

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI
Company Appeal (AT)(Insolvency) No. 667 of 2020

[Arising out of order dated 26th June, 2020 passed by the Adjudicating Authority, National Company Law Tribunal, Hyderabad Bench, Hyderabad, in CP (IB) No. 636/9/HDB/2019]

IN THE MATTER OF:

M/s. M + R Logistics (India) Private Limited

(Formerly PL Shipping & Logistics Private Limited)

Having Registered Office at:

56/57, 3rd Floor, Rajaji Salai,

Chennai- 600 001

Tamil Nadu

Operational Creditor/
... **Appellant**

Vs.

M/s AGA Publications Limited

Having Registered Office at:

396, Vaartha, Lower Tank,

Bund Road,

Hyderabad- 500 080

Corporate Debtor/
.. **Respondent**

Present:

For Appellant:

Mr. E. Omprakash, Sr. Advocate with Mr. M. Anbalagan and Ms. Rithikha , Advocates

For Respondents:

Mr. P. Nagesh, Advocate

J U D G M E N T

(1st February, 2021)

KANTHI NARAHARI, MEMBER (TECHNICAL)

The present appeal filed by the Appellant aggrieved by the order dated 26th June, 2020 passed by National Company Law Tribunal,

Hyderabad Bench, Hyderabad (“**Adjudicating Authority**”), in CP (IB) No. 636/9/HDB/2019 rejecting the Application filed by the Appellant.

Brief Facts:

2. The Appellant filed the application under Section 9 of Insolvency and Bankruptcy Code, 2016 (in short ‘**IBC**’) in the capacity as Operational Creditor. The Appellant is engaged in the business of Freight Forwarding and Custom Clearance and the Respondent is a News Print Limited.

3. On 01.01.2010, the Respondent-Company issued a contractual order to the Appellant. The Appellant was handling consignment of the Respondent from 01.01.2010 to 29.05.2010 containing 14 documents in a span of six months and they have raised 14 invoices for payment of their charges in terms of the contractual order. The Invoices raised are between 12.05.2010 to 29.05.2010. The last payment was received by the Appellant from the Respondent was on 06.07.2010 for a sum of Rs. 1,89,000/-.

4. Failing to pay the amount by the Respondent, the Appellant issued a statutory notice dated 09.12.2010 under Section 434 of the Companies Act, 1956 for winding up of Respondent-Company on the ground of inability to pay the dues. After issuance of Notice, the Appellant filed Company Petition being C.P. No. 34 of 2011 before the Hon’ble High Court of Andhra Pradesh for winding up of the Respondent- Company.

5. The Respondent filed its Counter Affidavit before the Hon'ble High Court and raised some issues on two documents. During the pendency of the aforesaid Company Petition before the Hon'ble High Court, the Appellant preferred Civil Suit being OS No. 778 of 2013 before the Court of the Chief Judge, City Civil Court, Hyderabad for recovery of the same amount. The Respondent filed the Written Statement on 20.06.2014 with the same stand as stated in the Counter Affidavit filed in the Company Petition before the Hon'ble High Court of Andhra Prasad.

6. While so, after introduction of IBC, 2016, the Appellant filed an I.A. No. 5/2018 in C.P. No. 34/2011 before the Hon'ble High Court of Andhra Pradesh to transfer the Company Petition to the National Company Law Tribunal (in short NCLT), Hyderabad on 14.06.2018. The Hon'ble High Court of Andhra Pradesh allowed the Application and ordered to transmit the case filed to NCLT Hyderabad on 18.07.2018.

7. The Company Petition was taken on file by the Adjudicating Authority on 05.09.2019. The Respondent filed Counter Affidavit before the Adjudicating Authority and pleaded that there was dispute even before the initiation of the proceeding and hence the Appellant cannot invoke the provision of IBC, 2016. The Adjudicating Authority accepted the contention of the Respondent and passed the following order:

...

“13. Since there exists a real dispute between the Applicant and the Respondent in respect of claims made vide invoices raised in the month of May, 2010, we are not inclined to admit this application.

14. In view of the above observations, CP(IB) No. 636/9/HDB/2019 is hereby rejected. No order as to costs”

...

