

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Ins) No. 154 of 2023

IN THE MATTER OF:

Satish Kumar Sethi
(Member of Suspended Board of Directors
of the Corporate Debtor),
R/o G-37, Lajpat Nagar-III,
New Delhi-110024.

...Appellant

Versus

M/s. BASF India Ltd.,
Regd. Office at:
The Capital, 'A' Wing, 1204-C,
12th Floor, Plot No. C-70, 'G' Block,
Bandra Kurla Complex,
Sandra (East) Mumbai-400051.

...Respondent No. 1

Meghaaarika International Pvt. Ltd.,
Through Mr. Shaikh Nafis Anjum,
Regd. Office at:
7th Floor, DLF TOWER-B,
District Center, Jasola,
New Delhi-110044.

...Respondent No. 2

Present:

For Appellant : Mr. Salman Khurshid, Sr. Advocate with
Mr. Mohit Chaudhary, Mr. Prakhar Mithal,
Ms. Arushi Jain, Mr. Ishu Dikshit, Advocates.

For Respondents : Mr. P. Nagesh, Sr. Advocate with Ms. Geetika
Sharma, Mr. Akshay Sharma, Advocates.
Mr. Atul Bhatia, Advocate for R-2/RP

JUDGMENT

(Date: 31.5.2023)

[Per. Dr. Alok Srivastava, Member (Technical)]

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In this appeal the challenge is to the order dated 25.1.2023 passed by the Adjudicating Authority (National Company Law Tribunal, New Delhi) (in short “Impugned Order”), whereby on a section 9 application filed by BASF India Pvt. Ltd. (in short “operational creditor”), a Corporate Insolvency Resolution Process (in short “CIRP”) has been initiated against the corporate debtor M/s. Meghaaarika International Pvt. Ltd.

2. The Appellant, who was a director in the suspended board of the corporate debtor has stated and argued that a sale order bearing no. 6008159077 dated 6.1.2020 was issued by the operational creditor in favour of the corporate debtor, where after purchase order dated 8.1.2020 was placed by the corporate debtor on the operational creditor for supply of product called “Isobutanol”. The Appellant has further stated that at the request of the corporate debtor, its bankers Bank of Baroda, CSF Branch, Parliament Street, New Delhi opened an irrevocable Letter of Credit (in short “LC”) in favour of the operational creditor for a sum of Rs. 1.5 crores and it was also agreed between the two parties that the LC would be discounted by the South Indian Bank (in short “discounting bank”) so that the operational creditor receives payment in its account in Citi Bank N.A. along

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with 'Discounted Yield'. The Appellant has further stated that a High Seas Sale Agreement (in short "HSS Agreement") was entered into between the corporate debtor and operational creditor on 15.1.2020, whereby the operational creditor agreed to sell Isobutanol to the corporate debtor in accordance with terms set out in the HSS Agreement and has further stated that the operational creditor sent an invoice on 15.1.2020 for payment of the requisite amount of Rs.1.5 crores for the supply of Isobutanol in specified quantity.

3. The Appellant has further submitted that there were certain issues about the quality of the supplied material Isobutanol, which were brought to the notice of the operational creditor and an arbitration notice was sent by the corporate debtor on 5.3.2020 through Blue Dart Express Courier. He has further stated the LC could not be processed due to omission on the part of operational creditor regarding submission of complete and proper documents to the discounting bank, and as a result the LC got dishonoured. He has added that the operational creditor issued a demand notice under section 8 of the IBC on 19.10.2020 and thereafter filed section 9 petition on 23.12.2020, on which the Impugned Order was passed on 25.1.2023. The Appellant has stated that the adjudication of section 9 *Company Appeal (AT) (Ins) No. 154 of 2023*

application by the Adjudicating Authority is erroneous, and therefore, it has assailed the Impugned Order.

4. We heard the arguments of Learned Senior Counsels for both the parties and perused the record with their able assistance.

