



**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH (Court– I)
KOLKATA**

C.P. (IB) 267/KB/2021

*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:

R.K. Transport Private Limited

[CIN: U00701JH1987PTC002773]

..... *Operational Creditor/ Petitioner*

-versus-

Shree Balaji Transport & Roadways Private Limited

[CIN:U60231WB2009PTC132585]

..... *Corporate Debtor/ Respondent*

Date of Pronouncement of the order: 10.01.2024

Coram:

Mr. Rohit Kapoor, Member (Judicial)

Mr. Balraj Joshi, Member (Technical)

Appearances (via video conferencing/physical):

For the Operational Creditor:

Mr. Sumeet Garodia, Adv.

Mr. Ritesh Kumar Gupta, Adv.

Mr. Akash Sharma, Adv.

For the Corporate Debtor:

Ms. Shruti Tibrewal, Adv.

Mr. Snehashis Sen, Adv.



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ORDER

Balraj Joshi, Member (Technical):

1. This Court convened through hybrid mode.
2. This is a Company Petition under section 9 of the Insolvency and Bankruptcy Code, 2016 (herein after referred as “the Code” or “IBC”) by **R.K. Transport Private Limited**, hereinafter referred to as “*Operational Creditor*” seeking to initiate Corporate Insolvency Resolution Process (“CIRP”) against **Shree Balaji Transport & Roadways Private Limited**, hereinafter referred to as “*Corporate Debtor*”.
3. The Corporate Debtor is a private limited company incorporated on 17.04.2013. The nominal share-capital of the company ₹50,00,000/- and the paid-up share capital of the company is ₹5,10,000/-.
4. The total amount claimed to be in due to the Operational Creditor, is ₹ Rs. 5,82,36,434/-. The date of default is 17 August 2017.
5. The Operational Creditor has relied on the various documents in support of its claims, including:
 - a) Series of invoices annexed as Annexure **B and E**;
 - b) Letter dated 22.04.2021, annexed as Annexure **H**;
 - c) Demand Notice dated 09.08.2021, annexed as Annexure **J and J/1**;
 - d) Bank Statements reflecting the unpaid operational debt; annexed as Annexure **H**;
 - e) Reply to demand notice dated 30.08.2021, annexed as Annexure **K**.

6. Submissions on behalf of the Operational Creditor:

- 6.1 The case of the Operational Creditor is that the Corporate Debtor, vide work order dated 5.4.2017, awarded to the Operational Creditor, work in the nature of a 'Service Order for supervision and assistance in handling and dispatch of CCL Coal at Tori Siding'. Pursuant to the said work order, the Operational Creditor raised six different Invoices in the Financial Year 2017-18, for execution of the



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aforesaid work of a total value of Rs. 6,54,32,133/-Debtor. Against the said invoices, the Operational Creditor received payment of Rs. 2.89 Crore, and Rs. 11,09,019/- was deducted as TDS on the taxable value of the bills. Thus, an amount of Rs. 3,54,23,114/- was outstanding and payable for the Financial Year 2017-18.

6.2 Thereafter, for the Financial Year 2018-19, Operational Creditor raised total eleven Tax Invoices for the services rendered by it for a total amount of Rs. 2,59,08,135/-. However, against the aforesaid invoices, the Operational Creditor received payment of Rs. 2.15 Crore, and Rs. 4,39,120/- was deducted as TDS on the taxable value of the bills. Thus, an amount of Rs. 39,69,017/- is due and payable for the Financial Year 2018-19 against the Invoices raised by Operational Creditor to the Corporate Debtor.

6.3 In respect of the entire Bills raised for the Financial Years 2017-18 and 2018-19, TDS in terms of Section 194(C) of the Income Tax Act, 1961 has been deducted by the Corporate Debtor, meaning thereby, the entire amount billed by Operational Creditor has been claimed as 'Expenses' by the Corporate Debtor in its books of accounts. The Corporate Debtor has even availed ITC in respect of the entire Invoices raised by our company, but have not made payment of the due amount to Operational Creditor.

