

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 409 of 2019

[Arising out of Order dated 12th February, 2019 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi Bench (IB)-552(ND)/2017]

IN THE MATTER OF:

Indo Alusys Industries Limited,
A Public limited company
Having its Regd office at: -
606, Tolstoy House,
Tolstoy Marg, New Delhi – 110001.

....Appellant

Vs

SMW Metal Private Limited
Through Sh Mohinder Jain,
Director,
A private limited company
Having Regd office at: -
3/8, IInd Floor,
SAB House, Asaf Ali Road,
New Delhi – 110002.

....Respondent

Present:

**For Appellant: Shri Saurabh Kalia, Ms. Saloni Purohit and
 Shri Rohit K. Nagpal, Advocates**

**For Respondent: Shri P. Nagesh and Shri Shivam Wadhwa,
 Advocates**

J U D G M E N T

A.I.S. Cheema, J:

The Appellant – Original Applicant (‘Operational Creditor’) filed Application under Section 9 of the Insolvency and Bankruptcy Code, 2016 (‘IBC’ in short) before the Adjudicating Authority (National Company Law Tribunal), New Delhi Bench vide (IB) No.552/(ND)/2017 against the Respondent - ‘Corporate Debtor’.

2. It appears that the Respondent had also filed Application under Section 9 of IBC arising with regard to some transaction between the parties

having (IB)-553(ND)/2017. The Appellant claimed in the application under Section 9, operational dues (Annexure A12-Page 80 at page-99) Rs.13,76,36,931/-. The Respondent ('Corporate Debtor') in its cross case had claimed Rs.2,43,34,100/- as principal amount together with interest claiming liability of more than Rs.4 crores from the present Appellant. The Adjudicating Authority heard both the parties in cross cases and by common impugned order dated 12th February, 2019 dismissed both the Petitions.

3. Only the present Appellant appears to have filed Appeal against the impugned order. The Appellant claims that it had long standing business dealings with the Respondent ('Corporate Debtor') with regard to sale and purchase of Aluminum Extrusions and Ingots. In view of the dealings, the parties arrived at a reconciliation and it is claimed by the Appellant that the Respondent acknowledged the liability to pay the Appellant as Credit Notes, which were to be adjusted in three Financial Years. It is stated that Memorandum of Understanding (**MoU**) dated 25th January, 2016 (Annexure A3, Page-49) was executed. The Respondent Company issued Credit Notes to resolve issues of quality & quantity, amounting to Rs.24,86,67,626/-, which were to be adjusted in 2015-16, 2016-17 and 2017-18. The Appellant claims that in addition to such MoU, an Indemnity Bond was executed by the Respondent (Annexure A4 - Page-52) on the same date, i.e., 25th January, 2016 accepting that it has to receive Rs.2,46,34,100/- as on 31.12.2016 after adjustment of Credit Notes. However, the Respondent by letter dated 17th April, 2018 (Annexure A7-Page 61) unilaterally terminated the MoU. The Appellant claims that it had sent reply to the Respondent by letter dated 2nd May, 2017 (Annexure A9 – Page 65) and then notice under Section 8 of IBC

(Annexure A10–Page 68) was sent on 15th September, 2017 claiming debt of Rs.13,76,36,931.50/- The Appellant claims that by reply dated 25th September, 2017 (Annexure A11 – Page 73), the Respondent made false claims.

4. It is claimed in the Appeal and argued that parties had reconciled their accounts as on 31st December, 2015 and Respondent had agreed to the dues & issued Credit Notes worth Rs.24,86,67,626/- towards pending claims of certain qualities and quantities, issues of the material, which had been supplied for preceding many years. The Credit Notes were issued in favour of the Appellant. According to the Appellant, after adjustment of the Credit Notes in full, in December, 2015, it was agreed and reconciled that balance amount payable to the Respondent by the Appellant was Rs.2,46,34,100/- and Credit Notes were issued. Referring to the MoU, Indemnity Bond executed by the Respondent, according to the Appellant, Respondent could not have unilaterally backed out of the MoU.

5. Against the Appellant, the Respondent is claiming that the Appellant filed the Application under Section 9 against the Respondent claiming outstanding amounts for materials supplied by the Appellant to the Respondent. The Respondent claims that before the notice under Section 8 of IBC sent, the Respondent had vide Annexure A7 informed the Appellant that it was terminating the MoU dated 25th January, 2016 and Indemnity Bond letter dated 25th January, 2016. *Inter alia*, it was mentioned at page 61 as follows: -

“The SMW and Indo had reconciled their accounts on December 31, 2015 and calculated the total outstanding

amount of Rs.27,33,01,726/- (Rupees Twenty-Seven Crores Thirty-Three Lakh One Thousand Seven Hundred Twenty-Six) as payable by Indo to SMW ("said Outstanding Amount"). Keeping in view of the financial crunch faced by Indo and on its request, SMW had agreed to issue the following 3 (Three) credit notes ("Credit Notes") on the condition that Indo shall be purchasing substantial quantity of Aluminium Ingots, Aluminium Billets, Aluminium Wire Rods and Aluminium Scrap from SMW ("Products") in the financial years 2016-17 and 2017-18. The said Credit Notes were in the nature of discount/ benefits offered by SMW to Indo for subsequent purchases, competitive rates vis-à-vis market rates, as a special offer keeping in view of the long-term business relationship between the Parties. The aforesaid Credit Notes were never issued by SMW against any outstanding amount due and payable by SMW to Indo."

