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**BEFORE THE AJUDICATING AUTHORITY
(NATIONAL COMPANY LAW TRIBUNAL)
AHMEDABAD BENCH
AHMEDABAD**


C.P. (I.B) No. 120/9/NCLT/AHM/2017

Coram: **Hon'ble Mr. BIKKI RAVEENDRA BABU, MEMBER JUDICIAL**
Hon'ble Ms. MANORAMA KUMARI, MEMBER JUDICIAL

**ATTENDANCE-CUM-ORDER SHEET OF THE HEARING OF AHMEDABAD
BENCH OF THE NATIONAL COMPANY LAW TRIBUNAL ON 15.01.2018**

Name of the Company: TVS Interconnect Systems Pvt Ltd.
V/s.
ORG Informatics Ltd.


Section of the Companies Act: Section 9 of the Insolvency and Bankruptcy
Code

<u>S.NO.</u>	<u>NAME (CAPITAL LETTERS)</u>	<u>DESIGNATION</u>	<u>REPRESENTATION</u>	<u>SIGNATURE</u>
1.	Amrita A Patel (For Ms Megha Jani)	Adv	Respondent	
2.				

ORDER

None present for Operational Creditor/Petitioner. Learned Advocate Ms. Amrita Patel i/b Learned Advocate Ms. Megha Jani present for Respondent.

Order pronounced in open court. Vide separate sheets.


MANORAMA KUMARI
MEMBER JUDICIAL

Dated this the 15th day of January, 2018.


BIKKI RAVEENDRA BABU
MEMBER JUDICIAL

**BEFORE ADJUDICATING AUTHORITY (NCLT)
AHMEDABAD BENCH**

C.P. No.(IB) 120/9/NCLT/AHM/2017

In the matter of:

TVS Interconnect Systems
Private Limited,
Registered Office at
7-B, West Veli Street
Madurai-625001

: Petitioner.
[Operational Creditor].

Versus

ORG Informatics Limited
Registered Office at
Patel Square, 1st Floor,
Gorwa Industrial Road,
Off: Amar Car Show Room,
Gorwa, Vadodara-390003.

: Respondent.
[Corporate Debtor].

Order delivered on 15th January, 2018.

**Coram: Hon'ble Sri Bikki Raveendra Babu, Member (J) – And -
Hon'ble Ms. Manorama Kumari, Member (J).**

Appearance:

Mr. Nandish Chudgar with Mr. Raheel Patel, on behalf of Nanavati Associates, learned Advocates for the Petitioner.


Ms. Megha Jani with Ms. Amrita Patel, learned Advocates for the Respondent.

ORDER

[Per: Hon'ble Sri Bikki Raveendra Babu, Member (J)]

1. TVS Interconnect Systems Private Limited, in its Board Meeting held on 26.6.2017, authorised Mr. S. Santhanagopalan,



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Director and Mr. G. Srinivasa Raghavan, Director to institute and defend legal proceedings.

2. Pursuant to the said Resolution, the Petitioner filed this Petition under Section 9 of the Insolvency and Bankruptcy Code, 2016 ["the Code" for short] read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 with a request to trigger Corporate Insolvency Resolution Process in respect of ORG Informatics Limited, styling it as 'Corporate Debtor'.

3. Following are the facts that are necessary for disposal of this Petition.

3.1. In the year 2008, Bharat Sanchar Nigam Ltd., (BSNL) awarded contract for supply of certain IT and Networking materials, equipment and support services etc, to Telecommunication Consultant India Ltd (TCIL). TCIL in turn floated tenders for supply of related materials for implementation of BSNL Project. The contract was awarded to ORG Informatics Limited ["ORG" for short]. ORG approached MOKA Technology Services Ltd. ["MOKA" for short] (earlier known as "TVS Net Technologies Limited"). A Memorandum of Understanding dated 21.8.2008 was entered into between MOKA and ORG. MOKA supplied materials/equipment worth Rs. 24,14,58,252/- against the purchase orders placed by ORG for which MOKA raised Invoices-cum Delivery Challans from time to time. The said Invoices-cum-Delivery Challans were duly received and acknowledged by ORG. ORG also issued a Corporate Guarantee dated 24.9.2008 for performance security and accordingly issued 11 post-dated cheques worth Rs. 21,65,41,034/-. Mr. Kalyan Mazumdar, Director of MOKA acknowledged the liability for the Invoices raised by MOKA from time to time vide his e.Mail dated 27.1.2009. MOKA deposited the cheques issued by ORG but they were dishonoured with remarks "Account Frozen". MOKA instituted complaint under Section 138 of Negotiable Instruments Act against ORG.