5. The Learned Senior Counsel for Appellant has argued that in response to the sale order dated 6.1.2020 issued by the operational creditor, a LC was opened by the corporate debtor as agreed between both the parties, wherein a 90 day period from the date of bill of lading was provided for payment through the LC. He has further stated that the negotiated document regarding opening of the LC notes that three lakh kilograms of Isobutanol as per purchase order No. 6008159077 dated 6.1.2020 was given by the corporate debtor, and as per the LC document which specified validity of LC for 90 days, interest for the 60 days was to be free and for the next 30 days was on the corporate debtor's account. He has brought to our attention the definitions included in the 'Users' Handbook for Documentary Credits under UCP 600' to point out that the LC is an "undertaking on the part of the bank at the request of the corporate debtor to pay the main beneficiary (which is the *Company Appeal (AT) (Ins) No. 154 of 2023*

operational creditor) a specified amount of money within the specified period of 90 days, if the beneficiary presents documents in accordance with the terms and conditions specified in the LC.” He has further argued that the LC was as per negotiation for 90 days, even though the sale order dated 6.1.2020 mentioned that LC will be collectable within 60 days.

6. The Learned Counsel for Appellant has referred to the words contained in SWIFT MT700 to point out that as per Code 42C, the ‘bill of exchange will depend on the contract and is negotiable’. He has further referred to the judgment of Hon’ble Supreme Court in the matter of **Bawa Paulins Pvt. Ltd. vs. UPS Fright Services (India) Pvt. Ltd. & Anr. (Civil Appeal No. 8298 of 2022, MANU/SC/1471/2022)** to empathically argue that the autonomy of an irrevocable letter of credit is entitled to full protection and as a rule, courts refrain from interfering with this autonomy. On this basis, he has argued that 90 days’ limit, as negotiated and included in the LC document, cannot be overridden by any other document or terms contained therein.

7. The Learned Senior Counsel for Appellant has further argued that due to issues about improper quality of the material supplied, the corporate debtor brought them to the knowledge of *Company Appeal (AT) (Ins) No. 154 of 2023*

the operational creditor and in response to the demand notice under section 8 sent by the operational creditor, the corporate debtor sent a reply wherein it pointed out that an arbitration notice under section 21 has been duly served to the operational creditor, since the goods supplied to them were of extremely poor quality. He has further argued that as per the arrangement between the parties, the payment was to be made on the basis of LC, but the operational creditor failed to provide the necessary documents to the Bank of Baroda (the bank issuing LC) and hence, the payment due to the operational creditor could not be received. He has further claimed that the notice for arbitration under section 21 of the Arbitration and Conciliation Act, 1996 seeking appointment of an Arbitrator to adjudicate the dispute pertaining to the quality of the goods supplied, was sent by the corporate debtor to the operational creditor, which was within 30 days after the receipt of the goods as specified in the HSS Agreement and therefore, in the light of the invocation of arbitration clause by the corporate debtor, the section 9 application should not have been admitted in view of pre-existing dispute.

8. The Learned Senior Counsel for Appellant has strongly argued the 90 days limit for the payment of LC was to expire on *Company Appeal (AT) (Ins) No. 154 of 2023*

25.4.2020, when the bar to filing of section 9 application had come into force by virtue of section 10-A, and therefore, the section 9 petition could not have been admitted.

9. In reply, the Learned Senior Counsel for Respondent/operational creditor has argued that the 'date of default' which was mentioned by the operational creditor in its section 9 application, is 15.3.2020, which is the 60 day period from the date of bill of lading, and which is in accordance with the period of validity of LC. He has further brought to our notice that HSS Agreement wherein clause 1 clearly sets out General Conditions of Sale (in short "GCS"), which is annexed to the agreement and also forms part of the seller's invoice, shall be applicable for sale under this agreement, and further the GCS which is part of record, in clause 8 very clearly stipulates that the invoice value has to be paid by the due date indicated in the invoice. He has thus argued that the date of default was 15.3.2020 and therefore, the section 9 application is not barred by the section 10-A. He has pointed out that the sale invoice is dated 6.1.2020 and the purchase order is issued on 8.1.2020, where after the High Seas Sale Agreement was signed between the two parties on 15.1.2020, which is after the LC was opened on 13.1.2020, and therefore, in accordance with the High Seas *Company Appeal (AT) (Ins) No. 154 of 2023*

Sales Agreement wherein it is stipulated that the invoice value should be paid as per the date given in the invoice should be the 'date of default'.

