

IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH

C.P. No. 507/I&BP/2017

Under section 9 of the IBC, 2016

In the matter of
Balaji Enterprises rep. by its
Sole Proprietrix Mrs. Amitha Dubey,
No. P-301, The Metro Zone,
No. 44, Pillaiyar Koil Street,
Anna Nagar West, Chennai - 400 004
... Applicant/Petitioner

v/s.

Gammon India Ltd.
Gammon House, Veer Savarkar Marg,
Prabhadevi, Mumbai - 400 025.
... Respondent

Order delivered on: 19.07.2017

Coram:

Hon'ble Mr. B.S.V. Prakash Kumar, Member (Judicial)
Hon'ble Mr. V. Nallasenapathy, Member (Technical)

For the Petitioner : Mr. R.L. Bansal, Adv.
For the Respondent : Mr. Rashmin Khandekar, Adv.

Per V. Nallasenapathy, Member (Technical)

ORDER

1. Balaji Enterprises, represented by its sole Proprietrix Mrs. Amita Dubey, filed this Company Petition for initiation of Corporate Insolvency Resolution Process under section 9 of the Insolvency and Bankruptcy Code, 2016 (the Code) read with Rule 6 of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules 2016, saying that M/s. Gammon India Ltd., the Corporate Debtor, herein defaulted on 29.11.2016 in making payment of Rs.65,80,536/- (inclusive of interest charged @ 18% from 20.07.2013 to 20.03.2017) in respect of sub-contract work done at Ennore and also defaulted on 28.10.2015 in making another payment of Rs.93,72,026/- (inclusive of interest @ 18% from October

2015 till March 2017) in respect of hire charges of scaffolding materials for construction site at New India Hotel & Resort project, Bangalore.

2. The claim of the Operational Creditor is of two-fold, one is in respect of payment for this sub-contract work done at Ennore and another is in respect of hire charges for scaffolding materials for construction site at New India Hotel & Resort project, Bangalore.

3. In respect of the first claim i.e. sub-contract executed at Ennore:

(a) The Operational Creditor says that vide Work Order No.8633/297, dated 27.2.2010, work order reference GIL/NTECL/MPOCUU/WO/8633/09-10/244 and Letter of Intent reference GIL/NTECL/MPOCUU/WO/8633/10-11/255, the work order was entrusted by the Corporate Debtor and the same was executed by the Operational Creditor. The work order (tender for sub-contract) dated 27.02.2010 says the work order value is Rs.81,01,700/-. The Letter of Intent dated 28.09.2010 issued by the Corporate Debtor says the agreed price for the subject work is Rs.32,11,200/- (job code 8633). In the event of any dispute arising out of the sub contract the parties have to agree that the matter shall be referred to the Sole Arbitration of an officer of the company nominated by the Managing Director of the Company (other than with the sub-contract) and the award of the Arbitrator so nominated shall be final, conclusive on binding on all parties to the sub-contract.

(b) The Operational Creditor has enclosed a mail dated 20.07.2013 issued by one Shankar S. Iyer of Gammon India Ltd. to 8633NTPCTamilnaduEnergyACC.account, seeking from one Mr. Jayakumar, the outstanding statement of Balaji Enterprise in respect of Job Code Nos. 8633 and 8813. By an e-mail reply on the same day i.e. 20.07.2013 the said Shankar S. Iyer of Gammon India received the outstanding amount details showing the following as outstanding:

Job Code	Account No.	Account	Closing Cr.
8633	1357510410	Balaji Enterprises	4,412,709.05
8633	1357511119	Balaji Enterprises	8,687.00
8813	1357510410	Balaji Enterprises	529,853.41
Total			4,951,249.46

(c) By an e-mail dated 30.07.2013 the said Shankar S. Iyer of Gammon India Ltd. sent an e-mail to Mr. Jaykumar stating that further to the meeting with Mr. Dubey at Mumbai and as instructed by Mr. Shailesh Shenoy - V.P., Internal Audit, you can release Rs. 30,00,000/- payment to Balaji Enterprise against their outstanding bills. However, the Corporate Debtor has made payment of Rs. 6,00,000/- on 06.11.2013 and another payment of Rs. 7,00,000/- on 26.12.2013.

