



**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOCHI BENCH**

CP(IBC)/19/KOB/2023

*(Under Section 9 of the IBC, 2016 r/w Rule 6 of
IBBI(AAA) Rules, 2016)*

***In the matter of* Kerala State Electricity
Board Limited**

MEMO OF PARTIES:

**POULOSE NECHUPADAM CONSTRUCTIONS
PRIVATE LIMITED,**

6, Wheat Crofts Road, Nungambakkam
Chennai-600 034

... Petitioner/ Operational Creditor

-Vs-

**KERALA STATE ELECTRICITY BOARD LIMITED,
Vaidhyuthi Bhavanam, Pattom,
Thiruvananthapuram, 6950 04**

... Respondent/Corporate Debtor

Order delivered on: 05.12.2023

Coram:

Hon'ble Member (Judicial) : TMT. (Retd.) Justice T Krishna Valli

Hon'ble Member (Technical) : Shri. Shyam Babu Gautam

Appearances:

For the Petitioner : Mr. Mohan Pulickal, Advocate

For the Respondent : Mr. Riji Rajendran, Advocate



ORDER

Per Coram

1. This application has been filed under Section 9 of the Insolvency & Insolvency & Bankruptcy Code, 2016 (hereinafter referred to as IBC) read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 by Poulose Nechupadam Constructions Private Limited (CIN: U45201TN1990PTC019531) (hereinafter 'OC') for initiation of Corporate Insolvency Resolution Process against **Kerala State Electricity Board Limited**, the Corporate Debtor, (hereinafter 'CD') for alleged default in repayment of Operational Debt of ₹11,81,50,595/- (Rupees Eleven Crore Eighty One Lakh Fifty Thousand Five Hundred Ninety Five only), due and payable by the Corporate Debtor to the Operational Creditor.
2. Petitioner (OC) submit that the CD erstwhile known as Kerala State Electricity Board is a government of Kerala enterprise incorporated in 2011 has its registered office at Vaidhyuthi Bhavanam, Pattom, Thiruvananthapuram, 695004. The paid-up capital of the CD is Rs. 3499,05,00,000/-

Brief facts of the case are as follows: -
3. Silical Metallurgical Ltd, a company under liquidation under order of the High Court of Madras dated 11.12.2006, with its registered office at Coimbatore, Tamil Nadu, had entered into Annexure A4, agreement dated 30.12.1994 with the CD for execution of civil works at Bhoothathankettu Hydro Electric Project in Kerala during



years 1997-99. The petitioner was a sub-contractor of Silcal Metallurgical Ltd. who carried out civil works on behalf of Silcal Metallurgical Ltd in pursuance of Annexure A5, agreement dated 25.06.1997. It is stated that the CD owes a sum of Rs.11,81,50,895/- to Silcal Metallurgical Ltd. which in turn owes it to the petitioner as evidenced by Annexure A6, statement showing pending payments. It is stated that the petitioner staked its claim before the Official Liquidator (OL), Madras High Court which after considering the matter ordered the OL to adjudicate the claim vide Annexure A7 and A8, orders dated 11.11.2014 and 11.01.2017. The OL adjudicated the claim to tune of Rs.11,81,50,895/- against Silcal Metallurgical Ltd as evident from Annexure A9 notice of admission of proof of claim by OL. As the OL did not take step to recover the sum from CD, the petitioner moved before Madras High Court which vide Annexure A10 order dated 28.06.2019 permitted the petitioner to proceed against the CD to realise the debt due to the petitioner from Silcal Metallurgical Ltd. which was payable by CD to Silcal Metallurgical Ltd. The petitioner hence stands in shoes of 'Assignee' of the debt of Silcal Metallurgical Ltd. due from CD in terms of the order and hence present this petition for initiating CIRP against CD. It is stated that the petitioner called from CD for payment of the debt vide Annexure A11 letter dated 26.10.2019 but CD did not respond. Subsequently vide Annexure A12 demand notice dated 01.12.2022, the petitioner demanded payment of Rs.11,81,50,895/-. It is stated that demand notice was received by CD on 05.12.2022 but failed to raise any dispute.



4. The OC state that the CD is in operational debt to the OC exceeding Rs. 1 Crore and the registered office of CD is in Kerala. The date of default is on account of failure to respond to the letter dated 28.06.2019 pursuant to order of Madras High Court. It is stated that the petition is within limitation as per order of Hon'ble Supreme Court in suo moto WPC No.3/2020 dated 10.01.2022. The petitioner has produced Annexure A14 NeSL Certificate in terms of regulation 21 and audited Financial Statements of petitioner for FY 209-20, 2020-21 and 2021-22. The OC has filed the following as evidence of debt: -
- (i) Order dated 28.06.209 of Madras High court in CA Nos. 609&610 of 2018 in CP No. 141/1999.
 - (ii) Record of default issued by NESL
 - (iii) Agreement dated 30.12.1994 between KSB and Silcal Metallurgical Ltd.
 - (iv) Agreemnetn dated 25.06.1997 between Silcal Metallurguical Ltd and Petitioner.
 - (v) Notice of admission of proof of claim by OL dated 01.09.2017
 - (vi) Letter dated 28.06.2019 to Chairman KSEB from petitioner
 - (vii) Demand Notice in Form 3 dated 01.12.2022
5. CD in its reply state that it is a profit-making PSU of Government of Kerala incorporated under Companies Act, 1956 on 14.01.2011 which generates, transmits and distributes electricity in the state of



