National Company Law Appellate Tribunal

Principal Bench, New Delhi

COMPANY APPEAL (AT) (INSOLVENCY) No. 122 of 2021

(Arising out of Order dated 04th January, 2021 passed by National Company Law Tribunal, Principal Bench, Delhi, in Company Petition (IB) No. - 180(PB)/2020).

IN THE MATTER OF:

BKB Transport Pvt. Ltd.
2F, Vatika Apartment,
Line Tank Road,
Ranchi-834001 **...Appellant**

Versus

NTPC Ltd.
Having its registered office at:
NTPC Bhawan, Scope Complex,
Institutional Area, Lodhi Road,
New Delhi – 110003 **...Respondent**

Appellant: **Mr. Sumeet Godadia, Mr. Kaushik Poddar and Mr. Saurabh Jain, Advocates.**

Respondent: **Mr. Balbir Singh, (Addl. Solicitor General of India) alongwith Mr. R. Sudhinder, Mr. Adarsh Tripathi, Mr. Vikram Singh Baid and Mr. Naman Tandon, Advocates.**

J U D G E M E N T

[Per; Shreesha Merla, Member (T)]

1. Aggrieved by the Order dated 04.01.2021, in C.P.(IB) No.-180(PB)/2020, passed by the Learned Adjudicating Authority (National Company Law Tribunal, Principal Bench, Delhi) dismissing the Application filed under Section 9 of the Insolvency and Bankruptcy Code (hereinafter referred to as the **'Code'**), M/s. BKB Transport Private Limited (hereinafter

referred to as the **'Operational Creditor'**) preferred this Appeal under Section 61 of the Code.

2. By the Impugned Order, the Learned Adjudicating Authority while dismissing the Section 9 Application, has observed as follows:-

> *"29. All these correspondences clearly indicate that the Operational Creditor failed to supply the requisite coal to the Siding as mentioned in the Purchase Order, therefore according to Clause 3.2 of the Purchase Order, the penalty shall be paid towards the short supplies of the coal as required under the Purchase Order.*
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> *30. It is an admitted fact that from the Operational Creditor side that the Corporate Debtor replied to its Section 8 notice dated 12.04.2020, on 21.04.2020 i.e. within 10 days from the date of receipt of notice, in the reply, the Corporate Debtor has again disputed that the Operational Creditor is liable to pay penalty, therefore it could not be decided who is liable to pay whom, because if the penalty is more than the unpaid invoice amount retained by the Corporate Debtor, the Operational Creditor would be liable to pay the penalty remained due and payable by the Operational Creditor.*
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> *31. In all the three Volumes filed by the Operational Creditor, it has not included the **Purchase Order** which is binding upon the Operational Creditor. In the Reply notice dated 21.04.2020, the Corporate Debtor sated that as per the corporate debtor records, the amount payable to the operational creditor is 151,09,867, whereas the amount **retained as** penalty for short supply is 78,95,38,277 (penalty for 17rakes (January 18-2 rakes, Feb 18-3 rakes, March 18 and April 18-6 rakes each. Penalty @ double the rate of transportation).*
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> *32. The Operational Creditor counsel has filed rejoinder setting up a new case that since the Performance Bank Guarantee has not been retained, it is to be construed that no dues are outstanding against the Operational Creditor, therefore whatever*

defence taken up by the Corporate Debtor, the operational creditor says, could not be considered as dispute is in existence before receipt of Section 8 notice by the Corporate Debtor.

33. Here the point for consideration at the time of admission of Section 9 Petition is, it is to be seen whether ***any debt is in existence,*** *whether default is in existence, if default is in existence, it is to be seen that if any dispute is* ***pre-existing*** *before receipt of Section 8 notice by the Corporate Debtor.*

34. In the backdrop of the factual scenario of this case, it is not the case of the Operational Creditor that it has not short supplied the coal and it is not also the case of it that penalty need not be paid in the event the Operational Creditor failed to supply coal to the Siding as mentioned in the Purchase Order 13.04.2016.

35. There are several letters from the Corporate Debtor that the Operational Creditor failed to supply 2.2 rakes of Coal per day and that the Corporate Debtor in the year 2018 itself wrote letter after letter that the Operational Creditor is liable to pay penalty for short supply, and the Corporate Debtor indeed called upon the Operational Creditor stating that the final bill would be reconciled provided the Operational Creditor authorized representative come to the Corporate Debtor for finalization of the bill because the Penalty liable to be paid by the Operational Creditor would be discounted from the unpaid invoice amount retained with the Corporate Debtor.

36. The Operational Creditor, for the reasons best known to it, did not send its authorized representative to make the bill final, unless bill is made final, in case anything is to be paid, the Corporate Debtor cannot be called as defaulted in paying the bill of the Operational Creditor.

37. In a sense, it could be said, that the default is not in ***existence*** *because final bill has not been prepared. In fact the Corporate Debtor itself called upon the Operational Creditor to clear this issue to discount the*

penalties from the unpaid invoice amount retained with the Corporate Debtor.

