

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT)(Insolvency) No. 1343 of 2022

[Arising out of order dated 07.07.2022 passed by the Adjudicating Authority, National Company Law Tribunal, Ahmedabad, Court-II in CP(IB) No.216/NCLT/AHM/2020]

IN THE MATTER OF:

**Shree Durga Iron & Steel Company Ltd.
49, P D Mello Road,
403 Vyapar Bhawan,
Mumbai, Maharashtra – 400009**

...Appellant

Versus

**Rawalwasia Textile Industries Private Ltd.
Office No.104, 1st Floor, Raghuvir Textile Mall,
Aai Mata Road, Dhumbhal,
Parvat Patia, Surat,
Gujarat – 395010**

...Respondent

Present:

For Appellant: Mr. Ravi Raghunath, Advocate

For Respondent: Mr. Vikram Hegde, Mr. Abhinav Hansaraman, Mr. Manoj Harit, Advocates

J U D G M E N T

[Per: Barun Mitra, Member (Technical)]

The present appeal filed under Section 61 of Insolvency and Bankruptcy Code, 2016 (“**IBC**” in short) by the Appellant arises out of the Order dated 07.07.2022 (hereinafter referred to as “**Impugned Order**”) passed by the

Adjudicating Authority (National Company Law Tribunal, Ahmedabad Court-II) in CP (IB) No. 216/NCLT/AHM/2020. By the Impugned Order, the Adjudicating Authority has dismissed the Section 9 application filed by the Operational Creditor-Shree Durga Iron and Steel Company Ltd. (the present Appellant) seeking initiation of Corporate Insolvency Resolution Process (**'CIRP'** in short) against Corporate Debtor-Rawalwasia Textile Industries Pvt. Ltd. (the present Respondent). Aggrieved by this impugned order, the present appeal has been preferred by the Operational Creditor.

2. The Learned Counsel for the Appellant while making his submissions on the factual matrix of this case submitted that the Appellant is engaged in the business of trading and import of Coal, Iron and Steel. The Appellant was engaged in a business relationship with the Respondent for supply of steam coal. For this purpose, a High Seas Sale Agreement (**'HSSA'** in short) was entered into between both the parties dated 24.05.2014 for supply of 4000 MTs of Coal by the Operational Creditor from a vessel named "M.V. Jag Aarati". It has been claimed that the above material was supplied in four consignments of 1000 MTs each on 22.08.2014 for which four Bills of Lading (**'BoL'** in short) were issued in favour of the Corporate Debtor. The delivery having been completed an invoice of Rs. 1,63,29,680/- was raised by the Appellant on 15.09.2014 besides issuing a debit note towards stevedoring charges amounting Rs.11,46,072/- dated 24.12.2014.

3. It has been further submitted that the Appellant had filed a summary suit before the Hon'ble Bombay High Court against the Corporate Debtor in which the Hon'ble Bombay High Court on 14.12.2018 had decreed a sum of Rs. 2,45,78,804/- including principal amount, interest thereon and costs. The said

decree was served upon the Corporate Debtor on 13.12.2019. Subsequently, on 31.01.2020, the Appellant sent a Section 8 demand notice to the Corporate Debtor seeking payment of the unpaid operational debt. Further submitting that the Corporate Debtor did not raise any notice of dispute, the Appellant filed the Section 9 application on 28.02.2020 claiming an amount of Rs.2,68,59,749/- as on 15.01.2020 arising out of the decree passed by the Hon'ble Bombay High Court on 14.12.2018.

4. The Learned Counsel for the Appellant stated that the Adjudicating Authority had erroneously dismissed the Section 9 application on the ground that there was a pre-existing dispute between the parties with regard to quality of goods supplied by the Appellant as raised by the Corporate Debtor.

