

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
(Court No. II)
KOLKATA**

C.P (IB) No. 186/KB/2019

*An application 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:

Trans Sea Transport B.V.

...Operational Creditor

Versus

Lords Polymer [India] Private Limited [CIN U01132WB1997PTC082507], a
company incorporate under the Companies Act, 1956, having its registered office at
33A, J. L. Nehru Road, 4th Floor, Room No. 4A, Kolkata – 700071.

...Corporate Debtor

Date of Hearing: 26.08.2022

Date of pronouncing the order: 28.10.2022

Coram:

<i>Shri Rohit Kapoor</i>	:	<i>Member (Judicial)</i>
<i>Shri Balraj Joshi</i>	:	<i>Member (Technical)</i>

Appearances (through Video Conferencing/physical hearing)

<i>For the Operational Creditor</i>	:	Mr. Yadunath Bhargavan, Adv.
	:	Ms. Shrishty Punjabi, Adv.
	:	Ms. Labanyasree Sinha, Adv.
<i>For the Corporate Debtor</i>	:	Ms. Manju Bhuteria, Adv.
	:	Mr. Pankaj Agarwal, Adv.
	:	Ms. Pallavi Ray, Adv.

O R D E R

Per Balraj Joshi, Member (Technical)

1. The Court convened *via* hybrid mode.
2. This is a Company Petition filed under section 9 of the Insolvency and Bankruptcy Code, 2016 (*'the Code'*) read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 by Trans Sea Transport B.V. (*'Operational Creditor'*), for initiation of Corporate Insolvency Resolution Process (*'CIRP'*) against Lords Polymer [India] Private Limited (*'Corporate Debtor'*).
3. The present Petition was filed on **04 February, 2019** before this Adjudicating Authority. The total principle amount claimed in default is Rs.2,65,62,981.83¹ (Rupees Two Crore Sixty Five Lakh Sixty Two Thousand Nine Hundred Eighty One and Eighty Three Paisa) along with an interest of Rs.47,59,790.99² (Rupees Forty Seven Lakh Fifty Nine Thousand Seven Hundred Ninety and Ninety One Paisa). The date of default is stated to be as on 17 February, 2016.
4. In part II of the Petition the authorized share capital of the Corporate Debtor is Rs. 35,00,000/- (Rupees Thirty Five only) with subscribed share capital of Rs. 23,54,800/- (Rupees Twenty Three Lakh Fifty Four Thousand Eight Hundred only).
5. ***Submissions by the Ld. Counsel appearing on behalf of the Operational Creditor.***
 - 5.1 The Corporate Debtor had entered into a Fixture Note and Charter Party dated 07 September, 2015 with the Operational Creditor for the vessel M.V. Dokos at USD 12.68. per. Mt.
 - 5.2 However, the Corporate Debtor unilaterally rescinded the Charter Party because they received an offer of lower freight from the owners of the vessel M.V. Rubella.

¹ Converted as on 17 October, 2022

² *Ibid*

- 5.3 This unlawful conduct of the Corporate Debtor led to a dispute between the parties, for the adjudication of which an arbitration proceeding was initiated as per clause 40 of the Fixture Note.
- 5.4 Thereafter, an Arbitration Award was pronounced on 17 February, 2016, upholding the Operational Creditors claim , along with interest, and the claim is undisputed.
- 5.5 Despite notice of the liability owned by the Corporate Dbetor in favor of the Operational Creditor and despite being called to discharge such debt, the Corporate Debtor has failed and neglected to pay any sum as awarded in the favor of the Operational Creditor
- 6. *Submissions by the Ld. Advocate appearing on behalf of the Corporate Debtor.***
- 6.1 The Operational Creditor is a company incorporated under the laws of Netherland and is a foreign company under the Companies Act, 2013
- 6.2 The Corporate Debtor has never entered into any agreement or charter party agreement for any purposes whatsoever with the Operational Creditor. The Corporate Debtor, sometime in the month of September, 2015 had approached the Operational Creditor with the proposal of hiring the vessel M.V. Dokas owned by the Operational Creditor on time charter basis. The Corporate Debtor had initiated negotiations for such charter, however, such negotiations ultimately fell off and did not materialise into any binding agreement between the parties.
- 6.3 In the aforementioned scenario, the Corporate Debtor was shocked to receive an email dated 08.01.2016 from one R.L. Gorden, purporting to act as a sole arbitrator purportedly adjudicating on a claim filed before it by the Operational Creditor for wrongful repudiation of the purported charter party agreement. The Corporate Debtor immediately replied to such email by its email dated 26.01.2016, 04.02.2016 and 05.02.2016. In the said emails, the Corporate Debtor clearly mentioned that the Corporate Debtor had not entered into any charter party agreement with the Operational Creditor and as such there was

no binding agreement by and between the parties herein on the basis of which arbitration can be invoked [*Annexure A of the Reply*].

