IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, COURT NO. 5

CP 4603(IB)/MB/2018

Under Section 9 of the I&B Code, 2016

In the matter of

LCL LOGISTIXS PVT LTD

…Operational Creditor/ Petitioner

v/s

WAAREE ENERGIES LIMITED

...Corporate Debtor

Order Pronounced on: 29.06.2020

Coram: Hon'ble Smt. Suchitra Kanuparthi, Member (Judicial)
Hon'ble Shri Chandra Bhan Singh, Member (Technical)

For the Petitioner : Mr. Nitin Mehta, Adv., Mr. M Balakrishnan, Adv.
For the Respondent: Mr. Kunal Kanungo, Adv.

Per: Chandra Bhan Singh, Member (Technical)

ORDER

1. This is an Application being CP No. 4603(IB)/MB/2018 filed by LCL Logistixs, Operational Creditor under section 9 of Insolvency & Bankruptcy Code, 2016 (**I&B Code**) against Waaree Energies Limited Corporate Debtor, for initiating Corporate Insolvency Resolution Process (**CIRP**).

2. The Petitioner is a Private Limited Company registered under the Companies Act, 1956. This Petition is filed by Mr. Sujeet Kumar Chaudhary, Finance Head of the LCL Logistixs India Pvt. Ltd. duly authorized to file the present Petition.

3. The Petitioner has claimed an amount of Rs. 1,76,91,451/- with interest from the Corporate Debtor. The claim of the Petitioner is

based upon the Freight Forwarding Agreement. A copy of the said Freight Forwarding Agreement dated 07.12.2016 is annexed to the Application.

4. COMPUTATION OF AMOUNTS IN TABULAR FORM:

PARTICULARS	AMOUNT(INR)
Principal amount outstanding and due to operational creditor under total 176 invoices	1,50,97,439/-
Add- Interest @21% PA	25,94,012.65/-
Total Outstanding Amount	**1,76,91,451.70/-**

The submissions made by the Petitioner:

5. A brief history of the transaction between the Petitioner and the Corporate Debtor is as follows:

a. The Petitioner engaged in freight forwarding business of manufacturing and trading of solar photo voltaics modules. The Petitioner and the Corporate Debtor entered into a Freight Forwarding Agreement dated 07.12.2016.

b. The scope of the work based on the agreement as follows:

(i) In respect of import cargo pick up shipments from the customer warehouse located overseas,

(ii) Receipt of cargo as per the customer requirements at origin,

(iii) Handing import/export cargo FCL/LCL,

(iv) Clearance of shipment at destination,

(v) Dispatch and delivery of cargo as per customer requirement and

(vi) Daily/weekly/monthly MIS as per customer's requirement.

c. Thereafter the Corporate Debtor approached the Petitioner for further services. The Petitioner mentions that the agreement clearly provides that the Corporate Debtor paying container detention charges and other charges as and when the same is demanded from them.

d. The Petitioner mentions that due to the Corporate Debtor negligence and failure to timely de stuff the consignment in the said containers and/or returning the empty containers back to the Petitioner, the container incurred detention and demurrage charges.

e. The Petitioner submits that for the services rendered and availed the Corporate Debtor is required to pay import CFS charges/import detention charges, import transport charges, ocean freight etc., the terms of the agreement provide that the Corporate Debtor will pay Container Detention Charges and other charges.

f. The Petitioner raised various invoices on the Corporate Debtor the same is accepted by the Corporate Debtor

g. The Petitioner received the payments in respect of the Freight invoices, but no payment is received by the Petitioner in respect of pending invoices which pertain to demurrage and detention charges.

6. The Petitioner sent the statutory demand notice under Section 8 of the code on 05.09.2018 to the Corporate Debtor demanding payment of Rs.1,91,55,312/-.

Main Contentions of the Corporate Debtor:

7. The Corporate Debtor in reply to the demand notice dated 14.09.2018 denied the liability. Some of the important points

presented by the Corporate Debtor in support of his contention have been enumerated in the succeeding Paragraphs.

