

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 498 of 2024

(Arising out of Order dated 28.02.2024 passed by the Adjudicating Authority (National Company Law Tribunal), Cuttack Bench, Cuttack in IA(IB) No.36/CB/2024 in C.P.(IB) No.36/CB/2022)

IN THE MATTER OF:

Balasore Alloys Limited
Having Registered Office at
Balgopalpur, District Balasore,
Odisha-756020

... Appellant

Versus

MSTC Limited
Having registered office at
Plot No. CF 18/2, Street No. 175,
Action Area 1C, New Town
Kolkata-700156

... Respondent

Present:

For Appellant: **Mr. Joy Saha, Sr. Advocate with Mr. Sandeep S. Ladda, Mr. Apoorv Shukla, Mr. Prabhleen A Shukla, Ms. Tanvi Luhariwala, Advocates.**

For Respondent: **Mr. Abhijeet Sinha, Sr. Advocate with Ms. Pallavi Pratap, Ms. Muskan Jain, Mr. Saikat Sarkar, Advocates for R-1.**

J U D G M E N T

ASHOK BHUSHAN, J.

This Appeal has been filed by the Corporate Debtor, challenging order dated 28.02.2024 passed by National Company Law Tribunal, Cuttack Bench, Cuttack by which IA(IB) No.36/CB/2024 filed by the Appellant for accepting two additional documents was dismissed. Appellant aggrieved by the said order has come up in this Appeal.

2. Brief facts of the case necessary for deciding the Appeal are:

- (i) The Appellant – Corporate Debtor and Respondent – Operational Creditor entered into an Agreement for purchase and sale of various procurement, e.g. like low ash metallurgical coke, HR coil naptha, crude oil, coking coal etc.
- (ii) The Operational Creditor issued a Demand Notice dated 05.05.2022 under Section 8 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the “**Code**”) with respect to outstanding amount of Rs.18,69,06,540/-. The Demand Notice was replied by the Corporate Debtor vide reply dated 16.05.2022. Company Petition – CP(IB) No.36/CB/2022 was filed under Section 9 by the Operational Creditor seeking initiation of CIRP. In Section 9 Application, Corporate Debtor filed its reply on 19.11.2022.
- (iii) The Appellant issued notice dated 11.04.2023 calling upon the Respondent to pay a sum of Rs.17 crores within a period of 08 days, failing which the said notice be treated as Arbitration notice as per Clause 23 of the Agreement. The Respondent – Operational Creditor sent a reply denying all the allegations. It was further stated that outstanding is due on the Corporate Debtor and Section 9 Application is already pending before the Adjudicating Authority.
- (iv) The Corporate Debtor filed Application under Section 11 (6) of the Arbitration and Conciliation Act, 1996 before the High Court of Calcutta seeking appointment of sole Arbitrator. Vide order dated 13.09.2023, the Hon’ble High Court of Calcutta allowed the Application and appointed Arbitrator in the matter. The Operational Creditor filed a SLP (C) 25781/2023 challenging order dated 13.09.2023 passed by the High Court. The said SLP was dismissed by the Hon’ble Supreme Court making observation “*we make it clear that the impugned order and conformation thereof will not affect the pending proceedings under the Insolvency and Bankruptcy Code, 2016*”.

- (v) After the aforesaid order of the Hon'ble Supreme Court, the Corporate Debtor filed an I.A. No.36/CB/2024 before the Adjudicating Authority to bring on record arbitration petition AP/640/2023 and order dated 13.09.2023 passed by the Calcutta High Court. The Corporate Debtor also filed an MA No.107/2024 before the Hon'ble Supreme Court seeking clarification of order dated 28.11.2023, which MA was dismissed by the Hon'ble Supreme Court on 23.01.2024.
- (vi) The Adjudicating Authority by the impugned order dated 28.02.2024 dismissed IA No.36/CB/2024 observing that it is not explained by the Applicant how the additional documents are just and necessary to arrive conclusion in the C.P. No.36/CB/2022. This Appeal has been filed challenging the order passed by the Adjudicating Authority IA No.36/CB/2024.

