

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) Insolvency No. 698 of 2020

IN THE MATTER OF:

LCL Logistix India Pvt. Ltd.

Appellant

Versus

Waaree Energies Ltd.

Respondent

Present:

**For Appellant : Mr Rupender Sinhmar, Mr K. Gurumurthy
Mr Prahlad Singh and Mr Shyam Gopal, Advocates.**

**For Respondent : Mr Akshay Sapre, Mr Abhijeet Swaroop and
Mr M. Sridhar, Advocates.**

ORDER
(Through Virtual Mode)

26.08.2020 The Appellant has filed this Appeal against the order passed by the Adjudicating Authority, Mumbai Bench in CP No. 4603(IB)/MB/2018 dated 29th June 2020 whereby the Adjudicating Authority has rejected the Application filed by the Operational Creditor/Appellant under Section 9 of the Insolvency & Bankruptcy Code, 2016.

It is contended that the Operational Creditor LCL Logistix (India) Pvt Ltd is engaged in conducting freight forwarding, warehousing and distribution services for third parties such as, but not limited to warehousing, product handling, inbound and outbound transportation, customs documentation, freight management and forwarding activities and WAAREE Energies Ltd, is engaged in the business of manufacturing and trading of solar photovoltaic modules.

The service agreement provided that the Respondent Corporate Debtor would pay the container detention charges and other charges as and when the same is demanded from them. The Appellant from time to time rendered timely services in respect to Respondent's cargo stuffed in containers at various overseas ports. A vital contractual requirement was that it was incumbent upon the Respondent to destuff the import consignment stuffed in the said containers and/or return the empty containers to the empty yard of the careers within the free period which was mutually agreed by the Respondent. The failure to destuff the import consignment, the containers/vehicles incurred detention and demurrage charges. The Appellant further contends that the demurrage charges is an operational cost/expenditure paid by the Appellant on behalf of the Respondent.

The principal amount due and outstanding against the Corporate Debtor in respect of pending demurrage invoices aggregating to Rs.1,50,97,439/-. In addition to this interest @ 24% per annum amounts to Rs.25,94,012.65 aggregating to total outstanding amount Rs.1,76,91,452.70. Invoices in respect of the services rendered had been raised and duly served upon the Corporate Debtor Respondent which have been accepted by the Corporate Debtor without any protest.

The Appellant further contends that the Corporate Debtor failed to make any payment towards demurrage and detention charges; therefore demand notice dated 05th September 2018 was issued against the Corporate Debtor. But the Corporate Debtor Respondent made a reply on 14th September 2018

falsely denying its liability; after that, the Appellant filed an application under Section 9 of the I&B Code, 2016, which was rejected by the impugned order.

The Respondent/Corporate Debtor contends that the alleged claim amounting of Rs.1,50,97,439/- relates to demurrage and detention charges is not crystallised. The issue regarding the payment against detention charges requires extensive evidence which cannot be decided under summary jurisdiction provided to Adjudicating Authority under I&B Code.

The Adjudicating Authority has rejected the Application on the ground that the Corporate Debtor has raised a dispute regarding demurrage payment, much before the issuance of demand notice. The contention raised by the Corporate Debtor regarding non-payment of demurrage charges are neither spurious & hypothetical nor illusory. There is a dispute as to the existence of debt payable by the Corporate Debtor. In the circumstances, the Adjudicating Authority, given the law laid down by Hon'ble Supreme Court in the case of Mobilox Innovations Pvt Ltd Vs. Kirusa Software (P) Limited 2017 (SCC Online SC 1154) has rejected the Application filed under Section 9 of the I&B Code, 2016.

Admittedly, the alleged claim relates to demurrage charges and detention charges amounting of Rs.1,50,97,439/-. Based on the freight forwarding agreement. It is contended that due to the Corporate Debtors negligence and failure to destuff the import consignment the containers/vehicles incurred detention and demurrage charges for which invoices have been raised. The demand notices dated 05th September 2018 was issued against the Corporate

Debtor. The Corporate Debtor sent a reply dated 14th September 2018, denying its liability. After that, Section 9 Application was filed by the Operational Creditor.

The Adjudicating Authority has rejected the Application mainly on the ground that the Corporate Debtor has raised a dispute about demurrage payment much before the issuance of demand notice.

It appears that on 09th March 2018 i.e. much before the issuance of demand notice, the Corporate Debtor raised dispute about the alleged demand of demurrage charges. The contents of email dated 09th March, 2018 is as under:

“Dear Mr Doshi,

The turn of events have been surprising to us as well. All along there has been a very different line of discussion between Ms Asmita and myself from LCL Ligistix and Mr Amit and Mr Prem from Waaree team who were also involved in day to day working when these detentions were being incurred. They are fully aware of each case as it happened. Basis their knowledge of events these invoices were already accepted by Mr Prem and Mr Amit.

Self and Asmita went over every single invoice with Mr Prem and Mr Amit involving detentions incurred at Bhiwandi / Sez Sachin and Akola (Roha project) and looked at individual cases. A synopsis for every invoice was made giving supporting of all charges incurred. The synopsis contained date wise activity as it happened for every invoice involving. Basis this synopsis invoice were cleared and we worked on a single document updating every invoice. On acceptance Mr Prem has sent us mails confirming acceptance of those invoices.

Given this background we fail to understand why do we have a change in stance many month after the invoices were raised.”

Based on the above, it is clear that the dispute was raised by email dated 09th March 2018 regarding the alleged claim of demurrage and detention charges. The demand notice regarding the alleged claim has been issued on 05th September, 2018. The issue regarding payment against the detention charges requires extensive evidence because the parties are at variance interalia in respect of the period for which such charges are to be levied. The alleged claim is not crystallised and the Adjudicating Authority while exercising summary power cannot investigate into the matter regarding the liabilities of the Corporate Debtor to pay the demurrage and detention charges. The dispute raised by the Corporate Debtor cannot be said to be spurious, hypothetical or illusory.

In case of Mobilox Innovations (P) Ltd. v. Kirusa Software (P) Ltd., (2018) 1 SCC 353 : 2017 SCC OnLine SC 1154 : (2018) 1 SCC (Civ) 311 at page 405 Hon’ble the Supreme Court of India has held:

“56. *Going by the aforesaid test of “existence of a dispute”, it is clear that without going into the merits of the dispute, the Appellant has raised a plausible contention requiring further investigation which is not a patently feeble legal argument or an assertion of facts unsupported by evidence. The defence is not spurious, mere bluster, plainly frivolous or vexatious. A dispute does truly exist in fact between the parties, which may or may not ultimately succeed, and the Appellate Tribunal was wholly incorrect in characterising the defence as vague, got up and motivated to evade liability.*

51. *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 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 need to be satisfied that the defence is likely to succeed. 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.”

Therefore, we are of the considered opinion that the Adjudicating Authority has rightly rejected the Application filed under Section 9 of the Code based on the ground of the pre-existing dispute. There is no reason for interference by this Appellate Tribunal, and Appeal deserves to be dismissed at the threshold.

[Justice Bansi Lal Bhat]
Acting Chairperson

[Justice Anant Bijay Singh]
Member (Judicial)

[V.P. Singh]
Member (Technical)

pks/gc