5. Advancing their side of arguments, the Learned Counsel for the Respondent while admitting the HSSA of 24.05.2014, however, vehemently contended that there was a dispute between the two parties which was raised by them in their email of 15.10.2014 wherein it was clearly stated that the coal supplied by the Appellant was of poor-quality having Sulphur content beyond contracted levels as per test report of 29.09.2014. Moreover, owing to poor quality, the Corporate Debtor had lifted only 633.94 MT of coal against the contracted amount of 4000MT and cancelled the contract. Due to poor quality of coal, it was claimed by the Learned Counsel for the Respondent that the Appellant refunded Rs.80 lakhs on 21.10.2014 as payments for the coal consignment had been made in advance. It was also stated that the Corporate Debtor had raised one debit note on 24.12.2014 and two debit notes on 31.01.2015. These debit notes squared off the accounts of both the parties. The Corporate Debtor in the reply to the Section 9

application had submitted that no money/debt was due or payable to the Operational Creditor. It was also submitted that the decree dated 14.12.2018 passed by the Hon'ble Bombay High Court has been challenged by the Corporate Debtor in statutory appeal No.3043 of 2020 before the Hon'ble Bombay High Court which is pending adjudication. Given these facts, the Learned Counsel for the Respondent stoutly contended that there being clear evidence of pre-existing dispute, the Adjudicating Authority had rightly dismissed the Section 9 application.

6. We have duly considered the arguments and submissions advanced by the Learned Counsel for the parties and perused the records carefully. The moot point for consideration is whether in the facts of the present case, a genuine and real pre-existing dispute can be said to be in existence between the two parties.

7. It is the case of the Appellant that in terms of the HSSA dated 15.09.2014, 4000 MTs of coal had been transferred to the Corporate Debtor by endorsing four BoLs in the name of the Corporate Debtor. It is, therefore, claimed that in terms of the Sale of Goods Act, 1930, and Bills of Lading Act, 1856, the transaction of delivery of goods stood concluded and accordingly, invoices had been raised for the supply of coal on the Corporate Debtor. The delivery of coal consignment is further evidenced from the fact that the Corporate Debtor subsequent to receipt of coal consignment in turn made onward sale of 1000 MT of coal each to four other parties on High Sea. It was claimed that this was the usual modus operandi of sale-purchase transactions on high-seas. The Corporate Debtor having failed in the discharge of their operational debt liabilities, it was contended that this was a fit case for initiation of CIRP under section 9 of IBC.

8. Countering the above standpoint, the Learned Counsel for the Respondent stated that merely because the HSSA was in place and attendant invoices had been raised, that in itself is not sufficient basis to establish a conclusion of a commercial transaction. In the absence of clear proof of delivery, BoLs cannot be construed as constructive evidence that the consignment has been delivered. It has been asserted that the modus operandi of the business of high seas sale purchase transaction has been twisted by the Learned Counsel for the Appellant to create a misleading perception that goods have been received and onward delivery made in the high seas besides pointing out that the issue of onward sales was never raised as a ground by the Appellant before the Adjudicating Authority.

9. It was pointed out that the Corporate Debtor had not lifted 3366 MTs of coal out of the total invoiced quantity of 4000 MTs due to excess sulphur content. That the coal supplied was of inferior quality was raised by the Corporate Debtor in their email of 15.10.2014. Further, the very fact that the Operational Creditor had refunded a sum of Rs.80 lakhs in two tranches on 20.10.2014 and 21.10.2014 post their invoice of 15.09.2014 clearly establishes that coal supplied suffered from inferior quality. The Learned Counsel for the Appellant claimed that the email of 15.10.2014 which has been relied upon by the Adjudicating Authority to hold that there was pre-existing dispute was misconceived since the email vaguely stated that the cargo has been rejected without making any reference to HSSA or the attendant invoice. Moreover, there are no documents which mandated the Operational Creditor to guarantee Sulphur content of 1%.

10. At this stage it may be relevant for us to notice the contents of the said email which is to the following effect:

----- Forwarded message -----
From: "Samir Agarwal" <samir@sanskarprocessors.com>
Date: 15 Oct 2014 08:19
Subject: Our order for 5000 gar coal ex kandla port
To: "Surendra Agarwal" <imports@utkalintrade.com>, "Surendra" <surendraagarwal@utkalintrade.com>, "Rajkumar Agarwal" <durgasteel@gmail.com>
Cc:

Dear Sir

We regret to state than you had sold us the cargo with a guranteed sulphur content of 1% max but the actual sulphur content is in approx 1.3%, if you wish we can go for joint analysis of the cargo, hence your cargo stands rejected and we reserve the right to claim all looses.

Thanking you.

