**BEFORE THE NATIONAL COMPANY LAW TRIBUNAL,**
**CHANDIGARH BENCH, CHANDIGARH.**

**CP (IB) No.11/Pb./2017.**
**RT No.CP(IB)12/Chd/Hry/2017.**
**Date of Order: 08.05.2017.**

**Coram: HON'BLE MR. JUSTICE R.P.NAGRATH, MEMBER (JUDICIAL).**
**HON'BLE MS. DEEPA KRISHAN, MEMBER (TECHNICAL).**

**In the matter of:**

Mr.HIMALAY DASSANI,

S/o Pannalal Lalchand Dassani,

Aged about 48 years,

R/o 416, Hubtown Solaris, N.S.Phadake Road,

Andheri (E), Mumbai – 400069.

.. .Petitioner/Operational Creditor.

Versus.

M/s ISOLUX CORSAN INDIA ENGINEERING

& CONSTRUCTION PVT. LTD.

CIN U74140HR2008PTC038089

A company registered under the provisions of the Companies Act, 1956 and having its registered office at 1st Floor, Splendor Towers, Golf Course Extension Road, Sector 65-Gurgaon, Haryana – 122018.

....Respondent/Corporate Debtor.

**Application by operational creditor to initiate corporate insolvency resolution process (in Form 5) under Section 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.**

Present: Mr.Pawan Sharma, Advocate for petitioner/operational creditor.
Mr.Akshay Bhan, Senior Advocate with Mr. Deepak Khurana, Advocate for respondent/corporate debtor.

**ORDER.**

**R.P.NAGRATH J. (MEMBER JUDICIAL)**

The instant petition has been filed by the operational creditor, seeking to set in motion the corporate insolvency resolution process as contemplated under Section 9 of the Insolvency and Bankruptcy Code, 2016 (for short to be referred here-in-after as the Code) read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (for brevity Rules) in relation to M/s M/s Isolux Corsan India Engineering & Construction Pvt. Ltd. (for short the Corporate Debtor). The registered office of the Corporate Debtor is situate at Gurgaon in the State of Haryana. The Corporate Debtor was incorporated on 25.06.2008. Copy of the Certificate of Incorporation with the Memorandum and Articles of Association is at **Annexure II-A**.

**FACTS.**

2. It is stated that the Corporate Debtor had availed the consultancy service of the petitioner/operational creditor in relation to awarding of a project for developing and executing the transmission system at Mainpuri and associated works on a build, own, operate and transfer

(BOOT) basis (Project) bids for which were invited by the **Uttar Pradesh Power Transmission Corporation Limited (UPPTCL)**. The Corporate Debtor entered into a Service Agreement dated 08.07.2010 (for brevity the Service Agreement) with the petitioner. Under the terms of clause 3 of the Service Agreement, the Corporate Debtor undertook to pay the applicant total amount of ₹84 crores towards consultancy for the services rendered along with all taxes such as service tax etc.to be paid over and above the said consultancy fee. Copy of the agreement is **Annexure II-C**. The project was awarded by UPPTCL to the Corporate Debtor on 05.07.2011. As per the terms of the agreement, the amount of operational debt was payable by the Corporate Debtor by the later of the following:

i) Within 120 days of the signing of the documents by the Isolux regarding the award of the Project; or

ii) The financial closure of the Project.

According to the applicant, there was a final financial closure of the project on 01.05.2014, which is said to be the date, on which the debt is said to have fallen due and the default committed by the Corporate Debtor.

3. The facts as highlighted further in the application in Form 5 are that on 15.03.2016, the Corporate Debtor had fraudulently induced the applicant to enter into a Final Settlement and Consultancy Agreement dated 15.03.2016 (Final Settlement Agreement) in order to fully and finally settle their claims and dues without any intention to honour its obligations. In terms of the Final Settlement Agreement, one M/s South East U.P.Power Transmission Company Limited ("SEUPPTCL") a subsidiary of the

respondent had undertaken to pay to the applicant, an amount of ₹38 crores along with direct and indirect taxes as full and final settlement of the amount for the services rendered by the applicant. However, neither the respondent nor SEUPPTCL made any payment to the applicant on the basis of the Final Settlement Agreement. The copy of Final Settlement Agreement dated 15.03.2016 is at Annexure II (D).

4. The applicant is said to have issued a demand notice dated 03.01.2017 in Form 3 as required by Section 8 of the Code read with Rule 5(1)(a) of the Rules to the Corporate Debtor. The total amount claimed is ₹96.60 crores detailed as the amount of ₹84 crores towards the services and ₹12,60,00,000/- towards Taxes. The computation chart in tabulated form is attached as Annexure 'A' with Form No.3. Earlier to that, the applicant had also issued legal notice dated 29.11.2016 through his Advocate and Solicitor. It is stated that the respondent-corporate debtor sent reply dated 06.01 2017 to the said legal notice.

