NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 358 of 2024

(Arising out of Order dated 10.01.2024 passed by the Adjudicating Authority (National Company Law Tribunal), Kolkata Bench (Court-I), Kolkata in C.P.(IB) No.267/KB/2021)

IN THE MATTER OF:

R. K. Transport Private Limited,
Main Road, Phusro, P.O. Phusro Bazar,
District Bokaro (Jharkhand) PIN-829144. ... Appellant

Versus

Shree Balaji Transport & Roadways Private Limited
Having its office at Hanuman Charai, P.O. Barakar,
District Burdwan, West Bengal, PIN-713324.

AND

Further, having its office at,
23A, Kalakar Street,
Ground Floor, Bedasaria Market,
Kolkata- 700007, West Bengal. ... Respondent

Present:

For Appellant: **Mr. Sumeet Gadodia, Mr. Kaustik Poddar, Mr. Akash Dalal, Advocates.**

For Respondent:

J U D G M E N T

ASHOK BHUSHAN, J.

This Appeal has been filed by Operational Creditor challenging order dated 10.01.2024 passed by Adjudicating Authority, by which Section 9 Application filed by the Appellant was rejected on the ground of pre-existing dispute.

2. Brief facts necessary to be noticed for deciding the Appeal are:

(i) An Agreement dated 05.04.2017 was entered between the Appellant and the Corporate Debtor for supervision and assistance in handling and dispatch of CCL Coal at Tori Siding. The Appellant for financial year 2017-18 raised six invoices and for the financial year 2018-19 raised further invoices.

(ii) The Appellant's case was that although TDS was deducted, but he has not received the full payment as per invoices. By letter dated 22.02.2021, the Appellant demanded outstanding principal amount of Rs.3,93,92,131/-. The Corporate Debtor replied to the above letter disputing the outstanding dues. The Appellant objecting to the denial of the claim by the Corporate Debtor again prayed for payment of outstanding amount. The Corporate Debtor by the legal notice dated 13.06.2021 disputed the claim and stated that M/s Hndalco Industries Limited, the Principal Contractor has imposed demurrage charges on the Corporate Debtor and imposed penalty on the Corporate Debtor, which is required to be adjusted from the Operational Creditor. The claim made by the Appellant vide its letter dated 22.02.2021 was denied and it was stated that Operational Creditor is liable to refund certain amount.

(iii) The Appellant thereafter on 09.08.2021 issued Demand Notice under Section 8 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the "**Code**") claiming an amount of Rs.3,93,92,131/-. The reply to Demand Notice was also given

by the Corporate Debtor on 30.08.2021, refuting the claim and denying the claim of the Appellant and further stating that Corporate Debtor is entitled to its legitimate claim.

(iv) The Appellant thereafter field Section 9 Application, claiming an amount of Rs.3,93,92,131/- as operational debt, which claim was refuted by the Corporate Debtor.

(v) The Adjudicating Authority by the impugned order has dismissed Section 9 Application. Aggrieved by which order, this Appeal has been filed.

3. The Adjudicating Authority while dismissing Section 9 Application has returned a finding that Corporate Debtor before the receipt of Demand Notice has brought into the notice of Operational Creditor regarding demurrages imposed by the Principal Employer. Following have been noticed by the Adjudicating Authority in paragraph 9.5, which is as follows:

> "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 letter 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 or the Code."

4. The materials which were brought on record before the Adjudicating Authority including the Notice given by the Operational Creditor and reply by the Corporate Debtor, which was much prior to the Demand Notice, are clear indication of pre-existing dispute. We may refer to Notice dated 20.04.2021 issued by the Operational Creditor to the Corporate Debtor, which was in response to letter dated 11.02.2021 written by the Corporate Debtor, where the claim was wholly denied. By the notice dated 22.04.2021, the Operational Creditor again demanded the payment and has also stated that there was deduction under Section 194(C). The claim which was made by the Operational Creditor in notice dated 22.04.2021 was refuted by detailed reply dated 13.06.2021. The letter dated 24.04.2021 as well as reply dated 13.06.2021 have been brought on record as Annexure-10 and 11 to the Appeal. It is useful to extract reply given by the Corporate Debtor to notice dated 22.04.2021, which is as follows:

> "
>
> Date 13.06.2021
>
> LEGAL NOTICE
>
> To
> The Director,
> R.K Transport Private limited,
> Main Road, Phusro Bazar,
> Dist. Bokaro Jharkhand (829144)
>
> My Client:- Shree Balaji Transport & Roadways Private Limited.
>
> Sub: Reply regarding your notice vide Ref.RFT(P)L/21-22/13 Dated: 22/04/2021
>
> Dear Sir,
>
> My above client received your above referred letter and handed over to me to give a reply and under the instruction and on behalf of my named-client, I hereby give you this reply as follows:-

You have sent the above mentioned reply letter to my client wherein you have arbitrarily and irrationally refused to pay my client's legitimate claim mentioned in my client's letter dated 11/02/2021.

That my client issued a work order on 05/04/2017 in continuance of the service order which had been awarded to your Company since 2015-16 for supervision and assistance in handling and dispatch of CCL coal from Tori siding and the work order was issued as a subcontract to your company against the service order which is issued by the principle company, M/s HINDALCO INDUSTRIES LTD. to my client and the pane] clauses as mentioned in the service order of the said principle contract is applicable to your company also.