38. In any event, apart from raising dispute over penalties from the year 2018 itself, the Corporate Debtor timely replied i.e. within 10 days from the date of receipt of Section 8 notice that the Operational Creditor is liable to pay penalty, therefore it cannot be called dispute is not in existence as on the date of receipt of Section 8 notice.

39. On record it is evident that final bill has not been prepared, penalties not discounted, the operational creditor has not deputed its authorized representative for finalization of final bill, therefore due itself cannot be assumed unless final bill is prepared, therefore question of default will not arise, in any event, dispute is pre-existing between the parties as on the date section 8 notice the corporate debtor received, therefore it is a clear case hit by pre-existing dispute.

40. In this case, both the parties relied upon ***Mobilox Innovations Put. Ltd. v. Kirusa Software Put. Ltd., Civil Appeal no. 9405 of 2017, wherein the Honorable Supreme Court of India held that in the cases where dispute of fact arises, the same truly require further investigation and cannot be decided under the Insolvency and Bankruptcy Code.***

41. From the Operational Creditor side contention is dispute is frivolous, from the Corporate Debtor side contention is dispute is pre-existing.

42. Nevertheless the sum and substance of the aforesaid judgment is, whenever any dispute is pre-existing, notwithstanding the merit of the dispute raised, the Petition shall be dismissed on the ground that Petition is hit by pre-existing dispute.

43. In view thereof, (IB)-810(PB)/2020 is ***hereby dismissed as misconceived."***

Facts in brief:

3. The 'Corporate Debtor', sought to set up a Super Thermal Power Project at Barh with a capacity of 330 MW and invited bids for 'engagement of agency for transportation of Coal from Amrapali Mine to Bandag Railway Siding and loading of Coal into Indian Railways wagons for NTPC Barh II (2x660MW) through RCR mode' from prospective bidders. The Appellant/'Operational Creditor' participated in the said bid and a Contract Agreement dated 30.06.2016 was entered into between the parties for the period 19.03.2016 to 18.03.2017 for a bid amount of Rs. 2,11,95,00,000/-. It is stated that the 'Operational Creditor' completed the contract on 26.04.2018, with the satisfaction of the Respondent and various invoices were raised for the work done. It is submitted by the Learned Counsel for the Appellant that an amount of Rs. 11,21,44,047.40/- excluding interest was 'due and payable' as on 29.02.2019, but the 'Corporate Debtor' alleged shortage of supply of Coal and the amounts were never paid. On 16.04.2019, a letter was addressed by the 'Corporate Debtor' to the Appellant herein to depute a representative for final payment but no amount was paid. The allegations of short supply were strongly denied by the 'Operational Creditor' and despite several reminders and an email dated 24.01.2020 addressed by the 'Corporate Debtor' admitting that an amount of Rs. 7,25,91,090.40/- is due as on 31.12.2019, made no payment. In the Reply to the email dated 24.01.2020, the Appellant informed that as per the books of account the amount 'due and payable' was Rs. 11,21,44,047.40/-.

4. The Leaned Counsel drew our attention to Clauses 5, 6 & 56 pertaining to 'Transit Time', 'Force Majeure' and 'Arbitration'. He submitted that there was no dispute as on 03.03.2020 as the 'Corporate Debtor' has released the performance Bank guarantee provided by the Appellant under the terms of the Agreement.

5. At this juncture, the Learned Counsel for the Appellant submitted that the Adjudicating Authority in Paras 29 and 34 of the Impugned Order has made some observations touching on the merits of the matter. For ready reference, Paras 29 and 34 are reproduced as hereunder:-

> *"29. All these correspondences clearly indicate that the Operational Creditor failed to supply the requisite coal to the Siding as mentioned in the Purchase Order, therefore according to Clause 3.2 of the Purchase Order, the penalty shall be paid towards the short supplies of the coal as required under the Purchase Order".....*
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> *".....34. In the backdrop of the factual scenario of this case, it is not the case of the Operational Creditor that it has not short supplied the coal and it is not also the case of it that penalty need not be paid in the event the Operational Creditor failed to supply coal to the Siding as mentioned in the Purchase Order 13.04.2016."*

6. The Learned Counsel sought for these two Paragraphs to be expunged as the comments would come in the way of any Arbitration Proceedings, if invoked.

7. On a query from the Bench, Learned Counsel for the Respondent has fairly conceded that the observations in these two Paras do touch upon the merits of the case and that he has no objection to the same being expunged.

Keeping in view the facts and circumstances of the case and the observation made in these two Paras, we are of the considered view that the aforenoted Paras 29 and 34 of the Impugned Order be expunged and the same is ordered. We observe that we have not gone into merits of the matter with respect to any 'Pre-Existing Dispute' or otherwise. This Appeal is disposed of expunging Paras 29 and 34 from the Impugned Order dated 04.01.2021.

8. The Registry is directed to upload the Judgement forthwith on the website of this Appellate Tribunal and is also directed to send a Copy of this Judgement to the Adjudicating Authority to carry out the necessary deletion.

[Justice Anant Bijay Singh]
Member (Judicial)

[Ms. Shreesha Merla]
Member (Technical)

NEW DELHI
08th September, 2021

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