NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI
COMPANY APPEAL (AT) (INSOLVENCY) No. 508 of 2019

[Arising out of Impugned Order dated 2nd April, 2019 passed by the National Company Law Tribunal, Mumbai Bench in C.P. (IB) No.2825/(IB)/MB/2018 filed under Section 9 of the Insolvency and Bankruptcy Code, 2016]

In the matter of:

Indiana conveyors Pvt. Ltd.
Indiana House, Makwana Road,
Marol Naka, Andheri East, Mumbai 400059 ..Appellant

Vs.

Ducon Technologies (I) Pvt. Ltd.
Plot No.A/4, Road No.1,
Behind Aplab Company, MIDC,
Wagle Industrial Estate
Thane, Maharashtra
400064 …Respondent

Appellant: Mr Abhijit Sinha, Mr. Mahesh Agarwal, Mr. Divyang Chandiramani, Mr Saikat Sarkar, Mr. Nishant Rao, Advocates.

Respondent: Mr. Rakesh Sinha, Mr. Arjun Harkauli, Ms A. Khurana, Mr Prateek Garg, Advocates.

J U D G M E N T
(18th March, 2020)

Mr. Balvinder Singh, Member (Technical)

1. The Appellant (Operational Creditor "OC") has filed this appeal under Section 61 of the Insolvency & Bankruptcy Code, 2016 ("I&B Code" for short) against the order dated 02.04.2019 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai in Company Petition No. 2825/(IB)/MB/2018 vide which the petition filed by the

Appellant was dismissed on the ground that there were pre-existing disputes between the parties.

2. The brief facts of the case are as follows:

The Appellant is a private limited company having a paid up capital share capital of about 2 crores 64 lakhs and is engaged in the business of manufacturing of equipments required for bulk material handling systems/ components across India. The Appellant has its registered office in Mumbai, in the State of Maharashtra. The Corporate Debtor raised certain purchase order/letter of intent on the Operation creditor in or around 2010. During the period 2010 to 2013, the Corporate Debtor availed of the goods and services of the Applicants for designing, engineering, manufacturing, supply, supervision of erection and commissioning of belt conveyors for their client M/s. Hindalco Industries Limited (unit Aditya Aluminum Project 1 and unit Mahan Aluminum Project 2). Thereafter the OC raised various invoices for the goods and services rendered to CD out of which some of them were cleared and some remained pending. The Respondent engaged M/s Hindalco Industries Limited to service the debt due and payable to the OC. The OC had agreed and/or arrived at an understanding to accept payment of its alleged dues directly from Hindalco for both the projects.

3. It is stated by the Appellant that from the period of 2011 to 2013, the Appellant in lieu of the deliveries made raised several invoices amounting

to a total sum of Rs 5,97,11,875/- towards the aforesaid mentioned invoices. A sum of Rs 1,15,50,712/- (Rs. 56,58,764/- being the principal amount plus interest amounting to Rs. 58,91,948) still remain due and payable by the Corporate Debtor to the Appellant towards the said aforesaid invoices. Despite the Appellant providing all goods within the time period stipulated and of the decided quality, the corporate debtor have not cleared bills raised for the goods and services which admittedly was provided to the corporate debtor for their project with M/s Hindalco Industries Limited.

4. The Appellant further stated that the Respondent i.e. the Corporate Debtor itself has admitted its liability to pay the said debt, yet has not taken any initiative. The same is evident from the following chronological correspondence:

    a) 26-07-2013- The Respondent, vide its Statement of Accounts for the period 1st April 2012 to 25th July, 2013 had confirmed that an amount of Rs 56,48,671/- is due and payable to the Appellant herein after adjusting debit notes, though the debit notes were not agreed upon by the Appellant.

    b) 01-03-2014 - A meeting held between both parties to discuss the pending issues, especially with regards to outstanding payments. The Respondent vide their email dated 1st march, 2014 to the Appellant forwarded their version of minutes of meetings dated 21st