5. This petition was filed before the National Company Law Tribunal, New Delhi. The jurisdiction in respect of the matters relating to State of Haryana having been transferred to the Chandigarh Bench, the Hon'ble Principal Bench has been pleased to transfer the case to this Bench The matter was listed before the Chandigarh Bench on 25.04.2017.

6. We have heard the learned counsel for the applicant-operational creditor and the learned senior counsel for the respondent-corporate debtor and have also perused the records with their able assistance.

7. The first and the foremost issue that needs to be discussed is whether the instant petition can be maintained, the petitioner having already taken recourse to the provisions of Section 9 of the Code against SEUPPTCL and filed a petition before the Allahabad Bench of NCLT? The answer has to be in negative.

8. Learned senior counsel for the respondent-corporate debtor during the course of arguments, handed over copy of the petition filed in Allahabad Bench of NCLT. The factum of filing of the said petition against SEUPPTCL by the applicant was not disputed by the learned applicants' counsel. That petition was filed on the basis of a demand notice dated 21.12.2016 in Form 3 of the Rules, reply to which was sent by SEUPPTCL on 03.01.2017. We are of the considered view that parallel proceedings on the version of a contradictory claim would not be maintainable. Before the Allahabad Bench, the amount in default is claimed to be ₹59,20,49,559/- by adding the other charges like direct and indirect taxes over the amount in default of ₹38 crores as agreed on the basis of the Final Settlement Agreement dated 15.03.2016. In the instant case, the amount of the debt for the same service provided by the applicant is stated to be ₹84 crores based on the agreement of the year 2010 with the total due to be more than ₹96 crores. The date of default in the instant application is stated to be 01.05.2014, whereas before the Allahabad Bench, the date of default against SEUPPTCL is 15.03.2016. From the above contradictory stand, it can be safely observed that there is a dispute so far as the respondent-corporate debtor is concerned, for which the present petition under Section 9 cannot be admitted.

9. The learned counsel for the petitioner-operational creditor vehemently contended that the case of the petitioner is covered under the definition of the terms 'claim' and 'default', as defined under the Code. Sub section 6 of Section 3 of the Code defines the term 'claim' as meaning:-

> (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"

10. The term 'default' is defined in Section 3 (12) of the Code, which reads as under:

> "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 repaid by the debtor or the corporate debtor, as the case may be."

It is contended for the petitioner that even non-payment of part of the debt or instalment of the amount would be covered within the requirement of the term "default", which entitles the petitioner for an order of admission.

11. Learned counsel for the petitioner further submits that the petitioner has come on the basis of the Service Agreement dated 08.07.2010 Annexure II-C and execution of this agreement is admitted in the Final Settlement Agreement dated 15.03.2016. The former is a bi-partite agreement and the later is tri-partite agreement. Final Settlement Agreement Annexure II-D is duly signed by all the three parties including the Corporate

Debtor wherein the respondent admitting the execution of the Service Agreement dated 08.07.2010. In this agreement, it is clearly stated that the project was completed as stipulated in the Service Agreement and that the final closure of the project has been achieved/completed. We find that the Final Settlement Agreement, stipulates clearly that the amount for the services is to the operational creditor is to be paid to the tune of ₹38 crores. The exact terms of Final Settlement Agreement Annexure II (D) are:-

> "SEUPPTCL shall make the payment of Settlement Amount to Mr.Dassani as under:
>
> (i) a sum of ₹2,00,00,000/- (Rupees Two Crore Only) on or before execution of these presents (the payment and receipt whereof Mr.Dassani doth hereby admit and acknowledge);
>
> (ii) balance amount of ₹36,00,00,000/- (Rupees Thirty Six Crore Only) ("Balance Payment") shall be paid in 12 (twelve) equal monthly instalments commencing from Trigger Date and in the manner set out in Schedule A hereunder written."

12. The learned counsel for the petitioner would further contend that though it is stipulated in the agreement that a sum of ₹2 crores was acknowledged by the petitioner, but in fact no such payment was made and the respondent has not placed on record any record relating to transfer of the said payment in favour of the petitioner. It is submitted that the petitioner agreed to the aforesaid term in order to settle the dispute so that the payment is made on time as stipulated. The terms having not been complied, the petitioner has a right to fall back upon the original Service Agreement entered with the respondent.

