relates to the Corporate Debtor, he has not denied the factum of placement of the Purchase Order dated 1st November 2012 and 22.03.2014. The Corporate Debtor has also admitted the execution of the aforesaid Order and the part-payments of the amount claimed by the invoices raised. Hence, it is the contention of the Corporate Debtor that since the purchase order provided for back-to-back payment of the transaction, the dues in full could not be remitted back to the Operational Creditor due to non-receipt of the part of the amount from M/s. GVK Coal (M/s. Tokisud Company Pvt. Ltd.). On perusal of the records including the contract agreement (Anx. 2A Page 74) and the purchase order (Anx.2, Page 62) and on its harmonious reading, we are of the view that neither the contract agreement dated 3rd September 2012 or the purchase order dated 01.11.2012, including its terms and conditions do not anywhere provide with any specific clause for deferring the payments due to the Operational Creditor till the Corporate Debtor receives the payment from M/s. GVK Coal (M/s. Tokisud Company Pvt. Ltd.). Thus the defence taken by

the Corporate Debtor of remittance of the balance amount only on the basis of back-to-back arrangement runs contrary from the contents of the two documents itself relied by them as referred to above.

21) Even a careful scrutiny of the contract agreement dated 03.09.2012 particularly in the context, to its contents provided in clause I.10 and I.40, dealing with the schedule of payment agreed to show that it does not envisage the payment by the Corporate Debtor to the Operational Creditor, would be depending only upon the receipts of amount made from M/s. GVK Coal (M/s. Tokisud Company Pvt. Ltd.). Hence, as far as the purchase order and the contract agreement are concerned, they will have to read only for the contract purposes and not to the liability of payment of the dues to the Operational Creditor. Thus, it could be rightly inferred that prior dues left unpaid by the Corporate Debtor to the Operational Creditor which necessitated invocation of Section 9 of the Insolvency and Bankruptcy Code, 2016, was justified in the eyes of law.

22) Another question which crops up for consideration is to whether there is a prior existence of the dispute between the parties or the pendency of other proceedings filed elsewhere and whether such will at all have any effect upon the liability of Corporate Debtor in respect of the unpaid operational debt. The said issue has been dealt with by the Hon'ble Apex Court in matters of **Mobilox Innovations Private Ltd. vs Kirusa Software Pvt. Ltd. as decided on**

21.09.2017, wherein it was ultimately held that the Adjudicating Authority at the stage when it is examining an application under Section 9, will only have confine itself to determine whether there happens to be an operational debt, exceeding amount prescribed under the Code and further the only precaution which is required to be taken is that based on documents on rigour as furnished, the aspects of liability of dues stand established and that if any of the ingredients as aforesaid exists, the application under Section 9 would be sustainable. Relevant observation is extracted hereunder:-

> *"Therefore, the adjudicating authority, when examining an application under Section 9 of the Act will have to determine: (i) Whether there is an "Operational Debt" as defined exceeding Rs.1 lakh? (See Section 4 of the Act) (ii) Whether the documentary evidence furnished with the application shows that the aforesaid debt is due and payable and has not yet been paid? and (iii) Whether there is existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before the receipt of the demand notice of the unpaid operational debt in relation to such dispute?"*

As per the records, there is nothing on record to otherwise that the Corporate Debtor had any intention to pay the amount due prior to the date the Demand Notice was issued by the Operational Creditor and that there was existence of any dispute with Operational Creditor by the Corporate Debtor prior to the receipt of demand notice served as a mandatory notice in terms of Section 7 of the Insolvency and Bankruptcy Code, 2016. Hence, since despite the demand

notice the amount therein was not paid by the Corporate Debtor in all to the Respondent/Operational Creditor. the existence of amount due to be paid becomes an admitted fact, more so in the light of the aforesaid fact that the Corporate Debtor has not raised any dispute as per terms of the purchase order. The fact of non-release of funds by M/s. GVK Coal (Tokisud) Company Pvt. Ltd. to the Corporate Debtor, would absolutely be a non-existence ground being an irrelevant ground to deny claim raised by the Respondent/Operational Creditor to the present Appellant especially when Corporate Debtor has received from M/s. GVK Coals (Tokisud) Company Pvt. Ltd., a total sum which is more than 3 times the amount it has to pay to Operational Creditor. Hence, the Adjudicating Authority while admitting the petition under Section 9 of the Insolvency and Bankruptcy Code, 2016 and dealing with the aspect of moratorium under Section 14 of the Code had not committed any legal error of law and fact in relation to the guidelines for the purpose of arrears or claim raised under Section 9 of the Code.

23) Though, the Respondents' case was to the effect that the notice does not answer the points and that the Application under Section 9 has been moved on a proper ground, thus while admitting the Application under Section 9 was on a proper ground. Infact, from the records and the purchase order, it is not correct that the entire mode of payment would be governed by the principles of **BACK-TO-BACK payment** basis, because the said clause, since not being a self-

contained, independent clause, laying down the full satisfaction and the manner in which it has been paraphrased, it has got no relevance to enable the Appellant to substantiate the stand of the Appellant. It is not **BACK-TO-BACK payment** rather it chooses a payment on a running basis. Hence, the contention raised by the Appellant on a scrutiny of the document does not support the contention of the Appellant on perusal of the records placed before us.

24) We are of the view that in terms of law of contract, any document determining a liability or creating of any right will only inter se bind the signatories to the Purchase Order or the Contract as herein and even if there is any stipulation as argued by the 'Appellant' the same will not be having any bearing over the controversy with regard to the so-called philosophy of back-to-back payment arrangement. Thus, the arguments as extended by the Appellant is not accepted.

25) The act of the Adjudicating Authority in declaring the moratorium for the purpose of Section 14 of the Code, in the light of provisions contained under Section 9 dealing with the aspect of remittance of the dues claimed, does not appear to suffer from any apparent error of law or a fact on record which could call for acceptance of the defence taken by the Corporate Debtor or questioning the existence of the dues to be paid and/or admitting the existence of any prior dispute regarding the amount due remaining unpaid.

26) Owing to the aforesaid fact, that all the aspects pertaining to the payability of dues stood established, coupled with the fact that the two documents which were relied on i.e. the purchase order and the contract agreement did not anywhere stipulate as a condition precedent of back-to-back payment as a condition to make the payments of amount due only after the receipt of amount from M/s. GVK Coals (Tokisud) Company Pvt. Ltd. that the Appellant has received a sum much higher than the amount payable to the Respondent No.1/Operational Creditor which renders **BACK-TO-BACK payment** clause superfluous and further that since the Corporate Debtor had not resorted to any remedial measures. Accordingly, it is held that the admission of proceedings by the Adjudicating Authority under Section 9 of the Insolvency and Bankruptcy Code do not suffer from any apparent error of fact and law, calling for any interference while exercising our Appellate jurisdiction under Section 61 of the Insolvency and Bankruptcy Code, 2016. Thus, the Company Appeal lacks of merits and the same is accordingly Dismissed.

[Justice M. Venugopal]
Member (Judicial)

[Justice Sharad Kumar Sharma]
Member (Judicial)

[Jatindranath Swain]
Member (Technical)

SE/RO/TM