(d) Since no further payment was forthcoming the Operational Creditor, on 29.11.2015, sent a legal notice demanding the outstanding amount of Rs. 36,51,249/- and security deposit of Rs.3,22,898/- together with interest @ 24% per annum from the actual date of due. Subsequently, the Operational Creditor received payments of Rs. 1,00,000/- on 26.04.2016 through bank, cash payment of Rs. 15,000/- on 22.06.2016 and another payment of Rs.75,000/- on 29.11.2016 through bank, from the Corporate Debtor. However, the full amount was not settled.

(e) The Operational Creditor on 05.01.2017 issued a notice to the Corporate Debtor referring the dispute arbitration u/s 21 of the Arbitration and Conciliation Act, 1996 stating that out of the work entrusted for the tentative value of Rs. 81,01,700/-, work to the extent of Rs. 53,76,488/- was completed, wherein the Corporate Debtor confirmed by e-mail dated 20.07.2013 a sum of Rs. 49,51,249/- as outstanding, a sum of Rs. 14,81,313/- was paid by the Corporate Debtor, after adjusting the payment with the outstanding due still a sum of Rs. 34,69,936/- is due and payable by the Corporate Debtor and as provided in the arbitration clause of the Work Order the dispute shall be referred to the sole Arbitration of an Officer of the Company nominated by the Managing Director of the Company and called upon the Corporate Debtor for

appointment of sole Arbitrator to be mutually agreed by the parties to adjudicate and resolve the dispute, failing which the Operational Creditor will have no other option except to approach the appropriate Court of Law seeking appointment of Arbitrator u/s 11(6) of the Arbitration and Conciliation Act, 1996. The Corporate Debtor by a letter dated 07.02.2017 requested the Operational Creditor to produce the signed copy of the Work Order, stated that they do not admit any claims or allegations made in the letter, and also stated that claims and counter-claims would be deemed as disputed and shall be subject to adjudication.

(f) Subsequently, the Operational Creditor on 16.03.2017, issued a demand notice u/s 8 of the IB Code demanding a sum of Rs. 65,80,536/- (inclusive of interest @ 18% from the date the amount fell due) enclosing the calculation amount due for the sub-contract work at Ennore and e-mails. The Corporate Debtor by a reply dated 23.03.2017 denied the liability, stated that the amount claimed has already been paid, the amount claimed are actually recoverable from the Operational Creditor, hence the claim amount is not correct and the account has to be necessarily reconciled.

4. It is to be noted that the Corporate Debtor has not produced any invoice raised for the work done. The Work Order reference No.: GIL/NTECL/MTOCUU/WO/8633/09-10/244 clearly provides that Operational Creditor will raise monthly bill for work completed during the month. Without any bill being raised, the Operational Creditor only relies on the email dated 20.7.2013, which states that the outstanding amount to the Operational Creditor is Rs.49,51,249.46 and the same is an internal email between the Corporate Debtor and its employer (NTPC Thermal Power Plant, Chennai) and the same email cannot be treated as a document for proof of debt, particularly when the contract provides for monthly raising of the bill then and there when the work is completed. The work order was issued on 27.3.2010 and provides that the sub contract work shall be completed within 12 months but it is not clear why invoices were not at all raised by the Operational Creditor. Further, the same email cannot be taken as an acknowledgement of debt since there is no direct acknowledgement of debt by the Corporate Debtor to the Operational Creditor. It is not the argument of the Operational Creditor that

monthly bills were raised in terms of work order, bills were regularly accounted and demand was raised. The contention of the Operational Creditor is that the tentative value of the work entrusted by the Corporate Debtor is Rs.81,01,700, quantified as executed is Rs.53,76,488 and the amount confirmed as outstanding in the internal email dated 20.7.2013 is Rs.49,51,250 and hence the Corporate Debtor is liable to pay the same. Further, there is no provision for any interest payment either in the work order or in the Letter of Intent but the Operational Creditor claimed interest @18% per annum and there is no disclosure about the basis on which 18% interest is claimed. Since the email document relied upon by the Operational Creditor cannot be treated as an acknowledgement of liability, the subsequent payments made upto 29.11.2016 by the Operational Creditor will not extend the period of limitation. Hence the debt is time barred.

