

IN THE NATIONAL COMPANY LAW TRIBUNAL, MUMBAI - BENCH-VI

CP (IB) No.185/MB/2019

[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:

KSHEERAABD CONSTRUCTIONS PRIVATE LIMITED

[CIN- U45200TG2005PTC047066]

Registered Office: House No. 8-2-120/114/A, Plot No. 96

Road No. 2, Banjara Hills, Kotak Mahindra Bank Lane

Hyderabad-500034, Telangana.

...Operational Creditor

V/s

RELIANCE INFRASTRUCTURE LIMITED

[CIN- L75100MH1929PLC001530]

Registered Office: Reliance Centre, Ground Floor

Walchand Hirachand Marg, Ballard Estate

Mumbai- 400 001 Maharashtra.

...Corporate Debtor

Pronounced: 02.08.2024

CORAM:

HON'BLE SHRI K. R. SAJI KUMAR, MEMBER (JUDICIAL)

HON'BLE SHRI SANJIV DUTT, MEMBER (TECHNICAL)

Hearing: Hybrid

Appearances:

Operational Creditor: Sr. Adv. J.P. Sen a/w Adv. Rakesh N. Reddy

Corporate Debtor: Sr. Adv. Prateek Seksaria a/w Adv. Tushad Kakalia and

Adv. Raghavi Sharma i/b Mulla & Mulla and Craigie Blunt & Caroe

ORDER

[Per: K. R. SAJI KUMAR, MEMBER (JUDICIAL)]

1. BACKGROUND

1.1 This Company Petition bearing C.P. (IB) No. 185/MB/2019 (Application) was filed on 14.01.2019 under Section 9 of the Insolvency and Bankruptcy Code, 2016 (IBC) read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (AA Rules) by Ksheeraabd Constructions Private Limited, the Operational Creditor (OC), through Mr. Kishan Kanuganti, Managing Director of the OC, authorised *vide* Board Resolution dated 29.10.2018, for initiating Corporate Insolvency Resolution Process (CIRP) in respect of Reliance Infrastructure Limited, the Corporate Debtor (CD).

1.2 The total amount of default alleged is Rs.35,80,00,000/- (Thirty-Five Crore Eighty Lakh Rupees) comprising of retention amount of Rs. 1.21 Crore, royalty dues of Rs. 8.86 Crore, Rs. 3.50 Crore against invoices during August and September 2018, as well as Rs. 22.23 Crore as outstanding amount due over other items including benefit sharing. The OC's alleged outstanding claims are based on services provided to the CD as contractor in the construction of Pune-Satara Section of the National Highway (NH)-4 in the State of Maharashtra.

1.3 The date of default as mentioned in Part IV of the Application is 30.10.2018, i.e., the date on which the alleged amount of Rs. 25.61 Crore fell due after encashment of the bank guarantees by the CD furnished by the OC. As the

CD defaulted in payment of its outstanding dues, the OC prays that CIRP may be initiated in respect of the CD under Section 9 of the IBC.

2. CONTENTIONS OF OC

2.1 It is submitted that the OC is engaged in the business of road construction while the CD is a Mumbai-based company involved in different infrastructure projects across States. It is submitted that the CD was awarded contract for designing, constructing and widening of the Pune-Satara Highway to six lanes from Km 820 to Km 865 of NH-4 in the State of Maharashtra under the National Highway Development Project Phase IV on Build Own and Transfer (BOT) basis (Project), following which the OC and the CD entered into Construction Agreement dated 04.04.2011, as the OC being construction contractor to the CD.

2.2 The Ld. Sr. Counsel for the OC submits that, as per the Construction Agreement, the OC's scope of work was for performing and executing all the design, procurement, etc., of the Project on item-rate basis. Accordingly, the OC carried out the work under the Project and raised running bills from time to time. The CD, in turn, issued Interim Payment Certificates (IPCs) against OC's running bills after carrying out joint certification process.

2.3 It is further submitted that the CD has been making payments against IPCs till July, 2018. The CD issued IPC Nos. 85 and 86 during August-September 2018 and sought reconciliation of accounts from the OC after taking into consideration any credits due to the CD.