8. The Corporate Debtor submits that a demand raised by the Operational Creditor under the Code has to be in respect of an operational debt. An operational debt has been defined as a claim in respect of provision of goods or services. Further, 'claim' has been defined as a right to receive payment or a right to remedy for breach of contract. The Corporate Debtor mentions that admittedly, there does not exist any underline contract/ agreement. The invoices relied upon; as such do not have any basis and consequently the corporate Debtor mentions that he is not obliged to make any payment in respect thereof. It is submitted by the Corporate Debtor that the Petitioner therefore do not have right either in law or otherwise to claim any payment from us.

9. It is submitted by the Corporate Debtor that the Parties had met on 08.03.2018 in relation to the issue of alleged outstanding dues being claimed. The invoices raised by the Petitioner were not accepted by the Corporate Debtor. The fact was further recorded by the Corporate Debtor through various emails including the one from chairman and managing director of the Corporate Debtor company dated 09.03.2018. The relevant excerpt of the same is extracted below:

"*Your email is really surprise to us which is not as per our discussion there is no outstanding regarding the demerges charges charged by you through separate invoice which we have explained are not due to WAAREE fault and this is reason they have been not accepted by us so far neither accounted. In fact, due to this issue has lost huge amount including GST and PPA, and still out customer is holding over 22 crores payment of WAAREE*"

Therefore, the corporate debtor says it has disputed the liability to pay the amount sought by the Petitioner.

10. The Corporate Debtor mentions that the Petitioner has failed to place on record any document that provides with the right to receive payment from the Corporate Debtor.

11. In view of the aforesaid facts and circumstances, the Corporate Debtor mentions that no amount is due and payable and that the subject notice has been issued only to arm twist the Respondent to succumb to the unjustified demand raised.

12. The Corporate Debtor has filed its Affidavit in Reply on 23.07.2019 opposing admission of Application filed by the Petitioner under section 9, and following are the contentions:

    a. The Corporate Debtor submits that the claim is based on the 91 invoices which are now removed by the Operational Creditor. According to form 4, in respect of the above invoices, the amount aggregating to Rs. 1,91,55,312. The present Petition is for the amount of Rs. 1,50,97,439, it is apparent on the face of it that the alleged claim is not crystallized.

    b. Present Petition seeks to recover an amount allegedly due under Bonds dated 07.12.2016 and 23.06.2017, which although signed between the parties in the ordinary course of business, were however not made effective. It is a matter of record the parties had decided to agree, vide the last clause of the bonds, upon a date from which the bonds were supposed to be made effective. However, no such dates were agreed upon and thus the said bonds did not come into force.

    c. The issues regarding the payment against detention charges require extensive evidence is borne out from the fact that parties are at variance inter alia in respect of the period for which said charges are to be levied. Further it is submitted that the Petitioner had never communicated to the Corporate Debtor the fact regarding levy of such detention charges, prior to raising invoices in this regard. It is normal industry practice for parties to arrive at an agreement before levying such charges.

Findings:

13. It is beneficial to refer the email sent by the Petitioner on 09.03.2018 wherein it is stated as below:

Subject: RE: MEETING
From: "Ajit Jog" <ajitjog@lcllogistix.com>
Date: 3/9/2018 4:16 PM
To: '"Hitesh Doshi'" <hiteshdoshi@waaree.com>, "'Ravi Menon'" <ravimenon@lcllogistix.com>, "'jignesh rathod'" <jigneshrathod@waaree.com>, "'Asmita'" <impsales7@mumbai.lcllogistix.com>, "'Vibhu Prakash'" <vprakash@lcllogistix.com>, "'PRAKASH Vibhu'" <MBY.VPRAKASH@cmacgm-log.com>, "'Atit Mahajan'" <atitmahajan@lcllogistix.com>, "'MAHAJAN Atit'" <MBY.AMAHAJAN@cma-cgm.com>, "'Unni Nair'" <UNNINAIR@LCLLOGISTIX.COM>
CC: "'Abhishek Pareek'" <abhishekpareek@waaree.com>, "'Hitesh Mehta'" <hiteshmehta@waaree.com>

Dear Mr Doshi,

The turn of events have been surprising to us as well. All along there has been a very different line of discussion between Ms Asmita and myself from LCL Logistix and Mr Amit and Mr Prem from Waaree team who were also involved in day to day working when these detentions were being incurred. They are fully aware of each case as it happened. Basis their knowledge of events these invoices were already accepted by Mr Prem and Mr Amit.

