

**NATIONAL COMPANY LAW TRIBUNAL  
DIVISION BENCH, CHENNAI**

**CP/141(IB)/2018**

*[U/s 9 of IBC, 2016 r/w Rule 6 of IB (AAA) Rules 2016]*

*In the matter of*

**M/s Centrum Capital Limited**

*... Petitioner/Operational Creditor*

*Vs.*

**M/s Shriram EPC Limited**

*... Respondent/ Corporate Debtor*

**Order delivered on: 31.08.2018**

**CORAM**

**K. ANANTHA PADMANABHA SWAMY, MEMBER (J)  
S. VIJAYARAGHAVAN, MEMBER (T)**

*For the Petitioner : Mr.Om Prakash Ellanty, Senior Advocate a/w  
Mr. Saahil Memon, Mr. Sidhartha Srivasthava  
Advocates for Link Legal India Law Services*

*For the Respondent: M/s. R. Parthasarathy, Rahul Balaji, Madhan  
Babu & Vishnu Mohan, Advocates*

**ORDER**

**Per: K. ANANTHA PADMANABHA SWAMY, MEMBER (J)**

Under consideration is a Company Petition filed by the Petitioner herein against the Respondent company under Section 9 of the Insolvency and Bankruptcy Code, 2016 (in short IBC) r/w rule 6 of the



Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (for brevity, IB Rules) for initiation of Corporate Insolvency Resolution Process against the Respondent company for recovery of ₹20,09,60,831/-.

2. It is the case of the Petitioner that the Petitioner by its offer letter (agreement) dated 20.2.2014 had offered to assist the Respondent to refinance and / or restructure the existing working capital and term loan limits of the Respondent and that the Petitioner is entitled to receive payments as per Clause III of the agreement for the services rendered by them. As per the agreement services were rendered and invoices were raised from time to time which was honoured by the Respondent. A final invoice dated 27.9.2014 for a sum of ₹14,11,62,003/- was raised by the Petitioner (Annexure P8 of the Application) and an email dated 18.11.2014 (Annexure P9 of the Application) was addressed to the Respondent providing for calculation/compensation fee in terms of the agreement dated 20.2.2014. It is further stated that an email dated 21.11.2014 recording the discussions held between the parties in relation to the services rendered by the Petitioner for the Respondent company – Beta Wind Farm Pvt. Ltd. and Leitwind Shriram Manufacturing Ltd. (part of the Shriram Group of companies) – and fee payment thereof amounting to ₹19.21 crores. It is further averred that

the Petitioner considered the said companies as subsidiaries of Shriram Industrial Holdings Ltd. and therefore reduced its compensation fee to ₹13.50 crores. The petitioner contended that the respondent was clarified that the reduction in fee was not on any ground of deficiency in service and that the compensation fee shall be paid by December, 2014. It is further stated in the Application that the Respondent vide its email dated 25.11.2014 (Annexure P-11 of the Application) recognized the efforts and contributions of the Petitioner in all the three companies and requested for further reduction of compensation fee to ₹11 crores. Subsequently, the Petitioner vide email dated 17.12.2014 (Annexure P13 of the Application) revised the fees for all the three group companies to a sum of ₹12 Crores from ₹19,21,34,000/- pursuant to the request for reduction of fee and on the assurance of payment of entire revised fee by December, 2014 by the Respondent. However, the Respondent failed to make the payments in spite of various reminder emails (Annexure P16).

It is stated in the petitioner that by an email dated 17.6.2015 the Respondent attached a Certificate stating that the Petitioner assisted the Respondent to complete the CDR restructuring of debt of ₹2917.17 crores with the lenders as per mandate dated 20.02.2014 which establishes the fact that the Petitioner had completed its scope of work and is

entitled to receive the compensation fee as claimed in the final invoice dated 30.9.2014. However, the Respondent failed to release the payment by September, 2015 the grace period granted by the Petitioner. The petitioner further stated that to their utter shock and surprise received an email dated 08.09.2015 from the Respondent wherein the Respondent stated that they had never agreed to pay the entire compensation fee as per the terms of the mandate.