8. The Respondent filed their Counter Affidavit before this Tribunal and submitted by admitting the fact that Respondent engaged the Appellant as forwarding Agent on 01.01.2010 to handle their voluminous SIC (Sea Import Consignment) capital consignment with necessary authority applicable to handle the same. It is further submitted that the dispute arises between the parties when the Appellant Company did not provide proper service and due to insufficient and delayed service, existence of dispute arose between the parties. The gross claim of the Appellant was Rs. 30,51,583.28. The Respondent on 06.07.2010 has remitted an amount of Rs. 1,89,000/- to the Appellant and disputed the balance payment on the ground of deficiency of service due to which the Respondent had to face huge financial loss.

9. It is also submitted that the Appellant vide e-mail dated 08.07.2010 has agreed that there is a deficiency in service rendered by them and they undertook to absorb loss incurred by the Respondent

to the extent of Rs. 1,10,799/-. Thereafter, vide email dated 16.07.2010, the Appellant accepted to bear Rs. 2.06 lakhs towards delay in clearance of two documents. It is further submitted that the Appellant filed a Civil Suit being OS No. 778 of 2013 before the Hon'ble City Civil Court, Hyderabad claiming an amount of Rs. 46,24,500/- against the invoices. It is submitted that the Respondent filed its Written Statement to the Civil Suit wherein the Respondent raised a counter claim of Rs. 41 lakhs due to delay and deficiency in services caused by the Appellant. The counter claim was raised as Respondent had to appoint another agent in place of the Appellant because of the delay and deficiency in services caused by the Appellant. The reasons best known to the Appellant, the Appellant did not pursue the Civil Suit and it was dismissed for default on 03.08.2018 by the City Civil Court, at Hyderabad.

Findings:

10. Heard learned Counsel appearing for the respective parties. Perused the pleadings, the documents and the citations filed relied upon by the parties in their support.

11. From the perusal of the impugned order at paragraph-4, the contents of the Respondent have been noted whereby the Respondent has taken a stand on following three issues and sought for dismissal of the Application filed by the Applicant/Appellant.

- a) Existence of dispute prior to notice
- b) Barred by Limitation

12. With regard to the 2nd part i.e., barred by limitation, the Adjudicating Authority has taken a correct stand that the proceeding has been transferred from the Hon'ble High Court, Andhra Pradesh in I.A. No. 5/2018 in C.P. No. 34/2011 and the Hon'ble High Court, by order dated 18.07.2018, transferred the matter to NCLT, Hyderabad Bench. In pursuance of the said order, the Appellant approached NCLT, Hyderabad. Therefore, there is no question of barred by limitation. Accordingly, the Adjudicating Authority rejected the stand of the Respondent herein. Further, the main issue i.e., existence of dispute prior to the notice was considered by the Adjudicating Authority and in our view, the Adjudicating Authority, by relying of the judgment of the Hon'ble Supreme Court was of the view that there is existence of dispute prior to the filing of the proceeding before the Adjudicating Authority, rightly rejected the Application filed by the Appellant.

13. We have perused the documents filed by the Appellant at Page-59, Annexure-P, the Appellant on 09.12.2010 issued a statutory Notice under Section 434 of the Companies Act, 1956 to the Respondent herein demanding an amount of Rs. 30,62,583/- on the basis of Invoices as mentioned in the Demand Notice. It is admitted in the Demand Notice signed by the Appellant that they have received a cheque for Rs. 1,89,000/- from the Respondent leaving a huge balance of Rs. 30,62,583/-.

14. In paragraph-8 of the Demand Notice, the Appellant admitted that they have addressed an e-mail dated 08.07.2010 stating that they are willing to bear the cost for an amount of Rs. 1,10,779/-. From the perusal of the Demand Notice under Section 434 of the Companies Act, 1956, the Appellant had admitted that they are willing to bear some costs. After the issuance of the above Demand Notice, the Appellant filed the Company Petition before the Hon'ble High Court of Andhra Pradesh seeking winding up of the Respondent-Company for the reasons that the Respondent failed and neglected to pay the outstanding amount of Rs. 30,62,583/- with interest of 18% per annum for the services rendered by it to the Respondent as on filing of the petition. The Respondent had filed Counter Affidavit to the above Company Petition on 26.09.2011.