13. In view of the aforesaid, learned counsel for the petitioner submitted that the present is not a case, where a dispute can be said to have been raised as no Civil Suit or Arbitration proceedings are pending. Reliance is placed upon the judgment of Mumbai Bench of National Company Law Tribunal reported as **"M/s DF Deutsche Forfait AG and Anr. Vs. M/s Uttam Galva Steel Ltd.", CP No.45/I&BP/NCLT/MAH/2017, decided on 10.04.2017** and it was held as under:

> " *If we read the sections 5 (6), 8 and 9 together, we can visualize the consistency. When the word "dispute" means pendency of suit or arbitration, then "dispute in existence" in section 8 means suit or arbitration proceedings pending since before the receipt of notice under section 8, on this logic, the receipt of notice of dispute under section 9 (5)(ii)(d) will obviously become a notice of dispute reflecting pendency of suit or arbitration proceedings in respect to the debt claim since before receipt of notice under section 8 of the code. Then next point to be seen is as to whether this understanding is advancing the purpose and object of the Code or not. A provision has been envisaged for an Operation Creditor to initiate Insolvency Resolution Process. If section 8 mandate is understood by reading dispute as mere assertion and denial, then no Operational Creditor can file a petition once the Corporate Debtor sends a reply notice saying that he is denying the claim raised by the Operational Creditor. The outcome of such situation is the doors of IB Code will remain closed for ever to any Operational Creditor. It is quite natural as and when operational creditor sends notice, the Corporate Debtor, whether he is in a position to pay or not, unless colluded, will simply send a reply saying that it is disputing the claim raised by the operational creditor. This eventuality raises a dispute without any support of pending suit or arbitration proceedings,*

*which will become detrimental for enforcing the mandate of this Code. As we already said, one should not start looking at the IB proceedings as harsh. Here in this case, the Debtor company failed to pay for three years since now, after three years, it is saying that Operational Creditor cannot file this case as it remained silent from March 15, 2014. Can it be an argument to say that since the Operational Creditors did not initiate any proceedings until before filing this Insolvency Petition, they are not supposed to pursue the remedies available to them before the case is hit by limitation? It can't be like that. Therefore, this Bench has not found any reason in the argument of the Corporate Debtor Counsel."*

14. It would, however, be important to refer to the order of Hon'ble Principal Bench of NCLT in **CA No.(IB) 07/PB/2017** and **CA No. (IB)08/PB/2017**, titled **M/s One Coast Plaster Vs. M/s Amblence Private Limited** and **M/s Shivam Construction Company Vs. M/s Ambience Private Limited.** View of the facts of that case, raising of the issue about quality of the work in the reply to the notice under section 8 of the Code was considered a notice of dispute dis-entitling the applicant for an order of admission and therefore, the application was rejected.

15. Before discussing the above contention, it would be appropriate to refer to the definition of term "dispute" as defined in Section 5 (6) of the Code, which reads as under:

" 'dispute' includes a dispute 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;

The above definition is clearly inclusive and not exhaustive. The requirement of admitting the application under Section 9 of the Code is provided in sub-section 5 thereof, which is reproduced as under:

> "(5) The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), by an order-
>
> (i) admit the application and communicate such decision to the operational creditor and the corporate debtor if,-
>
> (a) the application made under sub-section (2) is complete;
>
> (b) there is no repayment of the unpaid operational debt;
>
> (c) the invoice or notice for payment to the corporate debtor has been delivered by the operational creditor;
>
> (d) no notice of dispute has been received by the operational creditor or there is no record of dispute in the information utility; and
>
> (d) there is no disciplinary proceeding pending against any resolution professional proposed under sub-section (4), fi any.
>
> (ii) reject the application and communicate such decision to the operational creditor and the corporate debtor, if-
>
> (a) the application made under sub-section (2) is incomplete;
>
> (b) there has been repayment of the unpaid operational debt;
>
> (c) the creditor has not delivered the invoice or notice for payment to the corporate debtor;
>
> (d) notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility; or
>
> (e) any disciplinary proceeding is pending against any proposed resolution professional:
>
> Provided that Adjudicating Authority, shall before rejecting an application under sub-clause (a) of clause (ii) give a notice to the applicant to rectify the defect in his application within seven days of the date of receipt of such notice from the Adjudicating Authority."

