



**IN THE NATIONAL COMPANY LAW TRIBUNAL  
DIVISION BENCH (COURT- I) CHENNAI**

**ATTENDANCE CUM ORDER SHEET OF THE HEARING  
HELD ON 14.11.2024 THROUGH VIDEO CONFERENCE**

**PRESENT: HON'BLE SHRI. SANJIV JAIN, MEMBER (JUDICIAL)  
HON'BLE SHRI VENKATARAMAN SUBRAMANIAM, MEMBER (TECHNICAL)**

Application No :  
Petition No : CP(IB)/143(CHE)/2023  
Name of Petitioner : Toram Exports pvt Ltd  
& Vs  
Name of Respondent : APL Company Pvt Ltd  
Section : 9 Rule 6 of IBC, 2016

**ORDER**

Present: None for Petitioner.

Vide separate order pronounced in Open Court, the petition is dismissed.

File be consigned to records.

**-sd-**

**[VENKATARAMAN SUBRAMANIAM]  
MEMBER (TECHNICAL)**

MS

**-sd-**

**[SANJIV JAIN]  
MEMBER (JUDICIAL)**



**IN THE NATIONAL COMPANY LAW TRIBUNAL,  
DIVISION BENCH – I, CHENNAI**

**CP/IB/143/CHE/2023**

*(filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 r/w Rule 6 of the  
Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016)*

*In the matter of CMA CGM Agencies (India) Private Limited  
Formerly called as APL Co. Private Limited*

**M/s Toram Exports Private Limited**

Represented by its Managing Director,  
S.F. NO. 5, 1/2, Asher Nagar  
1st Street, Alamelu Industrial Complex  
Tirupur, Tamil Nadu - 641603.

*... Operational Creditor*

**-Vs-**

**CMA CGM Agencies (India) Private Limited**

Formerly called as,

**M/s APL Co. Private Limited**

106 F, 4 C and D, 2nd Floor,  
Visaka Trader Centre  
Millerpuram, Tuticorin Tamil Nadu.

(Cause title of the Corporate Debtor amended as per the order of this  
Tribunal dated 30.11.2023 in IA/2072(CHE)/2023)

*...Corporate Debtor*

*Order Pronounced on 14<sup>th</sup> November, 2024*

**CORAM:**

**SANJIV JAIN, MEMBER (JUDICIAL)**

**VENKATARAMAN SUBRAMANIAM, MEMBER (TECHNICAL)**



*For Operational Creditor: Ananda Gomathy, Advocate*

*K. Jayaganga, Advocate*

*Janani Balaji, Advocate*

*For Corporate Debtor : Sharanya Vaidyanathan, Advocate*

*S. Ragunathan, Advocate*

*H. Vishal, Advocate*

## **ORDER**

*(Hearing through hybrid mode)*

Under Adjudication is CP/IB/143/CHE/2023 which has been filed by **TORAM EXPORTS PRIVATE LIMITED** (hereinafter referred to as '**Operational Creditor**') under Section 9 of the Insolvency & Bankruptcy Code 2016 (in short, 'I&B Code, 2016') r/w Rule 6 of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 against **CMA CGM AGENCIES (INDIA) PRIVATE LIMITED**, formerly called as **APL CO. PRIVATE LTD** (hereinafter referred to as '**Corporate Debtor**'). The prayer made is to admit the Application, to initiate the Corporate Insolvency Resolution Process against the Corporate Debtor, declare moratorium and appoint Interim Resolution Professional (IRP).

2. Part-I of the Application sets out about the Operational Creditor.

It is stated that the Operational Creditor is a Private Limited Company



which was incorporated under the Companies Act, 1956 with CIN No: U51491TZ2010PTC016414. Part-II of the Application gives all the particulars of the Corporate Debtor. It is stated that the Corporate Debtor is a Private Limited Company with CIN: U63012MH2008PTC360950 and was incorporated on 04.06.2008 under the Companies Act, 1956. The Registered Office of the Corporate Debtor is situated at 106 F, 4 C and D 2nd Floor, Visaka, Trade Centre, Millerpuram, Tuticorin. In Part III of the application, the Operational Creditor has not proposed the name of the “Interim Resolution Professional” and left it to the discretion of this Tribunal to appoint anyone from the panel of Insolvency professionals maintained by IBBI.

