

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

(Arising out of Order dated (14.06.2019) passed by the Adjudicating Authority (National Company Law Tribunal) Principal Bench New Delhi in CP (IB) - 1643 (PB)/2018)

Company Appeal (AT) (Insolvency) No.737 of 2019

IN THE MATTER OF:

M/s.Sandvik Asia Private Limited

Mumbai-Pune Road, Dapodi

Pune – 411 012

...Appellant

Vs.

M/s.The IndurePrivate Limited

The Indure House,

Greater Kailash – II,

New Delhi – 110 048

...Respondent

Present:

For the Appellant:

Mr. Sabyasachi Chaudhury with

Mr.Debarshi Dutta and Mr.Rajat Pradhan,

Advocates.

For the Respondent :

Mr.Prashant Mehta with Ms.Neha Tanwar,

Mr. Anish Kumar, Mr.Varun Gupta,

Ms.Simron, Advocates.

J U D G M E N T

(13th December, 2019)

Dr. Ashok Kumar Mishra, Technical Member

The Appellant M/s.Sandvik Asia Private Limited has filed an appeal under Section 61(1) of the ‘Insolvency and Bankruptcy Code, 2016 (for short, ‘the I&B

Code’) R/w Rule 11 of NCLAT Rules, 2016 against the impugned order dated 14th June, 2019 passed by National Company Law Tribunal, (‘for short Adjudicating Authority’), Principal Bench, New Delhi in CP No.(IB) – 1643 (PB)/2018 rejecting the Appellant’s Application. The Appellant has filed the Appeal under Section 9 of the Code seeking initiation of Corporate Insolvency Resolution Process (for short ‘CIRP’) against the Respondent i.e. The Indure Private Limited. The Appellant has declared that he has filed the said Appeal within the period of limitation specified under Section 61(2) of the I&B Code.

2. The Appellant (‘Operational Creditor’ before the Adjudicating Authority) is a part of Sandvik Group which is a Global Engineering Group and is involved in the business of tools systems for industrial metal cutting, providing technical and service solutions for mining and construction industries etc.

3. The Respondent (Corporate Debtor before the Adjudicating Authority) is an EPC Contractor and involved in the manufacturing of ash handing systems on turnkey basis.

4. The Appellant has also raised 73 invoices on the Respondent for a total sum of Rs.34,72,35,271/-. Out of these 73 invoices, 16 invoices remain unpaid. The 16 unpaid invoices were raised between 4th September, 2014 and 22nd November, 2017. The Appellant is continuously chasing payment and also NTPC “the Employer” was involved, for whom both the parties were working for a particular contract in terms of Deed of Joint Undertaking dated 12th November, *Company Appeal (AT) (Insolvency) No.737 of 2019*

2010 executed between M/s.Sandvik Asia Private Limited, registered office at Mumbai-Pune Road, Dapodi, Pune 411012 and M/s. the Indure Private Limited registered office at Indure House, Greater Kailash –II New Delhi 110 048.

5. Thereafter, the parties have entered into a contract for successful performance of the relevant system (i.e. Stacker cum Reclaimer along with associated auxiliary equipment). As per the said Deed of Joint Undertaking that in case of any breach of the Contract committed by the Contractor, the parties undertake, declared and confirm that they shall be fully responsible for the successful performance of the Stacker-cum-Reclaimer and associated auxiliary equipment and undertake to carry out all the obligations and responsibilities under the contract in order to discharge the Contractor's obligations and responsibilities stipulated in the Contract. Further if the NTPC sustains any loss or damage on account of any breach of the Contract, they are 'jointly and severally undertake to promptly indemnify, and pay such losses/damages caused to the NTPC' on its written demand without any demur, reservation, contest or protest in any manner whatsoever. The Deed of Joint Undertaking also states that in case of Award, in addition to the Contract Performance Security furnished by the Bidder, the parties shall furnish "as Security" and on demand Performance Bank Guarantee in favour of the NTPC in a form acceptable to NTPC as per provisions of the Bidding Documents. The value of such Bank Guarantee shall be equal to quarter percent (0.25%) of the total contract price of the Contract awarded by the NTPC to the

Contractor and it shall be guarantee towards the faithful performance/compliance of this Deed of Joint Undertaking in accordance with the terms and conditions specified herein. The Bank Guarantee shall be unconditional, irrevocable and valid for entire period of Contract, i.e. till ninety (90) days beyond the end of the Defect Liability period of the Coal Handling Plant; Package under the Contract. In case of delay in completion of the defect liability period, the validity of this bank Guarantee shall be extended by the period of such delay. The Bank Guarantee amount shall be promptly paid to the NTPC on demand without any demur, reservation, protest or contest; any dispute that may arise in connection with this Deed of Joint Undertaking shall be settled as per arbitrator procedure/rules mentioned in the Contract Document. This Deed of Undertaking shall be construed and interpreted in accordance with the laws of India and the Courts of Delhi shall have exclusive jurisdiction.

