

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL, PRINCIPAL BENCH,
NEW DELHI**

Company Appeal (AT)(Ins.) No. 546 of 2020

IN THE MATTER OF:

Rajratan Babulal Agarwal

Gokul- Flat No. 4, Geet Gopal

Apartment, Opposite Laxmi Process

Ichalkaranji – 416115 Dist. Kolhapur,

Maharashtra.

Office 10/868, Koik, Building, Vardhaman Chowk,

Shahpur Road, Ichalkaranji, Dist. Kolhapur,

416115 Maharashtra.

...Appellant

Vs.

1.Solartex India Pvt. Ltd. & Ors.

Having Its registered office at:

105, 1st Floor, Raghuvir Textile Mall,

Aai Mata Road, Dhumbhal, Parvat Patia Surat,

395010.

...Respondent No. 1

2. Honest Derivatives Pvt. Ltd.

Having its registered office at:

E-43, Second Floor, Sumel Business Park,

Near New Cloth Market,

Outside Raipur Gate, Ahmadabad.

380002

Factory Gate No. 50, Maldabadi,

Tal, Jamner, Dsit. Jalgaon,
Maharashtra.

... **Respondent No. 2**

3. Kailash T Shah

Interim Resolution Professional for
Honest Derivatives Pvt. Ltd.
505, 21st Century Business Centre,
Near World Trade, Ring Road, Surat
395002

... **Respondent No. 3**

Present:

For Appellant: Mr. Mr. Ritin Rai, Sr. Advocate, Anish Agarwal Mr. Mayur Khandeparkar, Mr. Tejas Agarwal, Ms. Vanshika Gupta, Advocates

**For Respondent: Mr. Pavan Godiawala, Advocate for R1
Mr. Vishnu Shankar, Advocate for R2 & R3**

J U D G M E N T

Jarat Kumar Jain, J:

The Appellant 'Raj Ratan Babulal Agarwal', Ex-Director of Honest Derivatives Pvt. Ltd. (Corporate Debtor/ Respondent No. 2) filed this Appeal against the order dated 28.05.2020 passed by Adjudicating Authority (National Company Law Tribunal, Ahmedabad Bench, Ahmedabad) in CP(IB) 393/9/NCLT/AHM/2018 whereby the application filed by Solartex India Pvt. Ltd. (Operational Creditor/ Respondent No. 1) under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as 'IBC') was admitted and Corporate Insolvency Resolution Process (hereinafter referred to as 'CIRP') was initiated against the Corporate Debtor. Mr. Kailash T Shah

(Respondent No. 3) was appointed as the Interim Resolution Professional (IRP).

2. In this Judgment the parties are referred in their original status i.e. Honest Derivatives Pvt. Ltd. as Corporate Debtor and Solartex India Pvt. Ltd. as Operational Creditor.

3. Brief facts of this Appeal are that Corporate Debtor (Respondent No. 2) placed an order for supply of 500 MT Indonesian Coal vide their purchase order No. HDPL/16-17/586 dated 27.10.2016. Pursuant to this order the Operational Creditor, Solartex India Pvt. Ltd has supplied the required quantity of coal as per specifications to the Corporate Debtor's factory at Jamner District, Jalgaon, Maharashtra and issued 20 invoices from 28.10.2016 to 02.11.2016 for a total amounting to Rs. 15,73,279/-. The Corporate Debtor has not made any payment for supply of goods against the aforesaid invoices. As per the terms of the agreement, the Corporate Debtor is also liable to pay interest @ 30% p.a. from the date of default till date of actual payment. The Corporate Debtor is liable to pay the principal amount 15,73,279 plus interest amounting to Rs. 5,84,421.38 up to 31.01.2018, the total of which amounts to Rs. 21,97,700.38/-. The Corporate Debtor failed to pay the dues; therefore, the Operational Creditor issued a demand notice on 05.02.2018, which was delivered to Corporate Debtor on 08.02.2018. The Operational Creditor received a reply to the notice from the Corporate Debtor on 19.02.2018 which expressed complete denial of Operational Debt. Instead,

the Corporate Debtor demanded an amount of Rs. 4,44,17,438/- towards damage and loss caused to them. Therefore, the Operational Creditor on 30.07.2018 filed an Application under Section 9 of the IBC against the Corporate Debtor.