10. The Learned Senior Counsel for Respondent has rebutted the argument of the Appellant that there was a pre-existing dispute regarding poor quality of the goods supplied. He has contended that the clause 5 in High Seas Sale Agreement very clearly stipulates that regarding 'quantity shortages and non-conformance/ quality' the buyer shall notify to the seller about non-conformity of quality or shortage within 30 days after receipt of the goods, but no such communication or message was sent by the corporate debtor to the operational creditor. He has further argued that the claim of the Appellant that section 21 notice under Arbitration and Conciliation Act, 1996 was sent by Blue Dart Courtier as per Airway Bill No. 14905191162 dated 15.2.2020 was sent by the corporate debtor to the operational creditor did not actually travel in the Blue Dart network as was clarified to the operational creditor by Blue Dart Express Ltd. vide their letter dated 10.6.2021. He has further contended that merely producing receipt of submission consignment from Blue Dart Express Ltd. does not imply service of the notice on the operational creditor and therefore, no notice of pre-existing *Company Appeal (AT) (Ins) No. 154 of 2023*

dispute regarding quality of the supplied goods was found to be served on the operational creditor either within 30 days from the date of receipt of the goods, as stipulated in the High Seas Sale Agreement or on any date before the issue of section 8 notice by the operational creditor.

11. The three issues which are relevant in the adjudication of the present appeal are as follows:-

- (i) Whether the 'date of default' in payment of the dues for supply of Isobutanol by the operational creditor to the corporate debtor is in the period specified under section 10-A of the IBC?
- (ii) Whether there was a 'pre-existing dispute' regarding the poor quality of the material supplied to the corporate debtor as defined in law?
- (iii) Whether the dishonouring of the LC discounting by the South Indian Bank was on account of negligence of the corporate debtor?

12. On the first issue whether the 'date of default' is within the period as specified in section 10-A during which initiation of CIRP is suspended, we note that the purchase order was given by the *Company Appeal (AT) (Ins) No. 154 of 2023*

corporate debtor Meghaaarika International Pvt. Ltd. on 8.1.2020 (page 101 of the appeal paperbook Vol. I) and it stipulated that the payment terms are 'LC 60 days from the HSS date'. This purchase order was preceded by a sale order dated 6.1.2020. In this sale order the credit days as specified is 'collectable in 60 days'. Further, the LC document (attached at pp.103-106 of the appeal paperbook Vol.I), which is found to be created on 13.1.2020 has an entry stating "BY NEGOTIATION, 42C: 90 DAYS FROM THE DATE OF BILL OF LADING". Further, the HSS Agreement dated 15.1.2020, which is signed two days after the creation of LC on 13.1.2020, includes the following:-

"1. General Conditions of Sale

The General conditions of Sale (GCS) as annexed in Annexure-3 and forming part of the Sellers invoice (Local Sale invoice) shall be applicable for the sale under this Agreement."

The 'General Conditions of Sale' is annexed as Annexure III with the HSS Agreement and it includes the following regarding 'payment':-

"8. Payment

In the event the total invoice value, is not paid by the due date indicated on the invoice, seller reserves the right to change interest 18% per annum."