February, 2014. In the said minutes, the respondent admitted its liability towards the outstanding 52,87,267/-. It was also stated in the said minutes that final payment will be released project wise after considering all debit notes and deductibles provisioned as per respective PO's if any.

c) 08-03-2014 – Both the parties had a further meeting and the minutes of meeting dated 21st February, 2014 were revised. The Appellant vide its email dated 8th march, 2014 forwarded the correct version of the minutes of meeting dated 21st February, 2014 which was earlier agreed upon between both the parties. The said minutes incorporated correctly the outstanding amount towards the aforesaid invoices was Rs. 57,42,410/-. The respondent never challenged or denied this minutes of meeting.

d) 29-03-2014 & 23-05-2014 - When the issue was raised it was not in the form of quality issue as the same has arisen due to rubbing of the rubber belt against conveyor structure, as mentioned in the mails dated 29th march, 2014 and 23rd may, 2014 which was not within the scope of the Appellants work. Erection of the equipments was in the scope of respondent.

e) 17-01-2015 & 28-01-2015 – Since the Respondent was facing some financial crisis, they proposed that payments for certain outstanding invoices, with regard to project 1 (Aditya), be made directly by

Hindalco (to whom the respondents used to supply) to the Appellant. Accordingly, a joint meeting was held on 17th January, 2015 (mentioned as 16th Jan in the email) between both parties and Hindalco and other vendors. In the said joint meeting accounts were reconciled by all the parties and it was also agreed that balance payment to the Appellant shall be released by Hindalco directly from the Respondent's performance acceptance test invoice. It was also agreed that the Appellant shall submit performance bank guarantees (hereinafter referred to as "PBG") to the respondent and the same shall be confirmed by the respondent to Hindalco upon receipt of PBG before release of final payment. The respondent vide their email dated 28th January, 2015 to the Appellant recorded the discussions in the said meeting as well as attached an accounts statement for Project 1 (Aditya) showing an amount of Rs. 3001985.21 as due and payable to the Appellant after deducting debit notes of Rs 683668/-. It is pertinent to note that the minutes of the meeting dated 17th January 2015 clearly mentions that though Hindalco had technical issues with other vendors but had no technical issues with the Appellant. Thus an amount of Rs. 3001985.21 was due and payable to the Appellant without dispute.

f) 19-02-2015 – The Appellant informed the respondent that they intend to submit PBG for project 1 and requested to confirm whether

the respondent has completed all the formalities with Hindalco and that Hindalco has agreed to pay directly to the Appellant so that the Appellant can submit PBG and in return Hindalco pay Rs. 30 Lakhs after deducting debit notes worth Rs. 683668/-. In response, the respondent vide their email dated 19th February, 2015 again reiterated that payment of Rs. 30.1 Lakhs shall be made by Hindalco towards project 1 directly to the Appellant after submission of PBG (which was submitted on 23-03-2015). In the said email, the respondent attached the minutes of meeting dated 17th January, 2015 (erroneously mentioned as 17th January, 2014) and accounts statement for both the projects. As per the respondent's accounts statement and its own admission a sum of Rs. 57,54,910.50/- was due and payable by the respondent to the Appellant. However, the respondent unilaterally debited as sum of Rs. 2845757/- (Rs. 683668/- towards Project 1 and Rs. 2162089/- towards project 2) towards debit notes including Rs. 15 lakhs for Rubber belt warrantee for project 2. Even after deducting the amounts of debit notes for both the projects, an amount of Rs. 3510600.68 was still due and payable to the Appellant.

g) 14-03-2015 & 19-03-2015 – The Appellant vide their email dated 14th march, 2015 informed the respondent that they are going ahead with PBG preparation for Project 1 and asked the Respondent to

confirm the PBG amounts as stated in the said email which were confirmed by the respondent vide its reply dated 19th march 2015.

h) 23-02-2015 – PBG was submitted vide letter dated 23rd march, 2015.