15. It is seen that the Respondent had raised the dispute before the Hon'ble High Court of Andhra Pradesh in the Counter Affidavit dated 26.09.2011 filed as Annexure-R at page 81 along with the Appellant's Appeal Paper Book., it is stated that the Appellant failed to maintain the time schedule to clear the cargo out of which the Respondent suffered the business loss on account of delay. As a matter fact, the Petitioner-Company (Appellant) admitted the delay and even agreed to bear a sum of Rs. 1,10,779/-and Rs. 2,60,000/- vide their e-mails dated 08.07.2010 and 16.07.2010. Further, it is stated as such, the services rendered by the Appellant to the Respondent under the contract required to examine the relevant bills, its acknowledgement,

number, delay occurred, damaged caused on account of such delay, verification and reconciliation of accounts after taking into account debit and credit notes, if any exchanged between the parties and the Respondent is ready and willing to settle and pay the amounts found.

16. Further Counter Affidavit dated 26.09.2011, the Respondent had stated that there are certain disputes existed between the parties to settle their respective accounts in relation to contract entered by and between the Petition (Appellant) and Respondent and such dispute will have to be resolved after taking into consideration of reconciliation of accounts. The Appellant also filed Civil Suit before the Hon'ble City Civil Court for recovery of the dues amounting to Rs. 30,62,583/- towards principle and Rs. 15,61,917/- towards interest aggregating to Rs. 46,25,500/- in the above suit. Respondent filed their Written Statement before the City Civil Court.

17. At paragraph-e, page 113 of Volume-1, it is stated that the Plaintiff (Appellant) failed to carry out the jobs entrusted to them as some of the consignments cleared with abnormal delay out of which the Defendant (Respondent) forced to incur demurrages and handling charges in the Port of entry and paid to the custom authorities and some of the consignments have not been cleared though documents furnished, the goods arrived to the Port as per schedule and on account of withholding documents and consignment or news print by the Plaintiff (Appellant), the Defendant (Respondent) being a News Paper industry was forced to buy the news print in the open market by

incurring substantial money and further spent money once again and obtained the loan documents from the Bank appointed the Clearing Agent afresh and thereby incurred substantial loss towards demurrages and handling charges. Apart from these costs and business loss etc. totalling to Rs. 41 lakhs, it is also stated that the Respondent was forced to terminate the Appellant and appointing another Agent. Whereas the Appellant without rendering proper account and without reconciliation both the accounts maintained by the parties, the Appellant agreed to forgo a sum of Rs. 1,10,799/- as well as Rs. 2,60,000/- towards delay in clearing the consignment which amount is a paltry sum when compared to claim of Rs. 45 lakhs against the Appellant.

18. After transferring the matter from the Hon'ble High Court of Andhra Pradesh to the NCLT, Hyderabad by order of the Hon'ble High Court, the Appellant issued Demand Notice under Section 8 of IBC dated 21.02.2019 (Annexure – W, page 120 of Vol. II) to the Respondent claiming a sum of Rs. 30,62,583.00 with an interest @ 18% per annum since 06.07.2010. The Respondent filed Counter to the Application before the Adjudicating Authority, raising the same plea as raised before the Hon'ble High Court of Andhra Pradesh and the Hon'ble City Civil Court at Hyderabad stating that there exists a dispute prior to the initiation of the proceeding before the Adjudicating Authority and submitted that as per the provisions of IBC, if there exists a dispute

prior to the initiation of the proceeding or prior to the issuance of Demand Notice, the Application is not maintainable.

19. Now, we intend to refer to the crucial e-mails addressed by the Appellant to the Respondent dated 08.07.2010 and 16.07.2010 (pages 13 & 14 of the Reply filed by the Respondent before this Tribunal). Page-13, Annexure-A1 is the email dated 08.07.2010 addressed to the Respondent whereby it is stated:

“Dear Sir,

Thanks at the outset for extending the personal appointment today.

Further to our discussions, have discussed this our senior management and agree to absorb the detention charges that accrued due to our delay on these shipments.”

...

Page -14 of the Reply, the Appellant addressed an e-mail dated 16.07.2010 to the Respondent stated as under:

“Dear Mr. Gaurav,

Further to our discussion we, PL Shipping accepted to bear Rs. 2.6 lakhs towards delay in clearance of the 2 documents.”

It is apparent from the e-mails of the Appellant that they have acknowledged that there was some delay on their part and wanted to forgo a sum of Rs. 1,10,799/- and Rs. 2,60,000/- lakhs.