3. The Affidavit verifying the application is placed at Page No- 9-10 of the Application typeset. One Mr. J. Ravindranath, has sworn the Affidavit as the authorized signatory of the Operational Creditor. The Board Resolution authorizing Mr. Jeyaraman Ravindranath is placed at Page No. 126-127 of the Application typeset.

4. In Part-IV of the Application, it is stated that a total sum of Rs.1,70,52,352 /- (Rupees One Crore Seventy Lakhs Fifty-Two



Thousand Three Hundred and Fifty-Two only) is being claimed by the Operational Creditor as the Operational debt. The total amount claimed is a total of Rs.1,13,03,700 (principal amount) and Rs. 57,48,652 (interest). The Operational Creditor has also mentioned the date of default as 05.02.2019 in respect of the entire amounts involved.

5. Part – V of the Application discloses about the details of the documents which have been filed by the Operational Creditor in order to prove the ‘Operational debt’

6. The Applicant filed IA/2072(CHE)/2023 seeking to depict the name of the Respondent as ‘CMA CGM Agencies (India) Private Limited formerly called as M/s APL Co. Private Limited’ instead of ‘M/s APL Co. Private Limited represented by its agent, CMA CGM Agencies (India) Private Limited’ in CP(IB)/143(CHE)/2023’. It was stated that such an error in depicting the cause title of the respondent in CP(IB)/143(CHE)/2023 occurred inadvertently. The application was allowed on 30.11.2023 and the amended petition was filed by the Applicant on 15.12.2023 vide SR No. 5179.

**7. APPLICANT SUBMISSIONS:**



It is submitted by the Ld. Counsel for the Applicant,

- i) That the Operational Creditor M/s Toram Exports Private Limited is a private limited company carrying on business of manufacture and sale of garments to various countries.
- ii) That the Operational Creditor had confirmed orders for supply and exports of garments to M/s Freeze, A Division of Central Mills Inc. at United States of America under invoice no. TEPL/158/18-19 dated 01.01.2019 for value of USD 1,37,850/-
- iii) That as per the contract, the Corporate Debtor was nominated by the buyer as the Carrier/Liner for transportation of the above consignment with Shipping Bill No. 1039438 dated 01.01.2019 from India to USA. The terms of payment for the consignment was DP AT SIGHT (Delivery Against Payment) for which bill of lading bearing No. AQV0102033 was issued on 03.01.2019.
- iv) That the Operational Creditor submitted the original bills for this consignment to their banker Indian Overseas Bank



for realization of the value from the buyer's bank HSBC Bank. As per the terms of contract, on payment of the entire amount in the buyer's Bank, the original documents/ Bills shall be provided to the buyer. The delivery of the goods shall be made by the carrier i.e. Corporate Debtor only on the receipt of such Original Document/ Bills.

- (v) That the Corporate Debtor released and handed over the goods to the buyer on 05.02.2019 without receipt of the Original Documents/Bills and the buyer failed to make payment for the said consignment.
- vi) With no payment for the said consignment being received, by delivering the consignment (with a high value of USD 137,850.00) in contravention to the terms of contract, the Corporate Debtor committed criminal breach of trust and caused huge loss to the Operational Creditor. Hence, the Operational Creditor has filed the instant Application under section 9 of the I&B Code, 2016.



## 8. RESPONDENT SUBMISSIONS

The Respondent submitted its reply on 22.12.2023 vide SR No. 5319. It is submitted by the Respondent:

- i) That the contract of carriage contained in the Bill of Lading is between the Operational Creditor and the carrier viz., APL Co. Pte. Limited, having its registered office at 14-01, The Metropolis Tower I, Singapore. The Respondents are only the agents of the carrier and are not personally liable under Section 230 of the Indian Contract Act, 1872.
- ii) That the cargo was entrusted to the agents of the Carrier at Tuticorin on 03.01.2019 for being carried initially by the Vessel Queen of Luck and upon transshipment was carried by another Vessel owned and/or operated by the Carrier.
- iii) That the consignee named in the Bill of Lading had taken delivery of the cargo on the 05.02.2019. Hence, the claim is





barred by limitation and the liability, if any, of the Carrier has extinguished on the 05.02.2020 as per Article III Rule 6 of the Indian Carriage of Goods by Sea Act, 1925. The Operational Creditor admitted that they had become aware of the fact of wrongful delivery to the consignee on 19.02.2019 and overlooked the same. However, the instant Petition has been filed before this Tribunal only on the 30.06.2023. Consequently, the Petition is time barred and the liability of the Carrier has extinguished.

