

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
SPECIAL BNCH (Court -II)
KOLKATA**

CP(IB) No. 196/KB/2022

*A petition under section 9 of the Insolvency and Bankruptcy Code, 2016 read with rule
6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules,
2016.*

In the matter of:

Patel integrated Logistics Limited, a company within the meaning of Companies Act, 2013 and having Corporate Identification No- L71110MH1962PLC012396 and its registered office at Patel House, 5th Floor_ Plot No. 48, GazdarbandhNorth Avenue road, Santacruz (W) Mumbai - 400054.

.....Operational Creditor/ Petitioner

-Versus-

Asmi Express Private Limited, a company within the meaning of Companies Act, 2013 and having Corporate Identification No- U64120WB2003PTC096003 and its registered office at 1st Floor, 14/B, Gobinda Ghosal Lane, Kolkata Parganas South, West Bengal- 700025.

.... Corporate Debtor

Date of Hearing: 16.08.2023

Date of pronouncing the order: 05.03.2024

Coram:

Smt.Bidisha Banerjee, Member (Judicial)

Shri Balraj Joshi, Member (Technical)

Appearances (via video conferencing/ physical):

For Operational Creditor : Mr. Snehashis Sen, Advocate

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
SPECIAL BENCH (Court-II)**

C.P. (IB) No. 196/KB/2022

ORDER

Balraj Joshi, Member (Technical):

1. This Court convened through hybrid mode.
2. This is a Company Petition filed under section 9 of the Insolvency and Bankruptcy Code, 2016 (the Code) by **Patel integrated Logistics Limited**(Operational Creditor), seeking to initiate Corporate Insolvency Resolution Process (“CIRP”) against **Asmi Express Private Limited** (“Corporate Debtor”).
3. The Corporate Debtor is a public company incorporated on 02.04.2003. The authorized share capital of the company is ₹50,00,000/- and the paid-up share-capital of the company is ₹49,96,000/-.
4. The total amount claimed by the Operational Creditor is Rs.2,63,46,928.15/- out of which the principal amount due is Rs. 1,29,41,882/-. The Demand notice under section 8 of the Code was issued by the Operational Creditor on 06.03.2020. Reply to the demand notice was issued by the Corporate Debtor on 25.06.2020. the date of default is mentioned to be 01.07.2017.The instant petition was filed on 20.02.2021.

5. **Submissions on behalf of the Operational Creditor:**

- 5.1 The case of the Operational Creditor is that in terms of the All India Cargo Agreement ¹ executed by and between the Operational Creditor and the Corporate Debtor on 31.12.2013, the Operational Creditor had duly provided logistical assistance and dispatched the Cargos of the Corporate Debtor.
- 5.2 As per the Agreement, after successfully dispatching the said Cargos of the Corporate Debtor, the Operational Creditor raised invoices² to the Corporate Debtor for providing logistical services for the same, and it was duly received

¹Annexure “C”

²Annexure “D”

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
SPECIAL BENCH (Court-II)**

C.P. (IB) No. 196/KB/2022

by Corporate Debtor without any protest and demur. In terms of the conditions stipulated in the said Agreement, the Corporate Debtor was to follow the Billing Cycle/ Payment Terms which states that there shall be Centralized Bill Submission and Centralized Payment at Mumbai on following time period:

- a) 1st to 7th billing payment on 15th of the month;
- b) 8th to 15th billing payment on the 23rd of the month;
- c) 16th to 23rd billing payment on 2nd of the month;
- d) 24th to 31st billing payment on the 10th of the next month.

- 5.3 However, even after receipts of invoices without any demur and/or protest, and even after repeated reminders via email, the Corporate Debtor failed to pay the outstanding dues to the Operational Creditor.
- 5.4 As on 31.03.2016 sum of INR 2,67,76,927/- fell due and became payable by the Corporate Debtor to the Operational Creditor. The Corporate Debtor accepted that the sums were due and payable by it and as a testimony of its acceptance, the Corporate Debtor also confirmed the dues by way of a Balance Confirmation³. The Corporate Debtor has also admitted to paying the balance outstanding dues by various email⁴ communications, and that at no point of time disputed the same.
- 5.5 After repetitive follow ups, the Corporate Debtor had expressed its willingness to execute a Compromise/Settlement Agreement⁵ with the Operational Creditor which was accordingly executed by and between the Operational Creditor and the Corporate Debtor on the 07.02.2017. By way of the said agreement, the Corporate Debtor unequivocally agreed to pay an amount of a sum of INR 1,68,57,954/- in five monthly instalments starting from 28.02.2017.
- 5.6 Even after execution of the said Settlement Agreement, the Corporate Debtor failed to discharge its liabilities inasmuch as the Corporate Debtor made a

