

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI**

Company Appeal (AT) (Insolvency) No. 792 of 2024

[Arising out of the Impugned Order dated 22.04.2024 passed by the Adjudicating Authority, National Company Law Tribunal, Mumbai Bench-V in CP (IB) No. 573/MB/2023]

In the matter of:

NAVIN MADHAVJI MEHTA

(SUSPENDED DIRECTOR OF RR METALMAKERS
INDIA LIMITED)

...Appellant

Versus

1. JALDHI OVERSEAS PTE LTD

101, Cecil Street, #25-06,
Tong Eng Building,
Singapore – 069533
Email: srivathsan@jaldhi.com

...Respondent No.1

**2. VIKAS GOPICHAND KHIYANI INTERIM
RESOLUTION PROFESSIONAL**

Flat no. 103, 1st Floor,
Palm Acre CHS Ltd, Sunder Nagar,
Kolekalyan Village, Kalina, Santacruz East,
Mumbai Suburban,
Maharashtra, 400098
Email: cavikas.khiyani@gmail.com

...Respondent No.2

3. RR METALMAKERS INDIA LIMITED

(Formerly known as
Shree Surgovind Tradelink Limited)
B-001 & B-002, Ground Floor,
Antop Hill Warehousing Complex Ltd,
Barkat Ali Naka, Salt Pan Rd,
Wadala (E) Mumbai,
Mumbai City MH 400037 IN

...Respondent No.3

Present:

For Appellant : Mr. Abhijeet Sinha, Sr. Advocate with Mr. Anuj Tiwari,
Mr. Bijish Balan, Mr. Aditya Shukla and Mr. Ashwini
Gawdi, Advocates.

For Respondent : Mr. Krishnendu Datta, Sr. Advocate with Mr. Ashwin Shanker, Mr. Rishi Murarka, Ms. Isha Sawant, Mr. Raj Surana and Ms. Alina Mathew, Advocates for R-1.

J U D G M E N T

(Hybrid Mode)

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 22.04.2024 (hereinafter referred to as **‘Impugned Order’**) passed by the Adjudicating Authority (National Company Law Tribunal, Mumbai Bench-V) in CP (IB) No. 573/MB/2023. By the impugned order, the Adjudicating Authority has admitted the Section 9 application filed Jaldhi Overseas Pvt Ltd-Operational Creditor thereby admitting the Corporate Debtor-RR Metalmakers India Ltd. into Corporate Insolvency Resolution Process. Aggrieved by the impugned order, the present appeal has been preferred by the suspended Director of the Corporate Debtor.

2. The brief facts of the case which are necessary to be noticed for deciding this appeal are as follows:

- The Corporate Debtor-RR Metalmakers India Ltd. which was previously known as Shree Surgovind Tradelink Ltd. had approached Jaldhi Overseas Pvt Ltd., Operational Creditor for chartering of vessel MV Aetolia for carrying cargo from Port Redi to China for delivery to BST

(HK) Ltd.- (**“BST”** in short) under a Charter Party Agreement dated 15.03.2017. The parties had appointed Bulk Chart as their broker.

- The Operational Creditor performed its obligations under charter party and raised an invoice dated 18.04.2017 for USD 653,312 towards freight payable.
- On 25.05.2017, the Operational Creditor raised invoice for USD 22,942.74 towards Address Commission earned on the carriage.
- On 04.08.2017, the Corporate Debtor made a payment of USD 350,000 as partial payment towards freight rate invoice of 18.04.2017.
- On 27.12.2017, the Operational Creditor raised upon the Corporate Debtor a debit note for USD 242,772.19 for demurrage dues.
- Since the Corporate Debtor purportedly did not make further payments towards the outstanding freight and demurrage balance of USD 523,141.45 claimed by the Operational Creditor, the latter raised a Section 8 Demand Notice on 25.02.2020.
- On 09.03.2020, the Corporate Debtor sent their reply to Section 8 Demand Notice to the Operational Creditor.
- On 19.03.2020, the Operational Creditor sent another e-mail to the Corporate Debtor to clear the outstanding dues by 27.03.2020. The Corporate Debtor informed the Operational Creditor on 19.03.2020 that their office was closed due to Covid-19 and that the issue of payment would be taken up on re-opening of office.
- On 11.10.2022, the Operational Creditor sent a Legal Notice asking the Corporate Debtor to make good the payment of the outstanding dues.

- On 17.10.2022, the Corporate Debtor responded stating that they would need more time to ascertain the facts since their records were lying with Enforcement Directorate. Further it was contended that they had already made outstanding payment to Samruddha Resource Limited (**“Samruddha”** in short) and denied having any charter party with the Operational Creditor. The Operational Creditor denied these contentions of the Corporate Debtor in their communication dated 08.11.2022.
- On 19.11.2022, the Corporate Debtor sent another letter to the Operational Creditor stating that they were seeking information from Samruddha and that they would take more time for this purpose.
- Thereafter, the Operational Creditor served the Section 8 Demand Notice again on 25.02.2020 on the Corporate Debtor by e-mail on 19.12.2022 and hand delivery on 30.12.2022.
- On 10.01.2023, the Corporate Debtor responded to the Demand Notice raising their defence against the claim of the Operational Creditor.
- On 08.02.2023, the Operational Creditor sent another reminder for payment and followed it up with Section 9 petition of IBC.
- On 22.04.2024, the Adjudicating Authority passed the impugned order admitting the Section 9 petition initiating CIRP against the Corporate Debtor.
- Aggrieved by the impugned order, the present appeal has been preferred by the Appellant-Corporate Debtor.