- iv) That in terms of jurisdiction clause contained Clause 32 (ii) of the Bill of Lading, all disputes arising out of the said Bill of Lading shall be determined only by the Courts in the Republic of Singapore to the exclusion of the jurisdiction of the Courts of any other country. Therefore, the Applicant cannot invoke the jurisdiction of this Tribunal and seek any relief before this Tribunal.
- v) That cargo in containers is taken charge by the container terminal which delivers the cargo to the consignee at the



port of discharge, and the carrier or their agents are not present at the time of delivery. The Operational Creditor should only look to the receiver for payment of the amounts due and not initiate proceedings against the Corporate Debtor under the provisions of the Insolvency and Bankruptcy Code, 2016.

- vi) That the Carrier was not aware of the quality, quantity, volume and value of the cargo stuffed in the container. Further, the Carrier was unaware as to whether the consignee had paid for the value of the cargo or not since the Bill of Lading issued by them did not refer to the mode of payment for the value of the cargo by the receiver to the shipper.
- vii) It is denied that the carrier had delivered the container/cargo to the consignee in as much as neither the carrier nor their agents at the Port of Discharge had issued a delivery order.



- viii) That the instant Petition was originally filed against one "APL Co Private Limited". Since, an Indian Company by name "APL Co Private Limited" had never been in existence and that there is only a Company called APL India Private Limited which was merged with CMA CGM Agencies (India) Private Limited. The said Petition as it then stood was filed against a non-existent entity.

#### 9. REJOINDER

The Applicant has filed a rejoinder vide SR No. 1025 dated 03.03.2023.

It is submitted by the Applicant as follows:

- i) That as per the circular issued by the shipper dated 01.12.2020, the shipper M/s APL Co. Pte Ltd changed its name to M/s. CMA CGM Asia Shipping Private Limited. Further, the shipper has been a part of the CMA CGM group since 2016.
- ii) That the shipper and the Respondent both belong to the CMA CGM group. Since, the Principal is a foreign entity, the Respondent being its agent is being sued under Section 230 of the Indian Contract Act.



- iii) That the Applicant holds the original Bill of Lading.
  - iv) That the present action is sought under the IBC, 2016 and not under the Indian Carriage of Goods under the Sea Act, 1925. Hence, the instant petition is not barred by limitation as per the provisions of the IBC.
  - v) That the liability of the shipper to make good the loss that has accrued to the consignor because of the corporate debtors' fraudulent activities and negligence is not a contractual liability but a tortious liability. Hence, Clause 32(ii) of the Bill of Lading, pertaining to jurisdiction, is not applicable to the instant case.
  - vi) That unless the commercial invoice is filed with the customs, the Bill of lading would not be generated. Therefore, it cannot be stated that the carrier was not aware of the quality, quantity, volume and value of the cargo.
10. The parties were directed to file relevant judgements vide order dated 05.09.2024.



11. In support of his averments, the Applicant has placed reliance on the decision of the Hon'ble Hight Court *at Calcutta in Natvar Parikh Industries Ltd vs Jaytee Exports (CS No.481 of 2000)*. The Respondent has placed reliance on the order of the Hon'ble Supreme Court of India in *The East and West Steamship Company, Georgetown, Madras vs. S.K. Ramalingam Chettiar (AIR 1960 SC 1058)* and in *Marine Container Services South Pvt Ltd vs Go Go Garments (1998 3 Supreme Court Cases 247)* t. The Respondent has also submitted *Vestas RRB India Ltd vs. Danmar Lines (2008(3)CTC823)*.

#### FINDINGS OF THE TRIBUNAL

12. Heard the submissions made by both the parties and perused the pleadings and documents placed on record.

13. Upon perusal of the Bill of Lading dated 03.01.2019 having No. AQV0102033 submitted by the Applicant, it is seen that the Applicant was the shipper of cargo from the port of loading in Tuticorin to the consignee (buyer), M/s Freeze A Division of Central Mills, at the port of discharge in New York USA, through the carrier, APL Co. Pte.