3. We have heard Shri Joy Saha, learned Senior Counsel appearing for the Appellant and Shri Abhijeet Sinha, learned Senior Counsel appearing for Respondent.

4. Shri Joy Saha, learned Senior Counsel for the Appellant, challenging the order contends that the Adjudicating Authority in paragraph-7 of the order had made observation that the court should take a lenient view when an application is made for production of the documents, however, dismissed the Application relying on the observation of the order of the Hon'ble Supreme Court dated 28.11.2023. It is submitted that order of Hon'ble Supreme Court dated 28.11.2023 does not preclude the Adjudicating Authority from taking the additional document on record. By dismissing the Application for additional documents, the Adjudicating

Authority has completely struck off one of the defence of the Appellant. Passing of the order by the Hon'ble Supreme Court in MA No.107 of 2024 filed by the Appellant in no manner to be an embargo on the Adjudicating Authority from examining the aspect of pre-existing dispute, which could have been included by the Appellant by filing the documents as prayed for. The documents which were sought to be brought on record by the Appellant were necessary for adjudication of Section 9 Application. The Adjudicating Authority committed error in rejecting the Application of the Appellant seeking permission to bring additional documents on record.

5. Shri Abhijeet Sinha, learned Senior Counsel appearing for Respondent, refuting the submissions of learned Counsel the Appellant submits that arbitration proceedings initiated by the Corporate Debtor before the Hon'ble Calcutta High Court in which order dated 13.09.2023 was passed, which proceedings were initiated much after filing of Section-9 Application by the Operational Creditor. Only two documents were sought to be brought on record by the Corporate Debtor, i.e. (1) copy of the arbitration petition; and (2) order dated 13.09.2023 passed by the Calcutta High Court. Both the above documents were not related to Section 9 proceedings, since Section 9 proceedings were pending for consideration at the time when proceeding were initiated by the Appellant in the High Court of Calcutta. It is further submitted that in the Company Petition filed under Section 9, all details of proceedings prior to filing of Section 9 petition were already brought on the record. It is submitted that Hon'ble Supreme Court while dismissing the SLP filed by the Operational Creditor had made

observation that order dated 13.09.2023 and the order of Hon'ble Supreme Court shall not affect the pending proceedings under the Code. The Hon'ble Supreme Court, thus, clearly indicated that arbitration proceedings, shall not have any bearing on Section 9 Application. The Adjudicating Authority rightly taken note of the said observation of the Hon'ble Supreme Court while rejecting IA 36/CB/2024. It is further submitted that Adjudicating Authority also observed in the order that it is also not explained by the applicant how these additional documents are just and necessary to arrive conclusion in C.P. No.36/CB/2022. The Corporate Debtor has already filed reply to Section 9 Application and the Application filed by the Appellant was nothing but an attempt to derail and prolong the proceedings under Section 9, which is at the stage of final hearing.

6. We have considered the submissions of learned Counsel for the parties and have perused the records.

7. In IA No.36/CB/2024, which was filed by the Corporate Debtor, following prayers were made:

- "A. Leave to rely on the Additional documents of the Applicant/ Corporate Debtor annexed as Annexure "A" and Annexure "B" with this application at the time of hearing of the instant company petition and the Additional documents be taken on record;
- B. Consideration of the Additional documents of the Applicant/ Corporate Debtor by this Hon'ble Tribunal at the time of hearing of the instant company petition'
- C. Any other or further order(s) as this Learned Tribunal may deem fit and proper.

8. Annexure “A” which is referred in the prayer, is Arbitration Petition No.640 of 2023 filed under Section 11 of Arbitration and Conciliation Act and Annexure “B” is copy of order passed in the said arbitration dated 13.09.2023 by the Calcutta High Court.

9. As noted above, notice under Section 8 was issued by the Operational Creditor on 05.05.2022, which was also replied by the Corporate Debtor. Section 9 Application was filed being CP(IB)No.36/CB/2022 by the Operational Creditor in the year 2022, to which reply was also filed by the Corporate Debtor. Arbitration proceedings before the Hon’ble Calcutta High Court under Section 11, sub-section (6) of the Arbitration and Conciliation Act, 1996 was initiated on 31.08.2023, on which an order was passed by the Hon’ble Calcutta High Court on 13.09.2023. Both the Arbitration Application and order of the Hon’ble Calcutta High Court, which were sought to be brought on record by the Corporate Debtor, were much subsequent to filing of Section 9 Application.

