NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH
SPECIAL BENCH (video Conference)

CORAM: HON'BLE SHRI K. ANANTHA PADMANABHA SWAMY - MEMBER JUDICIAL
HON'BLE DR.BINOD KUMAR SINHA- MEMBER TECHNICAL

ATTENDANCE-CUM-ORDER SHEET OF THE HEARING OF NATIONAL COMPANY LAW TRIBUNAL, HYDERABAD BENCH, HELD ON 26.06.2020 AT 11.00 A.M. THROUGH VIDEO CONFERENCE

TRANSFER PETITION NO.	
COMPANY PETITION/APPLICATION NO.	CP No.636/9/HDB/2019
NAME OF THE COMPANY	AGA Publications Ltd
NAME OF THE PETITIONER(S)	M+R Logistics (India) Pvt Ltd
NAME OF THE RESPONDENTS(S)	AGA Publications Ltd
UNDER SECTION	9 of IBC

Counsel for Petitioner(s):

Name of the Counsel(s)	Designation	E-Mail &	Signature

Counsel for Respondent(s):

Name of the Counsel(s)	Designation	E-Mail &	Signature

ORDER

1. Matter taken up for pronouncement of Order in CP(IB)No.636/9/HDB/2019 through Video Conference in view of Notice of the Headquarters dated 17.04.2020 read with Notice dated 03.05.2020.
2. Member Judicial and Member Technical are connected through video conference.
3. Mr. B. DhanRaj, Counsel for the Petitioner and Mr. S. Chidambaram, PCS for the Respondent appeared through video conference.
4. Orders pronounced vide separate order. CP(IB)No.636/9/HDB/2019 is rejected.

Sd/-

MEMBER TECHNICAL
(Through video conference)

MEMBER JUDICIAL

IN THE NATIONAL COMPANY LAW TRIBUNAL

HYDERABAD BENCH, BENCH

CP (IB) No. 636/9/HDB/2019
Under Section 9 of the IB Code, 2016,
Read with Rule 6 of the Insolvency and Bankruptcy
(Application to Adjudicating Authority) Rules, 2016.

In the matter of
M/s. AGA Publications Limited

Between:

M/s. M+R Logistics India Pvt. Ltd.
(Formerly PL Shipping & Logistics Private Limited)
56/57, 3rd Floor, Rajaji Salai,
Chennai – 600 001.
Tamil Nadu, India.
(Rep. by Shri G. Chandrasekhar, Authorised Signatory)

... Petitioner/
Operational Creditor

And

M/s. AGA Publications Ltd.,
Having Registered Office at
396, "Vaartha", Lower Tank Bund Road,
Hyderabad – 500 080,
Telangana, India.

... Respondent/
Corporate Debtor

Date of order: 26.06.2020

Coram: Shri. K. Anantha Padmanabha Swamy, Member Judicial.
Dr.Binod Kumar Sinha, Member Technical.

Parties/counsels present:

For the Petitioner/
Operational Creditor : Mr. B. Dhanraj, Mr. Virkam Ramakrishnan and Mr. Ch. Srinvasulu, Counsels.

For the Respondent/
Corporate Debtor : Mr. S.Chidambaram, PCS.

Per. Dr. BINOD KUMAR SINHA, MEMBER TECHNICAL

ORDER

1. Under consideration is Company Application filed by M/s. M+R Logistics India Pvt Ltd. (in short, "**Petitioner/Operational Creditor**") against M/s. AGA Publications Ltd (in short, "**Respondent/Corporate Debtor**") under section 9 of the Insolvency and Bankruptcy Code, 2016 (in short, **IB Code, 2016**) read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (for brevity, **IB Rules, 2016**).

2. Brief facts of the present Petition are as under:

   a. That the Operational Creditor was formerly known as M/s. P. L. Shipping and Logistics Ltd. and subsequently, changed its name to M+R Logistics (India) Pvt. Ltd.

   b. That Operational Creditor is into the business of Freight Forwarding and Custom Clearance. The Corporate Debtor appointed the Operational Creditor for clearing its Sea Imports Consignment at ICD-Hyderabad for providing certain services i.e., paying the shipping line payments, paying concor payments, collecting the delivery order from the shipping lines, custom clearance and handling the cargo vide the work order dated 01.01.2010. The time period and payment terms as per the Corporate Debtor is 30 days from the date of submitting the bill. The Operational Creditor had provided services and raised invoices with the corresponding bill of lading (10 in No.) ranging from February 2010 to May 2010. The Operational Creditor stated that each invoice is pertaining to an independent contract.

