

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 85 of 2018

[Arising out of Order dated 15th January, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi Bench in Company Petition No. (IB)480 (ND)/2017]

IN THE MATTER OF:

M/s Impex Services India Private Limited

Flat No.402, Pragati House,
4th Floor,
47-48, Nehru Place,
New Delhi.

...Appellant

Vs

M/s DBA Enterprises LLP

Having their registered office at:
K-336, Sarita Vihar,
New Delhi - 110076.

...Respondent

Present:

For Appellant: Mr. K. V. Balakrishnan, Advocate.

For Respondent: Mr. Sumit Shukla and Mr. Sushil, Advocates.

J U D G M E N T

BANSI LAL BHAT, J.

This appeal has been preferred by Appellant – ‘Impex Services India Private Limited’ (Operational Creditor) against impugned order dated 15th January, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi Bench, in Company Petition No. (IB)480 (ND)/2017.

2. By the impugned order, the Adjudicating Authority rejected the Appellant's application for triggering the Corporate Insolvency Resolution Process filed by it under Section 9 of the Insolvency and Bankruptcy Code, 2016 (in short 'I&B Code') on the ground that disputes existed between the Appellant/Operational Creditor and the Respondent/Corporate Debtor in regard to deficiency in services even prior to the issuance of demand notice under Section 8(1) of the I&B Code by the Operational Creditor.

3. The issue raised in this appeal is that the agreement dated 01.10.2015 between Appellant - 'M/s Impex Services India Pvt. Ltd.' and 'M/s SSMP Industries Ltd.' does not relate to any transactions made between the Appellant and 'M/s DBA Enterprises LLP.' (Corporate Debtor) and the Adjudicating Authority erred in coming to the conclusion that there was 'an existence of dispute' between the Appellant/Operational Creditor and the Respondent/ Corporate Debtor.

4. The facts germane to the disposal of instant appeal may briefly be noticed. The case set up by the Appellant/ Operational Creditor before the Adjudicating Authority was that the Appellant/Operational Creditor, engaged in the business of Freight Forwarding, rendered services to the Respondent/Corporate Debtor for a period spanning about two years. However, from November, 2016 the Respondent/ Corporate Debtor defaulted in remitting the amounts under some invoices, though, the Appellant/ Operational Creditor discharged its part of the work to the satisfaction of

Respondent/ Corporate Debtor, who did not find any fault with the quality of services rendered. It is the further case of Appellant/ Operational Creditor that the Respondent/ Corporate Debtor, in terms of its email dated 19.04.2017, admitted the amount due to the Appellant/ Operational Creditor as Rs.14,15,923.65/- which is perfectly in tune with the Ledger Account maintained by the Appellant/ Operational Creditor. The Appellant/ Operational Creditor claimed that since the Respondent/ Corporate Debtor failed to clear the liability, it was constrained to issue demand notice in terms of Section 8 (1) of I&B Code, which came to be duly served on the Respondent/ Corporate Debtor. Appellant/ Operational Creditor claimed that it was only after issuance of such notice that the Respondent/ Corporate Debtor issued notice of dispute proposing arbitration in the matter.

5. Respondent/ Corporate Debtor in its reply filed before the Adjudicating Authority raised the issue of pre-existing dispute stating that the Appellant/ Operational Creditor was providing services to the sister concern of the Respondent/ Corporate Debtor viz. 'M/s SSMP Industries Ltd.' under an agreement executed on 01.10.2015. It was stated that though there was no formal agreement between the parties to the application u/s 9, the Respondent/ Corporate Debtor being the sister concern of 'M/s SSMP Industries Ltd.' was also provided with the services on similar terms. It was further stated that the management of 'M/s SSMP Industries Ltd.' and the Corporate Debtor- 'DBA Enterprises LLP' was

common and the bills were discharged from the accounts of either Company. It was further stated that the Registered Office of both Companies had common address and liability of one was discharged by the other. It was further stated that both Companies were entitled to duty drawbacks/ benefits from the Director General of Foreign Trade. The documentation had to be done by the Freight Forwarding Agent, who was obliged to fill in the format in regard to uploading of shipping bills on the DGFT website correctly. It was further stated that due to negligence on the part of Appellant/ Operational Creditor in filling in the documents online correctly benefits under the duty drawbacks and the Vishwas Krishi Upaj Yojana (VKUY) were withheld causing financial loss to the Respondent/ Corporate Debtor to the tune of Rs.1,43,507/- under duty drawback and Rs.4,26,277/- under VKUY, respectively. It was further stated that Respondent/ Corporate Debtor had been making a demand for compensation/ reimbursement for the negligence in service. It is further stated that in terms of e-mails dated 19.04.2016 and 22.04.2016 the Appellant/ Operational Creditor admitted its negligence but subsequently denied any responsibility. It was stated that correspondence in this regard had started on 18.04.2016 and e-mail dated 19.04.2016 could not be construed as an acknowledgement of debt by the Respondent/ Corporate Debtor.