4. The Corporate Debtor resisted the application on the ground that the quality and quantity of the coal received by them was not as per the specifications contained in the purchase order. Further, the quality of coal was tested by the Corporate Debtor only upon receipt and usage. Upon finding out the inferior quality of coal, the Corporate Debtor immediately sent e-mails (dated 30.10.2016 and 03.11.2016) to the Operational Creditor. The Operational Creditor in its email dated 04.11.2016 admitted that the moisture content in the coal is not as per specifications. The Corporate Debtor had to suffer loss. Therefore, the Corporate Debtor filed a suit on 26.03.2018 against the Operational Creditor inter alia seeking damages and losses suffered under the said purchase order.

5. The Adjudicating Authority after hearing Ld. Counsel for the parties held that the Corporate Debtor has failed to establish pre-existing dispute. Admittedly the default has occurred on 10.11.2016 which is above Rs. 1 lakh. A statutory notice has been duly served. Thus, the Adjudicating Authority admitted the application under section 9 of the IBC and appointed Shri Kailash T Shah as the IRP and declared a moratorium, for the purposes referred to in Section 14 of the IBC.

6. Being aggrieved with the said order, the Ex-Director of the Corporate Debtor has filed this Appeal.

7. Ld. Counsel for the Appellant submitted that Ld. Adjudicating Authority failed to consider the documents filed in support of the pre-existing dispute. The Corporate Debtor vide its e-mail dated 30.10.2016 as well as its e-mail dated 03.11.2016 informed the Operational Creditor that the supplied coal was about 4000 Gross Calorific Value (GCV) whereas the Purchase Order was for 5,400 GCV and the coal had a high moisture content. This fact was also admitted by the Operational Creditor in its letter dated 04.11.2016. It is also submitted that various lab test reports clearly show that the coal supplied was of a substantially poor quality and not as per purchase order. In support of this argument, the Appellant has filed e-mails dated 30.10.2016, 03.11.2016, 04.11.2016 and an analysis report of raw material by Central Testing Laboratory and the reply to the notice.

8. Ld. Counsel for the Appellant further submitted that the both Members of Adjudicating Authority (Mr. Harihar Prakash Chaturvedi and Prashanta Kr. Mohanty) were transferred with immediate effect vide separate orders dated 12.05.2020 and 30.04.2020. They have passed the impugned order on 28.05.2020 which is in contravention to Rule 152 of the NCLT Rules 2016. It was pointed out that the impugned order was passed more than six months after being reserved, which violates Rule 150 of the NCLT Rules, 2016 which mandates that the orders have to be passed within 30 days of such order

being reserved. Hon'ble Supreme Court in the case of Anil Rai Vs. State of Bihar (2001) 7 SCC 318 laid down guidelines regarding the pronouncement of judgments which shall be followed by all concerned. As per the guidelines, after conclusion of the arguments in civil matters the judgment must be pronounced within a period of two months. However, it was submitted that in the present case, the impugned order has been pronounced after six months from the date of conclusion of the arguments. Therefore, on this ground, the impugned order is liable to be set aside.

9. Ld. Counsel for the Appellant further submitted that as per Rule 89 of the NCLT Rules, 2016, the registry is required to publish the cause list for the next day in advance, however, in the present case, the cause list for pronouncement of the impugned order was published on the same day i.e. on 28.05.2020 and may even have been issued after pronouncement of the order, therefore, there is a clear violation of Rule 89 of the NCLT Rules, 2016. This has caused prejudice to the Appellant as the Appellant did not get an opportunity to claim rehearing which is a substantive right of the Appellant.

