

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) (Insolvency) No. 545-546 of 2018

IN THE MATTER OF:

Kavita Anil Taneja

...Appellant

Versus

ISMT Limited

...Respondent

Present:

For Appellant :

**Mr. Nitin Lalwani, Mr. Shakul R. Ghatole and
Mr. Sushant Mahajan, Advocates**

For Respondent :

**Mr. Atanu Mukherjee, Advocate
Mr. Kishore Soni, FCA
Mr. Mrinal Gunjan, ACA**

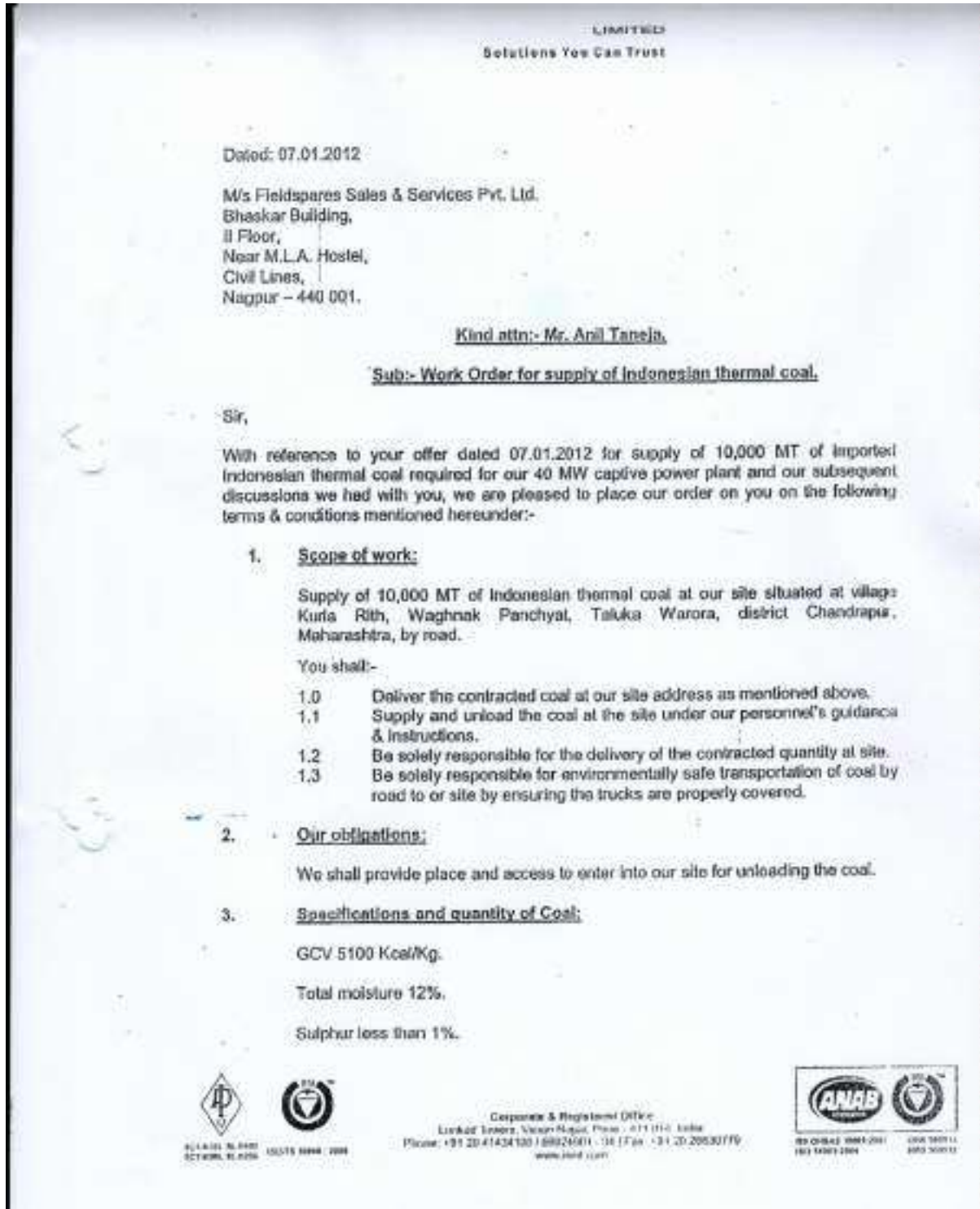
ORDER

24.01.2019 The respondent –‘M/s. ISMT Limited’ filed an application under Section 9 of the ‘Insolvency & Bankruptcy Code, 2016’ (for short, the ‘**I&B Code**’) in Form 5 alleging default of debt amounting to Rs. 2,10,00,000/- . The Adjudicating Authority (National Company Law Tribunal), Mumbai Bench taking into consideration that the respondent had issued notice under Section 8(1) of the I&B Code and there being default, admitted the application by the impugned order dated 13th September, 2017.