5. In respect of the second claim i.e. hire charges for scaffolding materials, for the construction site at New India Hotel and Resort Project, Bangalore:

(a) The Operational Creditor says that by an agreement dated 15.5.2006 for supply of Unlock scaffolding materials entered into between the Operational Creditor and the Corporate Debtor, it was agreed that the Operational Creditor will supply certain scaffolding materials at specified rate strictly for 24 months from 15.05.2006 to 14.05.2008. Accordingly, the materials were supplied to the Corporate Debtor. Subsequently, on 20.01.2011 one Mr. P.P. Arasu, DGM-Projects, of the Corporate Debtor sent a letter as below:

"We wish to inform you that our Coordinator Mr. G.S. Prakash has confirmed that outstanding payment as on 30th August 2009 against hire charges of scaffolding pipes supplied by you - hired by our Bangalore site (New India Hotel) is cleared. Balance payment against hire charges of scaffolding pipes beyond August 2009 would be paid once we return all your scaffolding materials".

(b) On 28.10.2015 the old and used scaffolding materials were returned to the Operational Creditor by the Corporate Debtor. By a letter dated 30.11.2015 the Operational Creditor demanded a sum of Rs. 74,67,750/- towards hire charges for the period from September 2009 to October 2015 i.e. for 75 months @ 99,570/- p.m. For this demand there

was no reply from the Corporate Debtor. The Operational Creditor, on 05.01.2017, sent a letter to Corporate Debtor demanding a sum of Rs. 74,67,750/- with interest forthwith failing which, treat the failure as subsisting dispute and treat this notice as notice of reference to arbitration u/s 21 of the Arbitration and Conciliation Act, 1996 and requested for appointing a sole Arbitrator agreeable to the parties failing which the Operational Creditor will have no other option except to approach the appropriate Court of Law seeking appointment of Arbitrator u/s 11(6) of the Arbitration and Conciliation Act, 1996. The Corporate Debtor by a letter dated 07.02.2017 contested the allegation of the Operational Creditor that the agreement dated 15.05.2006 contains Arbitration Clause and requested the Operational Creditor to produce a copy of the agreement, averred that the agreement is valid for only 2 years whereas the claim pertains for period between years 2009 to 2015, the dispute arising after expiry of the agreement shall not be subject to terms and conditions of the agreement, a signed copy of the agreement is not enclosed, denied all the allegations in the notice and further stated that any claims or counter-claims would be deemed as disputed and shall be subject to adjudication.

(c) Subsequently, the Operational Creditor on 16.3.2017, issued a demand notice u/s 8 of the IB Code demanding a sum of Rs.93,72,026/- (inclusive of interest @ 18% from the date the amount fell due) enclosing the calculation amount due for hire charges of scaffolding materials. The Corporate Debtor by a reply dated 23.03.2017 denied the liability, disputed the claim amount of Rs.74,67,750/- and also stated that the claim is time barred since the contract is dated 15.5.2006 and the amount fell due in 2009 as mentioned in the Petition. It was further stated that the return of material in 2015 does not extend the limitation for recovery of amounts.

