NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 582 of 2018

[Arising out of Order dated 26th July, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench in Company Petition No. CP(IB)-20(MB)/2018]

IN THE MATTER OF:

Overseas Infrastructure Alliance (India) Pvt. Ltd.
Registered address at 501-502,
OIA House, 470, Cardinal Gracious Road,
Andheri East, Mumbai – 400 099.

...Appellant

Vs

Kay Bouvet Engineering Ltd.
Having it's Registered office at:
BG7/8 Phase 1, Mayfair Eleganza,
NIBM Road, KondhwaKhurd,
Pune-411048, Maharashtra.

....Respondent

Present:

For Appellant: Mr. Amir Arsiwala, Advocate.

For Respondent: Mr. Ajay K. Jain and Mr. Atanu Mukherjee, Advocates.

J U D G M E N T

BANSI LAL BHAT, J.

This appeal has been preferred by 'M/s Overseas Infrastructure Alliance (India) Pvt. Ltd.', claiming to be an 'Operational Creditor' against the order dated 26th July, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench in Company Petition No. CP(IB)-20(MB)/2018, by virtue whereof petition filed by the Appellant under Section

9 of 'The Insolvency and Bankruptcy Code, 2016' (hereinafter referred to as 'I&B Code') against Respondent - 'M/s Kay Bouvet Engineering Ltd.' for initiation of 'Corporate Insolvency Resolution Process' has been dismissed on the ground that there was existence of a dispute between the two parties as the Appellant was contesting a specific performance civil suit on one hand and on the other hand pressing for commencement of insolvency proceedings in respect of an amount which is the subject matter in both the proceedings. The Appellant has, through the medium of instant appeal, assailed the impugned order on various grounds set out in the memo of appeal.

2. The factual matrix of the case lies within a narrow compass. Appellant was awarded an EPC Contract by one Mashkour Sugar Mills, Sudan (hereinafter referred to as 'Mashkour') for an amount of US$.149975000 for commissioning of a sugar plant at its site at White Nile State, Sudan with capacity of crushing 8750 tons of sugarcane per day which included all activities right from designing to commissioning. The said project was proposed to be financed under the Government of India's line of credit being operated through Export-Import Bank of India (EXIM Bank). Respondent was selected as sub-contractor for the said project through competitive bidding. A Tripartite Agreement dated 18th December, 2010 came to be executed between Mashkour, the Appellant and the Respondent in this regard. In terms of the agreement Mashkour and the Appellant agreed to sub-contract the whole of the work as defined in a

Bilateral Contract between Mashkour and the Appellant. Mashkour accepted the bid of Respondent sub-contractor for all works relating to commissioning of the sugar plant right from the stage of its designing till installation and commissioning and the Respondent agreed to execute the work for a consideration of US$.106.200 million. The Appellant claimed to have paid 10% of the contract value to the Respondent as advance payment. As the project was decided to be financed by EXIM Bank in two tranches of US$.25 million and US$.124.975 million, two separate tranche based contracts were signed between the Mashkour and the Appellant respectively on 14th April, 2010 and 9th February, 2014. Appellant paid an advance amount of Rs.47,12,10,000 being equivalent value of US$.10.62 million (10% of the contract value) to the Respondent through Demand Draft dated 30th August, 2011 towards performance of its obligations under the said contract as the Respondent was unable to provide Advance Bank Guarantee in US Dollars in terms of the agreement.

3. The case set up by the Appellant before the Adjudicating Authority was that the first tranche contract between Mashkour and the Appellant was almost completed without involvement of Respondent. However, since the EXIM Bank did not release the payment under second tranche agreement dated 9th February, 2014 executed between Mashkour and the Appellant, Mashkour terminated the contract vide its letter dated 15th June, 2017 citing unwillingness of Government of India and EXIM Bank to support the project with the Appellant as an EPC Contractor. This