10. On the other hand, Ld. Counsel for the Respondent No. 1/Operational Creditor submitted that there is no pre-existing dispute. Shri. Tradco Deesan Pvt. Ltd. (STDPL), the sister concern of the Corporate Debtor has sent an e-mail dated 30.10.2016 to the group concern of the Operational Creditor which was a separate transaction and the Corporate Debtor tried to interlink the transactions only to mislead this Appellate Tribunal. So far as the lab reports

are concerned, it was submitted that these false reports are unilaterally prepared to create evidence. There is no sanctity of such reports which are admittedly not delivered to the Operational Creditor. It is further submitted that e-mail dated 03.11.2016 was received by the Operational Creditor. Immediately thereafter, the Operational Creditor sent a reply on 04.11.2016 which is self-explanatory and the Operational Creditor stopped the supply of coal. The supply of coal till 02.11.2016 was as per specifications of the Corporate Debtor and the Corporate Debtor has upon consuming the goods tried to create a false dispute. It is also submitted that after sending the e-mail dated 03.11.2016, the Corporate Debtor has neither issued any debt note nor sent any reminder that huge loss has been sustained by them. After receiving the statutory notice, a false suit claiming damages Rs. 03 Crores has been filed. Admittedly, the suit is filed after receiving the statutory notice, therefore, as per Section 8 (2) (a) of IBC, the suit was not pending before the receipt of statutory notice, therefore, it is not a pre-existing dispute. Reliance was placed on a judgment rendered by the Hon'ble Supreme Court in the case of Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software Pvt. Ltd. (2018) 1 SCC 353 wherein it was held that the dispute should not be patently feeble legal argument or an assertion of unsupported by evidence. The dispute is purely spurious hypothetical and illusory. Therefore, Ld. Adjudicating Authority has rightly rejected the plea of the pre-existing dispute and admitted the application.

11. Id. Counsel for the Respondent No. 1 further submitted that it is true that both the Members of the Adjudicating Authority were under transferred however, due to the COVID-19 pandemic, they could not travel and take charge of another bench. Hence, the matters which were already heard, in those matters orders were pronounced. The matters were getting listed for pronouncement of order, hence, there is no violation of any Rule. The Appellant does not have merits in the Appeal, therefore, he has raised such baseless issues.

12. It is further submitted that the Appellant has no locus to prefer the appeal independently without any authority. Thus, the appeal is liable to be dismissed with cost.

13. After hearing Id. Counsel for the parties, we have minutely examined the record and considered the submissions.

14. Following issues arise for our consideration.

(i) Whether there is any pre-existing dispute?

(ii) Whether the impugned order is passed in contravention of Rule 152, Rule 150 and Rule 89 of the NCLT Rules 2016?

Issue No. (i)

15. Ld. Counsel for the Appellant argued that there was a pre-existing dispute as defined in Section 5(6) r/w Section 8 (2) (a) of the IBC. For this purpose, he placed reliance on following documents:

(a) Email dated 30.10.2016

(b) Email dated 03.11.2016

(c) Email dated 04.11.2016

(d) Analysis Report of raw material by Central Testing Laboratory

(e) Reply to statutory notice

(f) Civil Suit for damages filed against Operational Creditor.

16. We are considering the documents one by one. The e-mail dated 30.10.2016 reads as under:-

“Sun, Oct 30, 2016 At 12:50PM

Dear sir,

With reference to 5400 gcv imp coal supply to (Stdpl) dhule and (Hdpl) Jamner, following issues are to be shared

For dhule plant: high moisture and powder percentage is to be found, already discussed to you.

For Jamner Plant: recently supply include high level of powder percentage and moisture too.

Kindly consider the issues and please make us assure about quality of coal should not be down the level.

Its difficult to run the plant smoothly that's down the production efficiency.

Pics attached for your reference”

17. Ld. Counsel for the Respondent No. 1/Operational Creditor submitted that this e-mail was sent by Shri Tradco Deesan Pvt. Ltd. (STDPL), the sister

concern of Corporate Debtor to Group Concern of the Operational Creditor and has nothing to do with the transaction in question.