Self and Asmita went over every single invoice with Mr Prem and Mr Amit involving detentions incurred at Bhiwandi / SEZ Sachin and Akola (Roha project) and looked at individual cases. A synopsis for every invoice was made giving supportings of all charges incurred. The synopsis contained date wise activity as it happened for every invoice involved. Basis this synopsis invoice were cleared and we worked on a single document updating every invoice. On acceptance Mr Prem has sent us mails confirming acceptance of those invoices.

Given this background we fail to understand why do we have a change in stance many month after the invoices were raised.

Tks n Rgds

Ajit Jog
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14. The above email which are prior to the issue of demand notice clearly shows that there is a dispute with regard to the amount claimed and the same is covered under Section 5(6) of the Code which reads as below:

> *"5(6) "dispute" includes a suit or arbitration proceedings relating to— (a) the existence of the amount of debt; (b) the quality of goods or service; or (c) the breach of a representation or warranty."*

15. This Bench observes that the Freight Forwarding Agreement dated 07.12.2016 does not speak about any demurrage charges. The Corporate Debtor has paid the total amount due from him to the Operational Creditor for the services provided by the Operational Creditor as per the Freight Forwarding Agreement. This fact has been acknowledged by the Operational Creditor also. Therefore, in terms of the Freight Forwarding Agreement no amount is due.

16. The total amount which is being claimed by the Operational Creditor is only with respect to demurrage charges. This, the Operational Creditor mentions, is derived from the Bond letter sent by the Corporate Debtor to the Operational Creditor on Judicial Stamp paper. The bond has been signed by Authorised signatory of the Corporate Debtor which mentions *"we shall pay you the container detention charges & other charges as and when demanded by you".* However, it has also explicitly mentioned in the Bond Document in the last few lines that *"This Bond shall become effective from (Effective date to be mentioned)….."* . This clearly brings the fact that this Bond letter, until and unless an effective date between the Parties is arrived at and signed, cannot come into force. Since no Effective date was arrived at between the Parties, therefore, the clauses in the Bond document cannot be said to be mutually agreed Bond document. Therefore, the Petitioner cannot claim demurrage

charges based on the clauses in the Bond, which does not have an effective date of implementation.

17. This Bench takes into account the fact that the Corporate Debtor has always cleared it dues/ amount owed to the Petitioner well in time except the disputed claim relating to Demurrage charges which is not enforceable, as the Bond document on the basis of which the Corporate debtor lays its claim on the purported demurrages, is a dead instrument as it never became effective in the absence of any mutually agreed date of implementation.

18. The Bench based on the facts presented before it by both the Parties clearly understands that there is no "Agreement" between Parties for the Payment of Demurrage charges. Reliance on the Bond document for payment of Demurrage charges is not admissible as it was supposed to come into force from a mutually agreed "Effective Date" which was never arrived at. Therefore, there is no contractual or mutually agreed enforceable document based on which any demurrages can be claimed by the Petitioner. The Bench is also mindful of the fact that the Corporate Debtor has raised dispute regarding the Demurrage payment, much before the issue of Demand Notice by the Petitioner to the Corporate Debtor. In the case on hand the contentions raised by the Corporate Debtor regarding nonpayment of demurrage charges are neither spurious nor hypothetical nor illusory and in fact there is a dispute as to existence of the debt payable by the Corporate Debtor.

19. It is appropriate to cite the decision of the Hon'ble Supreme Court in the case of *Mobilox Innovations Pvt. Ltd. V/s Kirusa Software (P) Limited 2017 (SCC Online SC 1154)* held as below: -

"………IBC is not intended to be substitute to a recovery forum. It is also laid down that whenever there is an

existence of real dispute, the IBC provisions cannot be invoked."

20. When the law laid down by the Hon'ble Supreme Court in the above case is applied to the facts of the present case it is established that there is a clear dispute claimed by the Corporate Debtor as provided u/s 5(6)(a) of the Code.

21. In the light of the above, the Petition no. CP 4603(IB)/MB/2018 is **dismissed.**

SD/-

Chandra Bhan Singh
Member (Technical)

SD/-

Suchitra kanuparthi
Member (Judicial)