The petitioner stated that they have issued a legal notice on 28.04.2017 (Annexure P24) under Section 8 of the IBC calling upon the Respondent to pay the unpaid amounts and that the Respondents sent a reply letter dated 20.05.2017 wrongly denying the claim of the Petitioner. Since the Respondent failed to pay the fees, the Petitioner filed an application under Section 9 of the I & B Code and in view of an order made by the NCLAT wherein it was held that an Advocate / Lawyer cannot issue a demand notice under Section 8 of the I & B Code, the Petitioner filed a memo on 12.12.2017 before the Tribunal to withdraw the application filed under the IBC. However, due to the judgment rendered by Hon'ble Supreme Court in the matter of M/s. Macquarie Bank Limited Vs. Shilpi Cable Technologies Limited, the Petitioner filed an affidavit dated 27.12.2017 to withdraw the memo filed on 12.12.2017 filed for withdrawal of the application filed under IBC.

However, the Tribunal by an order dated 12.01.2018 recorded that the Petition was treated as withdrawn and granted liberty to the Petitioner to file fresh Petition under IBC.

The Petitioner filed the present application on the basis of legal notice dated 14.12.2017 under Section 8 of the IBC and again the Respondent vide reply dated 22.12.2017 denied the claim of the Petitioner stating that the amount claimed by the Petitioner is not due and payable. It is submitted that the Respondent wrongly asserted that the Petitioner has breached the terms of the agreement and the Respondent has not raised any deficiency of services or breaches of the terms of the said agreement. Therefore, there was no dispute on the work carried out and the fee payable for the same. Hence the petition.

3. The Respondent filed a Counter and, *inter-alia*, stated that the present proceedings under the IBC is not maintainable in view of that the Respondent had already invoked the Arbitration Proceedings against the Petitioner vide notice dated 12.12.2017 that was issued and communicated to the Petitioner on the same date. The Respondent had also appointed Hon'ble Justice Mr. J.D. Kapoor, Retd. High Court of Delhi as their nominee arbitrator under Para IX of the agreement dated 27.02.2014. The Respondent further called upon the Petitioner to nominate their arbitrator. Despite receiving the notice invoking and

commencing the arbitral proceedings, the Petitioner has chosen to commence proceedings against the Respondent under the IBC. Under Section 5 (6) of the IBC, "dispute" includes a suit or arbitration proceedings relating to (a) an existence of the amount of dispute, (b) the quality of goods or services, (c) the breach of a representation or warranty. It is submitted that in the light of the contents of the notice invoking arbitration by the Respondent, there clearly exists an arbitrable dispute against the Petitioner for the losses incurred by the Respondent. The Petitioner rather than appointing an arbitrator within a period of 30 days from 12.12.2017 had chosen to suppress the said fact and filed the present Petition which clearly indicates that the Petitioner has approached the Tribunal with unclean hands.

It is further submitted that in view of the notice dated 12.12.2017, the arbitral proceedings are deemed to have commenced as per Section 21 of the Arbitration and Conciliation Act, 1996. Since the Petitioner did not respond, the Respondent has approached the Hon'ble High Court, Bombay under Section 11 (6) (a) of the Arbitration and Conciliation Act, 1996 praying for appointment of an arbitrator on behalf of the Petitioner and the said application is pending in Arbitration Application (L) No. 42 of 2018. Hence, filing of the present application is entirely misconceived and the present application ought to be

dismissed in view of the existing disputes as defined under 5 (6) of the IBC.

Further, it is submitted that the Petitioner had initially issued a notice under Section 8 of the IBC on 28.04.2017 and it was replied by the Respondent on 20.05.2017 disputing the same. Despite such denial, the Petitioner filed an application under IBC in CP No. 684/(IB)/CB/2017 and the said petition was disposed of as withdrawn by the Order dated 12.01.2018. The Tribunal ordered that the Petition is withdrawn allowing the memo filed on 12.12.2017 by the Petitioner and the Respondent invoked the arbitration proceedings on 12.12.2017. The Petitioner issued the fresh notice under IBC only on 14.12.2017 and it was duly disputed by the Respondent vide reply dated 22.12.2017. It is submitted that the Respondent had invoked the arbitration proceedings against the Petitioner and in view of this, the present petition filed under IBC cannot survive and it is not maintainable.