3. Making his submissions, the Ld. Sr. Counsel for the Appellant, Shri Abhijeet Sinha stated that the Corporate Debtor had chartered the vessel through Samruddha for export of cargo to BST with the vessel agent being Globe Chart Ltd. (**“Globe Chart”** in short). It was contended that the Appellant-Corporate Debtor had not executed any charter party agreement with the Operational Creditor. As the entire transaction was negotiated by Samruddha with the Corporate Debtor, BST and Globe Chart, hence payments had been made by the Appellant to Samruddha/BST or to any entity under instructions of Samruddha. It was contended that the entire amount which was due towards freight had been paid by the Corporate Debtor and no operational debt was due and payable to the Respondent No. 1. Much emphasis was laid on the fact that the Operational Creditor did not send any correspondence to the Corporate Debtor between the date of invoice of 18.04.2017 till 25.02.2020 when the Section 8 Demand Notice was issued to demonstrate that they had ever seriously pursued or chased up for payment of their outstanding dues. It was contended that any entity whose freight dues are not paid can never be expected to sleep over their dues for nearly three years. It was therefore asserted that this is indicative of the fact that there was no due qua the Operational Creditor. It was also contended that the entire dues of the Operational Creditor had already been paid and requisite documents substantiating the payments were also placed on record which the Adjudicating Authority erroneously did not take into consideration.

4. Submission was also pressed that the Operational Creditor had relied upon forged and fabricated debit note dated 25.12.2017 claiming demurrage

amount of USD 242,772.19. The claim of demurrage was not a crystallised claim and was required to be substantiated by the Operational Creditor which not having been done, this amount could not have been claimed as an outstanding due. It was also submitted that Section 9 application could not have been admitted on grounds of outstanding demurrage claimed by the Operational Creditor since demurrage are not operational debt in terms of Section 5(21) of IBC. It was also pointed out that the Section 9 application filed by the Operational Creditor was time-barred and therefore not maintainable. It was submitted that the invoice dated 18.04.2017 basis which the Operational Creditor has claimed debt and default as well as the debit note dated 27.12.2017 were time-barred. It was pointed out that even after considering the suo moto extension of limitation in terms of the orders of the Hon'ble Supreme Court, the alleged claim should have been filed on or before 30.05.2022. However, the Section 9 petition having been filed on 08.03.2023, the claim stood time-barred.

5. Refuting the submissions made by the Appellant, Shri Krishnendu Datta, Ld. Sr. Counsel for the Respondent-Operational Creditor submitted that the impugned order was well reasoned and that the Corporate Debtor has failed to make out any cogent grounds for setting aside of the impugned order. It was contended that the Corporate Debtor had carried its cargo on a vessel made available by the Operational Creditor basis a Charter Party Agreement executed on 15.03.2017. It was emphasised that the Charter Party reflected the freight to be paid, demurrage charges as well as brokerage commission. It was pointed out that the Charter Party Agreement which is placed on record shows that the same was signed between the authorized signatory of the

Corporate Debtor and Operational Creditor with Bulk Chart as the broker. It is the contention of the Operational Creditor that for the cargo shipped, the total invoice value of the Operational Creditor was USD 653,312 against Freight Invoice dated 18.04.2017. The Corporate Debtor had made part payment of USD 350,000 on 04.08.2017 and a balance of USD 303,312 was still outstanding and payable by the Corporate Debtor. This shows that the Corporate Debtor had been paying to the Operational Creditor directly to clear their dues. Furthermore, the Corporate Debtor had admitted their debt in their reply dated 09.03.2020 to the Section 8 Demand Notice served by the Operational Creditor. It was also pointed out that the Corporate Debtor had been taking inconsistent stands from time to time with respect to payments made in respect of the charter party. It was vehemently contended that the alleged involvement of Samruddha, BST, and Globe Chart in the transaction are irrelevant since the Charter Party Agreement was between the Corporate Debtor and Operational Creditor with no role of third parties. It was pointed out that even though the Corporate Debtor had claimed that payments had been made by third parties to the Operational Creditor, the Corporate Debtor had not been able to produce the relevant remittance/Swift receipts of such payments. On the denial of the Corporate Debtor to pay for demurrages, it was pointed out that demurrage was an integral component of the Charter Party Agreement. Moreover, the Corporate Debtor in their reply to the Section 8 Demand Notice had also agreed to settle the issue relating to demurrage. Therefore, the Corporate Debtor had clearly admitted outstanding liability towards both freight charges and demurrage and cannot backtrack and deny their liability to clear the demurrage amount now. It was asserted that that

when the Corporate Debtor had themselves raised an invoice dated 25.05.2017 for Address Commission of USD 22,942.74 earned on freight and demurrage, the Corporate Debtor cannot deny that demurrage was not payable by them. The Corporate Debtor also failed to produce on record valid proof of payment of the balance freight and demurrage which was due to the Operational Creditor under invoice dated 18.04.2017 and debit note dated 27.12.2017. Hence, the Adjudicating Authority had rightly held that freight and demurrage charges were payable by the Corporate Debtor and the same not having been paid, default had arisen thus attracting Section 9.