Limited. The relevant container number is APZU4420649. The Respondent has signed the Bill of Lading on behalf as the agent of the carrier/Principal Company and was entrusted with the carriage of cargo by the Vessel Queen of Luck on 03.01.2019. As per the clause 16 of the Bill of Lading, goods had to be delivered in a container on surrendering of the Bill of Lading authorising such deliver. The relevant clause is extracted below:

**16. FCL MULTIPLE BILLS OF LADING**

(1) Goods will only be delivered in a Container to the Merchant if all Bills of Lading in respect of the contents of the Container have been surrendered authorising delivery to a single Merchant at a single Place of Delivery. In the event that this requirement is not fulfilled the Carrier may unpack the Container and, in respect of Goods for which Bills of Lading have been surrendered, deliver them to the Merchant on a LCL basis. Such delivery shall constitute due delivery hereunder, but will only be effected against payment by the Merchant of LCL Service Charges and any charges appropriate to LCL Goods (as laid down in the Tariff) together with the actual costs incurred for any additional services rendered.

14. Upon perusal of the correspondence of e-mails exchanged between the Applicant and the Principal Company, it is seen that the delivery of the cargo in Container No. APZU4420649 was made on 05.02.2019. Subsequently, a grievance was raised by the Applicant vide e-mail dated **19.02.2019** to APL, India claiming that the delivery is made while the original bill of lading is still available in the buyer's bank. The grievance was forwarded to APL, US who informed the Applicant vide e-mail dated **01.03.2019**, that the container was released as a result of a new program integration. Subsequently, multiple



communications were made to APL, US, by the Applicant claiming return of the goods or payment against such goods. On 24.05.2019, APL India added the India Claims Team to further assist the Applicant wherein it was stated that APL, US released the cargo to the consignee by oversight. The relevant portions of the e-mail correspondences are extracted below:

**From:** Toram-Sivasamy [mailto:documents@toram.in]  
**Sent:** Tuesday, February 19, 2019 10:46 AM  
**To:** RODRIGUEZ, Janet Annie <janet.annie.rodriguez@apl.com>  
**Cc:** UDAYAN, P <pk.udayan@apl.com>; ELAMARAN <exports@rosanseaair.com>; CCIndia TUT <CCIndia.TUT@apl.com>; SUGANTHAN, P <P.Suganthan@apl.com>; SANKAR <sankar@rosanseaair.com>  
**Subject:** Re: Top urgent : FREEZE container status - Reg  
**Importance:** High

Dear Janet,

We sent the original documents via bank payments terms is DP AT SIGHT (Documents Against Payment) and we confirmed with our bank Still original documents not collect from buyer bank. So, How is clear the shipment without shipping documents ( Original Bill of Lading) for APZU4420649?

Confirm and advice....

Best Regard's  
Sivasamy.M

**From:** RODRIGUEZ, Janet Annie  
**Sent:** Tuesday, February 19, 2019 8:59 AM  
**To:** APL US CS Import <APL.US.CS.Import@apl.com>; SOTO, Alejandra <alejandra.soto@apl.com>; SABORIO, Andres <andres.saborio@apl.com>  
**Cc:** UDAYAN, P <pk.udayan@apl.com>; ELAMARAN <exports@rosanseaair.com>; CCIndia TUT <CCIndia.TUT@apl.com>; SUGANTHAN, P <P.Suganthan@apl.com>; SANKAR <sankar@rosanseaair.com>; Toram-Sivasamy <documents@toram.in>; KANDABALAJEE, M <m.kandabalajee@apl.com>; MARESCA, William <william.maresca@apl.com>  
**Subject:** RE: Top urgent : AQV 0102033 / APZU4420649 : FREEZE container status - Reg - Delivered to Consignee without original documents

//Customer in Copy//

APL US CS Import,

Customer claims that cargo has been delivered to Consignee when the original documents are still in bank - AQV0102033 / APZU4420649. Please check and advise urgently.

--quote--

We sent the original documents via bank payments terms is DP AT SIGHT (Documents Against Payment) and we confirmed with our bank Still original documents not collect from buyer bank. So, How is clear the shipment without shipping documents ( Original Bill of Lading) for APZU4420649?