6.4 The Corporate Debtor has failed and neglected to pay the outstanding amount despite being requested by the Operational Creditor on several occasions. As such, the Operational Creditor issued a letter dated 22.04.2021 to the Corporate Debtor, demanding the outstanding payment. The Corporate Debtor replied to the same *vide* letter dated 13.06.2021, thereby disputing the total outstanding dues.

6.5 Subsequently, the Operational Creditor sent a demand notice in Form-3 under Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 on 09.08.2021 *vide* registered post as well as speed post to the registered address of the Corporate Debtor. A copy of the same was also



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forwarded to the e-mail ID of the Corporate Debtor on 09.08.2021 itself. The Corporate Debtor replied to the same vide letter dated 30.08.2021 thereby again disputing the amount of the outstanding dues.

6.6 The principal sum of Rs. 5,19,48,139/- - along with 18% interest per annum is due and payable by the Corporate Debtor, making the total Amount due to be Rs. 5,82,36,434/-. The debt fell due on and from 17.08.2017.

7 Submissions on behalf of the Corporate Debtor:

7.1 The Corporate Debtor has submitted that there are pre-existing disputes between the parties which were from time to time prior to actions before the Insolvency and Bankruptcy Code, 2016, was initiated by the Operational Creditor.

7.2 The Corporate Debtor had issued the Work Order¹ dated 5th April 2017 in favour of the operational creditor for the purpose of supervision and assistance in handling and dispatch of CCL coal from Tori Siding. The aforesaid Work Order, awarded to the operational creditor, was originally issued as a sub-contract against a service order issued by the principal company being M/s. Hindalco Industries Limited ('the principal employer company').

7.3 The scope of work pertaining to the aforesaid Work Order was clearly explained to the operational creditor by the Respondent/Corporate Debtor. It was further informed that the scope of work is not limited to mere loading of materials into rakes and that the scope of work was inclusive of the general practice of under-loading and overloading of rakes as well as the demurrage charges of the railway for the detention of wagons in excess of the permissible limit for loading.

7.4 After the contract between the Operational Creditor and the Corporate Debtor herein was entered into between the parties, the Corporate Debtor was awarded with several Service Orders from Hindalco Industries Limited, Renukoot Works, P.O. Renukoot 231217, District - Sonbhadra, Uttar Pradesh. It

¹Annexure A to the Reply Affidavit



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would appear from the records that Hindalco Industries Limited, from time to time, placed several service orders dated 22.6.2017, 12.2.2018, 19.7.2018, 26.11.2018, 17.7.2019, 20.7.2019 and 10.12.2019 in respect of several units of Hindalco Industries Limited.

7.5 In terms of the agreement between the Operational Creditor and the Corporate Debtor, the Operational Creditor started engaging into the service of loading of Coal at Tori Siding (TPST), Jharkhand. The scope of work of the Operational Creditor was to diligently and without causing any demurrage load the requisite quantities of coal on the rakes of Hindalco at the Tori Siding. The Operational Creditor however in utter breach of the contract between the parties did not diligently and with due care and expedition load the coal at the Tori siding. As a result of such under-loading as well as delayed loading resulted in demurrages imposed upon Hindalco Industries Limited, by the Railways, the Corporate Debtor started receiving series of demands/debit notes and/or claims against itself for the breach committed by the Operational Creditor in carrying out its obligation under the contract dated 5th April, 2017.

7.6 Hindalco Industries Limited by its email² dated 3.7.2017, 28.3.2018, 20.4.2018, 30.8.2018, 30.5.2019 and 10.7.2020 raised several claims on account of under-loading and/or demurrage to the tune of Rs. 9,24,00, 000/- only as on 31.3.2018.

7.7 Since the Corporate Debtor was also delinquent in promptly uploading coal on to the rakes at Tori siding, the Railways, in turn, had claimed demurrage from Hindalco Industries Limited. As a result of such negligent act of the Operational Creditor which resulted in claiming of demurrages by Railways upon Hindalco Industries Limited, Hindalco Industries Limited, in turn, raised its claims against the Corporate Debtor to the tune of Rs. 1,92,53,040/- and Rs. 5,21,325/- by way of its two emails³ dated 4th June, 2019 and 24th July, 2019.