i) 03-07-2015 – Respondent vide their email dated 03-07-2015 to Hindalco gave its consent to release an amount of Rs. 508615.47/- to the Appellant. Alongwith the said email the respondent forwarded statement of account which clearly shows that an amount of Rs. 508615.47 was due and payable to Appellant after deducting debit notes worth Rs. 2162089/- for project 2 including Rs. 15 lakhs towards rubber belt. Therefore, even after considering debit notes of Rs 2162089/- an amount of Rs. 508615.47/- was undisputedly payable to the Appellant.

j) 04-07-2015 – Hindalco vide their email dated 04-07-2015 forwarded the respondent's email dated 3rd July, 2015 along with its attachment, i.e. statement of account to the Appellant and informed that the respondent has agreed on Hindalco paying directly to the Appellant and whether the same is acceptable or not to the Appellant. This accounts statement shows debit notes of Rs. 2162089/- for project 2 which includes Rs. 15 lakhs towards rubber belt. Therefore, even after considering debit notes of Rs. 2162089/- an amount of Rs 508615.47/- was undisputedly payable to the Appellant.

k) 03-09-2015 – In response to Hindalco email dated 04-07-2015, the Appellant wrote to the respondent that the debit amounts shown by the respondent that the debit amounts shown by the respondent in the accounts statement were not acceptable to the appellant as the debit notes of Rs. 15,00,000/- towards damage to the conveyor rubber belt was due to improper erection and operation of conveyor by the respondent. As per the terms of LOI's and PO's, erection and commissioning of belt conveyors was not within the Applicant's scope of work and the erection of belt conveyors was done by the respondent. As the erection of belt conveyors was not done properly, the respondent started to notice that the belts were damaging. In this behalf, the respondent addressed several emails to the appellant requesting to deploy the services engineering of the appellant or Hindustan Rubber Industries (HRI) and look into the problem. It is pertinent to note that warranty of the rubber belt lapses on account of damage caused to the rubber belt due to improper alignment of conveyors structure. However even after deducting the amounts of debit notes including Rs 15 Lakhs for rubber belt for project 2, an amount of rupees 508615/- was due and payable to the Appellant.

l) 07-01-2016 – Hindalco vide email dated 7th January, 2016 (with copy to the respondent) once again informed the Appellant that they have held back the final payments for long and hoped that the

Appellant has settled issues with the Respondent. Hindalco further informed that they are releasing respondent payment as the respondent has promised to settle appellant accounts of Rs. 508615/- for project 2 (after deducting debit notes worth Rs. 2162089/-) after getting payments from Hindalco. Even after considering debit notes of Rs. 508616.47 was undisputedly payable to the Appellant.

m) 09-01-2016 – In response to Hindalco email dated 7th January, 2016, the Appellant on 9th January, 2016, the Appellant on 9th January, 2016 informed Hindalco that an amount of Rs. 5026043/- has to be recovered from the respondent (after deducting debit received from respondent) for both the projects. The appellant further requested Hindalco to hold respondent payment for Rs. 2025043/- for project 2 and release the same to the appellant.

n) 09-01-2016 – Hindalco vide email dated 9th January, 2016 informed the appellant that they won't be in position to hold respondent payment contractually. Hindalco at best can pay directly to the Appellant subject to confirmation from the respondent, however there is no such confirmation from the respondent. Hindalco also informed that they have already processed respondent case.

o) 13-01-2016 In response the Appellant once again informed Hindalco to hold Respondent payment and release the same directly to the appellant.

5. It is also stated by the Appellant that in spite of having received the goods, when the balance payments were not forthcoming from the respondent despite various reminders by the appellant and assurances by the respondent, the appellant was constrained to issue a statutory demand notice dated 5th February, 2016 under Section 433 and 434 of the Companies Act, 2013 for the outstanding amount of Rs. 56,60,203/- along with interest at the rate of 27% to be compounded on monthly basis from due date of payment till actual date of payment within three weeks of the date of the notice. Since the respondent failed to comply with the said statutory notice dated 5th February, 2016 hence the appellant filed a Company Petition (L) No. 960 of 2016 in the Bombay High Court for winding up the respondent company. The same was transferred to National Company Law Tribunal, Mumbai Bench, pursuant to the amendment in Companies Act, 2013 and the introduction of the Insolvency and Bankruptcy Code, 2016. The case stood abated due to failure of appellant to abide by the timeline prescribed by the Ministry of Corporate Affairs.