18. In order to appreciate the arguments, it is useful to refer to Para 7.11 of the reply affidavit filed by Mr. Vinod P. Chaturvedi before the Adjudicating Authority (Annexure A-10 Pg. 121).

“7.11 Immediately thereafter by an email dated 30th October, 2016 STDPL informed the Applicant that the coal supplied and delivered by the Applicant was not in accordance with the specifications prescribed under the said PO and the Purchase Order dated 11th October, 2016 and that the use of such coal caused production losses to the Respondent and STDPL. Hereto annexed and marked as Exhibit “c” is a copy of the said email dated 30th October, 2016.”

19. With the above admission in the affidavit, it is apparent that on 30.10.2016, STDPL, a sister concern of the Corporate Debtor has sent an e-mail to Group Concern of the Operational Creditor in regard to the Purchase Order dated 11.10.2016 whereas, the present claim is in regard to the Purchase Order dated 27.10.2016. It is also to be seen that there is no reference of this e-mail in the reply to the statutory notice. In the said e-mail it is not mentioned that it is in relation to the Purchase Order dated 27.10.2016. In the subsequent e-mail dated 03.11.2016, there is no reference to the earlier e-mail dated 30.10.2016. In such circumstances, we are of the view that the e-mail dated 30.10.2016 is not related to the transaction in question.

20. Now we have considered the email dated 03.11.2016 which reads as under: -

“Date 03.11.2016
Kind Attn: Mr. Samirji

Sub: - Inferior/poor quality of Indonesian Coal.

Dear Sir,

We have placed an order for 500 MT Indonesian Coal to you vide our P.O. No. HDPL/2016-17/586 dated 27.10.2016 for 5400 GCV and Moisture condition is 38-40%. But, on receiving the coal we found that GVC less than 4000 and size of coal is 0mm 50% and maximum size is 5mm to 6 mm only and moisture is 48-50%. It seems if we receive such type of coal we are facing the cleaning problem of boiler and due to that nozzle bent and boiler become damaged. This will occur heavy production loses. Hence, please stop delivery of the material/coal and advise us what to do this loss. If any more losses occurred due to poor/inferior quality of coal, we may debit the same amount in your account which may please be noted.

Thanking you,
Yours faithfully,
For Honest Derivatives Pvt. Ltd.
Ravi Jajodia
Vice President (Operation)”

21. The Operational Creditor has sent reply through e-mail dated 04.11.2016 which reads as under: -

“Fri, November 4, 2016 at 4:45AM

Dear Sir,

It is not possible that the coal is off 4000 GCV, secondly from port it is possible that moisture can go upto 42 percent but not above that also because at port they are putting water on the coal as per GPCB guidelines of pollution.

So please take a note regarding this. We have immediately stopped the delivery, but please inform your transporter.

Regards,
Samir Agarwal
Rawalwasia Group
104, Raghuvir Textile Mall,
Bh. DR World, I mata chock
Poona Khubhariya Road, Surat – India – 395010
M - + 91-9824102989, + 9374538264
O- +91- 261-2705000”

22. Upon a bare reading of e-mail dated 03.11.2016, it is clear that the Corporate Debtor stated that the supplied coal is not as per specification and

due to that nozzle bent and boiler has become damaged which would lead to heavy production losses. Hence, it was requested that delivery of the coal be stopped. It is also mentioned that if more losses occurred due to poor/inferior quality of coal they may debit the same amount in the account of Operational Creditor. The Operational Creditor has sent a reply through e-mail dated 04.11.2016 and immediately stopped the delivery of coal. Thereafter, Corporate Debtor has neither issued any debit note nor has returned the supplied coal but consumed the same. It means that after receiving the e-mail dated 04.11.2016 the Corporate Debtor was satisfied and kept quiet for about 15 months. It is only when they received a statutory notice that they filed a Civil Suit against the Operational Creditor.

23. With the aforesaid discussion, it cannot be held that there was any dispute in regard to the transaction in question. It seems that in order to avoid the liability, the Corporate Debtor through its reply to notice, tried to impress that there was a pre-existing dispute.