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3.2. MOKA along with M/s. Tulip Telecom Ltd., and M/s. Sterlite Technologies Ltd., being Creditors of ORG entered into an Agreement dated 20th April, 2012. In that Agreement it was stipulated that MOKA is entitled for the amount of Rs. 23.20 Crores. In the said Agreement it was agreed that if Rs. 14.99 Crores is received by MOKA within a period of four months it shall be considered as full and final settlement whereas the time limit can be extended only once by way of mutual consent of the parties and failing to pay the dues even thereafter the original invoice amount with interest charges, costs and damages can be pursued by MOKA. According to the Petitioner, the admitted and undisputed fact is that ORG is under an obligation to pay amount of Rs. 23.20 Crores as a legal and undisputed debt to MOKA.

3.3. On 17.11.2012, a supplementary agreement was entered into between the same parties wherein the time period to pay the amount of Rs. 14.99 Crores was extended to 31.3.2013 without altering the other conditions stipulated in the Principal Agreement dated 20th April, 2012. ORG has not paid the aforesaid amount. Therefore ORG became liable to pay Rs. 23.20 Crores with interest at 21% besides legal expenses and other damages.

3.4. MOKA initiated arbitration proceedings by invoking Clause 15 of the Agreement dated 20th April, 2012 and referred the matter to arbitration. Mr. Justice D.P. Wadhwa, Hon'ble Retired Judge, Supreme Court was appointed as 'Arbitrator' by the Hon'ble High Court of Delhi on 27.5.2014.

3.5. MOKA simultaneously assigned all the debts in relation to ORG to TVS Interconnect Systems ~~Private~~ Limited vide Assignment Agreement dated 14.11.2013. The said Assignment Agreement was placed before the learned Arbitrator. The learned Arbitrator passed the Award in view of the admitted facts. The Award was passed on 9.12.2016 awarding an amount of Rs. 24,14,58,252/- in favour of MOKA with interest at 18 per cent per annum on the amount of

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Award from ORG from 31.8.2009 till the date of payment. The interest amount from 31.8.2009 till 19.6.2017 comes to Rs. 33,92,45,535/-. The total amount comes to Rs. 58,25,28,786/-. According to the Petitioner, the Arbitration Award has become final.

3.6. Petitioner issued Demand Notice dated 21.6.2017 to the Respondent and it was served on the Respondent on 30th June, 2017. The Petitioner filed copy of Bank statement from 1.12.2016 to 20.7.2017 of State Bank of India, Madurai of the Petitioner-Operational Creditor. Petitioner also filed Certificate of the financial institution of the Operational Creditor. Petitioner also filed Affidavit under Section 9(3)(b) of the Code. Petitioner filed copy of Memorandum of Understanding dated 21.8.2008; copy of Agreement dated 20th April, 2012; copy of Supplementary Agreement dated 17.11.2012; copy of Assignment Agreement dated 14.11.2013; and copy of Arbitration Award dated 9.12.2016. Petitioner also filed copy of Demand Notice and copies of Invoices-cum-Delivery Challan.

4. On this Petition, Respondent, having received the Notice, appeared through learned Counsel and filed Objections;

4.1. The Memorandum of Understanding dated 21.8.2008 referred to by the Petitioner was executed between TVS Net Technologies Limited and ORG; the Petition is filed for operational debt allegedly based on equipment/materials supplied by MOKA Technology Services Limited, but no proof is filed to show that MOKA Technology Services Ltd was earlier known as "TVS Net Technologies Limited".

4.2. The second objection is the Petition is filed by TVS Interconnect Systems Private Limited, allegedly in the capacity of an assignee. The Assignment Agreement dated 14.11.2013 refers to assignment of alleged debts mentioned therein to one "TVS Interconnect Systems Limited" and it is a Public Limited Company, whereas the present Petitioner is a Private Limited Company.