prompted the Appellant to file suit no. 382 of 2017 before the Hon'ble High Court of Bombay praying for certain reliefs mentioned therein. In view of Mashkour appointing the Respondent as its EPC contractor for the said project in terms of EPC contract dated 5th July, 2017, the earlier Tripartite Agreement dated 18th April, 2010 became invalid and incapable of being performed. The Appellant, in view of the aforesaid development, demanded refund of the advance amount as in terms of the fresh contract Respondent instead of the Appellant had been appointed as EPC Contractor for Mashkour. In its reply to the demand notice issued by the Appellant, the Respondent alleged existence of dispute with respect to the Operational Debt. This was contested by the Appellant as being spurious. Appellant claimed that subject matter of the suit was completely different from the subject matter of the petition under Section 9 of the I&B Code and pendency of the suit in no manner operated as a bar against the Appellant to claim payments from Respondent qua the Operational Debt.

4. The Adjudicating Authority found that the Appellants suit for specific performance and initiation of Corporate Insolvency Proceedings at his instance could not run side by side. The Adjudicating Authority, while interpreting the terms of Tripartite Agreement observed as under:-

> *"7.1. On elaborate analysis of the background of the case in the light of the Agreements/Tri-partite Agreements executed it emerges that there was an Agreement for*

Engineering, Procurement and Construction (EPC) to be executed under the instructions of Mashkour (in the Agreement referred as "The Employer"). EPC Contractor is made responsible for all the activities. On completion of the project had over the same to the Employer. A contracting party who is actually performing all these jobs as assigned for execution is, therefore, responsible for completion of the Agreement. Arrangement of the Funds or disbursement of Fund on behalf of another party do not change the intention of such Agreement. Arrangement of the Funds or disbursement of Fund on behalf of another party do not change the intention of such Agreement hence due to this reason such person cannot step into the shoes of the Contractor who is responsible for completion of EPC contract."

5. Having made the aforesaid observations which are self contradictory, if not absurd, the Adjudicating Authority proceeded to dismiss the petition holding that there was an existence of a dispute prior to filing of the petition. The finding has been assailed by the Appellant on the ground that the factum of receipt of Rs.47,12,10,000/- as 'Operational Debt' stands admitted by the Respondent and the suit filed by the Appellant is on the basis of a Bilateral Agreement dated 27th March, 2014 executed between the EXIM Bank and the Appellant wherein the Respondent figures as Defendant

No. 3 with no substantial relief claimed against it. It is the further case of Appellant that the liability to pay the 'Operational Debt' by the Respondent to the Appellant arose on or around 5th July, 2017 which was after the filing of the suit. Hence, the impugned order was liable to be set aside.

6. Learned counsel for the Appellant would submit that in terms of the Tripartite Agreement the Appellant and Mashkour jointly appointed the Respondent as sub-contractor to complete the works specified in the Tripartite Agreement. The total consideration to be paid to the Respondent for the work to be undertaken was US$.106.2 million and it was in furtherance of such Tripartite Agreement that the Appellant advanced an equivalent value of US$.10.62 million in Indian currency and since Mashkour terminated the bilateral EPC contract with the Appellant on **15th June, 2017**, the Tripartite Agreement itself stood terminated in terms of its clause no.15.2, due to which the advance amount of US$.10.62 million became due and payable by the Respondent to the Appellant. Learned counsel for Appellant would further submit that the debt owed to the Appellant by the Respondent falls under the definition of 'Operational Debt'. He further submits that the suit filed by the Appellant cannot be considered as proof of existence of dispute between the parties as it relates to a distinct transaction which is neither the subject matter of demand notice issued by the Appellant under Section 8(1) of I&B Code nor the petition filed by it under Section 9 of the said code.