6. On consideration of documents relied upon by the parties, the learned Adjudicating Authority was of the view that disputes existed inter-se the

parties even prior to issuance of Demand Notice under Section 8 of I&B Code with respect to deficiency in services rendered. Resultantly, petition under Section 9 of I&B Code was rejected.

7. Learned counsel for the Appellant/ Operational Creditor submits that the Adjudicating Authority was bound to admit the petition as the invoices in question were raised by the Appellant/ Operational Creditor in regard to services rendered to the Respondent/ Corporate Debtor, which had not denied the delivery of consignments at the places mentioned by the Respondent. It is further submitted that no discrepancy has been intimated by the Respondent to the Appellant within the period stipulated in the invoices. It is further submitted that the Respondent has admitted the dues as reflected in e-mail dated 19.04.2017. It is further submitted that the dispute raised by the Respondent was in regard to the invoices raised by the Appellant on 'M/s SSMP Industries Ltd.' which is a company incorporated under the Companies Act, while the claim of the Appellant is in regard to 'M/s DBA Enterprises LLP' which is a limited liability partnership firm. It is submitted that dispute raised by Respondent/ Corporate Debtor is not in regard to the invoices raised by the Appellant on 'M/s DBA Enterprises LLP'. Thus, the Adjudicating Authority committed grave error in rejecting the Appellants petition under Section 9 of the I&B Code.

8. Per Contra it is contended on behalf of Respondent/ Corporate Debtor that the Respondent suffered financial loss on account of denial of export

incentives due to negligence on the part of Appellant. When brought to its notice, the Appellant failed to resolve the issues. It is further submitted that it was after wait of 16 months that the Respondent/ its sister concern raised the debit note dated 31.08.2017 to recover the losses as per agreed terms. However, the Appellant disputed the entire claim which had been previously admitted forcing the Respondent to invite the Appellant for conciliation. It is further submitted that so long as the Appellant was getting the business it continued to work with the Respondent and its sister concern treating them as a common account. It is further contended that the Appellant suppressed the factum of existence of unresolved dispute between the Appellant and the Respondent before the Adjudicating Authority, which demonstrated malafides on its part.

9. Heard learned counsel for the parties' and perused the record. The requisite conditions necessary to trigger the Corporate Insolvency Resolution Process under Section 9 of the I&B Code by an Operational Creditor are:

- (i) occurrence of a default;
- (ii) delivery of a demand notice of an unpaid operational debt;
- (iii) non-receipt of payment by the Operational Creditor from the Corporate Debtor within the period of 10 days of receipt of the demand notice or receipt of reply from the Corporate Debtor not indicating existence of a pre-existing dispute or repayment of the unpaid operational debt.

If the aforesaid conditions exist, the Operational Creditor may file an application under Section 9(2) of the I&B Code in the prescribed manner alongwith the requisite fee. A copy of the invoice demanding payment or demand notice delivered by the Operational Creditor to the Corporate Debtor has to be furnished with the application. This is clearly borne out by conjoint reading of Section 8 and 9 (1) of the I&B Code. The Hon'ble Apex Court while dealing with this aspect in **“Macquarie Bank Limited Vs Shilpi Cable Technologies Ltd.” in Civil Appeals No. 15135, 15481 and 15447 of 2017 decided on 15th December, 2017** held that the requirement of an application filed under Section 9(2) of the I&B Code being accompanied by an invoice/ demand notice is a mandatory condition precedent to the filing of the application.

10. While dealing with triggering of Corporate Insolvency Resolution Process at the instance of an Operational Creditor in **“Mobilox Innovations Private Limited V/s. Kirusa Software Private Limited”, Civil Appeal No.9405 of 2017 decided on 21.09.2017**, the Hon'ble Apex Court held:-

“It is clear, therefore, that once the operational creditor has filed an application, which is otherwise complete, the adjudicating authority must reject the application Under Section 9(5)(2)(d) if notice of dispute has been received by the operational creditor or there is a record of dispute in the

information utility. It is clear that such notice must bring to the notice of the operational creditor the “existence” of a dispute or the fact that a suit or arbitration proceeding relating to a dispute is pending or the fact that a suit or arbitration proceeding relating to a dispute is pending between the parties. Therefore, all that the adjudicating authority is to see at this stage is whether there is a plausible contention which requires further investigation and that the “dispute” is not a patently feeble legal argument or an assertion of fact unsupported by evidence. It is important to separate the grain from the chaff and to reject a spurious defence which is mere bluster. However, in doing so, the Court does not at this stage examine the merits of the dispute except to the extent indicated above. So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application.”