²Annexure B to the Reply Affidavit

³Annexure C to the Reply Affidavit



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- 7.8 By reasons of breach committed by the Operational Creditor, Hindalco Industries Limited has withheld the dues in excess of Rs. 15.0 Crores of the Corporate Debtor and has also refused to reconcile the account till date. The principal employer company had imposed penalties on the Respondent/Corporate Debtor.
- 7.9 The Corporate Debtor informed The Operational Creditor that after adjusting the dead freight on account of under-loading and overloading of rakes and considering the on account tolerance quantity as well as demurrage charges in respect of the rakes on year to year basis, the operational creditor was liable to pay Rs. 1,47,97,381/- to the Corporate Debtor.
- 7.10 By letters dated 20th October, 2020 and dated 3rd December, 2020 the Operational Creditor made frivolous demands from the Corporate Debtor. By its reply bearing Reference No. SBTRPL/RKT/02-01/20-21 dated 11th February, 2021 the Corporate Debtor categorically denied the claims of the Operational Creditor. In reply to the said letter dated 11th February, 2021, the Operational Creditor by a letter bearing reference no RKTPL 21-22/ 13 dated 22nd February, 2021, purported to deny the claim of the Corporate Debtor and reiterated its claims arising out of the Work order while pleading complete ignorance of any amounts incurred due to under-loading of rakes, overloading of rakes, demurrage charges incurred.
- 7.11 The above exchange of correspondence would reveal that long before the present proceedings, and the demand notice dated 18th January 2021 issued by the Operational Creditor, the dispute between the parties existed as a result of rival claims being made by both parties against each other.
- 7.12 By the demand notice dated 13th June 2021, the Respondent/Corporate Debtor had clarified that as a general practice the input tax credit of the GST amount is availed initially on the basis of the bill raised by the supplier of the goods and services and that tax is also deducted at source and deposited on the basis of the provisional bill only till the actual settlement of the accounts, which can be



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reversed by issuing the debit note/credit note after settlement of the accounts. As such, the Respondent/Corporate Debtor was supposed to issue debit note against penalty amount of the aforesaid under-loading, overloading and demurrage charges debited by the aforesaid principal employer company, in compliance with the penalclauses which fall under the general terms of the contract as well as the terms and conditions of the sub-contract. The operational creditor was further informed that it had failed to abide by the terms and conditions as specified by the railway authority while performing its job at the railway siding.

8 Rejoinder on behalf of the Operational Creditor:

8.1 The submissions made by the Operational Creditor in its rejoinder have been summarized hereinafter:

- a) The Corporate Debtor has relied on claims made by Hindalco Industries Limited against the Corporate Debtor in order to justify withholding payments to the Operational Creditor. However, the said claims were never communicated to the Operational Creditor until the Operational Creditor issued a legal notice. It is further submitted that the said claims have no relation with the Operational Creditor.
- b) For the invoices of FY 2017-2018, the Corporate Debtor made a payment of Rs. 2,89,00,000/- and deducted and deposited TDS of Rs. 11,09,019/-, thus a sum of Rs. 3,00,09,019/- was paid against the invoices. A sum of Rs. 3,54,23,114/- remained due and payable. Similarly, for the financial year 2018-2019, invoices amounting to Rs. 2,19,56,048/- and IGST of Rs. 39,52,089/- totalling to Rs. 2,59,08,137/- was raised. For the invoices of FY 2018-2019, a payment of Rs. 2,15,00,000/- was made and TDS of Rs. 4,39,120/- was deducted and deposited by the Corporate Debtor. Balance of Rs. 39,69,017/- remained due and payable.



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c) The Corporate Debtor booked the balance amounts payable to the Operational Creditor for both the FY 2017-2018 and FY 2018-2019 in its books of accounts as expense and thus deducted TDS on the said amount and deposited the same to the account of the Operational Creditor. The same is reflecting in Form 26AS Statement of the Operational Creditor. The Corporate Debtor also made provision in the accounts for payment of the balance amounts, thereby, admitting the amounts being due and payable. The said amounts have not been disputed by the Corporate Debtor in its books and neither did the Corporate Debtor seek rectification of its TDS with the Income Tax Department.