Kerala and has unparalleled track record. As per Kerala state power policy in 1989 to engage private agency for power generation, KSEB vide order dated 22.08.1992 allotted the Bhoothankettu Hydro Electric Project to Silcal Metallurgic Ltd. (hereinafter 'Silcal') for the generation of power resulting in Annexure A4 agreement dated 30.12.1994. Silcal had to engineer, procure and construct, operate and maintain the whole Project at their own cost and was to hand over the Project after a predetermined period of 30 years from the date of commissioning of the Project during which, the energy generated will be metered on feeding into the KSEBL grid and this quantum of energy, after reducing 12% towards wheeling charge and transmission and distribution losses will be delivered free of cost to the company at the Extra High Tension terminal at the point of supply in their installation. As per A4 agreement the date of commissioning was to be on 31.03.1999 but due to inordinate delay the government of Kerala terminated the Annexure A4 agreement with Silcal on 08.09.2010 vide Annexure B1 letter. It is stated that Silcal had arrears with CD for energy charges and penalty therein as per Annexure A4 agreement and that CD filed claim which was to be adjudicated by the OL pursuant to order dated 02.06.2014 of High court of Madras. It is further stated that the application filed before High court of Madras praying for assessment of civil works done by petitioner in the project was dismissed and OL was directed to consider the claim of petitioner in normal course. OL further sought vide Annexure B2 letter dated 12.11.2014 details of payment made by CD to Silcal and to conduct an independent



assessment of works done at project site. The CD replied to the query vide Annexure B3 letter dated 03.12.2014 stating that no considerable work is done by Silcal and need for independent assessment does not arise as no privity of contract exist between petitioner and CD. It was reiterated in Annexure B4 letter dated 25.06.2015 that as per clause 5 of Annexure A4 agreement CD does not intend to pursue the work carried out by Silcal and consequently no claim for compensation will lie.

6. CD state that the Petitioner is a contractor engaged by Silcal for some construction in the Project and the engagement of the Petitioner by the Silcal as well as the impugned claim was not within the knowledge of the KSEBL or under the purview of Annexure A4 agreement. It is stated that A11 letter and A12 demand notice pursuant to Annexure A10 judgement cannot be valid as there exist no contractual relationship between petitioner and CD. It is stated that petitioner is not an operational creditor as it has not provided any service or goods as per section 5(21) of IBC directly or indirectly to CD. Annexure A5 agreement for any civil work made through petitioner by Silcal was solely under their discretion and as per Annexure A4 agreement CD has no involvement in same. CD relies on **Mr. Harrish Khurana Vs. M/s One World Realtech Pvt. Ltd Com, Company Appeal (AT) (Ins.) No. 1100 of 2019** that an operational debt includes only those debts arising from contract in relation to supply of goods or service from CD. It is also stated that as per Annexure A10 order the petitioner only receive a permission to realise any debt owed by CD



to Silcal as a legal measure but does not get a status as operational creditor.

7. Moreover, the CD state that a counter claim is pending before the Madras High court and CD is not made a party in Annexure A10 order. It is stated that until Annexure B2 letter dated 12.11.2014 was received by CD, they were unaware of contract of Silcal with petitioner. CD however admit that no reply to Annexure A11 and A12 is made. The CD relies on **Brandy Realty Services Ltd v. Sir John Bakeries India (P) Ltd, 2022 SCC OnLine NCLAT 290** and **Greymatter Entertainment (P) Ltd v. Pro Spotify (P) Ltd, 2023 SCC OnLine NCLAT 82** to state that a reply to section 8 notice does not preclude the CD's right to bring fact of preexisting dispute between parties.
8. The petitioner in his rejoinder state that the CD was aware of petitioner's engagement by Silcal which is evident from Annexure A19 and A20, Note dated 21.05.2009 and 27.10.2010 submitted before Member (Generation), KSEB by Chief Engineer- C(I&P). It is stated that Member (Generation), KSEB vide Annexure A21 letter dated 26.10.2010 advised petitioner to approach OL. It is stated that Annexure B1 letter of termination dated 08.09.2010 to Silcal is not valid as Silcal was put to liquidation on 11.12.2006 and this fact was known to CD as per Annexure A22 Note to Member (Generation), KSEB by Legal Advisor & DE officer. It is further stated that the cost of civil works done by petitioner at project site relate to 'services' rendered to CD on behalf of Silcal. The CD was



bound by clause 5 of Annexure A4 agreement to pay for cost of equipment and works taken over to Silcal. The CD had also taken measurement of civil works carried out by petitioner which is evident from Annexure A23 reply to RTI request of petitioner. It is further contended that CD was a party before High Court of Madras in another application in the matter and had not raised a dispute to claim of petitioner. It is also stated that no claim of CD is adjudicated by OL and no dispute has been raised before High Court of Madras by CD against the claim of petitioner against the Annexure A10 order.

