

A M/S WIZAMAN IMPEX PVT. LTD.

v.

KEDRION BIOPHARMA INC.

(Civil Appeal No. 466 of 2022)

B FEBRUARY 7, 2022

[DINESH MAHESHWARI AND VIKRAM NATH, JJ.]

Insolvency and Bankruptcy Code, 2016 – s.9 – Corporate Insolvency Resolution – Respondent filed s.9 application against

- C *appellant-corporate debtor – National Company Law Tribunal ('NCLT') considered the documents referred by the respondent in support of its contention that there had been acknowledgement of debt and thereby the period of limitation would shift from the date of acknowledgement – However, NCLT rejected the s.9 application by noting that, viewed from any angle, the application filed by the*
- D *respondent was beyond the limitation period of three years – In appeal before National Company Law Appellate Tribunal ('NCLAT'), respondent sought permission to produce exchanges of e-mails with respect to the propositions for settlement of dues – The said documents were not on record before the NCLT – Appellate Tribunal granted permission to respondent to place such additional documents on record – All suggestions, admissions and offers evidenced by said e-mails were taken by NCLAT as acknowledgement by the corporate debtor within time and therefore, the order of the NCLT rejecting s.9 application was set aside – Held: The impugned order of NCLAT allowing the appeal and even admitting the s.9 application cannot be sustained on a short point that the said additional documents were taken on record only while finally deciding the appeal and without adequate opportunity of response to the corporate debtor – However, at the same time, due consideration of the said documents also appears requisite and the documents i.e., the said e-mails, cannot be removed out of consideration only because they were not on record before NCLT – NCLT directed to re-consider the s.9 application filed by respondent-applicant while taking into consideration the additional documents taken on the record and at the same time, while extending adequate opportunity of hearing to the corporate debtor.*

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Partly allowing the appeal, the Court

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HELD: 1. The impugned order allowing the appeal and even admitting the application under Section 9 of the Insolvency and Bankruptcy Code, 2016 cannot be sustained on a short point that the said additional documents were taken on record only while finally deciding the appeal and without adequate opportunity of response to the corporate debtor. However, at the same time, due consideration of the said documents also appears requisite and the documents i.e., the said e-mails, cannot be removed out of consideration only because they were not on record before NCLT. [Para 7][124-B-C]

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2. The appropriate course in this matter would be to set aside the impugned order passed by NCLAT to the extent it has allowed the application under Section 9 of the Code filed by the applicant-respondent but while retaining the other part of the impugned order taking the documents filed on record. After taking the said documents on record, for the appropriate process of adjudication in the matter, it is also considered just and proper that the order dated 06.10.2020 passed by NCLT be also set aside and the NCLT be directed to re-consider the application under Section 9 of the Code as filed by the applicant-respondent while taking into consideration the additional documents now taken on record and at the same time, while extending an adequate opportunity of hearing to the corporate debtor. [Para 8][124-C-E]

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CIVIL APPELLATE JURISDICTION: Civil Appeal No. 466 of 2022.

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From the Judgment and Order dated 15.12.2021 of the National Company Law Appellate Tribunal, New Delhi in Company Appeal (AT) (Insolvency) No.981 of 2020.

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Jayant K. Mehta, Sr. Adv., A. T. Patra, Karan Khaitan, Aditya Ghadge, Ms. Bina Gupta, Advs. for the Appellant.

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Nakul Dewan, Sr. Adv., Ms. Suruchi Suri, Simran Jot Singh, Chanchal Kumar Ganguli, Advs. for the Respondent.

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- A The Judgment of the Court was delivered by
DINESH MAHESHWARI, J.
1. Having regard to the short point involved and the contesting parties being represented, we have heard learned counsel for the parties finally at this stage itself.
- B 2. By way of this appeal, the appellant-company, said to be the corporate debtor within the meaning of the Insolvency and Bankruptcy Code, 2016¹, has questioned the judgment and order dated 15.12.2021, as passed in Company Appeal (AT) Insolvency No. 981 of 2020 whereby, the National Company Law Appellate Tribunal, Principal Bench, New Delhi² has set aside the order dated 06.10.2020, as passed by the National Company Law Tribunal, New Delhi Bench- V³ in CP(IB) 841(ND) of 2020 and has also allowed the application moved by the applicant (respondent herein) under Section 9 of the Code.
3. The said application under Section 9 of the Code was filed by
- D the applicant-respondent on 30.06.2020, in its capacity as an operational creditor of the corporate debtor while claiming, *inter alia*, that there had been a distribution agreement whereby, the corporate debtor was to sell the pharmaceutical products of the applicant company only until its subsidiary by the name “Kedrion India” was capable of doing so. Several
- E invoices were raised in duration and credit notes were also issued. It has been the case of the applicant-respondent that as regards the debts due, a notice dated 25.07.2019 was sent, demanding a sum of USD 9,01,000 but, the said demand notice was returned undelivered. Thereafter, on 07.08.2019, another demand notice was sent at the new registered office address of the corporate debtor. The applicant alleged that on 17.08.2019,
- F the corporate debtor replied to the said demand notice disputing the admitted and acknowledged the dues payable, with reference to its pending dispute with the Directorate of Health Services, Maharashtra with regard to the supply of short shelf-life products. The applicant contended that the corporate debtor had committed a default within the meaning of
- G Section 3(12) of the Code and the outstanding amount qualified as an operational debt within the meaning of Section 3(11) read with Section 5(21) of the Code.