7. Per contra it is contended by learned counsel for Respondent that the Appellant is not an Operational Creditor of the Respondent as there is no existence of Operational Debt. Learned counsel would further submit that the Appellant has neither provided any goods nor services to the Respondent so as to raise a claim against the Respondent as an 'Operational Creditor'. It is further contended that no amount is due and payable to the Appellant under the Tripartite Agreement as in terms of the said agreement commissioning of the sugar plant was to be executed by the Respondent which was funded by EXIM Bank and the Respondent has received interest free advance of US$.10.62 millions equivalent to Rs.47.12 crores from EXIM Bank on instructions from Mashkour. It is further contended that no amount is due and payable to the Appellant under the Memorandum of Understanding dated 18th December, 2010 executed between Mashkour, Appellant and the Respondent, which supersedes the Tripartite Agreement. It is further submitted by learned counsel for the Respondent that the suit filed by the Appellant before the Hon'ble High Court of Bombay shows existence of dispute in relation to contracts dated 11th October, 2009, 14th April, 2010 and 9th February, 2014 executed in relation to Mashkour sugar project. Therefore, the Appellant was not entitled to raise the same dispute under the garb of petition under Section 9 of I&B Code. The suit filed by Appellant on 22nd June, 2017 was prior in point of time as the demand notice under Section 8(1) of I&B Code was issued by the Appellant on 23rd November, 2017. Further pleas have been raised in the written submissions

regarding the jurisdiction of this Appellate Tribunal and the issue of limitation though the same were not pressed during oral hearing.

8. Heard learned counsel for the parties and considered their submissions in the light of material on record. The first and foremost question for consideration is whether the transaction in question is an 'Operational Debt' and the Appellant qualifies as an 'Operational Creditor'. Under Section 3(11) of the I&B Code 'debt' means a liability or obligation n respect of a claim which is due from any person. It includes an 'Operational Debt' which is defined under Section 5 (21) of the I&B Code as follows:

> *"**5(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;"*

Section 5(20) of the I&B Code defines 'Operational Creditor' as under:-

> *"**5(20)** "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;"*

On plain reading of the aforesaid definitions, it comes to fore that the person seeking triggering of Corporate Insolvency Resolution Process under Section 9 of I&B Code must be a person to whom 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 and payable to the Central Government, State Government or local authority is owed. Whether, in a given case, the claim is in respect of the provision of goods or services has to be ascertained from the agreement governing contractual relation between such person and the Corporate Debtor in regard to a transaction which may have been executed under the agreement. Thus, reference to the Tripartite Agreement executed inter-se 'Mashkour', Appellant and the Respondent becomes inevitable. A bare look at the aforesaid Tripartite Agreement dated 18th December, 2010 would reveal that the Appellant, who was appointed as EPC Contractor by 'Mashkour' in terms of agreement dated 11th October, 2009, and 'Mashkour' jointly appointed Respondent as sub-contractor to complete the works specified in the Tripartite Agreement against total consideration of US$.106.2 Million. It was in adherence to the aforesaid Tripartite Agreement that the Appellant made an advance payment of US$.10.62 Million in Indian currency to Respondent. This represented 10% of the sub-contract price as reflected in sub-clause 14.1 of the Tripartite Agreement. Subsequently on 15th June, 2017, 'Mashkour' terminated the EPC Contract dated 11th October, 2009 with the Appellant. Such an

eventuality was contemplated in Tripartite Agreement in sub-clause 15.2 which provided in unambiguous terms that:

> *"xxx… In the event of the Mashkour –OIA contract between the employer and the EPC contractor is terminated, this sub-contract agreement shall be deemed to be terminated and any compensation required to be paid for the same will be paid in proportion upon receipt of such amounts from the employer."*

Thus, the termination of EPC contract with the Appellant by 'Mashkour' had the consequential effect of termination of the Tripartite Agreement executed inter-se 'Mashkour', Appellant and the Respondent, which rendered the Respondent liable to refund the advance amount of US$.10.62 Million to the Appellant which had become due and payable. It emerges from the Tripartite Agreement that the Respondent was engaged as sub-contractor for design, engineering, supply, installation, erection, testing and completion of factory plant for 'Mashkour Sugar Co. Ltd.' in Sudan while Appellant was made responsible for all activities relating to engineering, procurement and construction as EPC contractor and required to handover the project to 'Mashkour' upon its completion. The responsibility for completion of the project lay on the shoulders of the Appellant. The works were to be completed within thirty months from the time the contract became effective. Viewed thus it is manifestly clear that the Appellant, who jointly with 'Mashkour' engaged the Respondent as sub-contractor for