c. That the Corporate Debtor has admitted to pay the invoice vide e-mail dated 15.06.2010. In the said e-mail, the Corporate Debtor had categorically admitted that the Corporate Debtor will make payment of the invoices within 10 to 15 days.

d. Since the Corporate Debtor defaulted in clearing its dues, the Operational Creditor had issued a statutory Demand Notice dated 09.12.2010 under Section 434 of the Companies Act of 1956 and the same was served on the Corporate Debtor on 15.12.2010.

e. That the Corporate Debtor failed to reply the statutory Demand Notice dated 09.12.2010 as per the Companies Act, 1956. Accordingly, the Operational Creditor had instituted Civil Suit bearing O.S.No.778 of 2013 before the City Civil Court, Hyderabad for recovery of money as pleaded in the affidavit along with the Company Petition.

f. That the Corporate Debtor questioned the authority to institute the suit and pleaded to raise a counter claim for loss of ₹41,00,000/-.

g. That the said suit was not pursued by the Operational Creditor and was dismissed for default by the Hon'ble City Civil Court on 03.08.2018.

h. Pursuant to the I&B Code, 2016 being notified, the Corporate Debtor filed I.A. No.5/2018 in C.P.No.34/2011 before the Hon'ble High Court of Andhra Pradesh to transfer the Winding up proceedings in case of C.P.No.34/2011 from the file of the Hon'ble High Court of Andhra Pradesh to this Adjudicating Authority. The Hon'ble High Court vide its order dated 18.07.2018 made in I.A.No.5/2018 categorically recorded the presence of both parties and allowed the Operational Creditor to transfer the case of C.P.No.34/2011 to this Adjudicating Authority.

i. That the Operational Creditor pursuant to the transfer of the Company Petition in C.P.No.344 of 2011, issued Form 3 Demand Notice on 21.02.2019 demanding a sum of ₹30,62,583.28/- against the Corporate Debtor.

j. That in response to the Demand Notice in Form 3, the Corporate Debtor issued a Reply dated 01.04.2019. The Corporate Debtor has pleaded that the invoices are not sustainable and that the proceedings under the I&B Code are not maintainable in view of bar of Limitation. The Corporate Debtor has not disputed the debt.

k. That the Corporate Debtor seems to have raised the plea of Limitation without adverting to Section 434 of Companies Act of 1956 and in terms of order of the Hon'ble High Court of Andhra Pradesh made I.A. No.5/2018 in Company Petition. The Company Petition filed by the Operational Creditor is well within the limitation and is maintainable.

l. The issuance of Form 3 Demand Notice and other provisions of the I&B Code of 2016 are mandatory and as such the same cannot be construed as fresh cause of action.

m. That the Corporate Debtor except for e-mails of the Operational Creditor dated 08.07.2010 and 16.07.2010 has not placed any material reflecting dispute. The e-mail dated 08.07.2010 is nothing but absorption of detention charges amounting to ₹1,10,700/- and the e-mail dated 16.07.2010 is the Operational Creditor's acceptance of ₹2.6 Lakhs towards the delay in clearance of two documents.

n. The e-mail dated 15.06.2010 is categorical admission that the Corporate Debtor will arrange payment after the due date of invoices positively. Therefore, the Corporate Debtor is bound to establish as to which invoices were disputed out of the 10 invoices.

o. That the Operational Creditor states that the statutory Demand Notice issued under the Companies Act, 1956 dated 09.12.2010 specifically notified that in addition to winding up, the Operational Creditor is entitled to other remedies available. Accordingly, the civil suit was filed which was dismissed for default. Therefore, as on 21.02.2019, the date of issuance of Form 3 Demand Notice, there was no suit or arbitration proceedings pending to bring it within the definition of dispute in terms of Section 5(6) of the I&B Code, 2016.

p. That the Corporate Debtor except for merely repeating the pleadings of the Corporate Debtor in the High Court has not denied the direction of the High Court to transfer the petition in I.A. No.5/2018 in C.P.No.34/2011 to this Adjudicating Authority.

q. That the Corporate Debtor has heavily relied on Board Resolution wherein, the Board Resolution empowers the signatory to file the Petition before the NCLT, Chennai Bench.

r. That the total amount of Default is ₹34,44,692.99/-(₹30,62,583.28/- since 06.07.2010 plus Interest @ 18% p.a. for the period of 253 days from the date when the o/s became due (06.07.2010) till filing of CP No.34/2011 (15.03.2011) is Rs.3,82,109.71/-).