6. On the point of limitation, it was pointed out that the debt of outstanding freight and demurrage charges having been admitted and acknowledgment given in writing by the Corporate Debtor in their reply dated 09.03.2020 to the Section 8 Demand Notice amounted to acknowledgment of debt. Since the Corporate Debtor had acknowledged their liability in their letter dated 09.03.2020 this constituted an acknowledgement of liability on the part of the Appellant under Section 18 of the Limitation Act. This letter was prior to the expiry of limitation period of three years calculated from the date of part payment done on 04.08.2017. In support of their contention, the Ld. Sr. Counsel for the Respondent placed reliance on the judgment of Hon'ble Supreme Court in ***Dena Bank Vs C. Shiva Kumar Reddy (2021) 10 SCC 330*** which held that Section 18 of the Limitation Act, 1963 applies to IBC proceedings.

7. On the letters and correspondences placed in the Additional Affidavit of the Appellant before this Tribunal to buttress their contention that the Operational Creditor had received freight payments from third party-BST, the

Ld. Sr. Counsel for the Respondent strongly opposed these documents for having been placed for the first time at the appeal stage before this Tribunal when these had not been placed for consideration of the Adjudicating Authority. It was asserted that even the grounds stated by the Appellant to explain the reasons for not being able to place these documents before the Adjudicating Authority earlier were flimsy and frivolous. It was also added that the Operational Creditor had already registered an FIR disputing the authenticity of these documents placed by the Corporate Debtor.

8. We have duly considered the arguments advanced by the Learned Counsel for both the parties and perused the records carefully.

9. The short point for our consideration is whether there is any infirmity in the impugned order passed by the Adjudicating Authority in allowing the Section 9 application on the ground that operational debt which was due and payable stood established by the Operational Creditor and that a default had been committed by the Corporate Debtor in respect of the said debt, the liability having been admitted without disputing the debt.

10. Before we analyse the findings of the Adjudicating Authority in the light of the rival submissions made by both parties, it may be helpful to advert attention to the statutory construct of IBC as in Sections 8 and 9 of the IBC. Section 8 requires the Operational Creditor, on occurrence of a default by the Corporate Debtor, to deliver a Demand Notice in respect of the outstanding Operational Debt. Section 8(2) lays down that the Corporate Debtor within a period of 10 days of the receipt of the Demand Notice would have to bring to the notice of the Operational Creditor, the existence of dispute, if any. From a

plain reading of the above provision, it is clear that the existence of dispute and its communication to the Operational Creditor is therefore statutorily provided for in Section 8. In the present case, it is an undisputed fact that the demand notice was issued by the Operational Creditor on 25.02.2020 and notice of dispute was raised by the Corporate Debtor on 09.03.2020.

11. Now coming to Section 9 of IBC, sub-section (1) thereof provides that if the Operational Creditor does not receive payment from the Corporate Debtor or notice of the dispute under Section 8(2), he may file an Application under Section 9(1) of the IBC. It remains an undisputed fact that the Operational Creditor did not receive any payment from the Corporate Debtor and chose to file an application under Section 9 of IBC. However, Section 9(5)(ii) envisages that if a notice of dispute is received by the Operational Creditor or there is a record of dispute in the Information Utility, the application is liable to be rejected by the Adjudicating Authority.

12. In arriving at our analysis and findings, we would like to bear in mind the guiding principles laid down by the Hon'ble Supreme Court in ***Mobilox Innovations Private Limited v. Kirusa Software Private Limited in Civil Appeal No. 9405 of 2017***. It is relevant to refer to paras 33, 51 and 56 of the said judgment which are extracted as hereunder:

“33.....What is important is that the existence of the dispute and/or the suit or arbitration proceeding must be preexisting i.e. it must exist before the receipt of the demand notice or invoice, as the case maybe. In case the unpaid operational debt has been repaid, the corporate debtor shall within a period of the self-same 10 days sent and attested copy of the record of the electronic transfer of the unpaid amount from the bank account of the corporate debtor or send an attested copy of the record that an operational creditor has encashed a cheque or otherwise received payment from the corporate debt [Section 8(2) (b)]. It is only if, after the expiry of the period of the said 10 days, the operational creditor

does not either receive payment from the corporate debtor or notice of dispute, that the operational creditor may trigger the insolvency process by filing an application before the adjudicating authority under Sections 9(1) and 9(2).....

