

NATIONAL COMPANY LAW APPELLANT TRIBUNAL**NEW DELHI****COMPANY APPEAL (AT) (INSOLVENCY) NO.1233 OF 2019**

(Arising out of Order dated 1ST October, 2019 in CP No.110/9/JPR/2019) passed by National Company Law Tribunal, Jaipur)

IN THE MATTER OF:**Before NCLT****Before NCLAT**

Excel Infra Logistics Pvt Ltd
S-1, 2nd Floor, Madhuban Tower,
Plot No.283, Ward 12-B,
Gandhidham (Kutch)
Gujarat State 340201

Applicant

Appellant

Vs

Karnani Solvex Pvt Ltd
S-8 Mahesh Colony,
Tonk Phatak,
Jaipur, Rajasthan

Respondent

Respondent

Ms.Ranu Purohit, Advocate for appellant.

Mr. Dinesh Mohan Sinha and Mr. Prince Mohan Sinha, Advocates/PCS for Respondent.

JUDGEMENT
(12th June, 2020)

Mr. Balvinder Singh, Member (Technical)

The Appellant –‘Excel Infralogistics Private Limited’ (Operational Creditor) filed an application under Section 9 of the Insolvency and Bankruptcy Code, 2016 (“I&B Code”) for short) against “Karnani Solvex Private Ltd” (Corporate Debtor). The Adjudicating Authority (National Company Law Tribunal, Jaipur Bench, Jaipur) by impugned order dated 1st October, 2019 after discussing the case on merit, rejected the application on the ground that the claim of the Appellant falls within the ambit of ‘Existence of Dispute’.

2. The Operational Creditor is engaged in the business of transportation, clearing and storage work. The Operational Creditor has carried out transportation clearing and storage work for the Corporate Debtor and has raised several invoices against the Corporate Debtor. The invoices are payable within 15 days from the date of issue of the invoices, after which the Corporate Debtor would be liable to pay interest @ 18% per annum on the outstanding dues. The Operational Creditor submitted that it had sent several reminders through email and made numerous personal visits regarding pending bills and invoices but all went in vain. Therefore, the operational creditor issued demand notice under Section 8 of the I&B Code dated 20.03.2019 on the Corporate Debtor, which was duly received by the Corporate Debtor through post on 27.03.2019. The Applicant submitted that the Corporate Debtor has neither replied to the Demand Notice nor raised any dispute of the unpaid operational debt. Therefore, the appellant filed application under Section 9 of the I&B Code, 2016. The total amount claimed by the appellant as mentioned in Part IV is a sum of Rs.37,51,623/- alongwith interest @18% per annum amounting to Rs.8,77,731/- as an outstanding amount which is due and payable by Corporate Debtor.

3. The Respondent admitted the fact that appellant and respondent were in a commercial contract and appellant has provided the services related to storage, transportation and delivery of cargo but has denied the amount of debt claimed by the appellant .

4. The Respondent stated that on 10.02.2018 a report titled as “Godown wise Stock report” was communicated to the respondent by appellant that

only 84.500 GMT of balance cargo belonging to respondent is left in godown (Paradise GO-5) and out of that stock only 8-10 MTS is physical as 75 MTS of cargo is lost due to moisture and other operations.

5. Respondent stated that one more report titled as “Godown Wise Stock Report” of Godown “Paradise GO-5” was also communicated to Respondent on 10.02.2018 by which it was informed that in godown “Paradise Go-6” the total balances cargo is 100.760 MTs.

6. Respondent stated that as per calculation presented to the respondent by appellant verbally, out of 100.760 tons of cargo of Godown “Paradise Go-06” 78.170 tons of cargo was delivered to one of the customers of respondent and only approx 22 tons of cargo left in godown. The final calculation as per respondent remained as 22 tones of “Paradise GO-6” with 8 tones of “Paradise Go-05 makes as total of 30 tons of cargo.

7. Respondent stated that suspecting some sort of deceit and mischief on the part of appellant, Respondent searched its previous records and found out that four cargo trucks which were disappeared in 2013 carrying 115 MT of cargo in total, were intentionally never marked as received by appellant.

8. Respondent stated that the amount of Rs.3751623/- excluding interest raised by appellant is not admitted. Respondent stated that bills amounting to Rs.2918599/- were duly raised for the services rendered, however, the same are liable to be adjusted against the claims of the respondent which amounts to Rs.4017321/- which makes the appellant liable to pay Rs.1098722/- to the Respondent. Respondent raised invoice dated 31.3.2019

(Page 73 of reply) upon appellant for Rs.40,17,321/- for 225.060 MT. Respondent also stated that earlier he sent an mail dated 20.11.2018 (Page 71 of reply) to appellant to clear the amount.

