

**In the National Company Law Tribunal
Mumbai Bench - (C-III)**

C.P.(IB)-4495/MB/2019

Under Section 9 of Insolvency & Bankruptcy Code, 2016

In the matter of

Crimson Logistic Private Limited : Operational
Creditor

Versus

EXM Project Movers Private Limited : Respondent

Order delivered on: 20.09.2021

Coram:

Hon'ble Member (Judicial) : Shri H. V. Subba Rao
Hon'ble Member (Technical): Shri Chandra Bhan Singh.

For the Applicant(s) : Ms. Sonali Pawar, Advocate

For the Respondent(s) : Mr. Rishi Murarka

Per: Chandra Bhan Singh, Member (T).

ORDER

1. This Application has been filed in Form No.5 by M/s. Crimson Logistic Private Limited (Applicant/Operational Creditor) u/s. 9 of the Insolvency & Bankruptcy Code, 2016 r/w Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating

Authority) Rule, 2016 against M/s. EXN Project Movers Private Limited, Mumbai 400013 (Respondent) to claim an outstanding principal operational debt amount of Rs.18,62,300/-. The amount fell due on 05.05.2018.

2. **Submissions by the Applicant :-**

The Applicant/ Operational Creditor is engaged into transportation business and are owner of Volvo Fleet, Transport Contractors ODC, Luxury Cars & Buses. The Applicant submits that the Respondent debtor had hired the services of 'Puller' rented to it by the Applicant and the Respondent accepted the terms of contract as per emails dated 28.02.2018 and 05.03.2018. The Applicant further submits that it was clearly informed and agreed upon by the parties that the Billing will start from the date the Puller leaves the Padgha Yard and will stop once it returned back to the Padgha Yard. The Corporate Debtor agreed for the same. The Puller left the Yard on 04.03.2018 and reached the site address provided by the Corporate Debtor on the same day and the cargo, a 250 MT Transformer, was loaded from BHEL Hyderabad. The same was reached Odisha on 13.05.2018.

2.1. The Puller reached the unloading point on 15.05.2018. The driver of the Puller informed the representative of the Respondent Company that the Puller could not go beyond a particular point because

it had a 250 MT Transfer and the road had a steep slope. However, on instructions from the Supervisor of the Respondent Company, the driver entered the stretch of the road and the Puller tilted. However, the Transformer suffered no harm.

- 2.2. The Applicant submits that the Respondent Company was informed of the accident and the Respondent was willing to bear the cost of the accident and insisted that another Puller be arranged to complete the work and necessary charges would be paid.
- 2.3. The Applicant states that it was the Respondent's responsibility to repair and get the Puller back in working condition, however, the Puller remained lying there for two days. The Respondent insisted for another Puller. Therefore, the Applicant arranged for the same and the work was completed.
- 2.4. The Applicant further states that the Respondent informed the Applicant that the Respondent had no manpower to take back the Puller to Padgha Yard and requested the Applicant to make necessary arrangement. The Applicant requested the Respondent to negotiate the cost for the same with the driver of the Puller. According to the Applicant, a cost of Rs.80,000/- was agreed for the same by the Respondent and a sum of Rs.49,000/- was transferred through NEFT on 29.05.2018 and the balance Rs.31,000/- was to be cleared on the next day. The

Applicant claims that the amount of Rs.49,000/- paid by the Respondent on 29.05.2018 was for the expenses of Driver and not against the outstanding amount. No further amount was released by the Respondent though they kept assuring that the payment would be made shortly. Therefore, the Applicant had no option but to take the Puller back from Aurangabad to Padgha at their own cost.

- 2.5. The Applicant further submits that email was received from the Respondent about the incident happened at site and the Applicant placed the facts on record vide email dated 16.05.2018 that the Puller titled because of insistence of the Supervisor of the Respondent and the Applicant's driver had informed the consequences. In this email of 16.05.2018 the Applicant had informed that the Applicant will bear the Insurance Cost, however, the Puller rent would continue till the Puller reached back to its starting point. The Applicant submits that thereafter the Respondent unilaterally stated in another email that they would not pay any further charges except demobilization cost. According to the Applicant, this email is in clear violation of the terms of contract as it was specifically agreed between that parties that the contract will end only once the Puller reaches back to the Padgha Yard, Mumbai and till then the rent will continue.

2.6. The Applicant further submits that vide email dated 22.05.2018 informed the Respondent that the Puller is ready for movement but the Respondent did not clear the dues as raised against the Invoice. Instead, the Respondent vide email dated 23.05.2018 informed the Applicant to move the Puller and the Invoice be submitted after arrival of the Puller in Mumbai. The Applicant did not agree to this and conveyed its inability to act as per the email of the Respondent, vide email dated 23.05.2018 and requested the Respondent to assign their person for movement. The Applicant submits that the Respondent, vide email dated 25.05.2018, informed the Applicant to depute the Puller at the expenses of the Applicant and the same would be paid by the Respondent. The Applicant submits that they informed the Respondent through telephone the charges for demobilization of the Puller and the Respondent agreed for the same and the Respondent released demobilization cost of Rs.49,000/- via NEFT to the Applicant.