51. *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.”*

56. *Going by the aforesaid test of “existence of a dispute”, it is clear that without going into the merits of the dispute, the appellant has raised a plausible contention requiring further investigation which is not a patently feeble legal argument or an assertion of facts unsupported by evidence. The defense is not spurious, mere bluster, plainly frivolous or vexatious. A dispute does truly exist in fact between the parties, which may or may not ultimately succeed, and the Appellate Tribunal was wholly incorrect in characterizing the defense as vague, got-up and motivated to evade liability.”*

13. Having noted the relevant statutory construct of IBC and the guiding principles laid down by ***Mobilox supra***, we now proceed to see from the facts of the present case whether the debt claimed by the Operational Creditor qua the Corporate Debtor was due and payable and whether the purported debt had been undisputedly admitted by the Corporate Debtor.

14. Coming to the question whether operational debt stood established by the Operational Creditor and whether a default thereto had been committed by the Corporate Debtor, it is the case of the Appellant that the entire transaction was facilitated by Globe Chart and negotiated by Samruddha. As per the business arrangement, the Operational Creditor received business from Samruddha with which it had a running account. The cargo was exported by the Operational Creditor on the instructions of Samruddha and the freight was released by BST to Globe Chart which in turn paid to the Operational Creditor. However, the Operational Creditor did not disclose before the Adjudicating Authority the arrangement that existed between them with Samruddha, BST and Globe Chart. Even when payment of USD 350,000 was made by the Corporate Debtor to the Operational Creditor, this was done not by the Corporate Debtor on its own but because of directions from Samruddha. It is further the case of the Appellant-Corporate Debtor that against the freight invoice dated 18.04.2017 for USD 653,312 raised by the Operational Creditor, they have placed on record the proof of payment of the entire amount before the Adjudicating Authority. Hence, there was nothing which was due and payable by them to the Operational Creditor. Only when the Operational Creditor was faced with some issues relating to payment in respect of transaction with Samruddha, that they foisted their claim on the Corporate Debtor by sending a Section 8 Demand Notice. The Adjudicating Authority erroneously did not consider the proofs of payment filed before it. Instead, it wrongly viewed the reply of the Corporate Debtor dated 09.03.2020 to the Section 8 notice as admission of their liability.

15. Per contra, it is the contention of the Respondent-Operational Creditor that the total invoice value of the Operational Creditor was USD 653,312 as placed at page 141 of Appeal Paper Book ("**APB**" in short). The Corporate Debtor had admitted their debt liability having made part payment of USD 350,000 on 04.08.2017 against Freight Invoice dated 18.04.2017. A balance of USD 303,312 was still outstanding and payable by the Corporate Debtor. It was further pointed that the Corporate Debtor in their letter dated 09.03.2020 in reply to the Section 8 Demand Notice served by the Operational Creditor had admitted this liability which letter is placed at pages 156-157 of APB. This letter has been rightly taken note of by the Adjudicating Authority in the impugned order at para 20 to hold that the Corporate Debtor had admitted the freight charges and even made partial payment. This was a clear acknowledgement of debt due and payable. It was contended that from a reading of the above letter, it would be clear that the Respondent had admitted the freight charges and that "partial payment" on freight has also been admitted which therefore showed that the Corporate Debtor was liable to pay outstanding freight charges.

16. When we peruse the material on record, we notice that the Corporate Debtor has contended that no dues were payable by them qua the total invoice value of the Operational Creditor of USD 653,312. The details of the payments made by the Corporate Debtor as per their claims is captured in the table below for easy referencing:

Date	Particulars	Amount (USD)
03.08.2017 Page 223 of APB	Debit Note issued by Corporate Debtor to Operational Creditor.	3,50,000

25.05.2017 Page 225 of APB	Credit Note issued by Corporate Debtor while receiving payment from BST.	44,568.05
03.08.2017 Page 227 of APB	Credit Note issued by Corporate Debtor.	1,22,446
24.06.2019 Page 230 of APB	Debit Note issued by Samruddha to the Corporate Debtor.	1,36,298.41
Total		6,53,312.46

On the Debit Note of 03.08.2017 of 3,50,000 and Credit Note of USD 1,22,446, there is no dispute between the parties. For the remaining two Credit and Debit notes, the two parties are however found to be at variance with each other. From the table depicted above, we find that the Corporate Debtor in the Credit Note of 25.05.2017 has pointed out that the amount of USD 44,568.05 was credited into the account of the Operational Creditor for having received the payment from BST. This credit note is placed at page 225 of APB. As regards payment of USD 1,36,298.41 of 24.06.2019, when we look at the page 230 of APB, we find that the debit note indicates that it was issued by Samruddha to the Corporate Debtor for payment of said amount to the Operational Creditor by them. It is contended by the Operational Creditor that when Charter Party Agreement was between Operational Creditor and Corporate Debtor, it is the Corporate Debtor who had the obligation for payment of freight, demurrage and detention. In the absence of any communication from the Corporate Debtor to Operational Creditor informing them about assignment of freight payment to BST, no such assignment can be accepted. To the contrary, it is the contention of the Corporate Debtor that the Operational Creditor had suppressed critical information about their business relationship with Samruddha besides the involvement of other

parties like BST and Globe Chart in the transaction. Prima-facie, the rival contentions made by both parties clearly manifests existence of dispute which is of such nature that the same needs to be investigated by a proper forum and that it was beyond the remit and scope of Adjudicating Authority to enquire into such disputes.