(d) It is to be noted that the Agreement dated 15.5.2006 provides that the period of contract is only for 24 months from 15.5.2006 to 14.5.2008. The letter of Corporate Debtor dated 20.1.2011 which states that the balance payment against hire charges beyond 2009 would be paid once the scaffolding materials are returned is a unilateral document and will not extend the validity of the Agreement dated 15.5.2006. It is not the case

of the Operational Creditor that there is an extension of Agreement dated 15.5.2006, raised invoices monthly/or at least yearly on the Corporate Debtor. The Operational Creditor is almost dormant from September 2009 to October, 2015, even though the monthly hire charges is Rs.99,570, never made any attempt to renew the contract dated 15.5.2006 which is the basis for the claim, relies on the letter of 20.1.2011 which cannot be treated as renewal of contract dated 15.5.2006, raises a bill on 30.11.2015 for Rs.74,67,750 basing on the Agreement/Work Order dated 15.5.2006 which expired on 14.5.2008 and on top of that claims interest @ 18% per annum. There is no interest provision even in the expired contract dated 15.5.2006. In view of the above discussion, the Operational Creditor failed to establish that there is a debt.

6. Admittedly the Operational Creditor has initiated Arbitration proceedings on 5.1.2017 by issuing notice to the Corporate Debtor for referring the dispute to Arbitration under Section 21 of the Arbitration and Conciliation Act, 1996. Hence it is abundantly clear that before the issue of Demand Notice under Section 8(2) the Operational Creditor initiated arbitration proceedings. The only contention of the Operational Creditor in respect of initiation of arbitration proceedings is that the Corporate Debtor as required under Section 8(2) of the Code has neither brought to the notice of the Operational Creditor the existence of pendency of any suit or arbitration proceedings filed nor repaid the debt. These Arbitration proceedings is not initiated by the Corporate Debtor but by the Operational Creditor. Hence the contention of the Operational Creditor defies the logic as if the Operational Creditor is unaware of the arbitration proceedings. Since arbitration proceedings already initiated is pending, the same will attract the provisions of Section 5(6) of the IB Code, which provides that:

"dispute" includes a suit or arbitration proceedings relating to-

- (a) The existence of the amount of debt;
- (b) The quality of goods or service; or
- (c) The breach of a representation or warranty;

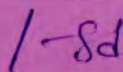
7. The Operational Creditor Counsel argued that initiation of arbitration proceedings cannot be taken as arbitration proceedings filed since neither

arbitrator was appointed nor any claim was filed before the Arbitrator. The Counsel for the Corporate Debtor cited many decisions in support of its claim that the arbitral proceedings in respect of a particular dispute commenced on the date on which a request for the dispute would be referred to arbitration is received by the Respondent. The following are the decisions:

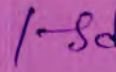
- (a) State of Goa Vs. Pravin Enterprises (2012) SCC 581 – to say that Section 21 of the Act provides that the arbitration proceedings shall be deemed to commence on the date on which a request for the dispute to be referred to arbitration is received by the Respondent.
- (b) Milkfood Ltd. Vs. GMC Icecream Pvt. Ltd. reported in 2004 (7) SCC 288 – wherein it was held that service of notice for appointment of an Arbitrator would be relevant date for the purpose of commencement of arbitration proceedings.
- (c) H. Candolker & Sons, Civil Engineer and Contractors Vs. Union of India through Secretary, Government of India, Ministry of Communication and Ors. reported in Manu/MH/1417/2009 wherein the Hon'ble Supreme Court has held that service of notice for appointment of an arbitrator would be relevant date for the purpose of commencement of Arbitration proceedings.

8. The Hon'ble National Company Law Appellate Tribunal in the matter of *Kirusa Software Pvt. Ltd. Vs. Mobilex Innovations Pvt Ltd.* held that the dispute in Insolvency and Bankruptcy must relate to specified nature in clause (a), (b) or (c) of sub-Section 6 of Section 5 of the Code. Accordingly, the case on hand herein squarely falls under section 5 (6) (a) of the Code in view of the dispute relating to the existence of debt.

9. In view of the above discussion, this Company Petition is dismissed with liberty to the Operational Creditor to proceed in accordance with law.



V. NALLASENAPATHY
Member (Technical)



B.S.V. PRAKASH KUMAR
Member (Judicial)