2. The case of the appellant is that the respondent – ‘M/s. ISMT Limited’ does not come within the definition of the ‘Operational Creditor’ as it has not supplied any goods or given any services. On the other hand, according to the learned counsel for the respondent – ‘M/s. ISTM Limited’, which is an ‘Operational Creditor’ had to pay 50% as advance against security to pay to the ‘corporate debtor’ under the work order dated 7th January, 2012.

3. Parties have enclosed the work order dated 7th January, 2012, which relates to supply of 10,000 Metric Tons of Indonesian Thermal Coal. The work

order was issued by the respondent – 'M/s. ISMT Limited' in favour of the 'corporate debtor' who was to supply coal to respondent is 40 MW captive power plant and the scope of the work and obligations have also been mentioned therein, relevant portion of which reads :



4. Rate:

The rate per MT shall be as follows:-

Cost of coal is Rs. 5,200/- per MT (price inclusive of transportation and all taxes). The price is valid for 10,000 MT of coal to be dispatched by you within 7 days of issue of LC, subject to confirmation of quality.

5. Sampling and analysis:

Joint samples will be collected by both parties from your supplies at our plant on daily basis and the analysis of the same will be carried out at our laboratory. In case of dispute, a mutually agreed upon solution should be decided by both parties.

6. Price adjustments:(A) Total moisture(ARB)

If actual total moisture as determined by us is in excess of $12\% \pm 1\%$ (ARB), following penalty on price will be applied:-

Adjusted weight = BL Weight X $(112\% - \text{Actual TM}) / 100\%$

In no case the amount payable would exceed the agreed FOB price.

(B) Gross calorific value(ADB)

If the actual Gross Calorific Value is lower than 5100 ± 100 Kcal/Kg (ADB), then the price will be adjusted by the following formula:-

Involved price = $\frac{\text{FOB Price X Actual GCV (ADB)}}{5100}$

(FOB price includes transportation charges & all Taxes).

(C) On Short delivery

The ordered quantity of coal shall be delivered as per following Schedule:

Delivery will finish within 45 to 60 days of issue of LC.

7. Delivery of documents :

All original documents including invoice, packing list, Delivery Challan, Lorry Receipt, your test reports etc. shall be delivered to our site address to the attention of plant in charge Mr. Durga Rao.

8. Billing and payment:

(i) 50% advance against the security as under:-

(a) Rs. 1,25,00,000/- against submission of Bank Guarantee of equivalent amount by you. We are in receipt of a cheque no. 233628 dated 15.02.2012 drawn on Bank of India Nagpur Corporate Banking Branch for Rs. 1,25,00,000/- as additional security for the above Bank Guarantee which shall be returned on submission of the said Bank Guarantee.

(b) Rs. 1,35,00,000/- against cheque no. 233630 dated 01.04.2012 for Rs. 2,60,00,000/-.

(ii) 40% shall be paid by letter of credit.

(iii) 10% balance amount i.e. Rs. 520/- per ton of coal will be released through RTGS to your account (details to be provided by you) only after entire lot of 10,000 tons is delivered to us and after adjustment for penalties w.r.t. moisture and GCV as specified in this order.

Although this order is for 10,000 tons amounting to Rs. 5,200/- per ton inclusive of transportation and all taxes, the letter of credit will be opened in your favour for 40% of the order value i.e. for Rs. 2,080 per ton only. Bills of exchange will be drawn by you for the actual tonnage and value of coal received at our power plant site. Payment can be drawn by the beneficiary of the LC against submission of duly accepted bills of exchange accompanied by lab test report of the specifications of the coal, Delivery Challan, BL and LR.

LC opening charges will be to our account and any bank charges towards negotiation / reimbursement claims of your bank will be to your account.

Unloading of the coal will be by mechanical means and should be stacked properly under the guidance of our personnel, for which additional charge of Rs. 20/- per ton will be paid separately to you.

9. Safety norms:

You shall at your own cost arrange for transit insurance and also insure your staff and workers against any accident hazards during the course of the contract.