Samir Agarwal
Rawalwasia Group
113, Ratan Chambers, NR. Ratan Cinema,
Ring Road, Surat- India -395002
M - +91-9824102989, +91-9374538264
O - +91-261-4110000

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Thanking You
RAWALWASIA GROUP

11. We notice that though the email of 15.10.2014 may not be worded very well and is not so detailed, nevertheless, it is categorically stated in the email that the coal cargo stood rejected on grounds of inferior quality for exceeding threshold of Sulphur content. We do not find any material on record by way of reply to the Corporate Debtor by the Operational Creditor which substantiates their having controverted the email dated 15.10.2014. The Adjudicating Authority, has, therefore not committed any mistake in holding that the said email clearly reflected that there was a specific dispute about the poor quality of goods supplied by the Operational Creditor. We also notice that the quality test analysis report of Coal dated 29.09.2014 was conducted by the testing agency on the instructions of the Operational Creditor as placed at Annexure-H in the reply affidavit. This lends credulity to the contention of the Learned Counsel for the Respondent that when the test was conducted by an agency on behalf of the Appellant themselves

and refund was also allowed, the poor quality of coal stood admitted by the Appellant.

12. Furthermore, as the Corporate Debtor had raised debit notes on account of rejection of cargo it was claimed by the Learned Counsel for Respondent that the debit notes show evidence of dispute. Moreover, it was submitted that with the issue of debit notes, the ledger accounts of the two parties stood squared off and the Corporate Debtor has denied the liability to pay the operational debt.

13. The Learned Counsel for the Appellant, however, pointed out that the debit notes of Rs.1,52,00,698 issued on 31.01.2015 as amount debited towards 3366 MTs of un-lifted coal was also not accepted by the Hon'ble Bombay High Court in their judgment and decree dated 14.12.2018. However, the Adjudicating Authority has not taken cognizance of the findings of the Hon'ble Bombay High Court. The Learned Counsel for the Appellant, also stated that the Corporate Debtor has taken contradictory grounds for having lifted only 633 MTs of the cargo. While in their email of 15.10.2014, the ground for rejecting the cargo was ascribed to Sulphur content, in a subsequent letter of 31.01.2015 it has been stated that the Operational Creditor had not permitted the Corporate Debtor to lift the balance quantity of 3366 MTs. It has also been submitted that the letter of 31.01.2015 was dispatched by the Corporate Debtor on 10.09.2015 which was received by the Operational Creditor on 14.09.2015 as placed at page 134-135 of reply affidavit. It has also been denied that any advance money was paid by the Corporate Debtor in relation to the invoice dated 15.09.2014 and that the refund of Rs.80 lakhs was in respect of another transaction which related to "MV Pacific Pioneer". It is

therefore been contended that the defence raised by the Corporate Debtor being spurious deserves to be rejected.

14. The Adjudicating Authority has relied upon the judgement of the Hon'ble Supreme Court in ***Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software Private Limited (2018) in C.A. No.9405 of 2017 (MANU/SC/1196/2017)*** ("**Mobilox**" in short) for not admitting the Section 9 application. If we apply the above-cited test laid down by the Hon'ble Supreme Court to the facts of the present case, it is clear that the defence which was raised by the Corporate Debtor in their detailed reply filed in Section 9 Application based upon their email of 15.10.2014; letter of 31.01.2015 containing debit notes cannot be said to be moonshine. That the said email and debit notes were issued prior to the Section 8 demand notice also clearly establishes that there was real pre-existing dispute. And for such disputed amounts, Section 9 proceeding under IBC cannot be initiated at the instance of the Operational Creditor. We, therefore, have no hesitation in concurring in the findings recorded by the Adjudicating Authority.

15. We are satisfied that there was sufficient foundation of genuine disputes between the two parties and the same is amply supported by material on the record. It is not the remit of IBC to investigate all related contractual disputes and look into their merits as long as it suffices that a plausible defence has been raised as has been done in the present case. In the present factual matrix, the defence raised by the Corporate Debtor cannot be held to be moonshine, spurious, hypothetical or illusory.

16. Considering the overall facts and circumstance of the present case, and in view of the foregoing discussion, we are of the view that the Adjudicating Authority

did not commit any error in rejecting the Section 9 Application filed by the Appellant on the ground of pre-existing dispute. There is no merit in the Appeal. Appeal is dismissed. We however make it clear that the discussions and observations made herein will not act to the prejudice of both the parties in the ongoing appeal proceedings before the Hon'ble Bombay High Court. It will also remain open to the Appellant to resort to other remedies before any other competent court of law that may be available to it under any other law. No order as to costs.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

Place: New Delhi

Date: 26.05.2023

PKM