17. At this stage, it may be useful to peruse the exchange of letters by the Corporate Debtor with the Operational Creditor sequentially to ascertain whether there is sufficient evidence of admission of liability on the part of the Corporate Debtor to pay to the Operational Creditor or whether the payments had been disputed.

18. The first letter we refer to is the reply of the Corporate Debtor dated 09.03.2020 to the Section 8 Demand Notice of the Operational Creditor which reads as follows:

To

Date: - 9/3/2020

Jaldhi Overseas PTE Ltd.
Sripriya Balasubramanian
Group Financial Controller.

Ref: - Demand Notice for payment in respect of unpaid operational debt due from SHREE SURGOVINDTRADELINK LTD. under the Insolvency and Bankruptcy Code, 2016

Dear Sir,

With reference to the above subject, it was very disappointed, to receive such type of notices without any prior intimation for pending dues. Vessel freight is payable by us & we have paid the partial amount, for balance amount, you have to raise a debit note, as per RBI guidelines. We require the payment debit note as per shipping bill, which is accepted by our C.A. under the section 15CB. The bank requires the charter accountant certificates. Requesting you to please send the proper debit note as per shipping bill.

We and Broker have not confirmed the demurrage. In this regard, please arrange meeting & settle the issue.

Notice should be sent only after dispute arise in the meeting, but the sending demand notice to us is utterly disappointing act from your end. A well establish party doing business & paying the freight & other charges regularly still you send demand notice is not correct.

The disputed matter cannot be challenged under Rules of 5 of Insolvency & the Bankruptcy (Application Adjudicating Rule 16). We are not interested to raise dispute, but the demand should be submitted to us at the time of shipment effected & time limit should be indicated. Your demand for the freight Invoice sent late, which we cannot discuss, but you should know your accountability. In limited company, we require your invoices/ debit note in time otherwise we cannot make any provisions. Such type of debit note / Invoices with supporting proof is required for internal audit. Now we come to the conclusion first to prepare proper your demand paper as per RBI guidelines & C.A. guidelines. We have to remit foreign exchange as per Indian guidelines. After receiving all papers as per guidelines. We will arrange meeting & talk on point to be discuss & try to resolve the issue.

For RR METALMAKERS INDIA LTD.

(Emphasis placed)

19. In response, the Operational Creditor sent an e-mail to the Corporate Debtor in which letter the admission of debt liability towards freight and demurrage by the Corporate Debtor was emphasised and time was given to the Corporate Debtor to make payment by 27.03.2020. This letter was replied to by the Corporate Debtor on 19.03.2020 informing that their office was closed due to Covid-19 and that the issue of payment would be taken up on re-opening of office. The Operational Creditor thereafter sent a legal notice on 11.10.2022 to the Corporate Debtor which was replied to on 17.10.2022 by the Corporate Debtor which is as extracted below:

To,
Mr. Ashwin Shanker
Advocate & Arbitrator,

Date: 17/10/2022

Sub: Reply against E-Mail Dated: 11/10/2022

Dear Sir,

We have received your E-Mail Dated: 11/10/2022 & we want to reply you but delay has been taken place due to our record with ED (Enforcement Directorate) & we have apply for you're A/c extract.

We also inform to Samruddha Resources Ltd. & BST (HK) LTD., for this outstanding payment & as per our knowledge, payment has already made by Samruddha Resources Ltd., against our credit with Samruddha Resources Ltd. BST (HK) LTD. & Samruddha Resources Ltd., both are handling Iron Ore-A/c & the vessel payment.

We are doing the mining activity & material export from Redi Port to China but Steamer booking, freight negotiation & payment of the vessel all activities are handled by Samruddha Resources Ltd., Mr. Vinay Patil. Jaldhi Overseas PTE Ltd., is having a good business relation activity swith Samruddha Resources Ltd. We never negotiated any business with Jaldhi Overseas PTE Ltd., & not a single charter party agreement is executed by us.

We request you to please give us some time, we will take up the matter with Enforcement Directorate & Samruddha Resources Ltd. & will give you the fact situation which is available with us.

For RR METALMAKERS INDIA LTD.

(Emphasis placed)

20. This brings us to another letter dated 19.11.2022 sent by the Corporate Debtor to the Operational Creditor which is as extracted below:

To,
Mr. Ashwin Shanker
Advocate & Arbitrator,

Date: 19/11/2022

Sub: Reply against E-Mail Dated: 11/11/2022

Dear Sir,

With reference to the above, we have received your email, In this regard, we hereby inform you that we have already applied to collect the documents from ED department (Enforcement Directorate) but our statement is not completed with the department because the material which has been purchase through packing credit disbursement and payment directly released to Samruddha Resources Ltd but export is not executed.

The matters is under investigation with the bank and department personally visit at mines to check the stock position.

We are very much busy & try to settle this matter at our end. So please give us some time as our computer hard disk and documents are with the departments therefore we cannot reply for your letter.

We request you please give us the details if you are having the documents of this transactions it will help us to recollect our memory. We have contact Samruddha Resources Ltd but still no response received by them. The department planning to visit on 25th November 2022 at mines to check the stock position thereafter our next process will start and we will received our data. As per the discussion with department, we have given you the clear picture which we are facing. Samruddha Resources Ltd have executed so many documents in the export business and some of the documents have executed which is not as per law and against which we are facing the difficulties.