6. It is further stated by the appellant that on 14th February, 2018 the respondent replied to applicant's statutory notice dated 3rd February, 2018, inter alia, taking an incorrect plea that the statutory notice was false and frivolous, without any cogent reason. Thus with no option left to avail the Appellant herein filed an application under section 9 of the Insolvency and Bankruptcy Code, 2016 before the Adjudicating Authority (National

Company Law Tribunal), Mumbai vide Company petition 2825/IB/MB/2018 against the respondent for initiation of corporate insolvency resolution process, due to non-payment of said debt.

7. The Appellant argued that all the invoices were duly accepted by the respondent without any demur. As agreed between the parties the payment of the said invoices were required to be made by the respondent on or before the due date as mentioned in the LOIs/POs.

8. The Appellant reiterate that for the period 2011 to 2013, a sum of Rs. 56,58,764/- (plus interest) still remains due and payable by the Corporate Debtor to the Appellant towards the said aforesaid invoices. Even if the debit notes of Rs. 2845757/- for both the projects is considered by the respondent, still an amount of Rs 3510600.68 is due and payable to the Appellant as admitted by the respondent.

9. It is further stated by the Appellant that Form 3 had issued by the appellant to the corporate debtor on 3rd February, 2018. The principal amount claimed by the operational creditor in its Form 3 was Rs. 56,58,764/-. The said amount of Rs. 56,58,764/- was arrived at based on the individual purchase orders raised during the relevant period. However, upon reconciling its accounts, the operational creditor found that an excess amount of Rs. 37,501/- had been paid by the Corporate Debtor against an old order. Thus, the operational creditor, after setting off the excess amount

of Rs. 37,501/- against the amount claimed in Form 3, is now claiming an amount of Rs. 56,21,572/-.

10. It is submitted by the respondent that despite repeated oral reminders and written reminders (via email) sent by the appellant requesting the respondent to pay the outstanding amount due and payable by them under aforesaid mentioned invoices, the Respondent failed to pay the said amounts due, which have accumulated to a sum of Rs. 56,21,572/-.

11. It is further submitted by the Appellant that having agreed to pay the amount against the supplies, the respondent is now seeking to resile making payments, by raising frivolous and baseless grounds to create a 'dispute' under the I&B Code.

12. It is argued by the Appellant that NCLT has erroneously sought to place reliance on one email alone issued by the petitioner to hold that there were disputes existing between the parties i.e. email dated 03.09.2016 wherein the appellant wrote to respondent that the debit amounts shown by the respondent in the statement were not acceptable since the debit notes of Rs. 15,00,000/- was also not acceptable as the damage to the conveyor belt was due to improper erection and operation of conveyor.

13. It is also further argued that the said email dated 03-09-2015 was in response to email dated 04-07-2015 from Hindalco to the appellant. An account statement showing an amount of Rs. 508615.47 due and payable to appellant after deducting debit notes of Rs. 21,62,089/- was also annexed

to the said email from Hindalco. Hindalco had received this accounts statement from respondent vide their email dated 03-07-2015 and the same was forwarded to appellant. As per the terms of LOIs and POs, erection and commissioning of belt conveyors was not within the appellant's scope of work and the erection of belt conveyors was done by the respondent and as the erection of the conveyors was not done properly, the respondent started to notice the belts were damaging. In this behalf the respondent addressed several emails to the appellant requesting to deploy the service engineering of the appellant or Hindustan Rubber Industries (HRI) and look into the problem. It is pertinent to note that warranty of the rubber belt lapses on account of damage caused to the rubber belt due to improper alignment of conveyor structure. However even after deducting all the debit notes Rs. 30,01,985.21 for project 1 and Rs. 5,08,615.47 for project 2 (total Rs. 35,10600.68/-) was due anjd payable without any dispute.