16. The petitioner has attached copy of reply dated 17.01.2017 sent by the respondent to the demand notice dated 03.01.2017. This is at page 26 of Annexure I (B). It is stated in the reply that the notice is contradictory to the previous notice dated 29.11.2016, wherein claim of ₹38 crores was made by the respondent, whereas now the claim is raised for ₹84 crores. It is stated that on the basis of Final Settlement Agreement, the respondent has obligation to pay. It is further alleged that the Final Settlement Agreement is void and *non est* on the ground of alleged fraud and misrepresentation. The respondent even stated in the reply that it signed the alleged Final Settlement Agreement as the petitioner exercised coercion, undue influence by threatening them to cause harm to the business of the respondent.

17. There was exchange of communication between the parties relating to the dispute even before the Final Settlement Agreement was entered. The respondent has sent reply dated 02.03.2016 (at page 45 of the paper book) in response to the notice dated 02.02.2016 sent by the petitioner. It would be relevant to refer to para nos.5 and 6 of the said reply, which reads as under:

> "5. Without prejudice to the above, it is stated that pursuant to the execution of said agreement, your Client did not provide the services as agreed to our Client and failed to discharge his obligations under the agreement. It is reiterated that it was our Client management and representatives, who took upon themselves and did the entire work relating to the Project including preparation and finalization of all documents and information to be submitted to UPPTCL in connection with the bidding for the Project following up with UPPTCL on the bidding process, ironing out the issues with UPPTCL, discussion,

finalization and execution of the Project Documents and achieving the financial closure and other milestone under the Project. Even when our Client sought services from your Client, when it was required, your Client failed to provide the same and at times your Client did not even respond to our Client's request. On account of your Client's defaults, lapses and non-performance, the finalization of the project got delayed causing huge financial loss to our Client. Your Client, instead of admitting his lapses are defaults, is adding salt to our Client's injury by making preposterous claims against our Client. Our Client reserves its right to claim damages from your Client.

6. In as much as your Client failed to fulfil the obligations undertaken by him under the agreement, no payment can be said to be due or payable by our Client. On the contrary, our Client is suffering hugely on account of your Client's non-performance, for which your Client is liable to compensate our Client. Our Client was awarded the Project on its own strength and hard work and your Client made no contribution and provided no aid or assistance as agreed to between your Client and our Client. Now when our Client is proceeding ahead with the implementation of the Project, your Client has sought to jump in the fray by making baseless and dishonest claims against our Client. Your Client's contention that our Client has not raised any complaint/grievance in relation to deficiency in alleged service performed by your Client is specious in nature and stated to be rejected. The question of making grievance would arise only if your Client had provided the services as agreed. Your Client virtually abandoned the agreement. However, our Client still reserves its right to claim damages from your Client in due course."

18. The learned counsel for the petitioner, however, submitted that the execution of the Service Agreement of 2010 is admitted and thereunder the payment having admittedly not been made, the petitioner has the remedy under

the Code for an order of admission, as it was the intention of the legislature to rule out the frivolous defence. It was further contended that if the plea of fraud and coercion is raised, that is a triable issue, which need not be discussed in the summary procedure prescribed under the Code.

19. We are, however, of the view that in view of the case set up by the petitioner, the petition is liable to be rejected. The petitioner himself has stated against column No.I of part IV of Form 5 at serial number (d) that the Corporate Debtor had fraudulently induced the applicant to enter into a Final Settlement and Consultancy Agreement dated 15.03.2016, without having intention to honour the obligation. If the petitioner himself has raised the issue of fraud and inducement and there is also a counter defence by the respondent with regard to the fraud and coercion, it would be the fittest case to categorically hold that there is a 'dispute' between the parties, which would disentitle the petitioner for an order of admission. It is pertinent to mention that the Final Settlement Agreement does not provide that in case SEUPPTCL fails to make the payment of ₹38 crores, the petitioner would be entitled to fall back upon the original agreement of the year 2010. That cannot be permissible, especially when the petitioner has already taken recourse to the proceedings under the Code against SEUPPTCL in Allahabad Bench of NCLT.

20. The learned senior counsel for the respondent has rightly referred to the term of the Final Settlement agreement dated 15.03.2016, which states that the parties now wish to enter into this Agreement by renegotiating the original sum payable to the petitioner as per clause 3 of the original agreement and have reached at an understanding to close the said service agreement to be replaced fully with this agreement If this is the term of the Final Settlement

Agreement, how could the petitioner file the insolvency resolution process against the respondent. It is stipulated that the amount agreed and understood between the parties shall be paid to the petitioner by SEUPPTCL agreeing further that the project stands completed.

21. Finding no merit in the instant petition, the same is rejected with costs of ₹50,000/-. Copy of this order be supplied to both the parties immediately.

(Deepa Krishan)
Member (Technical)

(Justice R.P.Nagrath)
Member (Judicial)

May 08, 2017.
Ashwani