6. The communication further referred to understanding between the parties and added that: -

"In spite of the discount/ benefits offered to Indo in the form of Credit Notes (discount on subsequent purchase of Products), it has failed to honor its commitment towards purchasing of substantial quantity of Products from SMW. It has not placed any order against the said Credit Notes issued by SMW to Indo in the financial years 2016-17 and 2017-18. Therefore, the aforesaid Credit Notes could not be honored or set off against the Products as to be purchased by Indo from SMW except the Credit Note for the financial year 2015-16, which was agreed to be

set off against the supplies already made prior to December 31, 2015.”

7. The Respondent is claiming that the Credit Notes were in the nature of discount/ benefits offered by the Respondent to the Appellant for subsequent purchases, competitive rates vis-à-vis market rates as a special offer keeping in view the relationship.

8. Against this, the Appellant is claiming that the Debit Notes were towards the existing dues. Counsel for both the sides asserted their cases on the basis of the rival stand taken by the parties, in proceeding under Section 9 of IBC, which is summary in nature. It is not possible for the Adjudicating Authority to go into the questions whether the Respondent could or could not have unilaterally withdraw from the MoU and Indemnity Bond given; whether when the understanding has been reduced into writing, evidence other than what is stated in the document could or could not be admissible. These and other aspects would be matter of suit and in such summary procedure, it is not possible to deal with and decide such issues and the Adjudicating Authority has observed: -

“6. It is not disputed that the first tranche of the credit notes for Rs.8,86,67,626/- was adjusted in the year 2014-15. The dissension arose when SMW rescinded its agreement, the indemnity bond notwithstanding. It is their case that the said Credit Notes were in the nature of discount/ benefit offered by SMW to Indo for subsequent purchases, at competitive rates vis-à-vis market rates, as a special offer, keeping in view their long-standing business relationship. The aforesaid Credit Notes were never issued by SMW against any

outstanding amount due or payable by SMW to Indo. As per their case, it was duly conveyed by SMW that only on their request regarding the adjustment, the amount under the Credit Notes would be set off against substantial quantities of Products to be purchased by Indo from SMW in 3 financial years 2015-16, 2016-17 and 2017-18. Pursuant to such understanding, SMW and Indo calculated the outstanding amount of Rs.2,46,34,100/- as due to SMW as on December 31, 2015 taking the Credit Notes into account. SMW's stand has consistently been that inspite of the discount/benefits offered to Indo in the form of Credit Notes (discount on subsequent purchase of products), it has failed to honour its commitment towards purchasing substantial quantities of Products from SMW.

7. As this MoU executed between the parties was accompanied by an Indemnity Bond saying that the same was interminable, the grievance of Indo is that despite the aforesaid settlement and commitment that the terms would not be violated, SMW has terminated the settlement between the parties and refused to honour the credit notes for the years 2016-17, 2017-18. It is on the basis of these credit notes that the Indo seeks initiation of the Corporate Insolvency Resolution Process of SMW while SMW disputes this liability on grounds that these credit notes were given by way of a discount to Indo for future purchases. As Indo had failed to place adequate orders, they were considered to terminate the MoU. It has consistently been their case that the credit notes were given not on against of any outstanding liability, but by way of concession for future transactions. In fact, they have to recover Rs.2,46,34,100/- which they have now claimed in their counter petition.

8. *On the basis of the averments made in both the cross petitions it is noted that replies to the demand notice had been duly replied to by the respective Corporate Debtors disputing the claim. What is evidenced is the fact that the dispute is contested and has been an existence prior to the filing of the case. It is beyond the scope and jurisdiction of this Bench to adjudicate or quantify the liability against each Corporate Debtor which can only be adjudicated upon the touch stone of trial, looking into invoices and the qualitative value of the terms of settlement upon reconciliation of accounts.”*

9. We also find that there was a pre-existing contested dispute and the Adjudicating Authority rightly held that it could not quantify the liability, which would be matter of trial. Appellant calculated dues keeping in view MoU contents of which Respondent disputed before Notice under Section 8 of IBC was sent.

10. We do not find any reason to interfere with the impugned order. There is no substance in the Appeal. The Appeal is dismissed. No order as to costs.

[Justice A.I.S. Cheema]
Member (Judicial)

[Kanthi Narahari]
Member (Technical)

NEW DELHI

13th February, 2020

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