13. We thus note that the HSS Agreement, which was signed on 15.1.2020 after the creation of LC on 13.1.2020, says that the date of payment would be as given in the invoice. Further, the invoice (attached at pg. 102 of appeal paperbook, Vol.I) clearly states that the credit days are '060-LC collectable in 60 days'. It is thus clear that the HSS Agreement, which is the last final contract signed between the parties, clearly specifies that the payment against invoice is to be made by 'LC which is collectable within 60 days'.

14. We now peruse the judgment of Hon'ble Supreme Court in the matter of **Bawa Paulins Pvt. Ltd. vs. UPS Fright Services (India) Pvt. Ltd. (supra)**, which is cited in support by the Learned Senior counsel for Appellant, wherein paragraph 35, it is observed as follows:-

"35. In Hindustan Steel Workers Construction Ltd. V G.S. Atwal & Co. (Engineers) (P) Ltd. [(1995) 6 SCC 76] this Court held that a letter of credit is independent of and unqualified by the contract of sale or underlying transactions. The autonomy of an irrevocable LOC is entitled to protection and as a rule, courts refrain from interfering with that autonomy. If courts interfere in such transactions, it would be prone to misuse by the applicant party to gain undue advantage leaving the issuing bank at peril in the international financial market."

15. We note that above judgment places autonomy on an irrevocable LC which is held to be entitled to protection. In the present case, we note that after the opening of LC, a HSS Agreement was entered into between the two parties, which when seen in conjunction with the sales invoice, notes that the payment is to be made through a LC within 60 days from the date of issue of invoice, which is 6.1.2020. This judgment therefore, is distinguishable on the facts of the present case, wherein an explicit HSS Agreement has been signed between the parties since the sale of Isobutanol was on high seas. It is thus clear that the date of default is 60 days from 6.1.2020, which is the date of invoice. Counting 60 days from 6.1.2020, we find that the payment was due to be made by 5.3.2020. Thus, it is clear that the date of default is not covered in the period as stipulated in section 10-A of the IBC, and therefore, section 9 application does not suffer from bar as specified in section 10-A regarding its admission and initiation of CIRP.

16. On the issue of pre-existing dispute, we note that in reply to the section 8 demand notice, the corporate debtor has raised the issue of poor quality of Isobutanol supply by the operational creditor, and as also the invocation of arbitration clause and issuing of notice under section 21 of the Arbitration and *Company Appeal (AT) (Ins) No. 154 of 2023*

Conciliation Act, 1996. Notably, the corporate debtor has not produced any record or document before the NCLT or before us regarding 'pre-existence of dispute' about the quality of material supplied. We also note that a notice under section 21 of the Arbitration and Conciliation Act seeking appointment of arbitrator dated 14.2.2020 is submitted as part of the record, and ostensibly this notice was sent through Blue Dart Courier by Airway Bill No. 149045191162 dated 15.2.2020. The Learned Senior Counsel for Respondent/operational creditor has brought to our notice a letter dated 10.6.2021 (attached at page 261 of the appeal paperbook, vol.II) to bring for the fact that the said AWB No. 14905191162 dated 15.2.2020 did not travel in the Blue Dart Express Limited network. The relevant portion of this letter is reproduced below:-

"Date: June 20,2021

*BASF India Limited,
Plot No. 12, TTC Area,
Thane Belapur Road,
Turbhe, Navi Mumbai-400705.
Maharashtra India*

K/a: Mr. Magirish Kasbekar/Nilesh Waghmode

Re: AWB#14905191162, 14905191151

As requested by you, we, Blue Dart Express Limited hereby state that as per our records and to the best of our knowledge, following airway Bills (details of which were given by you vide your e-mail dated 16/04/2021 were not travelled in our network:

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1. AWB 14905191162 Dt. 15.02.2020
Sender Meghaaarika International, Delhi
Consignee. BASF India Ltd., Turbhe.

2. AWB. 14905191151 Dt. 05.03.2020
Sender Meghaaarika International, Delhi
Consignee. BASF India Ltd., Turbhe.

For **Blue Dart Express Limited**

Sd/-
Authorized Signatory
Mumbai.”