From: "Market Specialist" <market.specialist@apl.com>  
 To: "Toram-Sivasamy" <documents@toram.in>  
 Cc: "William MARESCA" <william.maresca@apl.com>, "Janet Annie RODRIGUEZ" <janet.annie.rodriguez@apl.com>, "P  
 UDAYAN" <pk.udayan@apl.com>, "ELAMARAN" <exports@rosanseaair.com>, "CCIndia TUT" <CCIndia.TUT@apl.com>, "p  
 suganthan" <P.Suganthan@apl.com>, "SANKAR" <sankar@rosanseaair.com>, "M KANDABALAJEE"  
 <m.kandabalajee@apl.com>

APL  
 H.L.  
 PUTHI

Sent: Friday, March 1, 2019 10:42:56 PM

Subject: RE: Top urgent : AQV 0102033 / APZU4420649 : FREEZE container status - Reg - Delivered to Consignee without original documents

Toram/Aii,

We regret the delay in replying but after thoroughly reviewing the matter we found that the container was released as a result of our new program (LARA) integration. We strongly regret that this has occurred and assure you that we are still actively reviewing and working to anticipate/prevent any future issues of this nature occurring in the future.

<image036.png> Pierre Armstrong  
 Customer Service - Market Specialist

APL - Nashville, TN USA  
 Phone - 800-899-7733 x2185  
 26 Century Blvd Suite 405  
 Nashville, TN 37214  
 www.apl.com

<image037.png>  
 <image038.png>  
 <image039.png>

From: Toram-Sivasamy [mailto:documents@toram.in]

Sent: Thursday, April 04, 2019 1:11 AM

To: Market Specialist <market.specialist@apl.com>; SUGANTHAN, P <P.Suganthan@apl.com>; UDAYAN, P <pk.udayan@apl.com>; CCIndia TUT <CCIndia.TUT@apl.com>

Cc: MARESCA, William <william.maresca@apl.com>; RODRIGUEZ, Janet Annie <janet.annie.rodriguez@apl.com>; KANDABALAJEE, M <m.kandabalajee@apl.com>; SANKAR <sankar@rosanseaair.com>; ravin (ravin@toram.in) <ravin@toram.in>; Toram-Suganthi <suganthi@toram.in>

Subject: Re: Top urgent : AQV 0102033 / APZU4420649 : FREEZE container status - Reg - Delivered to Consignee without original documents

Dear Pierre Armstrong,





Please understand, Customer cleared the goods at destination without original bill of lading which we handover through bank. So, we didn't receive the payment.

Without your knowledge customer cannot clear the goods so that you only responsible for our payment.

Reading APL Tuniconin,

We will handover the original bill lading to you, Make the payment against our goods or return back the goods to us.

Best Regards  
Sivasamy.M

**From:** ravin <ravin@toram.in>  
**Sent:** Friday, May 24, 2019 2:28 PM  
**To:** RODRIGUEZ, Janet Annie <janet.annie.rodriquez@apl.com>  
**Cc:** Toram-Sivasamy <documents@toram.in>; SANKAR <sankar@rosanseaair.com>; Somerbond Iren Tirupur <suganthi@toram.in>; Claims India <India.claims@apl.com>; MBY.ARSHEIKH@cma-cgm.com; SSC CARGOCLAIMS <ssc.cargoclaims@apl.com>; SUGANTHAN, P <P.Suganthan@apl.com>; UDAYAN, P <pk.udayan@apl.com>; KANDABALAJEE, M <m.kandabalajee@apl.com>; MARESCA, William <william.maresca@apl.com>; DAMASUS, A SI <shiam.damasus@apl.com>; JAMES, Bakhtawar <bakhtawar.james@apl.com>; Market Specialist <market.specialist@apl.com>  
**Subject:** Re: Top urgent : AQV 0102033 / APZU4420649 : FREEZE container status - Reg - Delivered to Consignee without original documents

Dear Janet,





Sorry for coming inn.

Yes you have accepted your office have issued the goods without document. This is illegal. Now we need the goods. We are have already proceeded for case against APL in USA. Can yo please confirm your stand for our goods.

With Kind Regards  
Ravin J  
Managing Director  
Toram Exports Pvt Ltd (India)  
Mobile: +91984645599  
Phone: +914214334545

On 24-May-2019, at 11:32 AM, RODRIGUEZ, Janet Annie <janet.annie.rodriguez@apl.com> wrote:

//Customer in Copy//

Adding India Claims

Dear Sivasamy,

Further to below mail, please note we are adding our India Claims team to assist further.