3. In order to prove the existence of the Operational Debt and the amount in default the Operational Creditor had filed the following documents:

a. Invoice with corresponding Bill of Lading (10 in No.) raised in the month of May 2010.

b. Offer Letter dated 29.12.2009 given by the Operational Creditor for Freight Forwarding and Customs Clearance Services w.r.t the Sea Import Consignments from Russian to ICD Hyderabad.

c. Release of Work Order to the Operational Creditor by the Corporate Debtor vide letter dated 01.01.2010.

d. E-mails exchanged between the Operational Creditor and Corporate Debtor on 15.06.2010, 03.07.2010, 08.07.2010 and 16.07.2010.

e. Statutory Legal Notice dated 09.12.2010 issued to the Corporate Debtor under Sec.434 of Companies Act, 1956 with PoD.

f. Company Petition vide CP No.34/2011 filed before the High Court of Andhra Pradesh, Hyderabad on 15.03.2011 praying for winding up of the Corporate Debtor.

g. Order dated 18.07.2018 passed in IA No.5/2018 in C.P.No.34/2011, whereby the High Court of Andhra Pradesh, Hyderabad directed for transmission of the said C.P. from the High Court of APIIC(now TSIIC), Hyderabad to NCLT, Hyderabad.

h. Ledger Account showing Principal Dues receivables from the Corporate Debtor.

i. Details of Interest Computation.

j. Banker's Certificate dated 07.06.2019 issued by the Operational Creditor's Banker Citibank.

k. Record of Default with the Information utility.

Relying on the aforesaid evidence to prove the existence of debt and default, the Ld. Counsel for the Operational Creditor prayed to admit the matter.

4. Respondent/Corporate Debtor filed its counter and written submissions inter-alia stating as under:

a. That the Application deserves to be dismissed due to the following three grounds:-

i. Existence of dispute prior to notice

ii. Limitation

iii. Application filed without proper authorization

b. That in the present case both the amount of debt as well as quality of service is under dispute. It is on record that dispute exists with respect to the claims of the Operational Creditor regarding the quality of services rendered by them. It is a fact that the Corporate Debtor suffered heavily, this could be verified from the email dated 08.07.2010 and 16.07.2010 extracted as under:

Mail dated 08.07.2010 from OC to CD

"Delay in clearance of 10x40 containers under 2 documents;
Further to our discussions having discussed this with out senior management and agree to absorb the detention charges that accrued due to our delay on these shipments;
Dispute amounting of Rs.1,10,799/-;
My only request is that to view our services and performances over the last six months and not this instance in isolation."

Mail dated 16.07.2010 from OC to CD

"Further to our discussions we Plots 4A and Plots6B shipping accept to bear Rs.2.6 Lakhs towards delay in clearance to the 2 documents."

c. That the above emails reflects existing dispute mainly pertaining to deficiency in service provided by the Operational Creditor. The above emails establish the following:

i. Dispute occurred in the year 2010.

ii. There is a delay in clearing consignments (poor quality of service)

iii. Operational Creditor agreed to bear loss occurred to the Corporate Debtor to the extent of ₹3.8 Lakhs.

d. In the civil suit it is the case of the Operational Creditor that he returned two documents to the defendant (CD herein) to make their own arrangement to clear the same as the plaintiff is in a financial constraint and not in the position to clear the same.

e. That strong disputes raised due to inefficiency of service based on single work order dated 01.01.2010, the Applicant has abandoned OS No.778/2013. Hence it is now clearly established there is an existing dispute about the claims and also a counter claim to the extent of Rs.41,00,000/- on the same transaction which is in excess of the total claim. On this ground alone the Application deserves to be dismissed with cost awarded.

f. That the existence of disputes was also pointed out in the counter affidavit dated 26.09.2011 by Corporate Debtor. The relevant paragraph (ix) and (xi) are extracted below:

> *"(ix) In reply to para 14, 15 and 16, it is submitted that the Petitioner failed to maintain time schedule to clear the cargo out of which the Respondent suffered business loss and account of delay. As a matter of fact Petitioner company admitted the delay and even agreed to bear some cost i.e., Rs.1,10799/- and Rs.2,20,000/- vide email Annexure P6 and P7. As such the services rendered by the Petitioner to 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 the debit and credit notes if any exchanged between the parties and the Respondent is ready and willing to settle and pay the amounts found. Hence all the adverse allegations made in para 14, 15 and 16 are hereby denied.*
>
> *"(xi) in reply to para 20 & 21, it is submitted that there are certain disputes exist between the parties to settle their respective accounts in relation to the contract entered by and between the Petitioner and Respondent and such disputes will have to be resolved after taking into consideration of reconciliation of accounts...."*

From the above counter affidavit it is clearly established that there are existing disputes with respect to the claims. Hence the Application deserves to be dismissed with cost awarded.