The learned Counsel for the Respondent while reiterating the above, prayed to dismiss the Petition by relying on the judgment delivered by the **Hon'ble Supreme Court in the matter of M/s. Mobilox Innovations Private Limited Vs. Kirusa Software Private Limited** and on the judgement rendered by the **Hon'ble NCLAT in the matter of Balaji Enterprises Vs. Gammon India Limited.**

4. In their written submissions, the Petitioner claimed that the present petition has to be treated as continuation of the proceedings from the first petition – CP/684(IB)/CB/2017 – since the first petition was treated as withdrawn with a liberty to the Petitioner to file a fresh petition vide orders of the Tribunal dated 12.01.2018. The Petitioner further contended that a notice for invocation of arbitral proceedings was issued by the Respondent on 12.12.2017 before the first petition was withdrawn and hence the same was issued prematurely with an intention to defeat the claim of the Petitioner. The Petitioner also stated that the IBC proceedings initiated was prior to the arbitration notice and that there is no pre-existing dispute between the parties. On such grounds, the Petitioner pressed for allowing the present Petition.

5. Per contra, the Respondent filed their written submissions stating that the present claim arises out of an agreement that contains an arbitration clause that has been invoked by the Respondent. The Respondent further contended that the Petitioner withdrew the earlier proceedings initiated under IBC prior to the present case in toto and that before institution of the present proceedings an arbitration notice was issued. Moreover, the Petitioner is deemed to have accepted the existence of disputes that are to be referred to arbitration by virtue of its failure to reply to the notice invoking arbitration dated

12.12.2017 made by the Respondent. It is further stated in the written submissions of the Respondent that the Hon'ble Bombay High Court has passed an order dated 26.07.2018, in Commercial Arbitration Application No. 71/2018, appointing Mr. Arif S. Doctor, Senior Advocate as Sole Arbitrator to adjudicate the disputes, by consent of parties. On such grounds, the Respondent prayed not to allow the present petition.

6. Heard the submissions made by the learned Senior Counsels for both the sides. Perused pleadings and documents submitted by both the parties. The point for consideration is whether the present petition filed under IBC is to be allowed or not.

7. It is an admitted fact that the Petitioner had filed an application under IBC which came to be withdrawn by the Petitioner through their Memo dated 12.12.2017 since Demand Notice under Section 8 of IBC was issued under the signature of an Advocate. Subsequently, on 27.12.2017 the Petitioner filed another Memo seeking withdrawal of earlier memo dated 11.12.2017 relying on the order passed by the Hon'ble Apex Court on 15.12.2017 in **M/s.Macquarie Bank Limited Vs. Shilpi Cable Technologies Limited** that held good a demand notice under Section 8 of IBC issued by an Advocate. It is

also a fact that in the meanwhile, the Respondent has invoked an Arbitration Clause, as was made available in the agreement entered into between the parties, by its notice dated 12.12.2017 that is prior to the issuance of fresh notice under Section 8 of IBC (i.e. 14.12.2017). This Tribunal duly recorded the above facts in its Order dated 12.01.2018 and allowed the Petitioner to withdraw CP/684/IB/CB/2017 with permission to file fresh Petition under IBC.

8. It is also on record that


(i) the Respondent has issued a notice to the Petitioner for invoking arbitral proceedings and since no reply was received from the Petitioner, the Respondent has filed a Petition under Section 11 (6) (a) of Arbitration & Conciliation Act, 1996;


(ii) the Hon'ble High Court of Judicature at Bombay has appointed a Sole Arbitrator Mr. Arif S. Doctor, Senior by consent of the parties in Commercial Arbitration Application No. 71 of 2018 and

(iii) that the Sole Arbitrator convened the first sitting of the Arbitral Tribunal on 21.8.2018 to decide the disputes between the parties herein arising out of the Agreement dated 27.02.2014 entered into between the parties. ✓

9. Since, evidently, there is a pending arbitration proceedings, without going into the other merits of the case, we conclude that the present CP under IBC is not required, at present. The judgment rendered by Hon'ble Supreme Court in the matter of M/s. Mobilox Innovations Private Limited Vs. Kirusa Software Private Limited referred by the Respondent squarely applies to the present case in support of the Respondent's contentions also. Moreover, the Petitioner is at liberty to approach this Tribunal subsequent to the failure, if any, on the part of the Respondents in complying with any direction in the Arbitral Award that may be passed by the Arbitral Tribunal.

In view of the above observations, the present Petition is not maintainable under Section 8(2)(a) of the IBC 2016. There will be no order as to costs.

  
[S. Vijayaraghavan]  
Member (Technical)

  
[K. Anantha Padmanabha Swamy]  
Member (Judicial)

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