9. Heard arguments and perused documents on record. The point for consideration is:
 - I. Can the petitioner be considered as a 'Operational Creditor'?
 - II. Is there pre-existing dispute between the parties?
10. From the definition of section 5(20) it is clear that a person to whom an operational debt is owed to including a legal assignee or a transferee of such operational debt is an operational creditor. Section 5(21) defines the word 'operational debt' which is a claim in respect of a provision of goods or services including employment dues or dues under any law in force payable to government. Here the petitioner claims to be 'operational creditor' on basis of Annexure A10 order of Hon'ble Madras High Court. The operational part of the order is as follows: -



“In such view of the matter, the petitioner is permitted to take appropriate legal action to realize the money due from KSEB to the company in liquidation. These petitions are Ordered accordingly”.

Vide the supra order, the Hon’ble Madras High court has acknowledged the ‘debt’ of the petitioner which is in turn out of ‘provision of goods and services’ by the petitioner to CD through Silcal. Hence there exists an ‘operational debt’. However, in order for the petitioner to stand in shoes of ‘operational creditor’ he should be owed the amount either directly or through an assignment or a transfer. As such there is no privity of contract between the petitioner and CD, so the only question arising is whether the Annexure A10 order constitute an ‘assignment of debt’. The word ‘assignment’ is not defined in IBC hence we derive meaning as used under the laws governing Contracts, which lays that ‘assignment’ of an actionable claim should be through execution of an instrument in writing with an intend to assign the debt or actionable claim and after duly obtaining the consent of the parties, i.e., the debtor and the creditor. In this case, it is noticed that the CD is not a party to the proceedings culminated in Annexure A10 order and no contention for the assignment of a debt is seen as per the Annexure A4 or A5 agreements. It is understood that Annexure A10 order only grants the petitioner a ‘permission’ to realise the money due from the CD following appropriate legal action and does not imply an ‘assignment’ of any debt which prerequisites consent of the other side. ‘Assignment of debt’ creates a right to the assignee on the debt whereas



‘permission’ to sue for realisation of debt from CD is not a right on debt. The outcome of such a suit or proceeding is contingent. Hence the intent of the order could not have been to ‘assign’ the debt but to merely give an equitable relief or remedy to the petitioner considering the circumstances. The Annexure A10 order is also not a ‘decree debt’. Hence the point is answered against the petitioner.

11. It is evident from the records that the claim of the petitioner towards CD arises from Annexure A4 and A5 agreements and out an Annexure A10 order. The CD state that it had terminated the agreement with Silcal vide Annexure B1 on 08.09.2010 and further state that a counter claim is pending before Hon’ble Madras High court pertaining to the debt of Silcal. Even though the CD has not replied to the section 8 demand notice by petitioner, it does not create a prerogative to the petitioner. In the situation as held by **Apex court in Mobilox Innovations 2018 (1) SCC 353**, the defence/dispute raised by the respondent is plausible contention requiring further investigation which is not a patently feeble legal argument or an assertion of facts unsupported by evidence. The defence is not spurious, mere bluster, plainly frivolous or vexatious. A dispute does truly exist in fact between the parties, which may or may not ultimately succeed. In fine it is answered to the point framed that pre-existing dispute prevails between the parties.
12. It is also noted by this Tribunal that the IBC is not a recovery mechanism to be at disposal of anyone who holds a claim above the



threshold limit and coming within the limitation. Here though petitioner vide Annexure A10 gets permission to pursue legal action for recovery of sum of money from CD, there exist viable alternate remedy through commercial suit. The claim is not as such at issue here but the nature of its admissibility under the scheme of IBC.

13. In the result, the petition is **DISMISSED**.
14. The Registry is hereby directed to send e-mail copies of the order forthwith to all the parties and their counsel for information and for taking necessary steps.
15. Let the certified copy of the order be issued upon compliance with requisite formalities.
16. File be consigned to records.

SHYAM BABU
GAUTAM

Digitally signed by SHYAM
BABU GAUTAM
Date: 2023.12.05 15:11:33
+05'30'

SHYAM BABU GAUTAM
(MEMBER TECHNICAL)

T.KRISHNAV
ALLI

Digitally signed by
T.KRISHNAVALLI
Date: 2023.12.05
15:11:14 +05'30'

T KRISHNA VALLI
(MEMBER JUDICIAL)

Signed on this, the 5th day of December, 2023.

Rohit/LRA