2.7. Thereafter on 04.06.2018, the Respondent informed the Applicant that the abovesaid Rs.49,000/- is the full and final payment towards the demobilization costs. The Applicant submits that before this email, the Respondent had informed that the payment of all the invoices would be cleared.

- 2.8. The Applicant further submits that Demand Notice dated 25.10.2019 has been sent in Form No.4 under the Insolvency & Bankruptcy Code, 2016 through India Post and it has been delivered to the Respondent on 26.10.2019. The Respondent replied to this demand notice after 20 days. The Applicant submits that the Respondent has not denied the services availed nor the Invoices but only denied/ disputed the quantum of the amount. The Respondent, in email dated 19.11.2019, even offered to settle the matter by paying a sum of Rs.21,000/- as due and payable.
- 2.9. The Applicant also submits that as per the agreed terms and conditions the Puller has been rented from 02.03.2018 and it reached back at Padgha Yard only on 30.09.2018. The Respondent has paid a total amount of Rs.4,58,700/- against the total Invoice of Rs.23,21,000/-, leaving outstanding of Rs.18,62,300/-. The last payment of Rs.2,97,000/- was received on 04.05.2018. According to the Applicant, the total debt amount due and payable by the Respondent to the Applicant is Rs.18,62,000/- along with interest of 18% p.a. Rs.3,24,000/-. The total debt amount due and payable by the Respondent is Rs.21,86,300/-.

Submissions by the Respondent :-

3. As against the above submissions of the Applicant, the Respondent submitted its defence as under :-

- 3.1. That, the Respondent hired its Puller truck for use (movement of transformer) at a site in Sundergarh, Orissa. While manoeuvring the puller at the site, the driver of the Puller lost control of the Puller and the Puller overturned and the Transformer suffered damage.
- 3.2. That, since the Puller was overturned on 15.5.2018 it was not available for the Respondent's use after that day.
- 3.3. The Respondent denied the Applicant's allegation that the site was unsafe and stated that the accident took place because of the Petitioner's driver could not properly control the Puller.
- 3.4. The Respondent informed the Applicant that because the Puller was not available to it now, they will not pay any charges w.e.f. 16.05.2018, except for demobilization charges i.e., cost for taking the puller back to Mumbai, vide email dated 16.05.2018. The Applicant accepted this and on 22.05.2018 asked the Respondent to pay demobilization charges to bring the puller to Mumbai.
- 3.5. That, the Applicant accepted the Respondent's position that the Respondent will not pay any hire for the puller after 15.05.2018 and that it will pay only demobilisation charges.
- 3.6. The Respondent submits that they hired another Puller to complete the movement of the transformer

and it could complete the movement successfully. This confirms that the site was safe, and it was the incompetence of the Petitioner's driver which caused the Petitioner's puller to overturn.

- 3.7. That, the Respondent suggested in email dated 23.05.2018 that the Applicant should mobilize the puller and submit its bill after the puller arrived at Mumbai. However, this suggestion was not accepted by the Applicant and the Applicant insisted on advance payment.
- 3.8. That, since the Applicant insisted for advance payment of demobilization charges, the Respondent agreed with the Applicant to pay lumpsum demobilization charges of Rs.50,000/- in advance.
- 3.9. That, as per the agreement, on 29.05.2021 the Respondent paid the Applicant Rs.49,000 (+ Rs.1,000/- TDS @ 2% as applicable) = 50,000/- for demobilization charges.
- 3.10. That, after receiving Rs.49,000/-, the Applicant reneged on the agreement and began demanding additional amounts towards demobilization charges. The Respondent disputed this and stated that all amounts as approved are paid, and that no further amounts will be paid. Thus, since June 2018 the Respondent has been disputing that any further demobilization charges are payable. Therefore, there is a pre-existing dispute between the parties. Here the

Respondent relied upon the judgment of the Hon'ble Supreme Court in the matter of *Mobilox Innovations (P) Ltd v. Kirusa Software (P) Ltd.*, - 2018) 1 SCC 353 according to which, if there is a pre-existing dispute between the parties, the Insolvency Petition must be dismissed. Accordingly, the Respondents prayed for dismissal of the Application.

3.11. The Respondent submits that the Applicant's claim is untenable as the Applicant claims hire even after the puller was demobilized on 16.05.2018 for the reason that: (a) the record bears out that no charges (except demobilization) were payable after 16.05.2018 and (b) whilst the Applicant admits that the puller left the site in early June 2018, it states that the puller arrived at its Padgha Yard on 30.09.2018 and on this basis, the Applicant claims hire for the period between June 2018 and 30.09.2018. The distance from the site to Padgha is about 1400 kms. The puller ought to have been able to cover this distance in 5-7 days. The Applicant has never explained why the puller took 4 months to cover a distance of 1400 kms.

3.12. The puller overturned due to the negligence of the puller driver and the Respondent suffered claims/damages. On 16.05.2018 itself the Respondent informed the Applicant in email dated 16.05.2018 that such losses would be recovered from the Applicant.