- 6.4 The present application has been filed for any purpose other than for the resolution of insolvency of the alleged Corporate Debtor and does not disclose any operational debt on the basis of which a section 9 application can be initiated. The present application has been filed on the purported basis of an New York convention award, which has not been declared as enforceable under the Arbitration and Conciliation Act, 1996, and as such, cannot form the basis of a crystallized operational debt.
- 6.5 Furthermore, the issue of enforceability of the purported New York convention award itself is subject matter of adjudication by an appropriate court of requisite jurisdiction. The Operational Creditor not and cannot be considered as an Operational Creditor under Insolvency and Bankruptcy code, 2016.
- 6.6 The application is barred by law and is not an operational debt as defined under Insolvency and Bankruptcy Code, 2016. Neither, it has been filed in proper form and manner as prescribed under Form 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.
- 6.7 Further, there exists prior dispute with regard to the enforceability of the present foreign award. Furthermore, the dispute raised by the Corporate Debtor regarding non-existence of any valid and binding charter party agreement itself is the subject matter of a section 48 proceeding of the Arbitration and Conciliation Act, 1996, without which there can be no binding enforceable award, and as such subject matter is within the jurisdiction of appropriate civil court of requisite jurisdiction. Hence, in view of the above, the foreign award, without adjudication as to its enforceability, has not crystallized into a binding decree of the court.
- 6.8 Further, no notice under Section 8 of the Insolvency and Bankruptcy Code, 2016 was served in terms of Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 to the Corporate Debtor. And, this Adjudicating Authority cannot scrutinize an award for the purpose of

ascertaining if the award deals with a difference not contemplated by or not falling within the terms of submissions to arbitration.

Analysis & Findings

7. We have heard the Ld. Counsel appearing on behalf of the Operational Creditor and the Ld. Counsel appearing on behalf of the Corporate Debtor and perused the record.
8. The prima-facie issue that arises in this case is that can an insolvency proceeding be initiated against the Corporate Debtor on the grounds of the foreign award?
9. However, the position was well settled by the Hon'ble Supreme Court in ***Government of India v. Vedanta Limited***, 2020 SCC OnLine SC 749, where in it has been held that “a foreign award does not become a “foreign decree” at any stage of the proceedings. The foreign award is enforced as a deemed decree of the Indian Court which has adjudicated upon the petition filed under Section 47, and the objections raised under Section 48 by the party which is resisting enforcement of the award. A foreign award is not a decree by itself which is executable as such under Section 49 of the Act. The enforcement of the foreign award takes place only after the court is satisfied that the foreign award is enforceable under Chapter 1 in Part II of the 1996 Act. After the stages of Sections 47 and 48 are completed, the award becomes enforceable as a deemed decree, as provided by Section 49. The phrase “that court” refers to the Indian court which has adjudicated on the petition filed under Section 47, and the application under Section 48.”

[emphasis implied]

10. In similar situation in ***Usha Holdings LCC & v. Francorp Advisors Pvt. Ltd.***³, the Hon'ble NCLAT has held that
“In view of the aforesaid decision in “***Binani Industries Limited***”, we hold that the Adjudicating authority not being a Court or “Tribunal” and ‘Insolvency Resolution Process’ not being a litigation, it has no jurisdiction to decide whether a foreign decree is legal or illegal. Whatever findings the

³ Company Appeal No. 44 of 2018 dated 30 November 2018

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Adjudicating Authority has given with regard to legality and propriety of foreign decree in question being without jurisdiction is nullity in the eye of law.”

- 11.** Further, it is imperative to mention that for the enforcement of foreign award in India, an enforcement/ execution petition is required to be filed before the Hon’ble High Court, as per the amendment to section 47 by Act 3 of 2016 (which came into force on 23 October, 2015). A proceeding seeking recognition and enforcement of a foreign award has different stages: in the first stage, the Court would decide about the enforceability of the award having regard to the requirements of section 47 and 48 of the Arbitration and Conciliation Act, 1996. Once the enforceability is decided, it would further proceed to take further effective steps for execution of the award. (*PEC ltd. v. Austbulk Shipping Sdn. Bhd.*).⁴
- 12.** The above provision of law made it clear that High Court only has exclusive jurisdiction to deal with foreign award and give effect to the same. In this context, the Petition being C.P. (IB) No. 186 /KB/2019 is *dismissed*. Needless to say that the Operational Creditor is at liberty to resort to other remedies that may be available to it under any other law.
- 13.** A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

Balraj Joshi
Member (Technical)

Rohit Kapoor
Member (Judicial)

The order is pronounced on 28th day of October, 2022

SA [LRA]

⁴ (2019) 11 SCC 620