That while awarding the subcontract of the job to your company of handling of coat at Tori siding, it was clearly specified to your company about the scope of the work, which not only includes the mere loading of materials into rakes but also as a general practice, the onus on liability for under loading and over loading of rakes as well as the demarage charges of railway for detention of wagon in excess of permissible time limit for loading, are also within the scope of work, which have elucidated to your person expressly or impliedly.

That previously on several occasions my client had requested to your concern repeatedly for reconciliation of the accounts and do the necessary adjustment in books for the penalty amount imposed by the principle Company i.e. M/s. HINDALCO INDUSTRIES LIMITED as per the principle contract clause, but my client's requests were never been considered by your Company and each time it was deferred citing one or other reasons. That as mentioned in your letter dated 29.04.2021 in Para 3,4,5 & 6 of your letter, my client refuses your claim of Rs.3.04 Crores as you have arbitrarily denied the penalty on under-loading over-loading and the

demurrage charges of the railways that my client had to borne due to negligence on your part in performance of the assigned job.

That as mentioned in your letter in Para 9 my client would like to state, that is a general practice in system that 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 the TDS is also deducted and deposited on the basis of provisional bill only till the actual settlement of the accounts, which can be reversed by issuing the debit note/ credit note after settlement of the accounts, which can be reversed by issuing the debit note/ credit note after settlement of accounts. For not setting the accounts since last five years, my client is supposed to issue the debit note for the penalty amount of the under-loading, overloading and demurrage charges debited by principle company, but my client is quite surprised to note that your company has finally created dispute over this matter by bluntly refusing to bear the loss my client have borne for the negligence on your part while performing the assigned job. In reply to your allegation in Para-9 my client would also like to state that is a common practice to follow and abide the miles stipulated by the railways authority while loading and handling of rakes in the railway siding and one cannot performed the assign job whimsically and negligently without abiding the rules of the railway authority and it is also unfeasible and impractical for the one who award the contract will bear any amount of penalty for the negligence in work of the contract awardees. All the penal clauses fall under the general terms of the contract and my client have clearly made you acquainted about these terms and conditions while awarded the sub-contract. Your Company negligently and whimsically have not followed up the terms and conditions as specified by the railways authority while performing your job at the railway siding.

You have been engaged by my client's company in the said job since 2015-16 and as the reconciliation was not done initially, my client was making the payments on ad-hoc basis as the job for supervision and loading was been performed by you on a continuous basis and there was enough scope for deduction of the penal amount in future. But when my client found that was enough scope for deduction of the penal amount in future. But when my client found that the process of reconciliation of amount was been continuously deferred by you, my client started holding the amount from FY 2017-18. However, in order to continue the job of loading and dispatches from Tori siding, my client had to ultimately release some advance amount even after adjustment of the penalties of railway.

That my client absolutely refuses your claim of Rs.3.94 Crores and also on Contrary you are requested to complete the necessary reconciliation of the accounts as early as possible, so as to settle the disputes over the differences in books and to initiate for the refund amount of Rs.1,47,97,381/- which you are liable to pay to my client after adjustment of the under-loading, overloading and the demurrage charges of the railway, otherwise my client will have no other option but to initiate civil/ criminal legal proceedings against your company for recovery of our claim amount without further reference and you will be liable for the same.

Thanking you,

Yours sincerely,
Sd/-
Chandan Banerjee
Advocate
Durgapur Court

R.K. Transport Pvt. Ltd.
Sd/-
Director"

5. The Demand Notice was issued by the Operational Creditor on 09.08.2021, i.e., much after the reply was given on 13.06.2021, when the Corporate Debtor had denied the claim of the Appellant and clearly claimed that penalty imposed by principal borrower, is to be deducted from the bills of the Operational Creditor, which makes it clear that there was pre-existing dispute.

6. The learned Counsel for the Appellant relying on the provisions of Section 194 (C) of the Income Tax Act, submits that deduction was made by Corporate Debtor under Section 194(C), after receipt of invoices by the Appellant. Hence, the said deduction clearly indicate that the bills are accepted.

7. The above submission of learned Counsel for the Appellant cannot be accepted for two reasons. Firstly, in a reply dated 13.06.2021, the Corporate Debtor has clearly indicated about the deduction under Section 194(C) as well as the credit of GST amount. In the reply it was stated that the Corporate Debtor was to issue debit/ credit note and the Operational Creditor has not settled the accounts for last five years for under-loading and overloading and demurrage charges debited by principal borrower, as Operational Creditor was required to adjust the amount. Thus, deduction under Section 194(C) cannot lead to conclusion that Corporate Debtor acknowledged the liability to pay the entire bills of the Operational Creditor. The dispute was raised by the Corporate Debtor, which is reflected in the letter dated 11.02.2021 referred by Appellant himself in his letter dated 22.04.2021 as well as the reply dated 13.06.2021. We have already

extracted the averments made in the reply dated 13.06.2021 above, which clearly indicate pre-existing dispute raised by the Corporate Debtor much before the Demand Notice dated 09.08.2021 was issued.

8. We, thus, are satisfied that Adjudicating Authority did not commit any error in rejecting Section 9 Application on the ground of pre-existing dispute. There is no merit in the Appeal. The Appeal is dismissed.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

[Arun Baroka]
Member (Technical)

NEW DELHI

9th April, 2024

Ashwani