The vessel owner blindly follow Samruddha Resources Ltd instruction and not practically executed the documents as per the compliances. So the difficulties are very big for us to settle so give us some documents which is available with you so we can verify the fact.

As on today, your outstanding which you have mentioned is not in our record so we have to talk with Samruddha Resources Ltd & take the record which was handled by Samruddha Resources Ltd so we perfectly understood what the right and wrong commitment carried out by whom. Matter will resolve with the help of Sarmuddha Resources Ltd.

For RR Metalmakers India Ltd.

(Emphasis placed)

21. From a plain reading of the above communications, it cannot be construed in any manner that there was a categorical admission of debt and default by the Corporate Debtor. The first letter of 09.03.2020 clearly states that freight is payable subject to receipt of debit payment note as per shipping bill compliant with RBI guidelines and C.A. guidelines. Besides not confirming the demurrage, the said letter also states that they would like to arrange meeting to discuss and try to resolve the issue. We thus cannot be unmindful of the fact that the Operational Creditor had been asked to provide documents and debit note as per RBI and other guidelines for the vessel/freight charges.

In the said reply, the issue of demurrage was also clearly disputed which we shall dwell into in details in the succeeding paragraphs. Even in their cryptic email of 19.03.2020, the Corporate Debtor has only stated that the issue of payment would be taken up on re-opening of office. That the issue of the debt was embroiled in dispute is also evident from the fact the Operational Creditor had themselves issued a Legal Notice 11.10.2022. Moreover, pursuant to the Legal Notice, replies were sent by the Corporate Debtor dated 17.10.2022 and 19.11.2022 wherein it has been asserted that the outstanding claimed by the Operational Creditor is not in their records. Further payment was stated to have been already done by Samruddha as freight negotiation and payment of the vessel were activities handled by Samruddha. This letter dated 19.11.2022 clearly mentioned that the matter of outstanding debt would be resolved with the help of Samruddha. It is pertinent to note that these letters addressed to the Operational Creditor by the Corporate Debtor were also endorsed to Samruddha and BST.

22. We also find that the Corporate Debtor has categorically disputed on 10.01.2023 the outstanding debt and liability in their reply to the Demand Notice which had been resent on 30.12.2022. This notice of dispute is placed at page 186-188 of APB and the relevant extracts are as placed below:

“2. At the outset the company disputes and denies the alleged claims and contentions contained in the Demand Notice. Without prejudice to the contention of the company that it is not liable to pay any amount to you, the alleged claim under the Demand Notice is hopelessly time barred.

3. In this regard, we have written letter to you and your Advocate on 19/11/2022. Admittedly, the alleged claim pertains to the transaction executed in Year: 2017/18 and the Vessel: MV Aetolia was chartered by Samruddha Resources Ltd ("Samruddha"), for the export of cargo

to BST (HK) LTD ("**BST**") and the Vessel Agent was Globe Chart Ltd ("**Globe Chart**").

4. After receiving your mail regarding the alleged claim, we have collected some data from our bank as well as Globe Chart. We understand that you have received the payment in respect of the alleged claim from Globe Chart for US\$145388 on 03/08/2017.

5. In relation to the same Samruddha have confirmed that Bothra Shipping Services Pvt. Ltd ("**Bothra**") have paid US\$107604.01 & US\$28694.40 to you. Apart from the above we have remitted US\$3,50,000 undated: 03/08/2017 to you and you have given us credit for US\$ 21625.31, dated: 18/04/2017 against their bills.

6. In the circumstances aforesaid nothing is due and payable by us to you in relation to your alleged time barred claim. We state that the alleged claim contained in the Demand Notice is frivolous claim and the same is being foisted on the company despite knowing that the fact that in the entire transaction several parties were involved. Admittedly, the entire transaction was facilitated by Globe Chart. However, the Demand Notice does not contain a single reference to the same and this shows your dishonesty and falsity.

7. You have suppressed the material facts and have deliberately not disclosed the aforesaid facts in the Demand Notice. In the past also the company has responded to your emails/letters and have repeatedly disputed and denied the liability in relation to the alleged invoice/debit note. However, with a view to foist your alleged claim, you are purportedly trying to create a false record by reforwarding the Demand Notice.

8. Admittedly, the purported transaction was executed in the year 2017 which is more than 6 years earlier and for the alleged claim now you are making the claim. We are very much surprised that despite receipt of the payment after 6 years you are purportedly trying to claim the same from us.

9. You are aware that Samruddha had arrangement with BST and Globe Chart and you. You received the business from them and business of export is running business. Apart from the above, your payment was always paid by Globe Chart and BST. We also understand that you have running account with Samruddha. You are also aware that the material exported from India was as per Samruddha's instructions. Further, BST was releasing freight to Globe Chart and in turn Globe Chart was paying you. The entire transaction

was negotiated by you with Samruddha and BST and we were not in concerned with the same.