RIC : India Claims,

This is case of customer taken delivery of high value cargo without document in USA, (consignee had access to cargo only after payment was remitted to bank and UBL released to customer by bank but by oversight our USA office issued delivery of Cargo without OBL)

Quoted below Customer key points.

—quote—

We sent the original documents via bank payments terms in DP AT SIGHT (Documents Against Payment) and we confirmed with our bank that original documents would be sent from paper bank. So, how to clear the shipment without shipping documents (Original Bill of Lading) for AP2U112549?

Confirm and advice...

—unquote—

Quote1

Buyer bank return the all original documents with Bill of lading due to non receipt of payment. We need return the goods or payment against our goods.

Quote1

Thanks & Regards

<image002.png> Janet  
Asst. Manager  
Customer Care



For TORAM EXPORTS PRIVATE LIMITED

15. A demand notice in Form 3 was issued by the Applicant on 15.03.2023. Thereafter, the Applicant filed the instant Petition on 22.07.2023 seeking to make good the loss accrued to it as a consequence of the wrongful delivery made by the Principal Company. To admit an



application filed under Section 9 of the IBC, 2016, it is essential that there must be operational debt under Section 5(21) of the Code exceeding the prescribed limit as laid down by the law i.e., Rs. 1 crore, there must be a default in the repayment of the said operational debt and there must not be any pre-existing dispute prior to the receipt of demand notice. The Hon'ble Supreme Court of India in ***Mobilox Innovations (P) Ltd. v. Kirusa Software (P) Ltd***, ((2018) 1 SCC 353), has held as under,

*"25. Therefore, the adjudicating authority, when examining an application under Section 9 of the Act will have to determine:*

- i) Whether there is an operational debt as defined exceeding Rs 1 lakh? (See Section 4 of the Act)*
- ii) Whether the documentary evidence furnished with the application shows that the aforesaid debt is due and payable and has not yet been paid? And*
- iii) Whether there is existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before the receipt of the demand notice of the unpaid operational debt in relation to such dispute?*

*If any one of the aforesaid conditions is lacking, the application would have to be rejected. Apart from the above, the adjudicating authority must follow the mandate of Section 9, as outlined above, and in particular the mandate of Section 9(5) of the Act, and admit or reject the application, as the case may be, depending upon the factors mentioned in Section 9(5) of the Act."*



16. Therefore, to ascertain whether the instant petition under Section 9 of IBC, 2016 is admissible, the primary issue that arises before this Tribunal is whether the amount of default claimed by the Applicant/ Operational Creditor qualifies as an “operational debt” within the meaning of Section 5(21) of IBC, 2016. In order to determine the same, the following statutory provisions of IBC, 2016 need to be considered,

*“3(6) “claim” means*

*(a) a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured or unsecured;*

*(b) right to remedy for breach of contract under any law for the time being in force, if such breach gives rise to a right to payment, whether or not such right is reduced to judgment, fixed, matured, unmatured, disputed, undisputed, secured or unsecured;*

*3 (11) “debt” means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt;*

*3 (12) “default” means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not [paid] by the debtor or the corporate debtor, as the case may be;*



*5 (20) “operational creditor” means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred;*

*5(21) “operational debt” means a claim in respect of the provision of goods or services including employment or a debt in respect of the repayment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority;”*

17. As per Section 5(21), an operation debt has two requisite elements – firstly, it must be a claim and secondly, it must pertain to provision of goods and services. The term ‘claim’ includes any right to payment and right to remedy for breach of contract under any law, if such breach gives rise to a right to payment. A liability or obligation in respect of such claim that is due is considered to be a debt. Further, for a claim to qualify as an ‘operational debt’, it must arise specifically on account of provision of goods or services.

18. Firstly, to establish that the Operational Creditor is entitled to a claim under Section 3(6) of IBC, 2016, it has to be determined whether any right to payment arises out of the actions of the Principal Company. In the present case, the **amount claimed by the Applicant**



comprises of the value of the cargo that is alleged to have been wrongfully delivered (Rs. 1,13,03,700/-) along with interest (Rs. 57,48,652/-) thereon. It is the contention of the Applicant that the Principal Company has made delivery of consigned goods in contravention with the terms of contract and has caused losses to the Applicant herein and the Respondent being the agent is liable under Section 230 of the Indian Contract Act, 1872. It is also alleged that Corporate Debtor is liable to make good the loss suffered by the Applicant owing to the tort of fraud, negligence and breach of trust committed by the Respondent/carrier.