From the above it is clear that there is a pre-existing dispute right from the year 2010 between the parties as reflected by way of email exchanges and as seen from the pleadings in civil suit and winding up petition filed before Hon'ble High Court.

g. It is to be noted that the above disputed amounts of ₹3,70,799/- was not reduced or adjusted by the Applicant in its claim. Refer page 4 columns 2, wherein, the gross claim of Rs.30.62 Lakhs is not reduced with the above figure. This itself shows the conduct of the Applicant.

h. That the invoices were raised in the Year 2010 and the form 5 is preferred on 23.08.2019. On the face of it, the Application deserves to be dismissed as barred by Limitation. As seen at page 4, column 2 of the Application wherein it is mentioned that date of default is 06.07.2010. Further as per Section 238A of the Code, the limitation is applicable to the present proceedings.

i. That the Application was authenticated and filed by Mr. G. Chandrasekhar, CFO of the Company. The Resolution authorizing this person to file before this bench is not found in the resolution of the Company dated 28.03.2019. Consequently the appointment of advocate by CFO is also without any authority. On this ground alone the application deserves to be dismissed and cost awarded.

Reiterating the above averments, the Ld. Counsel for the Respondent/Corporate Debtor prayed to dismiss the matter.

5. Heard both sides, and perused the records.

6. It is the case of the Operational Creditor that it has provided Freight Forwarding and Customs Clearance Services to the Corporate Debtor and that an amount of ₹30,62,583.28/- is due as on 06.07.2010 and along with interest, the total amount in claim is ₹34,44, 692.99/-.

7. Per contra the Corporate Debtor has stated that there is an existence of dispute between the parties, prior to issuance of Demand Notice and the Application is barred by Limitation and that the Application is filed without proper authorisation.

8. With regard to the issue of Limitation, it is observed that the Operational Creditor has approached this Adjudicating Authority pursuant to orders of the then Hon'ble High Court of Andhra Pradesh wherein it was directed to transfer the winding up proceedings vide I.A.No.5/2018 in C.P. No.34/2011 dated 18.07.2018 to the NCLT Hyderabad Bench and that pursuant to the said order, the Operational Creditor has approached this Adjudicating Authority by issuing Demand Notice U/s.8 of IBC. The series of events being continuous in nature and approach of the Applicant before this Adjudicating Authority by virtue of the order of

Hon'ble High Court of Andhra Pradesh covers the plea of Limitation and therefore the Application is within Limitation.

9. With regard to the contention of pre-existing dispute between the parties, it is observed that the Applicant had preferred a Civil Suit bearing O.S.No.778 of 2013 before the City Civil Court, Hyderabad against the Corporate Debtor wherein the Corporate Debtor herein has raised certain disputes by way of filing a counter-affidavit. However, the said matter was dismissed for default due to non-prosecution by the applicant herein.

10. It is observed that though the Civil Suit bearing O.S.No.778 of 2013 before the City Civil Court, Hyderabad was dismissed for default but there were many disputes raised by the Corporate Debtor therein and a counter claim of ₹41,00,000/- was also made. Further the Corporate Debtor duly replied to the Demand Notice issued U/s.8 of IBC by the operational creditor which reflects and highlights that there is existence of dispute between the parties.

11. On consideration of the above said email correspondence as well as disputes raised by the Corporate Debtor by way of Counter affidavit filed in the Civil Suit referred to hereinbefore, this Adjudicating Authority observes that there is evidence on record which indicates that there was pre-existence of dispute between the Applicant and Respondent in respect of the claims made by the Applicants.

12. Hon'ble Supreme Court in the case of *Transmission Corporation of Andhra Pradesh Limited vs Equipment Conductors and Cables Limited* (2018) Civil Appeal No.9597 of 2018 held as follows:

> *"15. In a recent judgement of this Court in Mobilox Innovations Private Limited vs. Kirusa Software Private Limited (2018) 1 SCC 353, this Court has categorically laid down that IBC is not intended to be substitute to a recovery forum. It is also laid down that whenever there is existence of real dispute, the IBC provisions cannot be invoked..."*

13. Since there exists a real dispute between the Applicant and Respondents 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.

-Sd-

Dr. Binod Kumar Sinha
Member Technical

-Sd-

K. Anantha Padmanabha Swamy
Member Judicial

Rathi/Alekhya