

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL**  
**NEW DELHI**

**Company Appeal (AT) (Ins) No.510 of 2019**

<b><u>IN THE MATTER OF:</u></b>	<b>Before NCLT</b>	<b>Before NCLAT</b>
1. Imran Iqbal Khan Director Western India Metal Processors Limited 132 B Mittal Towers Nariman Point, Mumbai Maharashtra 400 021	---	Appellant No.1
2. Mohammad Iqbal Khan Director Western India Metal Processors Limited 132 B Mittal Towers Nariman Point, Mumbai Maharashtra 400 021	---	Appellant No.2
<b>Versus</b>		
1. Benteler Trading International GmbH Through Sandeep Nag Sales Director A-3 Chakan MIDC Area, Phase II Chakan Telegaon Road Khalumbre, Taluka: Khed Chakan, Pune, Maharashtra 410 501	Petitioner/ Operational Creditor	Respondent No.1
2. Mr. Ramesh Bhosale, Liquidator of Western India Metal Processors Limited 1-21/22, Paragan Centre Pandurang Budhkar Marg, Worli, Mumbai – 400 013	---	Respondent No.2

**For Appellants:** Mr. Narender S. Yadav and Mr. Abhishek Yadav,  
Advocates

**For Respondents:** Mr. Lzafeer Ahmad, Advocate (Liquidator/RP)  
Mr. Ashwini Kumar Singh, Advocate (R-1)

### **ORDER**

**19.12.2019** Heard Advocate - Shri Narender S. Yadav for Appellants 1 and 2. The Appellants are Directors of “Western India Metal Processors Limited” - Corporate Debtor. Respondent No.2 is Liquidator as the process before Adjudicating Authority has reached that stage. Respondent No.1 is the Operational Creditor who moved the Petition under Section 9 before the Adjudicating Authority (National Company Law Tribunal, Mumbai Bench).

2. The Section 9 Application under Insolvency and Bankruptcy Code, 2016 (IBC – in short) was admitted by the Adjudicating Authority on 13<sup>th</sup> March, 2019, which Order is impugned in this Appeal.

3. The Adjudicating Authority considered the case of the Respondent – Operational Creditor that the Corporate Debtor had entered into a contract with the Operational Creditor for supply of Hot Rolled Steel Coils, Mill Edge. The Operational Creditor arranged to send the goods to the Corporate Debtor which were shipped on 28.11.2015 and 30<sup>th</sup> November, 2015 from China and unloaded at Mumbai. The Operational Creditor raised two invoices - both dated 1<sup>st</sup> December, 2015. The due date for one was 27<sup>th</sup> March, 2016 and for the other, it was 29<sup>th</sup> March, 2016. The Operational Creditor claimed that Corporate Debtor had sent e-mail dated 29<sup>th</sup> March, 2016 to AGM and Relationship Manager of State Bank of India acknowledging the import and

asking the bank to pay. It appears that the payment was not made and after Operational Creditor sent reminders, Corporate Debtor confirmed receipt and also expressed that the amounts would be paid in instalments. Still the payment was not made and it led to execution of Debt Acknowledgement and Settlement Agreement on 16<sup>th</sup> November, 2016 (Page -68). The Operational Creditor claimed before the Adjudicating Authority that Notice under Section 8 dated 6<sup>th</sup> March, 2018 had been served on the Corporate Debtor but no Reply was received and that hence the Section 9 Application was filed.

4. The Adjudicating Authority observed that the Demand Notice was not replied by the Corporate Debtor and that when the Petition was listed and the Corporate Debtor did not attend, it had asked the Operational Creditor to intimate next date which was fixed for 7<sup>th</sup> March, 2019. It appears that in spite of same, the Corporate Debtor did not attend and the Adjudicating Authority proceeded to consider the Application and to admit the Application and the Corporate Insolvency Resolution Process (CIRP – in short) was initiated.

5. At the time of Appeal, the learned Counsel for the Appellants who have taken up the Appeal for the Corporate Debtor submit that in the Debt Acknowledgement and Settlement Agreement, there was Arbitration Clause and Exclusion Clause also was there whereby dispute, if any, had to be taken up before Arbitration as per the Agreement and that the parties had also agreed that disputes, if any, would be subject to jurisdiction in Germany. The learned Counsel for the Appellants further submits that the Section 8 Notice was not served on the Corporate Debtor and although the Application under

Section 9 mentioned that the postal receipt and acknowledgement were being annexed, actually the same were not annexed. The Counsel further states that even the Section 9 Petition was not duly served on the Corporate Debtor and thus the Corporate Debtor could not defend itself before the Adjudicating Authority.