19. Secondly, a claim to qualify as an 'operational debt', must arise specifically on account of provision of goods or services. The Hon'ble Supreme Court of India in *Consolidated Construction Consortium Ltd vs Hitro Energy Solutions Pvt Ltd (2022 SCC Online SC 142)*, has held that the phrase 'provision of goods or services' means that the claim must have some nexus with provision of good or services regardless of whether the operational creditor is supplier or receiver of such goods or services. The relevant paragraph of the judgment in 'Consolidated Construction Consortium Ltd' (supra) is extracted below:



“43. First, Section 5(21) defines ‘operational debt’ as a “claim in respect of the provision of goods or services”. The operative requirement is that the claim must bear some nexus with a provision of goods or services, without specifying who is to be the supplier or receiver ...

... This is made even more clear by Regulation 7(2)(b)(i) and (ii) of the CIRP Regulations 2016 which provides an operational creditor, seeking to claim an operational debt in a CIRP, an option between relying on a contract for the supply of goods and services with the corporate debtor or an invoice demanding payment for the goods and services supplied to the corporate debtor. While the latter indicates that the operational creditor should have supplied goods or services to the corporate debtor, the former is broad enough to include all forms of contracts for the supply of goods and services between the operational creditor and corporate debtor, including ones where the operational creditor may have been the receiver of goods or services from the corporate debtor”

20. In this case, the Applicant had engaged the carriage services of the Principal Company. As per the law laid down in *Consolidated Construction Consortium Ltd (supra)*, the Applicant being the receiver



of services has to prove the existence of debt specifically arising out of the relevant contract subsisting between the shipper and the carrier i.e., Bill of Lading, as per Regulation 7(2)(b)(i) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. In the instant case, the Applicant has alleged that the liability arises out of tort committed by the carrier yet holds the Respondent liable for signing the Bill of Lading in the capacity of the agent of the Principal Company under contract law.

21. At this stage, the issue is whether the Operational Creditor is entitled to a claim, if any, as a result of 'breach of contract' or 'tort'. Further, even if the Applicant is entitled to any claim against the Principal Company, the liability of the Respondent as an agent of the Principal Company, has to be examined. These issues amount to civil dispute. This Tribunal, having only summary jurisdiction cannot decide the nature of the liability of the Principal Company, if any, that arises as a result of the alleged wrongful delivery of cargo container. The Hon'ble NCLAT in *Saregama India Ltd vs Home Movie Makers Pvt. Ltd (Company Appeal (AT) Insolvency No. 359 of 2019)*, has held





that the Adjudicating Authority is not a civil court to decide the breach of contract between the parties. The relevant portion of the judgment is reproduced below:

*“15. Under the IBC, the Adjudicating Authority or this Appellate Tribunal will not go into the aspects of the veracity of the agreement, its breach, void, voidable etc. The Adjudicating Authority is not a Civil Court to decide the breach of the contract between the parties. The IBC is a code by itself and will have to go strictly by the provisions of the Code, whether a claim is made under Section 9 by the Operation Creditor and under Section 7 by Financial Creditor and under Section 10 by a Corporate Applicant.”*

22. This Tribunal is not inclined to determine questions of law and facts that need to be determined by a Civil Court of Competent Jurisdiction.

23. Furthermore, it is seen from the e-mail correspondences submitted by the Applicant, that such civil disputes arose in 2019 much before the issuance of demand notice by the Applicant on



15.03.2023. This Tribunal is of the view that such pre-existing dispute requires further investigation by a Court of Competent Jurisdiction.

The Hon'ble Supreme Court of India in ***Mobilox Innovations Private Limited v. Kirusa Software Private Limited*** has held that,

*“ 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.”*

24. Since, there is a pre-existing dispute between the parties and the petition does not qualify to be admissible under Section 9 of IBC, 2016, this Tribunal is not inclined to admit the instant application.

25. Accordingly, this **CP(IB)/143/CHE/2023** stands **dismissed**.

**-Sd-**

**VENKATARAMAN SUBRAMANIAM**  
MEMBER (TECHNICAL)

**-Sd-**

**SANJIV JAIN**  
MEMBER (JUDICIAL)

*Hresha. S*