17. We thus, are of the clear opinion that while it is claimed by the Appellant that section 21 notice under the Arbitration and Conciliation Act, 1996 for invoking the arbitration clause under the HSS Agreement was sent through Blue Dart courier, the contents letter dated 10.6.2021 as mentioned above, very clearly show that such a document did not travel in the Blue Dart Express Ltd. network and therefore, no such notice was ever served on the operational creditor.

18. We, therefore, follow the law propounded by the Hon'ble Supreme Court in the matter of **Mobilox Innovations Private Ltd. vs. Kirusa Software Private Ltd. (7 SCC Online SC 1154)**, that the pre-existing dispute has to be 'real' and 'genuine' one, and not an 'illusory' or 'hypothetical' dispute. In this judgment, the Hon'ble Supreme Court has held as follows:-
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“39) Certainly the court will not examine the merits of the dispute other than to see if there is in fact a genuine dispute. The notion of a ‘genuine dispute’ in this context suggests to me that the court must be satisfied that there is a dispute that is not plainly vexatious or frivolous. It must be satisfied that there is a claim that may have some substance”. In *Greenwood Manor Pty Ltd v Woodlock* (1994) 48 FCR 229 Northrop J referred to the formulations of Thomas J in *Re Morris Catering (Australia) Pty Ltd* (1993) 11 ACLC 919, 922 and Hayne J in *Mibor Investments Pty Ltd v Commonwealth Bank of Australia* (supra), where he noted the dictionary definition of “genuine” as being in this context “not spurious ... real or true” and concluded (at 234): “Although it is true that the Court, on an application under ss 459G and 459H is not entitled to decide a question as to whether a claim will succeed or not, it must be satisfied that there is a genuine dispute between the company and the respondent about the existence of the debt. If it can be shown that the argument in support of the existence of a genuine dispute can have no possible basis whatsoever, in my view, it cannot be said that there is a genuine dispute. This does not involve, in itself, a determination of whether the claim will succeed or not, but it does go to the reality of the dispute, to show that it is real or true and not merely spurious”. In our view a “genuine” dispute requires that: • the dispute be bona fide and truly exist in fact; • the grounds for alleging the existence of a dispute are real and not spurious, hypothetical, illusory or misconceived.”

19. In the present case, we find that the dispute was neither raised before the issue of section 8 demand notice and also the notice under section 21 of the Arbitration and Conciliation Act, 1996 was not proven to be served on the operational creditor. In such a situation, we are of the clear opinion that the corporate debtor cannot claim ‘pre-existence of dispute’ in the adjudication of the section 9 application.

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20. The Learned Senior Counsel for Appellant has also raised the issue of discrepancy with regard to the submission of relevant documents to the discounting bank i.e. South Indian Bank Limited. In this connection, we note that the documents for discounting of LC were submitted by the corporate debtor to the discounting bank. We further find that the documents namely signed commercial invoices, lorry receipt of an IBA approved transporter evidencing dispatch of goods, packing list with details as per invoice, inland transit insurance policy, copy of High Seas Sale Agreement and bill of lading were to be submitted to the discounting bank for payment.

21. In the above connection, we note that South Indian Bank was approached by the corporate debtor Meghaaarika International Pvt. Ltd. vide letter dated 28.2.2020 enclosing documents for the LC purchase bill discounting facility granted by the South Indian Bank whereby the corporate debtor instructed the South Indian Bank to credit the proceeds of the bill net of margin, interest and other applicable charges in the bank account of City Bank N.A. Mumbai held by the beneficiary (seller) BASF India Limited. (This letter is attached at pp. 50-51 of the appeal paperbook vol. I). We further note that the *Company Appeal (AT) (Ins) No. 154 of 2023*

operational creditor BASF India also sent a letter dated 20.8.2022 addressed to the South Indian Bank, New Delhi referring to the letter sent by the buyer Meghaaarika International Pvt. Ltd. and further making the same request as was made by the corporate debtor for crediting the proceeds of the bill in its bank account in Citi Bank N.A., Mumbai. It is noted that both these letters were sent before the expiry of 60 days period as mentioned in the invoice.