11. Adverting to the facts of the instant case, be it seen that the Appellant/ Operational Creditor as also the Respondent/Corporate Debtor have relied upon agreement executed on 01.10.2015 inter-se the Appellant/ Operational Creditor and ‘M/s SSMP Industries Pvt. Ltd.’ which happens to be sister concern of Respondent/ Corporate Debtor - ‘M/s DBA Enterprises’. Parties also rely on common e-mails. It emerges from record that the

Respondent/ Corporate Debtor 'M/s DBA Enterprises' was provided services on terms and conditions similar to those governing relationship between 'M/s SSMP Industries Pvt. Ltd.' and the Operational Creditor. It is not in controversy that Corporate Debtor – 'M/s DBA Enterprises' and 'M/s SSMP Industries Pvt. Ltd.' shared a common address and common management. The bills raised qua either of them were discharged from accounts of one or the other irrespective of the fact that only one of them was a 'Corporate Entity'. The conclusion about the transactions of the two entities being interrelated is deducible from the fact that the e-mails relied upon by the parties are addressed to the sister company of the Respondent/Corporate Debtor. This is besides the fact that the agreement dated 01.10.2015 too was executed between the Appellant/ Operational Creditor and 'M/s SSMP Industries Pvt. Ltd.'. Same conclusion can be drawn from the debit notes dated 31.08.2017 forming Annexure F-1 at page 28-29 of the reply filed by Respondent/ Corporate Debtor. This conclusion is further reinforced from the email dated 19.04.2017 from the Appellant/Operational Creditor. Admittedly, there was no separate agreement executed between the Appellant/ Operational Creditor and the Respondent/Corporate Debtor qua the shipment of the Respondent Company. It emerges that non-receipt of export incentives by the Respondent/Corporate Debtor in terms of agreement dated 01.10.2015 governing there inter-se relations in respect of both entities and errors in the shipping bills of the Appellant/Operational Creditor led to a dispute in regard to performance of services which was

raised by 'M/s SSMP Pvt. Ltd.' in terms of its e-mail dated 18.04.2016 forming Annexure-B at page 126 of the appeal. The Appellant/ Operational Creditor appears to have assured the Respondent that corrective action will be taken. It is manifestly clear that the dispute in regard to deficiency of service was raised as early as 18.04.2016. Respondent/ Corporate Debtor claimed to have suffered pecuniary loss in an amount of Rs.5,69,734/-. Admittedly, demand notice in terms of Section 8(1) of I&B Code was issued by the Appellant/ Operational Creditor on 04.09.2017 demanding payment. However, the Respondent/ Corporate Debtor issued letter dated 01.09.2017 asking the Appellant/ Operational Creditor to resolve the dispute by way of conciliation proceedings under Arbitration Act. Thus, there is no escape from the conclusion that the Respondent/Corporate Debtor had raised dispute much prior to the issuance of demand notice by Appellant/ Operational Creditor under Section 8(1) of I&B Code. The mere fact that the Respondent/ Corporate Debtor had sent its ledger account via. e-mail dated 19.04.2017 in regard to principal amount of dues of the Appellant/Operational Creditor as per the closing balance mentioned in the statement would not in any manner dilute the factum of a pre-existing dispute when the demand notice in terms of Section 8(1) of I&B Code was issued by the Appellant/Operational Creditor.

12. On consideration of the material on record, we are of the considered opinion that the Respondent/ Corporate Debtor has been able to demonstrate that a pre-existing dispute in regard to deficiency of service was

in existence when the demand notice under Section 8(1) of I&B Code was issued by the Appellant/ Operational Creditor. The Adjudicating Authority did not err in noticing the same. There being no infirmity in the impugned order and the appeal being devoid of merit, we dismiss the appeal. There shall be no orders as to costs.

[Justice S. J. Mukhopadhaya]
Chairperson

[Justice Bansi Lal Bhat]
Member (Judicial)

NEW DELHI
19th July, 2018

AM