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4.3. The Demand Notice served on the ORG is given by TVS Interconnect Systems Private Limited which has no locus standi to address such notice and thus it is not a valid notice.

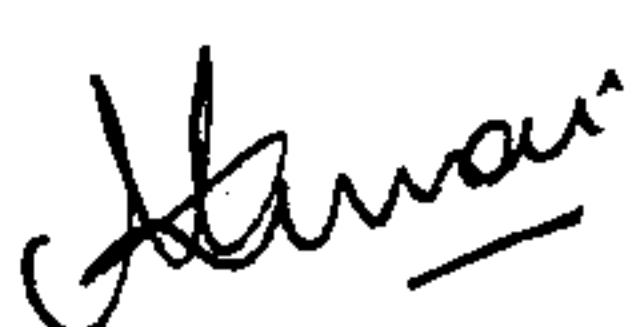

4.4. Petitioner suppressed the following material facts;

(a) MOKA Technology Services Limited preferred a winding up petition (CP No. 274 of 2016) before the Hon'ble High Court of Gujarat under the Companies Act pertaining to the present transaction but the same has not been disclosed in the Petition.

(b) This Petition is filed for a claim based on Memorandum of Understanding dated 21.8.2008. The Invoices relied upon are of the year 2008 and therefore the alleged debt is barred by limitation. The Petition for initiation of Insolvency Resolution Process based on time barred debt is not maintainable. The time barred debt cannot be assigned. The Memorandum of Understanding dated 21.8.2008 with TVS Net Technologies Ltd., clearly disclose that the monies would flow only from TCIL.

(c) The Agreement dated 20th April, 2012 is executed regarding direct disbursement of monies from TCIL to parties to Agreement and therefore it is not a crystalized debt. The Agreement dated 20th April, 2012 and Supplementary Agreement dated 17.11.2012 go to show that Petitioner knows that the money has to flow from TCIL. MOKA Technology Services Ltd., in 2005 initiated arbitration proceedings claiming the amount in respect of the same transaction and though Petitioner claims the alleged debts are assigned to it vide Agreement dated 14.11.2013. Respondent also stated that it is in the process of seeking legal advise on challenging the arbitration award and therefore it cannot be said that it attained finality.

(d) The present Application though styled as an application for initiation of Corporate Insolvency Resolution Process under IB


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Code for alleged default in payment of alleged debt but it is essentially an application seeking execution of arbitral award. MOKA filed a Petition under Section 9 of the Arbitration and Conciliation Act, 1996 restraining TCIL from releasing payments to ORG. It was dismissed. MOKA preferred an Appeal. The Appeal was also dismissed.

(e) Debt Recovery Tribunal, Ahmedabad passed orders restraining TCIL from paying money to ORG. The said fact was conveyed to MOKA.

(f) Apart from arbitration and winding up proceedings there are other proceedings pending pertaining to the transaction in question. The amount claimed in the petition is clearly disputed and a dispute evidently existed before issuance of notice under Section 8 of the Code.

(g) The Demand Notice is in a defective form.

5. The Petitioner filed an Additional Affidavit stating that TVS Interconnect Systems Ltd., was converted into a Private Limited Company and named as 'TVS Interconnect Systems Private Limited' on 18.11.2015 and in support of it filed Certificate of Incorporation issued by Registrar of Companies.

5.1. It is further stated in the Additional Affidavit that Company Petition No. 274 of 2016 filed by MOKA Technology Services Ltd., against ORG was disposed of as withdrawn on 16.11.2017. No reply is given to the Demand Notice dated 21.6.2017 issued under Section 8 of the Code.

6. The Respondent filed a Reply Affidavit that even a notice was given by TVS Interconnect Systems Private Ltd without disclosing that it was continuation of TVS Interconnect Systems Limited.




6.1. Assuming that the Petitioner is an assignee under an Assignment Agreement dated 14.11.2013 Petitioner cannot be treated as an Operational Creditor within the meaning of Section 5 sub-section (20) of the Code read with Section 5(6), 5(11) and 5(21) of the Code. It is further stated that MOKA initiated arbitration proceedings. MOKA's filing winding up petition before Hon'ble High Court of Gujarat clearly goes to show that MOKA ignored the Assignment Agreement dated 14.11.2013 and it has never been acted upon. It is further stated that in the absence of any assignment of rights under the Award dated 9.12.2016 Petitioner does not get any right as an Operational Creditor in respect of the Award. The statutory notice was not issued by an assignee under the Assignment Agreement and therefore there is no need to give reply to such notice.