2.4 The OC, accordingly, prepared a statement of its dues as well as amounts to be deducted by the CD. The statement disclosed a net amount of Rs. 8.58

Crore as payable by the OC to the CD, which was mentioned in the email dated 25.09.2018 by Mr. Ashok M. Maheshwari, representative of the CD to the OC. As on 25.09.2018, the CD had not made any claim except Rs. 8.58 Crore from the OC. During the course of business, the OC furnished various bank guarantees for total sum of Rs. 33.96 Crore in CD's favour, which were extended from time to time. However, the CD invoked all the bank guarantees during the period of 25.10.2018 to 29.10.2018 for their full value despite admitting only Rs. 8.58 Crore due to the OC in the aforesaid email dated 25.09.2018. According to the OC, the CD has retained Rs. 25.61 Crore in excess of their entitlements out of the total Rs. 33.96 Crore covered under the invoked bank guarantees. The CD owed this much amount to the OC.

2.5 Against the invocation of bank guarantees by the CD, the OC filed Commercial Arbitration Petition (L) Nos. 1220 and 1221 of 2018 against the CD and sought interim relief under Section 9 of the Arbitration and Conciliation Act, 1996 before the Hon'ble Bombay High Court. The High Court, *vide* order dated 26.10.2018, appointed a single member Arbitral Tribunal, which was later modified to three members Arbitral Tribunal on 01.11.2018 to adjudicate disputes between the parties under the Construction Agreement.

2.6 The OC issued demand notice dated 31.10.2018 under Section 8 of the IBC demanding payment of Rs. 25.61 Crore along with interest. The CD, *vide* its reply dated 05.11.2018, denied its liability on the ground of pre-existing dispute over claimed amounts and pending arbitration proceedings. The OC by rejoinder notice dated 10.11.2018, stated that the claims raised in the

demand notice were not part of its arbitration claims and are not covered under the arbitration proceedings.

2.7 After the filing of the present Application, the Arbitral Tribunal commenced the arbitration proceedings on 15.01.2019, wherein the OC and the CD filed their Statement of Claim dated 12.02.2019 and the Statement of Defence and Counter Claim dated 02.05.2019 respectively. According to the Ld. Sr. Counsel for the OC, the Commercial Arbitration Petitions Nos. 1220 and 1221 of 2018 were filed seeking only for injunction against invocation of bank guarantees and there was no dispute regarding the amounts claimed in the present Application. It is further argued that the CD is now trying to escape from its liability to pay debt due and payable to the OC, in spite of having admitted the claim amounts *vide* email dated 25.09.2018. Hence, the OC prays that CIRP is only to be initiated in respect of the CD.

3. CONTENTIONS OF CD

3.1 The CD contended that the Application cannot be admitted as there were pre-existing disputes between the parties, which is evident from the constitution of Arbitral Tribunal by Hon'ble Bombay High Court *vide* orders dated 26.10.2018 and 01.11.2018 for adjudicating all disputes arising out of the Construction Agreement dated 04.04.2011. Furthermore, the alleged debt claimed by the OC is highly disputed as there are claims and counter-claims made by the parties, as evident from the Statement of Claims and counter-claim filed before the Arbitral Tribunal. According to the Ld. Sr. Counsel for the CD, this is a fit case for dismissal as the disputes existing between the parties were not one of moonshine but were glaring disputes, as discussed

and decided by the Hon'ble Supreme Court in *Mobilox Innovations Private Limited Vs. Kirusa Software Private Limited*. [Civil Appeal No. 9405 of 2017] and in *Rajratan Babulal Agarwal Vs. Solartex India Pvt. Ltd & Ors.*, [Civil Appeal No. 2199 of 2021].

3.2 The CD has filed its counter-claim dated 02.05.2019 before the Arbitral Tribunal, wherein it claimed the amount of Rs. 268.99 Crore under various heads such as damages for delay in achieving Project-milestone, liquidated damages for delay in Project-completion, royalty, furnishing of guarantees bonds, etc. Further, the OC has suppressed material fact of reference of all disputes before Arbitral Tribunal, as well as fact of relinquishing its claims before Arbitral Tribunal. The Ld. Sr. Counsel for the CD submits that the OC cannot approach this Tribunal to seek those relinquished claims in the present Application.