6. The learned Counsel for the Respondent referred to the Reply Affidavit (Diary No.17149) and has pointed out the various efforts the Operational Creditor took to communicate its Demand Notice under Section 8 and that invoices were raised but in spite of that, there was default. Counsel submits that documents have been filed to show that repeated efforts were made to serve the Section 8 Notice and also the Petition under Section 9, which had been filed before the Adjudicating Authority, was served on the Corporate Debtor but still Corporate Debtor did not come and defend.

7. As regards the argument that there is Arbitration Clause and the parties had agreed to surrender to jurisdiction at Germany, in our view when the office of Corporate Debtor is situated in the jurisdiction of India, considering the provisions of Insolvency and Bankruptcy Code, 2016 (IBC in short), these arguments cannot be accepted. The jurisdiction of Indian Courts cannot be taken away by an Agreement between the parties considering the nature of IBC where the intention is to bring about resolution of the Company in trouble and not liquidation which is the last resort. To recover debt, the parties may agree for particular jurisdiction which would be subject matter of adjudication in an appropriate proceeding. However, resolution process is not a process for settling disputes or a recovery proceeding but an effort to save

the company if it is still able to pay its debts. Similarly, Arbitration Clause does not stop invoking of Jurisdiction under IBC.

8. As regards service of Section 8 Notice, copy of the Section 8 Notice is at Page 74. This Notice dated 6<sup>th</sup> March, 2018 has been referred by the Respondent in its Reply. Respondent has pointed out that before this Notice, on 24<sup>th</sup> January, 2018, a Section 8 Notice was personally served on the Appellant No.1 – Imran Khan (copy of the Notice is at Annexure R-2 – Page - 16/17). The Counsel for Operational Creditor has pointed out acknowledgement of the Appellant No.1 at Page – 26. The learned Counsel for the Appellant submits that this Notice was not part of record before the Adjudicating Authority. It is also stated that the acknowledgement (copy of which is at Page – 26) shows that it is on a plain paper with the signature of the Appellant No.1. When before the Adjudicating Authority, the Corporate Debtor did not attend or participate and in this Appeal, has taken a stand that no Notice as such was served on the Appellant, if the Operational Creditor has filed this copy of Notice dated 24<sup>th</sup> January, 2018 (Annexure R-2) with the acknowledgement to show that the Corporate Debtor did have Notice sent by Operational Creditor, we do not find force in the argument that this document is filed for the first time in the Appeal and so should be ignored. The signature on the acknowledgement although on plain paper is not disputed before us. The Counsel for the Respondent states that the acknowledgement sheet is in continuation of the notice which was served. The “Acknowledge of Receipt” is of same date of 24<sup>th</sup> January, 2018.

9. The learned Counsel for the Respondent points out that as per Para – 8 of the Reply filed in this Appeal, the Notice dated 6<sup>th</sup> March, 2018 which was relied on for the purpose of Section 9 proceeding, was also sent as an attachment in the e-mail (copy of which has been filed at Annexure R-3 of the Reply Page 27). Counsel points out that it was sent to the Appellant No.1. If the e-mail is perused, it refers to the attachment as “Western DN and Annexures\_20180306.pdf”. According to the Counsel, it shows that Demand Notice to the Corporate Debtor - Western India Metal Processors Limited was attached. Counsel states that not only the Operational Creditor sent copy of the Notice through courier UPS Saver (copy of which is at Annexure – R4 – Page 28) and acknowledgement is at Page 30 of the Reply which shows that the Notice was sent on 8<sup>th</sup> March, 2018 and served at the registered office of the Corporate Debtor on 10<sup>th</sup> March, 2018 and received by one Vijay from the office of Corporate Debtor.

10. The learned Counsel for the Respondent has further shown that even Section 9 Petition when it was filed, copy of the Petition was served through Clerk of Advocate of the Operational Creditor and there is also acknowledgement with stamp of the Corporate Debtor receiving the copy of Petition on 24<sup>th</sup> August, 2018. This is pointed out from Annexure – R-5 Page Nos.– 31 and 32. Counsel for Respondent further states that when the Adjudicating Authority directed to inform the date of next hearing fixed on 7<sup>th</sup> March, 2019, even that was duly executed and Affidavit in this regard is filed at Annexure – R6. Counsel states that these documents were before the Adjudicating Authority. Appellant in the Appeal has not denied receipt of this

intimation for the hearing of 7<sup>th</sup> March, 2019 and in the Appeal Para – 7(xi), accepted that such Notice of listing was received but it is claimed that “inadvertently, due to the fault of the employees”, the Appellants (for Corporate Debtor) did not participate.

11. From the above, we find that the Corporate Debtor was served with invoices as well as Section 8 Notice and was served with regard to the Petition filed and in spite of that, the Appellant failed to participate and raise any dispute. The debt was due and in default. Even today, there is no material to show that there is any pre-existing dispute. We do not find any substance in the Appeal.

The Appeal is dismissed. No orders as to costs.

[Justice A.I.S. Cheema]  
Member (Judicial)

[Kanthi Narahari]  
Member (Technical)

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