

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 73 of 2018

IN THE MATTER OF:

TVS Interconnect Systems Pvt. Ltd.

...Appellant

Vs.

ORG Informatics Ltd.

...Respondent

**Present: For Appellant: -Mr. Nikhil Nayyar and Mr. Divyanshu Rai,
Advocates**

For Respondent:- Mr. Devmani Bansal, Advocate

O R D E R

10.07.2018— The appeal has been preferred by TVS Interconnect Systems Pvt. Limited Vs. ORG Informatics Limited against Order dated 15th January 2018 passed by the Adjudicating Authority (NCLT), Ahmedabad Bench in C.P.(IB) No. 120/9/NCLT/AHM/2017. By the impugned order the Adjudicating Authority rejected the application preferred by the Appellant on the ground that the appellant does not come within the meaning of 'operational creditor', as in the arbitral award the appellant has not been shown as assignee of the claimant (original operational creditor).

2. The application of appellant under Section 9 is based on Memorandum of Understanding dated 21st August 2008. The invoices were raised on the basis of such Memorandum of Understanding.

3. In the year 2008 the Bharat Sanchar Nigam Limited (BSNL) floated tenders for supply of IT and Networking materials/equipment and for support

services. Telecommunication Consultant India Limited (TCIL), in turn floated tenders on 21st August 2008 for supply of related materials for implementation of BSNL's project, which was awarded to respondent ORG Informatics Limited (Corporate Debtor).

4. The Corporate Debtor thereafter approached MOKA Technology Service Limited (earlier known as TVS Net Technologies Limited) and expressed interest in purchasing the materials from MOKA with an intention to supply the said materials to TCIL. A Memorandum of Understanding dated 21st August 2008 was therefore entered into between MOKA and the respondent company. The materials/equipment like NORTAL switches, routers etc. were supplied by MOKA to respondent ORG Informatics Limited (Corporate Debtor) amounting to Rs. 24,14,58,252/- only. Upon the execution of the MoU, MOKA supplied equipment/materials on 24th September 2008 amounting to Rs. 23,20,00,000/- from August 2008 to November 2008 to the Corporate Debtor. The purchase orders placed by the company for which MOKA has raised invoices cum delivery challans from time to time. Eleven post-dated cheques worth Rs. 21,65,41,034 were provided by the Corporate Debtor which were acknowledged but subsequently in view of stop payment order, the MOKA could not receive the amount. Therefore, MOKA initiated various legal proceedings against Corporate Debtor including a complaint under Section 138 of the Negotiable Instruments Act, 1881. The matter was also referred on 30th March 2010 for arbitration by invoking the Clause 22 of the Corporate guarantee dated 24th September 2008 and MoU dated 21st August 2008. MOKA, was the Claimant and the Corporate Debtor was the respondent, who

approached to the Hon'ble High Court and thereafter before the Arbitrator. In the meantime, a supplementary agreement was entered between the parties on 17th November 2012 wherein time period for payment of sum of Rs. 14.99 Crores was extended to 21st March 2013, however, all other conditions stipulated in the Principal Agreement dated 20th April 20112 remained unaltered. As per Clause 6 of the Agreement dated 20th April 2012 stipulates that the Corporate Debtor is liable to pay the undisputed and duly acknowledged entire outstanding invoice amount of Rs. 23.20 Crores along with interest @ 21% legal interest and legal expenses and other damages.

5. During the pendency of Arbitration Proceedings, MOKA assigned all its receivables from the respondent Corporate Debtor to appellant EVS Interconnect Systems Limited by agreement dated 14th November 2013. Pursuant to the said agreement the appellant become assignee of the MOKA in respect of amount MOKA was entitled to receive from the Corporate Debtor. The Hon'ble Sole Arbitrator by award dated 9th December 2016 awarded a sum of Rs. 24,14,58,251/- in favour of MOKA along with interest @ 18% per annum. Apart from cost of Rs. 18,25,000/- with interest amount from 31st August 2009 till 19th June 2017 comes to Rs. 33,92,45,535/-.

6. The appellant being the assignee of the Operational Creditor issued a Demand Notice on 21st June 2017 under Section 8(1) of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as 'I & B Code' 2016). The respondent (Corporate Debtor) failed to reply, therefore after ten days the appellant preferred the application under Section 9 of the 'I&B Code' 2016 which has been rejected by the Adjudicating Authority.

7. Before the Adjudicating Authority, the respondent took plea that a winding up petition is pending but we find that no winding up petition has been admitted by any of the Hon'ble High Court against the Corporate Debtor. Learned Counsel for the appellant submits that the winding up petition against the Corporate Debtor was withdrawn on 16th November 2017.

8. Learned counsel appearing on behalf of respondent has taken other plea as observed by the Adjudicating Authority that the arbitral Tribunal having not shown the appellant as assignee, he cannot claim to be the Operational Creditor.

9. We do not intend to go into the definition of the 'Operational Creditor', as it is admitted that MOKA was the 'Operational Creditor' of the respondent corporate debtor. We are of the view that the appellant being assignee of the 'Operational Creditor' pursuant to the valid agreement dated 14th November 2013 and as the 'debt' comes within the meaning of 'operational debt', the goods having been supplied to the Corporate Debtor and awarded amount having not been paid, thereby there being a default, it was incumbent on the part of the Adjudicating Authority to admit the application preferred by the appellant under Section 9.

10. We accordingly, set aside the impugned order dated 15th January 2018 passed by the Adjudicating Authority and direct the Adjudicating Authority to pass formal order of admission of application under Section 9, order of moratorium and appoint Interim Resolution Professional and pass appropriate order in accordance with 'I & B Code' 2016. However, in the meantime, it will be open to the respondent Corporate Debtor to pay the

admitted dues with interest as awarded by the arbitral Tribunal before formal order of admission is passed by the Adjudicating Authority. In such case if it is brought to the notice of the Adjudicating Authority then the appellant may withdraw the application.

10. The appeal is allowed with the aforesaid observations and directions. There shall be no order as to cost.

(Justice S.J. Mukhopadhaya)
Chairperson

(Justice Bansi Lal Bhat)
Member(Judicial)

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