

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal(AT)(Insolvency) No. 237 of 2018

IN THE MATTER OF:

GAC Logistics Pvt. Ltd.

...Appellant

Vs

AI Nafees Frozen Foods Exports Pvt. Ltd.

....Respondent

With

Company Appeal(AT)(Insolvency) No. 238 of 2018

IN THE MATTER OF:

GAC Logistics Pvt. Ltd.

...Appellant

Vs

AI Nafees Frozen Foods Exports Pvt. Ltd.

....Respondent

Present:

For Appellant: Mr. Dhruv Mehta, Senior Advocate assisted by Mr. K. Datta and Ms. Prachi Johri, Advocates.

For Respondent: Mr. Sunil Dalal, Mr. Vivek Jain and Mr. Rajiv Singh Advocates

ORDER

24.05.2018 This appeal has been preferred by the Appellant ('Operational Creditor') against the order dated 05.04.2018 passed by the 'Adjudicating Authority' (National Company Law Tribunal), Principal Bench, New Delhi whereby and whereunder the application preferred by Appellant under Section 9 of Insolvency & Bankruptcy Code, 2016 (hereinafter referred to as 'I&B Code') has been rejected on the ground of 'existence of dispute'.

2. On hearing learned Counsels for the parties and perusal of the records, we find that the Respondent disputed the claim by Advocates Notice dated 12th December, 2015 which reads as follows:

“

SPPED POST

12.12.2015

*To, GAC Logistics
B-301, Ansal Chamber-1,
3rd Floor, Bhikaji Cama Place,
New Delhi- 110 066*

Sir,

.....

.....

3. You were to provide the lists of rates being charged by airlines from you time to time and we were to pay you on account and not bill wise.

....

6. Our client came to know that you made false representations and illegally over charged out client by concealing the correct price being charged by airlines from you concerning the shipments to our clients.

.....

*8. Our client has strong reasons to believe that you have cheated our client and its associated concerns including **M/s Al Nafees Protein Pvt. Ltd.**, M/s Rayban Foods Pvt. Ltd. and Al Saqib Exports Pvt. Ltd. to the tune of Rs. 30,00,00,000.00 approximately.*

.....

10. Our client is also sending copy of this notice to the airlines concerned to check the authenticity of your correspondence/communications sent by you concerning the rates being charged by airlines from you.

*We further call upon you to make good the loss suffered by our Client because of your above acts that may be amounting to Rs. 40,00,00,000.00 (Rupees Forty Crores) around.
.....”*

Taking into consideration the aforesaid legal notice, the Adjudicating Authority held that a case of overcharging was clearly pre-existing.

3. Learned Counsel appearing on behalf of the Appellant submits that the Respondent deducted Tax at Source (TDS) and deposited with the Income Tax Department and thereby a frivolous dispute have been raised which cannot be accepted. Reliance has been placed on the decision of Hon’ble Supreme Court in **“Mobilox Innovations Private Limited Versus Kirusa Software Private Limited”** -[(2018) 1 SCC 353] held:

“40. It is clear, therefore, that once the operational creditor has filed an application, which is otherwise complete, the adjudicating authority must reject the application under Section 9(5)(2)(d) if notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility. It is clear that such notice must bring to the notice of the operational creditor the “existence” of a dispute or the fact that a suit or arbitration proceeding relating to a dispute is pending between the parties. 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 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.”

It is submitted that the Adjudicating Authority was required to separate spurious defence, which has not been examined in the present case.

4. Similar issue fell for consideration before the Hon’ble Supreme Court in “**Innoventive Industries Ltd. Vs. ICICI Bank and Ors.**” – [(2018) 1 SCC 407] wherein Hon’ble Supreme Court held:

“29. The scheme of Section 7 stands in contrast with the scheme Under Section 8 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.”

From the aforesaid decision it is clear that if the dispute is frivolous unsupported by any evidence, the spurious defence is to be rejected. However, on the basis of records and evidence if there appears to be an ‘existence of dispute’, such case is to be rejected.

5. In the present case, it is not disputed that the Respondent had issued Lawyer's notice dated 12th December, 2015 and disputed the claim on the ground of overcharging. The 'Operational Creditor', was also informed that the 'Corporate Debtor' incurred huge loss due to overcharging. Counter claim was also made by Respondent. Such dispute having raised by Respondent in December, 2015, we are not inclined to accept the plea taken by the Appellant. We find no merit in this appeal. It is accordingly dismissed. No cost.

[Justice S.J. Mukhopadhaya]
Chairperson

[Justice Bansi Lal Bhat]
Member (Judicial)

Akc/gc