3.13. The Respondent also submits that after setting off expenses incurred by it as a result of the puller overturning against hire payable up to 15.05.2018 (but without accounting for claims received because of damage suffered by the transformer) there is a sum of Rs.21,000/- payable to the Applicant, however, pleads that this sum is below the threshold provided for in Section 4 of the Insolvency & Bankruptcy Code, 2016 and prayed for dismissal of the Application.

FINDINGS

4. This Petition has been filed by M/s Crimson Logistics Private limited, Petitioner/ Operational Creditor against EXM Project Movers Private Limited & Anr, Respondent for a total amount of Rs.18,62,300/-. The transaction has arisen, as per the Petitioner, on account of hire of 'puller truck' and the date of default is 05.05.2018. The demand notice to the Respondent was served on 25.10.2019 and a reply to the demand notice by the Respondent have been given on 19.11.2019.
5. The Respondent hired the Petitioner's puller truck for movement of its equipment at a site in Sundergarh district of Orissa. As is evident from the records, on 15.05.2018 while the Petitioner's driver was manoeuvring the puller truck at the site, he lost control of the puller. This caused the puller to overturn and resulted in stranding of the puller and it was not available for the Respondent's use after that day. It is

the case of the Respondent, therefore, that the demobilisation of the puller truck was with effect from 16.05.201. The Bench notes that the dispute between the parties relates to the period from 16.05.2018 when the puller was demobilised till the time it reached back to Padgha.

6. The Petitioner has produced an email dated 16.05.2018 addressed to the Respondent, the purport of which the Petitioner claims, is that it was not the fault of the driver of the puller but wrong instruction by the supervisor of the Respondent. In the same mail of 16.05.2018 the Petitioner had mentioned that they would charge all the cost other than insurance till the puller reaches their Padgha yard. The Bench notes that a clear dispute has been raised by the Respondents regarding their contention that the dues would be payable till the time puller reaches Padgha yard. In this regard before this Bench is a mail from the Respondent to the Petitioner dated 16.05.2018 where it reads as under:-

“Your Justification not accepted, if your driver was disagree why he has started the movement without taking your permission also we have not received any written intimation on this., yes its true we have moved and unloaded the first package with one puller without any issue.

Please note your puller is on offhire from today itself and, EXM is not paying any further charges except demob cost”

This clearly shows that the Respondent has not accepted the contention of the Petitioner and have clearly mentioned that the puller is offhire from that day itself i.e., 16.05.2018 and that the Respondent is not paying any further charges except demobilisation cost. The Bench notes that the Respondent subsequently paid on 29.05.2018 a total amount of Rs.50,000/-, less Rs.1,000/- TDS to the Petitioner and the puller truck left the site on 29.05.2018. The Bench further notes that the Respondents because of the non-availability of the Petitioner's puller had to engage an alternate puller along with manpower and a crane to move the cargo to the nominated location and in this process incurring further expenses. The Bench finds it very difficult to accept that even though the puller of the Petitioner left the accident site on 29.05.2018 it reached the Padgha yard only on 30.09.2018 i.e., after about 4 months. No explanation in this regard has been given by the Petitioner. The Bench therefore has no hesitation in arriving at a decision that ostensibly no amount after the date of the accident i.e., 15.05.2018 till 30.09.2018 is due and payable to the Petitioner. Also, Respondent has consistently disputed all payments which the Petitioner claims, is due. The Bench is of the view that there is a pre-existing dispute which has been going on since May 2018 in this matter, i.e., 16.05.2018, the date from which the puller truck got stuck. Here we would like to refer to the Hon'ble Supreme

Court Judgement in “*Mobilox Innovations (P) Ltd. V. Kirusa Software (P) Ltd.*, - (2018) 1 SCC 353, the Hon'ble Supreme Court of India, held whilst interpreting the term, “existence of dispute”:

*“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.’**” (emphasis supplied)*

A similar view was again recently taken by the Hon'ble Supreme Court of India in *Kay Bouvet Engineering Ltd v Overseas Infrastructure Alliance (India) P. Ltd.* – 2021 SCC Online Hon'ble Supreme Court 570 in which the Hon'ble Court observed:

“15. It could thus be seen that this Court has held that one of the objects of IBC qua operational debts is to ensure that the amount of such debts, which is usually smaller than that of financial debts, does not enable operational creditors to put the corporate debtor into the insolvency resolution process prematurely or initiate the process for extraneous considerations. It has been held that it is for this reason that it is enough that a dispute exists between the parties.

...

17. ... All that the adjudicating authority is required 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. It has been held that however, at this stage, the Court is not required to be satisfied as to whether the defence is likely to succeed or not. The Court also cannot go into the merits of the dispute except to the extent indicated hereinabove. It has been held that so long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has no other option but to reject the application.”

The Bench, therefore, is of the view that there are genuine pre-existing disputes between the parties regarding demobilization charges etc. In view of this, the Bench does not find any merit in this Petition and therefore 'dismisses' the Petition.

CP (IB)-4495/MB/2019 is "**dismissed**".

Sd/-

CHANDRA BHAN SINGH
Member (Technical)

Sd/-

H V SUBBA RAO
Member (Judicial)