3.3 The Ld. Sr. Counsel for the CD argues that the OC's reliance on the email dated 25.09.2018 as admission of its claims by the CD is misplaced since the said email was only an internal communication between the CD's employees and not an admission of any debt. Both the sender Shri Ashok M Maheshwari and the recipient Shri Kaushik Pal were the employees of the CD. According to the Ld. Sr. Counsel, the said email was never intended for the OC. Hence, it cannot be taken as formal admission of debt or liability by the CD. In any case, the OC itself claimed in its rejoinder notice dated 10.11.2018, that the amount due to the CD from the OC was Rs. 44.15 Crore, while the amount due to the CD by the OC is seen mentioned as Rs. 8.58 Crore in the said email, suggesting huge difference in claims and counter-claims by the parties. The Ld. Sr. Counsel for the CD also submits that this mismatch in the

amount of claim itself indicates disputes and differences between the parties as to their claims and counter-claims. He further argues that the OC is not entitled to the amounts claimed in the Application as they are highly disputed figures. The OC's claim regarding retention money is not maintainable as submission of unconditional and irrevocable retention bank guarantee for claiming retention money was required in terms of Clause 1.1.78 of the Construction Agreement. Similarly, according to the Sr. Counsel, the royalty amount cannot be claimed separately for it is already deemed to be included in the contract price. There is no explicit mentioning of the same in the Construction Agreement. Moreover, the OC has failed to produce any document to show that it had even paid the royalty amount and is entitled to recover the same from the CD. The claimed amounts based on the IPCs issued during August-September 2018 as well as extra items are neither admitted by the CD nor backed by any cogent evidence. In fact, the CD is entitled to obtain Rs. 8.58 Crore from the OC. The bank guarantees for about 33.96 Crore were invoked by the CD owing to the failure of the OC to perform its obligations under the Construction Agreement.

3.4 The present Application is defective in nature since it is not supported by any proof of authorisation to the OC's authorised representative, which is mandatory as per Form 5 of the AA Rules.

3.5 It is further submitted that the purpose of the Application is only to harass the CD for recovery which is not the objective of the IBC. Hence, the CD prays that the Application is to be rejected.

4. REJOINDER OF OC

4.1 The OC submitted that there was no pre-existing dispute between the parties since the CD's claims before the Arbitral Tribunal *vide* its Counter Claim do not predate the demand notice dated 31.10.2018 and the CD has admitted OC's claims *vide* email dated 25.09.2018 regarding the statement of summarising the financial position of the amounts due towards each other, which the CD had forwarded it to the OC. Moreover, the CD never raised objections during the execution of the Construction Agreement and all the OC's IPCs were certified by the CD.

4.2 Mere pendency of arbitration proceedings before Hon'ble Arbitral Tribunal, constituted by Hon'ble Bombay High Court does not affect the maintainability of the present Application, since the amounts claimed by the OC under the arbitration proceedings and this Application are different and there is no overlapping between the two claims. Moreover, the Arbitral Tribunal was constituted only to adjudicate the disputes between the parties on limited issues and the orders dated 26.10.2018 and 01.11.2018 of Hon'ble Bombay High Court do not prevent the OC from approaching this Tribunal. The OC relies upon the decision of Principal Bench of the Hon'ble NCLAT, New Delhi in *Mr. Aroon Kumar Aggarwal Vs. M/s. ABC Consultants Private Limited*, [Company Appeal (AT) (Ins.) No. 409 of 2020] to buttress this point.

4.3 It is further submitted that the CD, after encashing the aforesaid bank guarantees and constitution of Arbitral Tribunal, issued the notice dated 16.01.2019 for terminating the contract with the OC citing false allegations and even reassigned the works to other companies, which is proof of CD's pre-determined intention to terminate the contract.

4.4 Both the OC and the CD mutually agreed that the portion of contract valued at Rs. 350 Crore was deemed to be completed and return of performance bank guarantees and retention amount to the extent of applicable contract value were deemed to be completed in all respects. The CD, in fact, admitted the payment of Rs. 1.2 Crore as part of outstanding operational debt as well as the amounts claimed under the Royalty provisions to be paid to the OC during the meetings with the OC. For substantiating its contention, the OC placed copy of the minutes of meetings dated 26.08.2015 and 23.06.2017 on record.

4.5 The application is not defective on mere absence of proper authorisation since it is technical defect and curable in nature. The OC had authorised its Managing Director, Mr. Kishan Kanuganti to initiate IBC proceedings on behalf of the OC *vide* Board Resolution dated 29.10.2018.

5. ANALYSIS AND FINDINGS

5.1 We have perused all the documents and pleadings and heard both the Ld. Sr. Counsel for the OC and the CD.

5.2 The principal issue to be adjudicated in the present application is whether there is any pre-existing dispute between the parties or not. Upon perusal of available documents, we find that the dispute between the parties stems from the Construction Agreement dated 04.04.2011, for widening and constructing six laning of Pune-Satara National Highway 4 from Km 820 to Km 865. Clause 43 of the Construction Agreement makes provision for 'Dispute Resolution Procedure'. It was agreed between the OC and the CD in the aforesaid Agreement, more particularly in Clause 43.3 that "...any Dispute,

*which is not resolved by amicable resolution between the parties or by a reference to mediation, **shall be finally settled by binding arbitration under the Arbitration and Conciliation Act, 1996...***” (Emphasis supplied).