10. It is further relevant to notice that against the order dated 13.09.2023 passed by the Hon’ble Calcutta High Court, appointing an Arbitrator, the Operational Creditor filed an SLP before the Hon’ble Supreme Court being SLP No.25781/2023, in which the Hon’ble Supreme Court while dismissing of the SLP vide order dated 28.11.2023, noted as follows:

“No case for interference under Article 136 of the Constitution of India is made out.

However, it will be always open for the petitioner to raise all permissible objections/contentions before the Arbitral Tribunal in accordance with law.

The Special Leave Petition is accordingly dismissed.

We make it clear that the impugned order and confirmation thereof will not affect the pending proceedings under the Insolvency and Bankruptcy Code, 2016.

Pending application, if any, also stands disposed of.”

11. The observation of the Hon’ble Supreme Court to the effect “*We make it clear that the impugned order and confirmation thereof will not affect the pending proceedings under the Insolvency and Bankruptcy Code, 2016*”, makes it clear that Section 9 Application were to be heard without the arbitration proceedings having any effect on the Section 9 Application. It is further relevant to notice that Corporate Debtor also filed MA No.107 of 2024 before the Hon’ble Supreme Court for clarification of order passed by Hon’ble Supreme Court on 28.11.2023, which was dismissed by the Hon’ble Supreme Court on 23.01.2024.

12. The observation of the Hon’ble Supreme Court in order dated 28.11.2023 as noted above, clearly indicate that arbitration order passed in the arbitration proceedings shall not affect proceedings in Section 9 Application under the Code, which was filed by the Operational Creditor. By IA No.36/CB/2024, the Corporate Debtor prayed to bring order dated 13.09.2023 on the record, which has rightly been refused to be accepted by the Adjudicating Authority by the impugned order. The arbitration application, on which order dated 13.09.2023 was passed, was also not

relevant for Section 9 proceedings, since, the arbitration application was filed by Corporate Debtor before the High Court on 31.08.2023, i.e., much after the initiation of proceedings under Section 9. The learned Counsel for the Appellant has referred to paragraph-7 of the Adjudicating Authority, where Adjudicating Authority made following observation:

“7. In general, we used to adopt liberal approach in this kind of application, because this is an Authority of first instance. It is settled principle of law that *the court should take a lenient view when an application is made for production of the documents*. However, this application is concern, it is wholly unwanted application.”

13. The observation made by the Adjudicating Authority in paragraph-7 are observation, which required adoption of liberal approach in Application for production of documents. However, in paragraph-7 itself, the Adjudicating Authority observed that in the present case, the Application was wholly unwanted. Further, reasons have been given in paragraph-8 by the Adjudicating Authority, which is to the following effect:

“8. The documents intend to be received are emerged after filing of the main C.P.No.36 /CB/2022. The documents need to be received arc arbitration application and order passed on the arbitration application. When the respondent preferred an appeal before the supreme court against the Arbitration order dated 13.09.2023, the Hon'ble Supreme Court of India by its order dated 28.11.2023 clearly mentioned that the impugned arbitration order will not affect this pending proceeding. In spite of specific observation made by the Apex court, the applicant preferred this application. If this request of applicant is conceded then it will go against the observation made by the Apex Court. It is also not explained by the

applicant how these additional documents are just and necessary to arrive conclusion in the C.P. No. 36/CB/2022. In these circumstances, this application IA(IB) No, 36 / CB / 2024 is **DISMISSED.**”

14. In view of the aforesaid, we do not find any error in order of the Adjudicating Authority rejecting IA(IB) No.36/CB/2024 filed by the Appellant to bring on record two documents as noticed above. There is no merit in the Appeal. The Appeal is dismissed. No order as to costs.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

[Arun Baroka]
Member (Technical)

NEW DELHI

8th April, 2024

Ashwani