14. The Appellant finally submitted that NCLT, without considering that the debt was already admitted by the respondent and that no real 'dispute' under the IBC Code existed between the parties, dismissed the petition filled by the Appellant solely on the ground that dispute had been raised by the respondents. The view taken by the NCLT, if allowed to prevail, would lead to closing of rights of operational creditors on sham and bogus defences being raised by the respondents, which is not the aim or intention of I&B Code.

15. Respondents filed their reply and rebutted in brief as under: -

16. That the appellant has admitted vide its advocate that the respondent had raised a dispute under its email dated 16th September, 2014. Further, it is pertinent to note that the Respondent's email dated 16th September, 2014 states that the belts at both the projects had sheared.

17. That the admission by the appellant's advocate before NCLAT is particularly important as it conflicts with the Appellant's submission of the Company appeal that "vide previous communication exchanged between the parties, the issue of disputes with relation to the supplies were never raised, when the respondent clearly had an occasion to do so. Even when the issue was raised it was not in the form of quality issue as the same has arisen due to rubbing of the rubber belt against the conveyor structure erected by the respondent, as mentioned in the mails dated 29th march, 2014 and 23rd may, 2014, which was not within the scope of the appellant's work."

18. That further the appellant's reliance of emails dated 29th march, 2014 and 23rd may, 2014 are incorrect and misplaced as the supervision of erection of the belts was within the appellant's scope of work. Further as is evident from the respondent's email dated 29th march, 2014 there were other issues that were unresolved by the appellant in addition to the rubbing of the rubber belt against the conveyor structure.

19. That appellant's advocate has further represented to the NCLAT that the dispute raised by the respondent under its email dated 16 th September, 2014 was settled by the minutes of meeting dated 17th January, 2015 and confirmed under email dated 19th February, 2015. The respondent submits that the appellant has omitted to inform NCLAT that the minutes of meeting dated 17th January, 2015, pertains only to the full and final settlement amount being agreed by the parties in relation to Project 1 only and does not deal with Project 2 at all.

20. Further the respondent submits that the appellant has omitted to inform NCLAT that the minutes of meeting dated 17th January, 2015 was an acceptance of the fact that Hindalco had taken over the liability of payment of dues to the appellant which had been accepted by the appellant resulting in a novation of contract and discharge of the respondent's liability towards the appellant for project 1. This novation of contract is also mentioned and accepted by all the parties as is apparent under the emails dated 19 th February, 2015. Therefore, the respondent submits that there is a valid dispute as regards the liability of the respondent towards the appellant as the appellant itself has accepted under the minutes of meeting dated 17th January, 2015 and the emails dated 19 th February, 2015, that there is a novation of contract and it was Hindalco who was liable to the Appellant.

21. That the Adjudicating Authority has correctly concluded in paragraph 12 of its order that there was a "pre-existing dispute" between the parties.

Therefore, the appellant had failed to prove that this was a fit case for summary insolvency proceedings under the code hence, the NCLT correctly rejected the appellant's Company Application.

22. That the Adjudicating Authority in paragraph 7 of its order, correctly relies on the emails which are evident that the debt payable to the appellant being novated and agreed to be paid by Hindalco directly to the Appellant leading to a new contract between the parties. This new agreement between the parties contemplated that the payment would be made by Hindalco directly to the Appellant and the same was accepted by the Appellant. Therefor the appellant's averments that the primary responsibility of the debt being the respondent were considered by the adjudicating authority and rejected.

23. That additionally, in paragraph 7 of the order, the adjudicating authority, further correctly relies on the respondent's email dated 3 rd July, 2015 as evidence that the respondent had conveyed its consent for Hindalco to directly release a sum of INR 5,08,615 to the Appellant for full and final settlement of the Appellant's dues for Hindalco's Mahan project in Madhya Pradesh.