22. We note that the LC documents were presented by the corporate debtor to South Indian Bank Limited to be presented to the LC issuing bank i.e. Bank of Baroda, the South Indian Bank would release the payment to operational creditor before expiry of 60 days validity period of the LC. It is noted that the documents so required were not received by the South Indian Bank from the corporate debtor and hence, the payment due to the operational creditor by the due date 3.3.2020 could not be made.

23. We also note that e-mails were exchanged between the operational creditor BASF India, Bank of Baroda and the corporate debtor regarding payment due to BASF India. These e-mails and letters are attached at pp.149-160 of the appeal paperbook vol. I. It is also noted that the letter dated 24.2.2020 *Company Appeal (AT) (Ins) No. 154 of 2023*

(at page 149 of the appeal paperbook Vol.I) is addressed to the corporate debtor and further e-mails starting from 23.4.2020 to 3.9.2020 are all addressed to Mr. Nikhil Sethi with copy to Mr. Satish Kumar Sethi. Notably, Mr. Nikhil Sethi is a director in the corporate debtor company. We also note that in the e-mails dated 24.4.2020, 19.5.2020, 25.5.2020, 16.6.2020, 2.7.2020, 10.7.2020, 27.7.2020, 10.8.2020 and 3.9.2020, there are requests from the operational creditor for the payment of overdue amount, and it is after the overdue payment is not made despite such follow up, does the operational creditor send a demand notice dated 19.10.2020 to the corporate debtor with particulars of the operational debt.

24. On the point of the party responsible for discrepancies and deficiencies in the documents submitted to South India Bank, we note the letter dated 28.2.2020 sent by the corporate debtor to South Indian Bank for making payment against the discounted bill. The discrepancies in the documents submitted, which were later pointed out by the South Indian Bank was, therefore, required to be taken care of and cured by the corporate debtor. In this connection, we also note the rejoinder filed by BASF India before the NCLT, where in paragraph 20 the issue about discrepancies in documents and that the discrepancy letter was *Company Appeal (AT) (Ins) No. 154 of 2023*

not given by the South Indian Bank to BASF India, but to the corporate debtor has been mentioned. We are, therefore, of the view that when the payment could not be made to the operational creditor in view of discrepancies in the documents submitted to the South Indian Bank for discounting of the LC, it was the duty of the corporate debtor to make the requisite payments, and since the matter of non-payment was brought to the notice of the corporate debtor repeatedly by the operational creditor, the onus of not making the payment, was on the corporate debtor and the default began after a lapse of 60 days from the date of bill of lading.

25. On the basis of detailed discussion in the aforementioned paragraphs, we are of the clear view that the operational debt should have been paid through LC facility within 60 days from 15.1.2020, and since it could not be done due to discrepancies in submission of documents to the South Indian Bank, it was the responsibility of the corporate debtor to make the payments, more so when it was being repeatedly asked to do so by the operational creditor. The issue of pre-existing dispute has been dealt in detail earlier in this judgment and we find that the issue does not hold any water. We also note that HSS Agreement was executed on 15.1.2020 and under the General Conditions of Sale *Company Appeal (AT) (Ins) No. 154 of 2023*

included in the HSS Agreement, the payment was to be made with 60 days from the date of bill of lading, which would be 'date of default' and which would not be covered in the period stipulated in Section 10-A of the IBC.

26. We are, therefore, of the view that the Impugned Order does not suffer from any infirmity and it does not require any interference. The appeal is, therefore, dismissed with no order as to costs.

[Justice Rakesh Kumar]
Member (Judicial)

[Dr. Alok Srivastava]
Member (Technical)

New Delhi
31st May, 2023

/aks/