6. The Appellant has filed the Appeal with the basic purpose of getting the money as he has been chasing the payment since 18th December, 2015 at the time, the outstanding amount was of Rs.4.6 Crore. There was internal correspondence between the parties on 01.02.2016 wherein they have discussed about the genuine details of the supplier and deduction from bills. The Adjudicating Authority has observed that the Appellant has chased the payment vide email dated 15.04.2016 and also vide e-mail dated 03rd June 2017. The Appellant has also issued a notice for non-payment of dues vide letter dated 09.01.2018 and also issued a Demand

Notice dated 20.03.2018, wherein the outstanding amount was raised of Rs. 2,25,82,259/- along with interest of Rs. 97,86,723/-.

7. The Respondent has replied the said Demand Notice vide letter dated 31st March, 2018 raising the question on account of liquidated damages, pre mature demand which is not yet payable, issues regarding non-revalidation of the Advance Payment Bank Guarantee as provided in terms of the contract in spite of repeated requests and follow-ups etc.

8. The Respondent has also elaborately submitted that there is a net recovery amount of Rs.5,01,67,062.05/-. They have also submitted that the Terms and Procedures of Payment, Functional Guarantees and Performance Bank Guarantee are elaborately defined in the Deed of Joint Undertaking executed on 12th November, 2010.

9. The Respondent has reiterated the various averments made in the Appeal as mentioned supra and submitted that the Adjudicating Authority has rejected the said Application on the ground of existence of dispute prior to issuance of demand notice under Section 8.

10. The various submissions reflects that Appellant is chasing their payment since December, 2015 directly & also through NTPC. While Respondent is raising the issue of dispute with reference to the programme including the additional cost incurred by them when Appellant has abandoned their programme

midway. Deed of Joint Undertaking also stipulates the Dispute Resolution Mechanism.

11. Hence, considering the various facts and circumstances including submission made by the both the parties it is a clear case of chasing of payments & existence of disputes in terms of Insolvency and Bankruptcy Code, 2016. The Adjudicating Authority can admit the Application only if the following conditions are fulfilled as per Section 9(5) of the I&B Code, 2016:

Section 9(5) - *The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), by an order*

(i) admit the application and communicate such decision to the operational creditor and the corporate debtor if,-

(a) the application made under sub-section (2) is complete;

(b) there is no [payment] of the unpaid operational debt;

(c) the invoice or notice for payment to the corporate debtor has been delivered by the operational creditor;

(d) no notice of dispute has been received by the operational creditor or there is no record of dispute in the information utility; and

(e) there is no disciplinary proceeding pending against any resolution professional proposed under sub-section (4), if any;

(ii) reject the application and communicate such decision to the operational creditor and the corporate debtor, if –

(a) The application made under sub-section (2) is incomplete;

- (b) There has been [payment] of the unpaid operational debt;*
- (c) The creditor has not delivered the invoice or notice for payment to the corporate debtor;*
- (d) Notice of dispute has been received by the operational creditor or there is a recorded of dispute in the information utility; or*
- (e) Any disciplinary proceeding is pending against any proposed resolution professional:*

Provided that 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.

12. The Hon'ble Supreme Court in *Mobilox Innovations Private Limited Vs. Kirusa Software (P) Ltd* in 2017 (11) SCALE 754 wherein at Para 40 has held that:

“Once the Operational Creditor has filed an application, which is otherwise complete, the Adjudicating Authority must reject the application under Section 9(5)(2)(d) if notice of dispute has been received by the Operational Creditor or there is record of dispute in the information utility. It is clear that such notice must bring to the notice of the Operational Creditor the “existence” of a dispute or the fact that a suit or arbitration proceeding relating to a dispute is pending between the parties. Therefore, all that the Adjudicating Authority is to see at this stage is whether there is a plausible

contention which requires further investigation and that the “dispute” is not a patently feeble legal argument or an assertion of fact unsupported by evidence. It is important to separate the grain from the chaff and to reject a spurious defence which is mere bluster. However, in doing so, the Court does not need to be satisfied that the defence is likely to succeed. The Court does not at this stage examine the merits of the dispute except to the extent indicated above. So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating Authority has to reject the Application”.

13. Heard learned counsel for both the parties. We have carefully perused the pleadings of both the parties and extant provisions of the Code and the law on the issue.

14. We have the following observation on the present issue:

- a) The Appellant is no doubt chasing payment continuously from 2015. They have also involved NTPC to pressurize to the Corporate Debtor to release the said payment.
- b) The Operational Creditor has not completed the work within the stipulated contract schedule and failed to fulfill their contractual obligations leading to disputes between the parties.

- c) There is exchange of legal notice and its reply in the month of March, 2018 where the disputed issues are raised in respect of recovery of debts and claims.

15. All these suggests that the debt in question is disputed and the dispute was raised prior to issuance of demand notice under Section 8 of the Code. Accordingly, the Adjudicating Authority has rightly rejected the Application.

Hence, we find no merits in the Appeal and the same is accordingly dismissed. No order as to costs.

(Justice Jarat Kumar Jain)
Member (Judicial)

(Mr. Balvinder Singh)
Member (Technical)

(Dr.Ashok Kumar Mishra)
Member (Technical)

RK/SS

New Delhi