7. Heard the arguments of learned counsel for the Petitioner and learned counsel for the Respondent. Basing on the contentions and the pleas of both the sides, the following points emerge for determination;

- (i) Whether the Award amount is an operational debt;
- (ii) Whether Petitioner, i.e., TVS Interconnect Systems Private Limited is an Operational Creditor; and
- (iii) Whether there exists any dispute relating to the operational debt.

7.1. Section 5 sub-section (21) of the Code defines 'Operational Debt' as under;

"5. In this Part, unless the context otherwise requires,-

(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."

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In the case on hand, in the Additional Affidavit, the Petitioner clearly stated that the Arbitral Tribunal adjudicated the debt of the Corporate Debtor and finally passed Award on 9th December, 2016.

7.2. The 'Debt' is defined in Section 3(11) of the Code.

"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."

In the present case, the amount due to MOKA from ORG was subject matter of arbitration proceedings and in the arbitration proceedings, Award was passed in favour of MOKA and against ORG. The amount claimed by MOKA from ORG is towards supply of material and services. Therefore, the amount claimed by MOKA from ORG in the arbitration proceedings is an 'operational debt' but the said operational debt now transformed into an Arbitral Award which after it reached its finality can be put to execution. In this context, it is necessary to refer to Section 8 of the Code. Section 8(2)(a) says about existence of a dispute. No doubt, Section 8(2)(a) says, the Corporate Debtor shall, within a period of ten days of the receipt of the demand notice or copy of the invoice mentioned in sub-section (1) bring to the notice of the operational creditor about the existence of a dispute. However, Section 9(5) enjoins upon the Adjudicating Authority to admit the Petition subject to provisions contained in sub-clauses (a) to (e) of Clause (i) of sub-section (5) of Section 9. Among them sub-clause (d) of Clause (i) of sub-section (5) of Section 9 says, in case *no notice of dispute has been received or there is no record of dispute in the information utility, admission order has to be passed*. Therefore, by a conjoint reading of Section 8 sub-section (2)(a) and Section 9(5)(i)(d) goes to show that if there exists a dispute and there is a record of dispute available in the information utility, then there is no need to admit the Petition filed by the Operational Creditor. In the case on hand, the arbitral proceedings were initiated by MOKA and it culminated into passing of the Award in favour of MOKA and

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against the ORG. The arbitration proceedings were initiated even before the issuance of notice under Section 8 of the Code by TVS Interconnect Systems Private Limited (Petitioner). Therefore, there is a record of dispute. More over, the material placed on record goes to show that MOKA also filed a Petition under Section 9 of the Arbitration and Conciliation Act seeking a restraint order against the TCIL. Further, Debt Recovery Tribunal also passed a restraint order against TCIL from disbursing the amounts to ORG. The above said material clearly show that there exists a dispute between the MOKA and ORG. Therefore, the Award amount involved in this Petition cannot be treated as an operational debt. Even assuming that it is an operational debt in view of the finding that there exists a dispute between MOKA and Corporate Debtor, the Corporate Insolvency Resolution Process cannot be initiated.

7.3. Petitioner is not an assignee under the Assignment Agreement dated 14.11.2013. In fact, MOKA assigned all its debts to TVS Interconnect Systems Limited, but not to TVS Interconnect Systems Private Limited (Petitioner). But, Petitioner filed Incorporation Certificate dated 18.11.2015 to show that TVS Interconnect Systems Limited was converted into TVS Interconnect Systems private Limited. Therefore, it can be said that Petitioner is an assignee under the Assignment Agreement dated 14th November, 2013.

7.4. Now, coming to the definition of 'Operational Creditor', it is necessary to refer to Section 5 sub-section (20) which reads as follows;

“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.”