execution of the works specified in Tripartite Agreement was to render services to 'Mashkour' while the Respondent in his capacity as sub-contractor was required to render services to Appellant as also 'Mashkour' in terms of the Tripartite Agreement. Having glanced through the terms of Tripartite Agreement, we have no doubt in mind that the same made provision for rendering of services in the nature of execution of works related to construction, installation and commissioning of the 'Sugar Plant' with clear stipulation for supply of goods including equipment towards execution of work. It is expressly stipulated in the Tripartite Agreement that the Appellant has paid 10% of the contract value to the sub-contractor (Respondent) as advance payment. Therefore, there should be no difficulty in holding that the Tripartite Agreement provided for supply for goods and rendering of services and the Appellants claim was in respect of such provision of goods and services. Viewed in this perspective, it can be stated without any hesitation that the Appellant having advanced 10% of the contract value to Respondent – sub-contractor as advance payment had a claim in respect of provision of goods or services bringing him within the definition of 'Operational Creditor', to whom an 'Operational Debt' was owed by the Respondent – 'Corporate Debtor'. The plea raised by the Respondent that he had received the advance money from EXIM Bank on the instructions of 'Mashkour' cannot be said to be supported by record as such Advance money was admittedly paid under the Tripartite Agreement dated 18th December, 2010 well before the Tripartite Agreement got superseded.

The Adjudicating Authority declined to address this issue on the ground that the matter was sub-judice before the Hon'ble High Court ignoring its own observation that the suit filed by the Appellant sought the relief of specific performance of contract. The reluctance on the part of Adjudicating Authority to address the issue whether non-refund of the amount paid by the Appellant to Respondent, as advance amount, in terms of the Tripartite Agreement gave rise to a claim in respect of provisions of goods and services cannot be appreciated as the nature of relief claimed in the suit was distinct and same could not operate as bar for seeking remedy in the nature of triggering of Corporate Insolvency Resolution Process within the ambit of I&B Code. Admittedly, the issue whether the debt in question qualifies as an 'Operational Debt' and the Appellant was covered by definition of 'Operational Creditor' was not sub-judice before the Hon'ble High Court. It further emerges from record that in the Civil Suit filed before the Hon'ble High Court, EXIM Bank figures as Defendant No. 1 against whom inter-alia, declaration in regard to specific performance of agreement dated 27th March, 2014 has been sought as the primary relief while no primary relief is sought against the Respondent who figures as Defendant No. 3 in the Suit. Whether pendency of the aforesaid Suit on the date of filing of petition under Section 9 of I&B Code would amount to existence of a dispute operating as bar to initiation of Corporate Insolvency Resolution Process has to be examined in the light of observations of the Hon'ble Apex Court in "***Innoventive***

***Industries Ltd. v. ICICI Bank*, (2018) 1 SCC 407**". Para 28 and 29 of the aforesaid judgment are reproduced hereunder:

> *"**28.** When it comes to a financial creditor triggering the process, Section 7 becomes relevant. Under the Explanation to Section 7(1), a default is in respect of a financial debt owed to any financial creditor of the corporate debtor — it need not be a debt owed to the applicant financial creditor. Under Section 7(2), an application is to be made under sub-section (1) in such form and manner as is prescribed, which takes us to the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. Under Rule 4, the application is made by a financial creditor in Form 1 accompanied by documents and records required therein. Form 1 is a detailed form in 5 parts, which requires particulars of the applicant in Part I, particulars of the corporate debtor in Part II, particulars of the proposed interim resolution professional in Part III, particulars of the financial debt in Part IV and documents, records and evidence of default in Part V. Under Rule 4(3), the applicant is to dispatch a copy of the application filed with the adjudicating authority by registered post or speed post to the registered office of the corporate debtor. The speed, within which the adjudicating*

authority is to ascertain the existence of a default from the records of the information utility or on the basis of evidence furnished by the financial creditor, is important. This it must do within 14 days of the receipt of the application. It is at the stage of Section 7(5), where the adjudicating authority is to be satisfied that a default has occurred, that the corporate debtor is entitled to point out that a default has not occurred in the sense that the "debt", which may also include a disputed claim, is not due. A debt may not be due if it is not payable in law or in fact. The moment the adjudicating authority is satisfied that a default has occurred, the application must be admitted unless it is incomplete, in which case it may give notice to the applicant to rectify the defect within 7 days of receipt of a notice from the adjudicating authority. Under sub-section (7), the adjudicating authority shall then communicate the order passed to the financial creditor and corporate debtor within 7 days of admission or rejection of such application, as the case may be.