It is to be noted that these e-mails of the Appellant are after the receipt of Final Payment from the Respondent. The Respondent had categorically stated before the Hon'ble High Court, Andhra Pradesh and the Hon'ble City Civil Court, at Hyderabad that there was delay and dispute with regard to the accounts and invoices raised by the Appellant. They have clearly stated that the accounts need to be reconciled. Further, the Respondent had categorically stated that they have suffered loss for the abnormal delay and thereby they were constrained to engage another Agent to clear the goods consignment and spent money towards demurrage and neglecting charges and loss of business. It is explicit that the Respondent had raised the dispute prior to the filing of the petition and prior to the issuance of Demand Notice. Therefore, in view of the provisions of IBC, where there is existence of dispute, the Application is not maintainable and liable to be rejected. Further, Hon'ble Supreme Court in ***Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software Pvt. Ltd.*** — **(2018) 1 SCC 353** has categorically held:

“33. The scheme under Sections 8 and 9 of the Code, appears to be that an operational creditor, as defined, may, on the occurrence of a default (i.e. on non-payment of a debt, any part whereof has become due and payable and has not been repaid), deliver a demand notice of such unpaid operational debt or deliver the copy of an invoice demanding payment of such amount to the corporate debtor in the form set out

*in Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 read with Form 3 or 4, as the case may be [Section 8(1)]. **Within a period of 10 days of the receipt of such demand notice or copy of invoice, the corporate debtor must bring to the notice of the operational creditor the existence of a dispute and/or the record of the pendency of a suit or arbitration proceeding filed before the receipt of such notice or invoice in relation to such dispute [Section 8(2)(a)]. What is important is that the existence of the dispute and/or the suit or arbitration proceeding must be pre-existing i.e. it must exist before the receipt of the demand notice or invoice, as the case may be.***

“51. 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.”

[Emphasis supplied]

LEGAL POSITION:

20. Section 9 of IBC deals with the Application for initiation of Corporate Insolvency Resolution Process (in short **CIRP**) by Operational Creditor. Sub-section 3(d) read as under:

...

“(3)(d) *a copy of any record with information utility confirming that there is no payment of an unpaid operational debt by the corporate debtor, if available; and*”

...

As per the decision of the Hon’ble Apex Court, the Corporate Debtor (Respondent in this case) must bring to the notice of Operational Creditor, the existence of a dispute and/or the record of the pendency of a suit or arbitration proceeding filed before the receipt of such notice or invoice in relation to such dispute. In the present case, the Respondent very well brought to the notice of the Appellant with regard to the existence of dispute much prior to filing Section 9 Application. Therefore, the Judgment of Hon’ble Apex Court squarely applicable to the facts of present Case.

..

21. From the facts and records it is emphatically clear that there exists a dispute between the parties which are prior to issuance of Demand Notice. Neither the Adjudicating Authority nor this Appellate Tribunal, in summary jurisdiction, can go into those issues which otherwise require a regular trial.

22. From the above provision of law, it is clear that the moment there is an existence of dispute, the Corporate Debtor gets out of clutches of the rigour of the Court. Further, the adequacy of dispute is only to be seen where the dispute raised by the Corporate Debtor specify as a dispute as defined under Section 5(6) of IBC. Further, the Hon'ble Supreme Court clearly held:

“What is important is that the existence of dispute and/or the suit or arbitration proceedings must be pre-existing i.e., it must exist before the receipt of the Demand Notice or Invoices as the case may be.”

CONCLUSION:

23. Hence by relying judgment of the Hon'ble Supreme Court and in view of provisions of IBC i.e., 9(5)(ii)(d) of IBC that there is a record of dispute existing between the parties prior to issuance of Demand Notice and prior to filing of Section 9 Application. Hence, the same cannot be either entertained by the Adjudicating Authority or this Tribunal in a Summary Proceeding as held by the Hon'ble Supreme Court in the matter of ***Mobilex Innovations Pvt. Ltd. Vs. Kirusa Software Pvt. Ltd. — (2018) 1 SCC 353*** supra.

24. In view of the aforesaid reasons, we are not inclined to interfere with the order passed by the Adjudicating Authority. The appeal is

devoid of the merits and liable to be dismissed. Accordingly, the same is dismissed. No order as to costs.

[Justice Venugopal M.]
Member (Judicial)

(Kanthi Narahari)
Member(Technical)

Pronounced by one Member of the Bench in terms of Rule 92(1) of the NCLAT Rules, 2016.

(Kanthi Narahari)
Member(Technical)

New Delhi

Atc