24. The Corporate Debtor has filed some analysis reports of raw material of Central Testing Laboratory (*Pg. 65-84 Appeal Paper Book*). These reports were never sent to the Operational Creditor and these reports are prepared by the Corporate Debtor's testing laboratory. Therefore, these reports cannot be considered to demonstrate that the supplied coal was not as per purchase order.

25. It is an admitted fact that the Corporate Debtor has received the statutory notice on 08.02.2018. Pursuant to the said notice, they sent the reply to notice on 17.02.2018. Thereafter, the Corporate Debtor filed a Civil Suit for damages against the Operational Creditor on 26.03.2018. Section 8 (2) of IBC reads as under: -

“existence of a dispute, if any, or record of the pendency of the suit or Arbitration proceedings filed before the receipt of such notice or invoice in relation to such dispute”

26. In the present case, the Civil Suit has been filed after receipt of statutory notice, therefore, such Civil Suit cannot be treated as existence of dispute.

27. Thus, we are of the view that the Corporate Debtor has failed to prove any pre-existing dispute in regard to transaction in question.

Issue No. (ii)

28. It is an admitted fact that the NCLT Bench, Ahmedabad consisted of Shri H. P. Chaturvedi Member (Judicial) and Shri Prashanta Kr. Mohanty Member (Technical) who heard the application and reserved for orders on 20.11.2019. Thereafter, the parties have filed their written submission on 06.01.2020 and the impugned order was pronounced by the same Bench on 28.05.2020. Meanwhile, vide order dated 12.05.2020 and 30.04.2020 these members have been transferred. However, due to lockdown they were unable to join their new place of posting. Since the members were physically present at Ahmedabad. Therefore, in public interest vide order dated 21.05.2020, a

special Bench was constituted to pronounce the orders reserved by the erstwhile Bench as per Section 419 (3) of the Companies Act, 2013 for the period of 22.05.2020 to 29.05.2020. Thus, it cannot be said that the members have pronounced the impugned order in contravention of Rule 152 of the NCLT Rules, 2016.

29. Rule 150 of the NCLT Rules, 2016 provides that “*the Tribunal, after hearing the Applicant and Respondent, shall make and pronounce an order either at once or, as soon as, thereafter, as may be practicable but not later than thirty days from the final hearing.*” Hon’ble Supreme Court in the case of Anil Rai (Supra) while dealing with a Criminal Appeal framed detailed guidelines regarding expeditious pronounce of judgments. It was held that in Civil matters, the judgment must be pronounced within two months of the close of hearing of the case. It is true that in the present case, the parties have submitted written submissions on 06.01.2020, however, the impugned order was pronounced on 28.05.2020 i.e. after about five months from the conclusion of arguments which is against the aforesaid rule as well as guidelines laid down by the Hon’ble Supreme Court.

30. We are of the view that only on this count the impugned order cannot be set aside which is otherwise flawless.

31. Rule 89 of the NCLT Rules, 2016 provides that “*the registry shall prepare and publish the cause list for the next working day*”. Ld. Counsel for

the Appellant raised a plea that the cause list for pronouncement for the impugned order was not published in advance and may even have been published after pronouncement of the order. He has placed on record the additional cause list dated 28.05.2020 (*Pg. 215 of Appeal Paper Book*) which is in regard to pronouncement of impugned order. The cause list for pronouncement of the impugned order was published on the same day i.e. 28.05.2020. It may be an irregularity but not an illegality. It is not the case of the Appellant that he could not access the order on 28.05.2020.

32. With the aforesaid, we are of the view that the Appellant has failed to establish that there was a pre-existing dispute and in pronouncing the impugned order, the Adjudicating Authority committed any illegality. We find no merits in this Appeal. Thus, the Appeal is dismissed. However, no order as to costs.

[Justice Jarat Kumar Jain]
Member (Judicial)

[Kanthi Narahari]
Member (Technical)

New Delhi
27th May, 2021.

SC