According to the Ld. Sr. Counsel for the OC, it invoked the arbitration clause and filed Commercial Arbitration Petition (L) Nos. 1220 and 1221 of 2018, only on account of CD's fraudulent encashment of bank guarantees, which were furnished by the OC pursuant to Clause 13 of the Construction Agreement. However, we find that Clause 13.2(c) (Contract Performance Bank Guarantee); Clause 13.3 (c) (Performance Bank Guarantee); and Clause 13.4(d) (Advance Bank Guarantee) categorically state that the guarantees shall be unconditional in nature. The Ld. Sr. Counsel for the OC submits that the Petitions have been filed before the Hon'ble Bombay High Court for seeking injunction against fraudulent encashment of bank guarantees and not in respect of any disputed amounts payable by one party or between the parties.

5.3 In view of the foregoing, it is indisputable and undisputed by the parties that there existed certain arbitration proceedings initiated by the OC for resolving disputes with the CD and that the only issue to be decided is whether there existed any dispute before filing the present Application. On a careful consideration of Commercial Arbitration Petition (L) Nos. 1220 and 1221 of 2018, we find that these were filed on 26.10.2018, whereas the present Application was filed on 14.01.2019. This indicates that the OC had initiated arbitration proceedings before this Application for initiation of CIRP was moved. We find that in para 446 of the Statement of Claims filed by the OC before the Arbitral Tribunal, it has been stated that *“The claimant submits that*

after the respondent had encashed the bank guarantees furnished by the claimant, the claimant had filed an application before the Hon'ble National Company Law Tribunal vide diary no. 270913800321 of 2019, Mumbai for insolvency against the respondent herein, in capacity as an operational credit, under the Insolvency and Bankruptcy Code. The claimant herein reserves its right to amend the pleadings in the event of adverse findings and to include the claims." Further, in the Statement of Claims by the OC under the heading 'III POINTS OF DISPUTE AS BETWEEN THE CLAIMANT AND RESPONDENT' in paras 39 to 62, detail the nature and extent of its disputes with the CD pursuant to the Construction Agreement, more particularly, para 56, wherein the OC itself has submitted that "...the delay on the part of the respondent (**CD herein**) in releasing the payment of the IPC's has had a cascading effect on the completion of project as the claimant (**OC herein**) could not undertake most of the critical works due to the insufficiency of funds, which was brought to the notice of the respondent (**CD herein**) from time to time." (Emphasis supplied). Hence, we find that there existed disputes between the OC and the CD before filing this Application for initiating CIRP. Moreover, para 422 of the Statement of Claims by the OC under the heading 'VI. QUANTIFICATION OF CLAIMS', it has been stated by the OC that "*The claimant on account of failure on part of the respondent suffered immensely on several counts, which resulted in additional costs and losses to the claimant on account of excessive office overheads, bank and finance charges, deployment of plant...pending IPC payments, royalty fees, general losses, etc.*" We find that "royalty and other holds" and "Amount due towards invoices for the months of August and September..." are mentioned in Part

IV of the Application. In view of the above, we hold that such complex commercial disputes need to be decided by competent Court/Arbitral Tribunal and not by this Adjudicating Authority in a summary proceeding such as this under Section 9 of the IBC.

5.4 The OC not only claimed to be making single consolidated claim for all disputes between the parties in Paragraph 61 of its Statement of Claims dated 12.02.2019 filed before Arbitral Tribunal but also contended that the OC's failure in completion of contract was caused by factors such as hindrance as well as land acquisition issues caused by the CD. This contention of the OC has been corroborated from the order dated 06.03.2019 of Hon'ble Bombay High Court, where the High Court observed that there was consensus between the parties for arbitration proceedings in Commercial Arbitration Petition(L) Nos. 1220 and 1221 of 2018. As regards the contention of the OC that the subject-matter in the arbitration proceedings and in the present Application are different and hence, two proceedings are permissible, it is necessary to examine the claims made by the OC in both the proceedings. It is true that the Commercial Arbitration Petitions have been filed by the OC for challenging invocation of bank guarantees by the CD. In the present Application, the OC has prayed for initiating CIRP in respect of the CD as it failed to pay the debt due to it. However, the claims made by the OC in both the proceedings are similar or identical in nature and in respect of the same subject-matter. Moreover, we have already found that there existed previous disputes as to claims and counter-claims, which are not determinable by us. In *Aroon Kumar Aggarwal* (Supra), the Hon'ble NCLAT observed that the plea of pre-existing dispute has to co-relate with the amount

claimed by the operational creditor or if a suit or arbitration proceedings is pending, then the same should also be related to such dispute. In the present matter, the pre-existing dispute in the arbitral proceedings is relatable to the amount claimed as operational debt and the Construction Agreement is the genesis for the dispute between the parties. In view of the above, the factual matrix in the matter on hand is different from *Aroon Kumar Aggarwal* (Supra) and hence, inapplicable here.