Furthermore, the Operational Creditor filed its GSTR-1 Returns for the aforesaid financial years. Consequently, the Corporate Debtor availed the Input Tax Credit in respect of the aforesaid invoices.

d) The Corporate Debtor did not seek rectification of the TDS with the Income Tax Department, availed benefit of Input Tax Credit, unambiguously shows and confirms that the amounts as per the invoices raised by the Operational Creditor are admitted and due and payable.

9 Analysis and Findings:

9.1 Heard the Ld. Counsel on behalf of the Operational Creditor and Ld. Counsel on behalf of the Corporate Debtor and perused the record.

9.2 Upon perusal of the petition, it is clear to us that the primary contention raised by the Corporate Debtor is regarding “pre-existing disputes” between the parties, specifically the under-loading as well as delayed loading done by the



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Operational Creditor that resulted in demurrages imposed upon Hindalco Industries Limited upon the Corporate Debtor.

9.3 In this regard, we would first like to refer to the precedent set by the Hon'ble Supreme Court in the matter of ***Mobilox Innovations Private Limited Vs. Kirusa Software Private Limited***⁴ wherein the Apex Court held that:

“The scheme of Section 7 stands in contrast with the scheme Under Section 9 where an operational creditor is, on the occurrence of a default, to first deliver a demand notice of the unpaid debt to the operational debtor in the manner provided in Section 8(1) of the Code. Under Section 8(2), the corporate debtor can, within a period of 10 days of receipt of the demand notice or copy of the invoice mentioned in Sub-section (1), bring to the notice of the operational creditor the existence of a dispute or the record of the pendency of a suit or arbitration proceedings, which is pre-existing - i.e. before such notice or invoice was received by the corporate debtor. The moment there is existence of such a dispute, the operational creditor gets out of the clutches of the Code.” (Para 29)

The Apex Court, in **Mobilox Innovations Private Limited**(Supra) further held that:

“...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

⁴Mobilox Innovations Private Limited vs. Kirusa Software Private Limited (21.09.2017 - SC) : MANU/SC/1196/2017



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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.” (Para 40)

- 9.4 It is clear from the aforesaid judgment that the “dispute” raised by the Corporate Debtor should not be moonshine argument or a spurious defense. It should be “*a plausible contention which requires further investigation*”.
- 9.5 Coming to the merits of the instant case, the Operational Creditor has claimed that such correspondences were never communicated to the Operational Creditor before the legal notice was issued by it. There is no record to contradict the same. Be that as it may, it is clear to us from the letter⁵ dated 22nd April which was issued by the Operational Creditor as a reply to the Corporate Debtor’s reply dated 11.02.2021, that the Corporate Debtor had brought to the notice of the Operational Creditor, the disputes regarding the demurrages imposed by the principal employer long before the demand notice dated 09.08.2021 was issued. As such the Operational Creditor had notice of the said disputes before the service of the demand notice under section 8 of the Code.
- 9.6 As far as the plausibility of the said defense is concerned, it is clear from the Annexures B and C of the Reply Affidavit that the principal employer being Hindalco Industries Limited claimed demurrages from the Corporate Debtor. As such, the defence taken by the Corporate Debtor is not a feeble argument “unsupported by evidence”. In light of the aforesaid letter and emails, we are of the considered opinion that the disputes requires “further investigation” by an authority having competent jurisdiction.
- 9.7 In view of the above explanations, we are of the considered opinion that the petition is not maintainable as there are pre-existing disputes in the matter. Accordingly, this petition is liable to be ***rejected*** and we accordingly hold so.

⁵Annexure H to the petition



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9.8 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.

13.1 A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

13.2 CP(IB)267/KB/2021 is accordingly disposed of. File be consigned to record.

Balraj Joshi
Member (Technical)

Rohit Kapoor
Member (Judicial)

Signed on this, the 10th day of January 2024

SM(LRA)