¹ Hereinafter also referred to as ‘the Code’

² Hereinafter also referred to as ‘the Appellate Tribunal’ or ‘the NCLAT’.

H ³ Hereinafter also referred to as ‘the Adjudicating Authority’ or‘the NCLT’.

4. In its order dated 06.10.2020, the NCLT considered the documents referred by the applicant in support of its contention that there had been acknowledgment of debt and thereby the period of limitation would shift from the date of acknowledgment. The NCLT observed that the document dated 15.12.2017 was a credit memo, issued by the applicant and not by the respondent and thus, it could not be treated as an acknowledgment of debt. As regards document dated 07.07.2016 carrying the signatures of the Director of the Company and addressed to the Bank regarding payment of pending invoices, the NCLT observed that even if the said letter was treated as an acknowledgment of debt, the limitation would run from its date, i.e., 07.07.2016. The NCLT further considered another letter dated 02.02.2017 and observed that even if the said document was taken as an acknowledgement of debt, the limitation would run from 02.02.2017. Hence, the NCLT came to the conclusion that, viewed from any angle, the application filed on 30.06.2020 was beyond the period of three years in terms of Article 137 of the Limitation Act, 1963. Thus, the NCLT proceeded to reject the application so made by the respondent.

5. It appears from the perusal of the record that the applicant-respondent, in appeal against the aforesaid order of the NCLT, moved an application (I.A. No. 2685 of 2020) before the Appellate Tribunal and thereby, sought permission to produce the exchanges of e-mails from 03.11.2017 to 11.01.2019 with respect to the propositions for settlement of dues. Admittedly, the said documents were not on record before the NCLT.

6. However, the Appellate Tribunal found it just and proper to grant permission to the applicant (appellant before the NCLAT) to place such additional documents on record; but accorded such permission only in the impugned order dated 15.12.2021. Thereafter, on the basis of the said additional documents taken on record, the Appellate Tribunal came to the conclusion that the corporate debtor had admitted its liability and had shown its readiness to make payment as also to revise the settlement proposal. All such suggestions, admissions and offers evidenced by the said e-mails were taken by the Appellate Tribunal as acknowledgement by the corporate debtor within time and thus, it was held that the Adjudicating Authority erred in holding the applicant's claim to be barred by time.

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- A 7. Though several contentions have been urged by the learned counsel for contesting parties as regards effect of the said documents placed before the Appellate Tribunal by way of I.A. No. 2685 of 2020 but, we are clearly of the view that the impugned order allowing the appeal and even admitting the application under Section 9 of the Code cannot be sustained on a short point that the said additional documents were taken on record only while finally deciding the appeal and without adequate opportunity of response to the corporate debtor. However, at the same time, due consideration of the said documents also appears requisite and the documents i.e., the said e-mails, cannot be removed out of consideration only because they were not on record before NCLT.
- B 8. For what has been discussed and observed hereinabove, in our view, the appropriate course in this matter would be to set aside the impugned order dated 15.12.2021 passed by NCLAT to the extent it has allowed the application under Section 9 of the Code filed by the applicant-respondent but while retaining the other part of the impugned order taking the documents filed with I.A. No. 2685 of 2020 on record. After taking the said documents on record, for the appropriate process of adjudication in the matter, it is also considered just and proper that the order dated 06.10.2020 passed by NCLT be also set aside and the NCLT be directed to re-consider the application under Section 9 of the Code as filed by the applicant-respondent while taking into consideration the additional documents now taken on record and at the same time, while extending an adequate opportunity of hearing to the corporate debtor.
- C 9. We may, of course, observe that at the outset Mr. Nakul Dewan, learned senior counsel appearing for the respondent has attempted to question the maintainability of this appeal at the instance of the corporate debtor because NCLAT had, by the impugned order, allowed the application under Section 9 of the Code. We have overruled such objection for the simple reason that the said application had been rejected by NCLT and was allowed only by way of impugned order and until the said order was examined by this Court and attained finality, the right and locus of the corporate debtor to challenge the correctness thereof, could not have been denied. In any case, in the present matter, the impugned order was passed on 15.12.2021 and admittedly, no other steps had been taken in the matter including that of appointment of resolution professional. In the given set of facts, we overruled the objections raised by the learned senior counsel for the respondent.
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10. Accordingly, this appeal is allowed to the extent and in the manner indicated hereinabove. The application under Section 9 of the Code in CP(IB) 841(ND) of 2020 stands restored for re-consideration by the Adjudicating Authority keeping in view the observations and requirements foregoing. A

11. It goes without saying that we have not pronounced on the merits of the case either way and not even on the evidentiary value and effect of the documents in question. All the aspects are left open for examination by the Adjudicating Authority in accordance with law. B

12. Having regard to the circumstances of the case and the fact that the application under Section 9 of the Code was filed way back on 30.06.2020, we would expect the Adjudicating Authority to assign a reasonable priority to the matter and to proceed expeditiously. C

Bibhuti Bhushan Bose

Appeal partly allowed.