10. Termination of Contract:

The Company reserves the right to terminate the contract with immediate effect in the event of any deviation from terms & conditions mentioned herein.



4. Section 5(20) defines 'Operational Creditor' which is r/w Section 5(21) which defines 'operational debt'. In the present case, it is clear from the work order that the amount of Rs. 2,60,000,00/- was advanced by the respondent M/s. ISMT Limited to the 'corporate debtor' for supply of 10,000 Metric Tons of Indonesian Thermal Coal. From the aforesaid fact, we find that the respondent had not supplied any goods nor provided any services and, therefore, it does not come within the meaning of 'operational creditor'. Learned counsel appearing on behalf of the respondent referred to a letter

dated 9th August, 2018 issued by the 'corporate debtor' to the 'respondent ' M/s. ISMT Ltd.' for settlement of dues, which reads as follows:

"9th August 2018

Dear Mr Pankaj Wahi,

*SUB : Supply of 10000 MT of Indonesia coal vide work order
dated 7th Jan 2012*

REF : Our Letter dated 9th March 2015

Your NCLT – case no. 1206/1b/9(MB)/2017

We thank you for the courtesy extended to us and the positive response to resolve the pending claims and all issue between us.

As the purpose of the advance against your work order could not be fulfilled due to reasons beyond the control of both the companies. It was mutually agreed to share and absorb the cost equally between the two companies. Based on the understanding it was settled that we will pay Rs.1.30 cr. It was also agreed that the amount will be gradually settled from the supply of local coal to your plant via Nagpur.

Based on the understanding an amount of Rs. 50 lakhs was duly adjusted from the supply of coal to your plant. You had also retained an amount of Rs. 80 lakhs of M/s. Shyam Coal Service against the supply of coal. The total amount received by you is Rs.1.30 which was equal to the amount agreed between us. We presumed that the case was settled.

We are now informed that an amount of Rs.80 lakhs is payable to M/s Shyam Coal Service and this amount cannot be treated

as our payment and will be treated separately from our account. Considering this position, we agree to repay the outstanding of Rs.80 lakhs to you as full and final settlement.

We are willing to enter into a legally binding agreement to repay the amount of Rs. 80 lakhs in maximum 10 months. This is the upper time limit. However, we would try to settle the amount by March '19. We are also willing to support the proposal with post-dated cheque as counter guarantee to prove our bona fide intention to repay the amount.

Request you to kindly accept and approve this proposal of settlement.

Thanking you,

*Yours faithfully,
For Fieldspares Sales & Services Pvt. Ltd.
Sd/-*

ANIL TANEJA”

5. In reply to the same, learned counsel for the respondent submitted that the work order was a joint venture for which the respondent also invested 50% money and 50% of the same was payable to the ‘corporate debtor’. If that be so and we accept, as suggested by the learned counsel for the appellant that the respondent invested an amount for the joint venture, then in that case the respondent can claim as the ‘financial creditor’ and not as ‘operational creditor’.

6. In view of that we hold that the respondent is not an ‘operational creditor’, and, therefore, the application under Section 9 was not maintainable. We accordingly set aside the impugned order dated 13th September, 2017 passed by the Adjudicating Authority, Mumbai Bench.

However, we make it clear that if the 'corporate debtor' failed to make payment in terms of their offer or if there is any default, it will be open to the respondent to move appropriate application before the Appropriate Authority claiming it to be a 'financial creditor' as suggested by the appellant.

7. In effect, order (s) passed by Ld. Adjudicating Authority appointing 'Interim Resolution Professional', declaring moratorium, freezing of account and all other order(s) passed by Adjudicating Authority pursuant to impugned order and action taken by the 'Resolution Professional', including the advertisement published in the newspaper calling for applications, all such orders and actions are declared illegal and are set aside. The application preferred by the Respondent under Section 9 of the I&B Code is dismissed. The Adjudicating Authority will now close the proceeding. The Respondent Company is released from all the rigour of law and is allowed to function independently through its Board of Directors from immediate effect.

8. The Adjudicating Authority will fix the fee of 'Interim Resolution Professional' and the 'corporate debtor' will pay the fees for the period he has functioned. The appeal stands disposed of. However, in the facts and circumstances of the case, there shall be no order as to cost.

[Justice S.J. Mukhopadhaya]
Chairperson

[Justice Bansi Lal Bhat]
Member (Judicial)

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