³Annexure "E"

⁴Annexure "G"

⁵Annexure "F"

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
SPECIAL BENCH (Court-II)**

C.P. (IB) No. 196/KB/2022

payment of INR 36,50,000/- only to the Operational Creditor and the balance sum of INR 1,32,42,882/-remained unpaid.

- 5.7 As a result, the Operational Creditor had issued the first Demand Notice⁶ under Section 8 of the Insolvency & Bankruptcy Code, 2016 to the Corporate Debtor demanding payment of the said unpaid outstanding dues of INR 1,32,42,882/- on 12.02.2019. The Corporate Debtor didnot reply to the said demand notice.
- 5.8 Instead, the Corporate Debtor made a payment of INR 3,00,000/- in four tranches and the last payment⁷ was received through electronic transfer on 31.10.2019. Thereafter the Operational Creditor made repeated follow up and made several requests for release of the unpaid operational debt and on every occasion, the Corporate Debtor deliberately failed and/or neglected to pay the admitted unpaid operational debt of a principal sum of a Principal outstanding of INR 1,29,41,882/-.
- 5.9 In such circumstances, the Operational Creditor was constrained to issue another demand notice⁸ under Section 8 of the Code. The said demand notice was posted on 07.03.2020, however, the same was returned unserved with the endorsement "Left" on 11.03.2020. Subsequently, the said demand notice was served by way of an email to the Corporate Debtor. The Corporate Debtor replied to the said demand notice by way of a letter⁹ dated 25.06.2020. The said letter in reply mainly contained bare denials and as such the same could not be construed as a notice of dispute. The same was duly replied to on behalf of the Operational Creditor by way of a letter¹⁰ dated 20.07.2020.
- 5.10 The terms and conditions of the Agreements executed by and between the Operational Creditor and Corporate Debtor mandates that interest will be chargeable @ 21% per annum if there is any delay in payment. Therefore the Corporate Debtor is in turn liable to make payment of interest to the

⁶Annexure "H"

⁷Annexure "I"

⁸Annexure "J"

⁹Annexure "K"

¹⁰Annexure "L"

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
SPECIAL BENCH (Court-II)**

C.P. (IB) No. 196/KB/2022

Operational Creditor for delay in making payments of the invoices. Therefore, as on 01.12.2020, the Operational Creditor is entitled to an admitted principal sum of INR 1,29,41,882/- along with interest @21% per annum from 07/02/2017 till realization of dues of the Operational Creditor. The debt fell due and payable on and from 01.07.2017 and the last payment towards such discharge of debt was made by the Corporate Debtor on 31/10/2019.

6 Analysis and Findings:

- 6.1 Heard the Ld. Counsel on behalf of the Operational Creditor and perused the records.
- 6.2 In terms of order dated 03 August 2022, notice was served upon the Corporate Debtor vide speed post and email. Thereafter, several chances were given to the Corporate Debtor by the Adjudicating Authority to appear and file representation however, no one appeared on behalf of the Corporate Debtor. As such, the Corporate Debtor was set *ex parte* on 24.03.2023.
- 6.3 Despite the above-mentioned order, no one appeared for the Corporate Debtor in the subsequent hearing also and accordingly, the Adjudicating Authority vide order dated 13.04.2023 gave one last chance to the Ld. Counsel of the Corporate Debtor for appearance.
- 6.4 Since no one appeared on behalf of the Corporate Debtor in the subsequent hearings either, the Adjudicating Authority, upon hearing the submissions of the Ld. Counsel of the Operational Creditor, reserved the matter for final orders on 16.08.2023.
- 6.5 Upon perusal of the records before us, the following timeline comes into picture:

Date	Event
31.12.2013	Cargo agreement between the parties herein was executed.