10. The Demand Notice is premeditated with a view to now foist the purported claim on the company. The company is not going into the specifics and details of your dubious claims under the Demand Notice as the same is time barred. We reserve our rights to place the aforesaid facts and documents in support thereof before the Hon'ble NCLT in the event of you proceeding against the company.

11. We once again dispute and denies that the company is liable for the alleged claim under the Demand Notice. The company has responded to the Demand Notice in the past also and there is pre-existing dispute between the parties. Admittedly, from the correspondence exchanged between the parties, it is evident that there is pre-existing dispute between the parties and the Demand Notice is devoid of merits.”

(Emphasis placed)

23. Once plausibility of a pre-existing dispute is noticed, what has to be looked into is whether the dispute needs further adjudication by a competent court. The Adjudicating Authority is not to enter into final adjudication with regard to existence of dispute between the parties regarding the operational debt in terms of the statutory construct of the IBC. In the present case too, the freight charges having not been admitted by the Corporate Debtor, it is not a case wherein debt and default has been unequivocally established which is essential for entertaining a Section 9 application.

24. This brings us to the issue of demurrages. It is the contention of the Corporate Debtor that the Operational Creditor was not able to show service of debit note upon the Corporate Debtor of USD 242,772.19 dated 27.12.2017 towards demurrage. On the timing of the Debit Note, it was pointed out that while the freight invoice of the Operational Creditor was dated 18.04.2017, the debit note was dated 27.12.2017 without any explanation as to why the

debit note was raised eight months after the date of invoice. It was also asserted at length by the Ld. Sr. Counsel for the Appellant that demurrage cannot be treated as liability as it did not fall in the category of operational debt under Section 5(21) of IBC. Moreover, in the present case, demurrage had not crystallised between the Corporate Debtor and the Operational Creditor and was in the form of unliquidated damages. Unless the extent of damages was decided and firmed up by a Court of competent jurisdiction, demurrage charges would not have become payable. In support of their contention, reliance was placed on the judgment of this Tribunal in ***LCL Logistix India Pvt. Ltd. VS Waaree Energies Ltd.*** in ***CA(AT)(Ins.) No. 698 of 2020***. It was also pointed out that the extent of damages cannot be decided by the Adjudicating Authority since it enjoyed only summary jurisdiction. It is the case of the Appellant that Section 9 petition for demurrage was not maintainable and was required to be proved by leading evidence in civil courts.

25. Per contra, it is contended by the Operational Creditor that at a time when the Corporate Debtor raised an invoice dated 25.05.2017 claiming entitlement for Address Commission of USD 22,942.74 earned on freight and demurrage, the Corporate Debtor cannot claim that they were not liable to pay demurrage. When the Corporate Debtor had themselves admitted taken credit of the demurrage receivable, it did not lie in their mouth to submit that demurrage was not payable on their part to the Operational Creditor. Furthermore, on 11.10.2017, the Corporate Debtor had confirmed the lay time calculations provided by the Operational Creditor. It was asserted that the Corporate Debtor was liable to pay the outstanding debt of the Operational

Creditor towards demurrage under debit note dated 27.12.2017 after adjusting Address Commission earned by them.

26. Given this backdrop, it will be useful to find out how the Adjudicating Authority has considered the spectrum of facts relating to payment of demurrage. We find from the impugned order that the Adjudicating Authority noted that on 25.05.2017, the Corporate Debtor had raised an invoice for USD 22,942.74 towards Address Commission earned and that the Operational Creditor had also raised a Debit Note on 27.12.2017 for USD 242,772.19 towards demurrage dues. It was also noted by the Adjudicating Authority that the laytime calculations in support of their demurrage dues were confirmed by the broker of the Corporate Debtor vide email dated 11.10.2017. The Adjudicating Authority has further concluded after noticing the communication from the Corporate Debtor dated 09.03.2020 that the Corporate Debtor has admitted that there exist demurrage charges to be paid to the Operational Creditor, however, the same only needed to be confirmed after arranging a meeting with the Operational Creditor.

27. When we carefully look at the communication dated 09.03.2020 sent by the Corporate Debtor to the Operational Creditor, we find that the Corporate Debtor did not confirm the claim of Demurrage charges of USD 242,772.19. This is amply borne out from a plain reading of the communication of 09.03.2020 wherein it has been submitted as follows:

“We and Broker have not confirmed the demurrage. In this regard, please arrange meeting & settle the issue....”

28. From the above statement it is clear that the Corporate Debtor had not admitted the liability to pay demurrages. It is therefore, clear that payment on

account of demurrage was disputed by the Corporate Debtor. Under such circumstances, we are not inclined to agree that there was any admission of liability on the part of the Corporate Debtor on payment of demurrage and hence this defence taken by the Corporate Debtor cannot be disregarded as vexatious or feeble in nature. In the present factual matrix, the defence raised by the Corporate Debtor therefore cannot be held to be moonshine, spurious, hypothetical or illusory.