9. Respondent stated that there is existence of dispute and the Adjudicating Authority has not erred in delivering its judgement.

10. From bare perusal of the impugned order dated 1st October, 2019, it will be evident that the Adjudicating Authority have noticed that 75 MTs cargo is lost due to the moisture and remaining 30GMT cargo in rejected condition is still under the possession of appellant, which appears to be a disputed matter, came to the conclusion and hold that the claim amount raised by the appellant is a disputed claim.

11. In an application under Section 9, it is always open to the 'Corporate Debtor' to point out pre-existence of dispute. It is to be shown that the dispute was raised prior to the issuance of demand notice under Section 8(1).

12. In **"Mobilox Innovations Pvt Ltd Vs Kirusa Software (P) Limited - 2017 1 SCC Online SC 353"**, the Hon'ble Supreme Court held 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. In the said case, the Hon'ble Supreme Court held as to what are the facts to be examined by the Adjudicating Authority while examining an application under Section 9, which are – whether there is an operational debt as defined exceeding Rs.1 lakhs; whether the documentary evidence furnished with the application shows that the aforesaid debt is due

and payable and has not yet been paid; whether there is existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before the receipt of demand notice of the unpaid operational debt in relation to such dispute. The Hon'ble Supreme Court held that if any one of the above conditions is lacking, the application would have to be rejected.

13. From the aforesaid decision, it is clear that the existence of dispute must be pre-existing i.e. it must exist before the receipt of the demand notice or invoice. If it comes to the notice of the Adjudicating Authority that the 'operational debt' is exceeding Rs.1 lakh and the application shows that the aforesaid debt is due and payable and has not been paid, in such case, in absence of any existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before the receipt of the demand notice of the unpaid 'operational debt' the application under Section 9 cannot be rejected and is required to be admitted.

14. In the present case, it is not in dispute that there was a running account maintained for the transactions between the parties. The appellant was providing Godown Wise Stock Report to the Respondent (Page 19 and 20 of Reply). The appellant, while intimating Godown Wise Stock Report on 10.02.2018 (Page 19 of Reply) intimated the Respondent that **“out of the above stock physical balance in Godown No.5 will be about 8-10. Loss will be around 75 tones due to moisture and other operations.”**. Appellant also intimated the Respondent vide email dated 28.11.2018 (Page 96 of appeal) to arrange to lift balance cargo approx 30 mts lying in rejected

condition with appellant and the appellant demanded his payment. This clearly shows that the appellant have fairly conveyed to the Respondent that the loss will be around 75 tones due to moisture and other operations and 30 tons lying in rejected condition. We have gone through the email exchanged between the parties. The Respondent vide email dated 20.11.2018 (Page 71) informed the appellant first you have to give our cargo of 225 MT then automatically will clear your payment. The Corporate Debtor raised the invoice of Rs.40,17,321/- on the appellant towards 225 MT of Mustard De Oiled Cake (DO) on 31.3.2019 (Page 73 of Reply). The appellant has provided Godown Wise Stock Report to the respondent regularly and the Respondent has never raised the dispute. When the appellant has demanded his payment then the respondent raised the dispute of 2013. The Respondent showed no evidence to prove that the respondent raised the dispute when the appellant intimated him that loss will be around 75 tones due to moisture and other operation and 30 tons lying in rejected condition. The Respondent should have taken prompt action to lift or dispose of the material and should have raised the dispute with the appellant. No such action has been taken by the Respondent. Thus the Respondent has not been able to prove that there was any pre-existing dispute. Even NCLT in its order observed that the dispute raised by the Corporate Debtor in respect of 115 MTs cargo is time barred by Law of Limitation. The Respondent seems to have accepted the said order as he not filed any appeal against the said order.

15. From the record as we find that the Respondent has defaulted to pay more than Rs.1 lakh and in absence of any pre-existing dispute, and the

record being complete, we hold that the application under section 9 preferred by the Appellant was fit to be admitted.

16. For the reasons aforesaid we set aside the impugned judgement dated 1st October, 2019 and remit the case to the Adjudicating Authority for admitting the application under Section 9 after notice to the 'Corporate Debtor' to enable the 'Corporate Debtor' to settle the matter prior to admission.

The appeal is allowed with aforesaid observations and directions. No costs.

(Justice Jarat Kumar Jain)
Member (Judicial)

(Mr. Balvinder Singh)
Member (Technical)

(Dr. Ashok Kumar Mishra)
Member (Technical)

New Delhi

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