5.5 In the present matter, both the parties have filed their claims before Arbitral Tribunal. On a perusal of the Construction Agreement, we find that Clause 43 of the Construction Agreement referred to Dispute Resolution between the parties and Clause 43.3 of the aforesaid Agreement mentioned arbitration proceedings to be adjudicated by three-member Arbitral panel. The CD's reply to the demand notice dated 05.11.2018 as well as Hon'ble Bombay High Court's orders dated 26.10.2018; 01.11.2018; and 06.03.2019 show that the dispute between the parties existed prior to the issuance of demand notice. The orders of the High Court indicate that the OC never sought any modification to vary the scope of reference of its claims including the outstanding amount in Part IV of the present Application. Both the OC and CD consented for constitution of Arbitral Tribunal to adjudicate all disputes arising out of the Construction Agreement. It is a settled position of law as well as the judgment rendered by Hon'ble Supreme Court in *Mobilox Innovations Pvt. Ltd. v. Kirusa Software Pvt. Ltd.*, [(2018) 1 SCC 353] that "dispute" is said to exist, so long as there is a real dispute as to payment between the parties that would fall within the inclusive definition contained in Section 5(6) of the IBC. Further, the Hon'ble Principal Bench of the NCLAT,

New Delhi in *Mr. Sanjay Kumar Vs. Gannon Dunkerley & Co Ltd and Anr.* [Company Appeal (AT) (Insolvency) No. 1210 of 2023], relying on *Mobilox* (Supra), observed that the Adjudicating Authority does not have to venture into appreciation of the merit of pre-existing dispute and embark upon the adjudication of rival contentions of parties. If the dispute is raised by the CD and if the CD shows the disputed issues of facts which require adjudication by a competent court of law, then Section 9 of IBC would not empower the Adjudicating Authority to take upon itself the task of sifting through the rival contentions raised and to give a judgement upon it. Therefore, we are neither inclined to consider the claims and counter-claims made by the parties nor venturing into determination as to the merits of the dispute, which might culminate in favour of either of the parties. We are conscious that at this stage of an application under Section 9 IBC, our jurisdiction is limited to consideration of existence of an actual dispute, both in fact and in law. There cannot be a case for the OC that no dispute existed with the CD before filing the Application. We find that by filing this Application, after initiating arbitration proceedings against the CD, the OC is attempting forum shopping with the desire for recovery of money. This is a clear case of a real dispute existing between the parties before issuance of statutory notice under Section 8 of the IBC. The object of the IBC is not to admit a CD into CIRP when there is pre-existing dispute between the parties. In the present case, we have sufficient material to hold that there actually existed dispute between the OC and the CD, which is being pursued by them. No record has been produced by either of the parties to show that the Arbitral Tribunal has finally disposed of, or decided, the subject-matter of the disputes in the arbitral proceedings.

Hence, we have no hesitation to reject the Application on the ground of pre-existing dispute in terms of Section 9(5)(ii)(d) of the IBC as the CD had already brought to the notice of the OC existence of dispute of pending arbitration proceedings, in terms of Section 8(2)(a) of the IBC. Having found this cardinal issue of pre-existing dispute against the OC, we do not propose to consider or discuss other grounds.

ORDER

This Application bearing C.P. (IB) No. 185/MB/2019 under Section 9 of the IBC, filed by M/s. Ksheeraabd Constructions Private Limited, the OC, for initiating CIRP in respect of Reliance Infrastructure Limited, the CD is **rejected**.

We make it clear that any observations made in this Order shall not be construed as expressing opinion on merits. The OC's rights available as per law before any judicial/quasi-judicial forum shall not be prejudiced on the grounds of rejection of the present Application. No orders as to costs. Ordered accordingly.

Sd/-
SANJIV DUTT
MEMBER (TECHNICAL)

Sd/-
K. R. SAJI KUMAR
MEMBER (JUDICIAL)

//Tanmay Jain//