24. That the Adjudicating Authority correctly concludes that the rejection of the respondent's full and final settlement offer by the Appellant's own dated 3 rd September, 2015, proved that "the dispute were no settled and persisted even after the agreement and were brought to the notice of the

Operational Creditor before the receipt of demand notice and in the reply of the Corporate Debtor to the demand notice of the Operational Creditor".

25. That the records clearly indicate that the respondent had been in dispute with the appellant since 2014 in relation to the quality of the belts supplied by the Operational Creditor and at every opportunity, had raised the dispute with respect to the bad quality of services rendered by the appellant as well as appellant's inability to complete its services contracted for within the time prescribed under the LOI and the Purchase Order. The Respondent states that there has been a complete failure on the part of the Appellant to supply the belts as expected under the terms of the LOI and purchase Order.

26. That the Appellant admits in the Affidavit-in-Rejoinder dated 11th January, 2019, that the belt supplied by it were damaged. The appellant raised the spurious defence that the belt conveyors were damaged on account of the improper alignment of conveyance structure which is falsely alleged as being outside the appellant's scope of work under the LOI and the Purchase Orders.

27. That Hindalco withheld the payment due to the respondent on account of the actions of the appellant, causing enormous financial hardship. In fact, Hindalco and the respondent were engaged in litigation in relation to amounts payable with respect to services of the respondent to Hindalco for the project wherein Hindalco had relied on the Appellant's actions as

explained herein to indicate negligence and lack of quality of services by the respondent towards Hindalco for the projects.

28. After hearing the parties, the NCLT, Mumbai passed the order. Thereby rejected the petition on the ground of pre-existing dispute.

29. Heard learned counsel for the parties and perused the records. We are of the opinion that the adjudicating authority have erred in rejecting the application by solely relying on the email correspondence without taking into the merits of the matter and acceptance of debt by the respondent.

In 'Mobilox Innovations Pvt. Ltd. v. Kirusa Software Pvt. Ltd., the Hon'ble Supreme Court while discussing the provisions of Section 9 observed as follows:

> "34. 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?
>
> (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?

NCLT wrongly applied the principle enshrined in the aforesaid case to the present facts. The judgement of Mobilox clearly stipulated that the disputes in a case ought to be real disputes and that it is the duty of the adjudicating authority to bifurcate between the two.

30. Adjudication authority failed to consider that the respondent has sought to confuse matters by relating to prior correspondence, in fact that it was the liability of the respondent and that the respondent under an arrangement with the said M/s Hindalco Industries Limited had intended to clear the dues to the Appellant. The said arrangement was seemed to be made to run away from the obligation to pay the debt by the respondent as Hindalco could not hold respondent's payment contractually and also Hindalco can pay directly to the Appellant subject to confirmation from the Respondent, however there is no such confirmation from the respondent.

31. Adjudicating authority failed to consider that respondent has sought to shift the liability from itself to Hindalco Industries Limited to make payment to the appellant with a view to deny the appellant of its legitimate dues. The

defence raised by the respondent is not genuine and an after-thought merely to evade making payments of the liabilities under the purchase orders to the appellant.

32. For the reasons aforesaid, we set aside the impugned order dated 02nd April, 2019 passed in C.P. No. 2825/(IB)/MB/2018 and remit the case to the Adjudicating Authority, Mumbai Bench to admit the application and pass appropriate order in presence of the parties. All the plea taken by the parties, having discussed no further opportunity of hearing is required to be given to any of the parties for admission the application under Section 9 of the I&B Code.

33. However, it will be open to the respondent to settle the claim before admission of the application under Section 9. In such case, the appellant may withdraw the application before its admission. The appeal is allowed with the aforesaid observations. However, there shall be no order as to costs.

(Justice Venugopal M)
Member (Judicial)

(Justice Jarat Kumar Jain)
Member (Judicial)

(Mr. Balvinder Singh)
Member (Technical)

New Delhi

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