29. We also find that the Corporate Debtor has categorically disputed on 10.01.2023 the outstanding debt and liability in their reply to the Demand Notice which had been resent on 25.02.2020 and 30.12.2022. This notice of dispute is placed at pages 186-188 of APB. The relevant extracts from the said notice of dispute is extracted below:

*"1. We are in receipt of the Demand Notice dated February 25, 2020 ("**Demand Notice**") re-served under the cover of your Advocate's letter dated December 30, 2022 and in response we have to state as under: -*

2. At the outset the company disputes and denies the alleged claims and contentions contained in the Demand Notice. Without prejudice to the contention of the company that it is not liable to pay any amount to you, the alleged claim under the Demand Notice is hopelessly time barred.

4. After receiving your mail regarding the alleged claim, we have collected some data from our bank as well as Globe Chart. We understand that you have received the payment in respect of the alleged claim from Globe Chart for US\$145388 on 03/08/2017.

*5. In relation to the same Samruddha have confirmed that Bothra Shipping Services Pvt. Ltd. ("**Bothra**") have paid US\$107604.01 & US\$28694.40 to you. Apart from the above we have remitted US\$3,50,000 on dated: 03/08/2017 to you and you have given us credit for US\$ 21625.31, dated:18/04/2017 against their bills.*

6. In the circumstances aforesaid nothing is due and payable by us to you in relation to your alleged time barred claim. We state that the alleged claim contained in the Demand Notice is frivolous claim and the

same is being foisted on the company despite knowing that the fact that in the entire transaction several parties were involved. Admittedly, the entire transaction was facilitated by Globe Chart. However, the Demand Notice does not contain a single reference to the same and this shows your dishonesty and falsity.

9. You are aware that Samruddha had arrangement with BST and Globe Chart and you. You received the business from them and business of export is running business. Apart from the above, your payment was always paid by Globe Chart and BST. We also understand that you have running account with Samruddha. You are also aware that the material exported from India was as per Samruddha's instructions. Further, BST was releasing freight to Globe Chart and in turn Globe Chart was paying you. The entire transaction was negotiated by you with Samruddha and BST and we were not in concerned with the same.

10. The Demand Notice is premeditated with a view to now foist the purported claim on the company. The company is not going into the specifics and details of your dubious claims under the Demand Notice as the same is time barred. We reserve our rights to place the aforesaid facts and documents in support thereof before the Hon'ble NCLT in the event of you proceeding against the company.

11. We once again dispute and denies that the company is liable for the alleged claim under the Demand Notice. The company has responded to the Demand Notice in the past also and there is pre-existing dispute between the parties. Admittedly, from the correspondence exchanged between the parties, it is evident that there is pre-existing dispute between the parties and the Demand Notice is devoid of merits.”

30. From the above set of correspondences exchanged between the parties, it is clear that the Corporate Debtor had not agreed to the debt and wanted to discuss the matter to settle the issue. In the best-case scenario, the Corporate Debtor had only tentatively agreed to look into the matter of outstanding claim but cannot be said to have categorically admitted the claim. Once under the provision of Section 9 of IBC, a Corporate Debtor is in a position to satisfy that there was pre-existing dispute with regard to the purported debt liability, there is no scope for initiation of CIRP. This position has been put to rest by the Hon'ble Supreme Court in ***Mobilox judgment supra.***

31. We are, therefore, not satisfied in agreeing with the findings returned by the Adjudicating Authority at para 20 that the Corporate Debtor had admitted their liability and that the demand raised by the Operational Creditor was undisputed. In the facts of this case, the Corporate Debtor had only tentatively agreed to look into the matter of outstanding claim but did not categorically admit the claim either on account of freight or demurrage. The Corporate Debtor had not agreed to the debt but wanted to discuss the matter to settle the issue.

32. In a Section 9 petition, the Corporate Debtor enjoys the right to dispute the debt including the quantum of payment. From the correspondence placed on record it is clear that dispute was continuing between the parties regarding outstanding claim both in respect of freight and demurrage. Once the debt has been disputed, the question of default does not arise. For such disputed operational debt, Section 9 proceeding under IBC cannot be initiated at the instance of the Operational Creditor. In terms of the objectives of the IBC and settled proposition of law as expressed and explained time and again by the Hon'ble Supreme Court, the provisions of IBC cannot be turned into a debt recovery proceeding as it is a beneficial legislation which envisions the revival of the Corporate Debtor and bringing it back on its feet from the perils of extinction. When Operational Creditor seeks to initiate insolvency process against a Corporate Debtor, it can only be done in clear cases where no real dispute exists between the two which is not so borne out given the facts of the present case. The conditions laid down in Section 9 having not been fulfilled, the application deserved to be rejected.

33. In view of the facts and circumstances of the case as well as in view of the law laid down by the Hon'ble Apex Court in ***Mobilox judgment***, we are of the view that the Adjudicating Authority has erroneously allowed the application filed under Section 9 of the IBC by the Respondent. Accordingly, the impugned order is set aside. The Appeal is allowed. The Corporate Debtor is released from the rigours of CIRP. However, it will remain open to the Operational Creditor to resort to appropriate remedies that may be available to it under any other law. The impugned order is set aside. No cost.

**[Justice Ashok Bhushan]
Chairperson**

**[Barun Mitra]
Member (Technical)**

**[Arun Baroka]
Member (Technical)**

**Place: New Delhi
Date: 27.02.2025**

Abdul/Harleen