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
SPECIAL BENCH (Court-II)**

C.P. (IB) No. 196/KB/2022

2015 –2016	Invoices were issued between December 2015 – March 2016
31.03.2016	Confirmation of accounts was signed by the Corporate Debtor whereby the Corporate Debtor acknowledged that a sum of Rs.2,67,76,927/- was due and payable as on 31.03.2016
07.02.2017	Settlement Agreement was signed by parties.
12.02.2019	The Operational Creditor issued the first demand notice.
31.10.2019	The Corporate Debtor made part payment of Rs. 3,00,000/- in four tranches, the last date of payment being 31.10.2019.
17.06.2020	The second demand notice was sent to the Corporate Debtor vide email
25.06.2020	The Corporate Debtor replied to the second demand notice

- 6.6 The date of default is stated in the petition to be 01.07.2017. It is seen that after the execution of the Cargo Agreement between the parties on 31.12.2013 and the subsequent issuance of invoices by the Operational Creditor, the Corporate Debtor confirmed its outstanding dues as on 31.03.2016. The said invoices were issued between December 2015 and March 2016 and as mentioned in the invoices, and needed to be paid according to the payment terms mentioned in the Cargo Agreement. The last invoice issued on 31.03.2016 was supposed to be cleared within 10th of the next month.
- 6.7 Since the Corporate Debtor failed to clear such outstanding dues, a settlement agreement was executed between the parties according to which the due amount was to be paid in five installments starting from 28.02.2017 and ending on 30.06.2017. However, since the Corporate Debtor failed to adhere to the payment schedule and failed to clear its dues, the default with respect to the settlement

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
SPECIAL BENCH (Court-II)**

C.P. (IB) No. 196/KB/2022

agreement occurred on 01.07.2017. As such, the basis of the instant petition is the default committed by the Corporate debtor in the payment of installments under such settlement agreement and not the default of repayment of dues in respect of the invoices. As such, the claim of the petitioner in the instant matter is not in respect of an ‘operational debt’ within the meaning of section 5(21) of the Code and is therefore, not maintainable.

- 6.8 In this regard, reliance is placed on the judgment of the **Hon’ble National Company Law Appellate Tribunal (NCLAT)** in the matter of *Trafigura India Private Limited vs. TDT Copper Ltd*¹¹.for the proposition that breach of settlement agreement does not give any rise to operational debt. The Appellate Authority in the said judgment made following observations:-

*“The Adjudicating Authority has considered the Settlement Agreement and rightly come to the conclusion that **default of instalment of Settlement Agreement does not come within the definition of ‘operational debt’** as it does not fall within the definition of additional debt as per Section 5(21) of the IBC and further prayer made by the Corporate Debtor that the matter be referred to the Arbitration under Section 8 of the Arbitration and Conciliation Act, the Adjudicating Authority has also rightly held that therole of National Company Law Tribunal is very limited while exercising its power under Section 7, 9 and 10of the IBC, 2016, it is beyond the scope of Section 9 of the IBC.”(Para 17)*

- 6.9 It is noted that the subsequent payments made by the Corporate Debtor in 2019 are deemed to be made towards the settlement deed and not towards the repayment of invoices. In light of the aforesaid facts and the decision of the Hon’ble Appellate Authority cited above, we are satisfied that the instant petition is not maintainable

¹¹Company Appeal (AT) (Ins.) No.742 of 2020

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
SPECIAL BENCH (Court-II)**

C.P. (IB) No. 196/KB/2022

under the code and is liable to be *rejected* and accordingly hold so. The petitioner shall be at liberty to seek remedies available to it under any other law.

- 6.10 **CP (IB) No. 196/KB/2022** is accordingly disposed of. File be consigned to record.
- 6.11 The registry is directed to send e-mail copies of the order forthwith to all the parties and their Ld. Counsel for information and for taking necessary steps.
- 6.12 A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

Balraj Joshi
Member (Technical)

Bidisha Banerjee
Member (Judicial)

Signed on this, the 5th day of March, 2024

SM(LRA)