7.5. In view of the Assignment Agreement, it can be said that the Petitioner is an 'Assignee' of the operational debt due to MOKA

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from ORG. But without disclosing that the Assignee under the Agreement dated 14.11.2013 changed its name from Public Limited to Private Limited, issued Notice under Section 8 of the Code and therefore it is not a valid notice. However, the Petitioner, in this case is not seeking initiation of Corporate Insolvency Resolution Process on the basis of the debt assigned to it, but on the basis of the Arbitral Award. Therefore, Petitioner although can be termed as 'Operational Creditor' in respect of the operational debt assigned to it, it cannot enforce the Arbitration Agreement which is in favour of MOKA the Assignor unless there is specific assignment of the arbitral award amount to the Petitioner provided the Award amount is having the characteristics of operational debt. Therefore, the Petitioner being an Assignee under the Assignment Agreement of the operational debt cannot maintain this Petition for recovery of arbitral Award amount which has not been assigned to it.

8. The material on record clearly disclose that as on the date of filing of the Petition, winding up petition being Company Petition No. 274 of 2016 filed by MOKA against ORG was pending before the Hon'ble High Court of Gujarat and it was withdrawn only on 16.11.2017, i.e., after the objections were filed by the Respondent before this Tribunal in this Petition. It is a fact that the Petitioner did not choose to disclose about the winding up proceedings in the Petition. It is stated by the Petitioner that it has got knowledge about the winding up proceedings filed by MOKA only recently. The material on record show that the Petitioner obtained assigned debt from MOKA on 14.11.2013 during the pendency of arbitral proceedings and the same was also brought to the notice of the learned Arbitrator. It is also a fact that MOKA also filed Section 138, N.I. Act case before the Criminal Court, and that fact was in the knowledge of the Petitioner. But Petitioner made self-serving statement in the Reply Affidavit that only recently it came to know about the winding up proceedings. Therefore, it is a clear case where the Petitioner cannot deny knowledge about the winding up proceedings filed by MOKA which is

Answer

Assignor of the debt of ORG. Therefore, such a material fact has been suppressed by the Petitioner.

9. The learned Counsel appearing for the Respondent relied upon the decision rendered by the Hon'ble Supreme Court in the case of ***Rajasthan State Industrial Development And Investment Corporation And Another Vs. Diamond & Gem Development Corporation Limited And Another***, reported in (2013) 5 Supreme Court Cases 470, wherein the Hon'ble Supreme Court has, inter alia, held in Para No.23, that the terms of the contract have to be construed strictly without altering the nature of the contract, as it may affect the interest of either of the parties adversely. In the case on hand, the Assignment Agreement is only with reference to the operational debt but not to the Award amount. Therefore, the assignment contract if strictly construed cannot take in its ambit the arbitral Award amount.

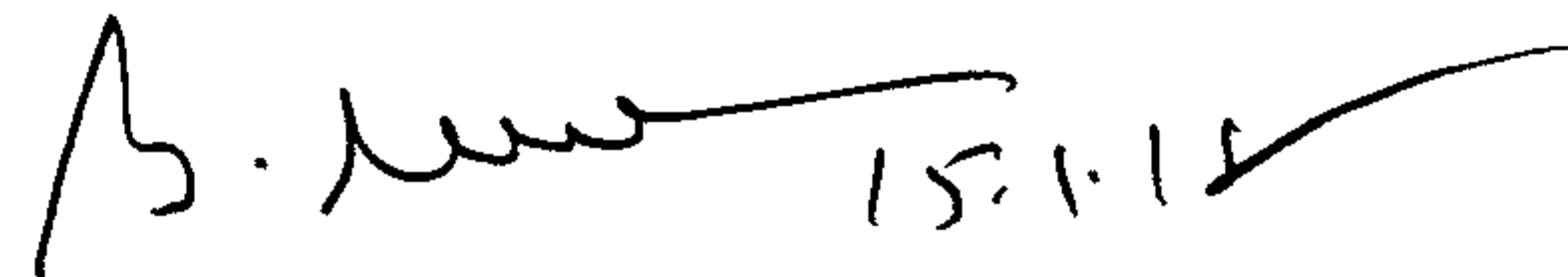
10. In view of the above discussion, the Petition deserves to be dismissed and it is accordingly dismissed with no order as to costs.

Signature:



**Ms. Manorama Kumari,
Member (Judicial)
Adjudicating Authority.**

Signature:



**Sri Bikki Raveendra Babu,
Member (Judicial)
Adjudicating Authority.**

Rmr..