29. *The scheme of Section 7 stands in contrast with the scheme under Section 8 where an operational creditor is, on the occurrence of a default, to first deliver a demand*

notice of the unpaid debt to the operational debtor in the manner provided in Section 8(1) of the Code. Under Section 8(2), the corporate debtor can, within a period of 10 days of receipt of the demand notice or copy of the invoice mentioned in sub-section (1), bring to the notice of the operational creditor the existence of a dispute or the record of the pendency of a suit or arbitration proceedings, which is pre-existing—i.e. before such notice or invoice was received by the corporate debtor. The moment there is existence of such a dispute, the operational creditor gets out of the clutches of the Code."

The dictum of law is loud and clear that when the Operational Creditor delivers the demand notice of the unpaid debt to the Corporate Debtor in prescribed manner, the Corporate Debtor can bring to the notice of the Operational Creditor, within ten days of receipt of demand notice, the existence of a pre-existing dispute or pendency of a suit or arbitration proceeding. Existence of dispute contemplated under this provision is in regard to a pre-existing dispute. The Hon'ble Apex Court, while dealing with the expression 'existence of a dispute' as contemplated under Section 8(2)(a) of the I&B Code in ***"Mobilox Innovations (P) Ltd. v. Kirusa Software (P) Ltd.,*** (2018) 1 SCC 353", held as under:-

51. *It is clear, therefore, that once the operational creditor has filed an application, which is otherwise complete, the adjudicating authority must reject the application under Section 9(5)(2)(d) if notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility. It is clear that such notice must bring to the notice of the operational creditor the "existence" of a dispute or the fact that a suit or arbitration proceeding relating to a dispute is pending between the parties. Therefore, all that the adjudicating authority is to see at this stage is whether there is a plausible contention which requires further investigation and that the "dispute" is not a patently feeble legal argument or an assertion of fact unsupported by evidence. It is important to separate the grain from the chaff and to reject a spurious defence which is mere bluster. However, in doing so, the Court does not need to be satisfied that the defence is likely to succeed. The Court does not at this stage examine the merits of the dispute except to the extent indicated above. So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application."*

On perusal of record, we find that the Appellant – Operational Creditor has in his demand notice dated 23rd November, 2017 at page 253 of the paper book specifically stated that the Respondent-Corporate Debtor has replaced Appellant as EPC Contractor for the project in terms of EPC contract dated 5th July, 2017 and thereby the Tripartite Agreement dated 18th April, 2010 stands superseded and in view of the same Respondent, being unable to perform under the Tripartite Agreement was liable to refund the advance amount of Rs.47,12,10,000/- being equivalent of US$.10.62 Million. Responding thereto the Respondent, while admitting that it had received equivalent of US$.10.62 Million as advance money, claimed that it had received the advance money on behalf of 'Mashkour' in terms of the Tripartite Agreement, which stood terminated as 'Mashkour' had entered into fresh contract with the Respondent. Respondent further stated that it was under no legal or contractual obligation to refund the advance money to the Appellant. The Respondent raised the dispute by denying the status of Appellant as 'Operational Creditor' and further stated that the Appellant had filed suit seeking release of amount of US$10745000. It has been noted elsewhere in this judgment that the suit filed by the Appellant primarily sought a declaration with relief of specific performance based on the contract which stood terminated/ superseded after Mashkour executed fresh contract with the Respondent eliminating the Appellant from the project. No primary or substantial relief was sought against the Respondent. It is also relevant to notice that the Hon'ble High Court of Bombay declined the interim relief on

the ground that the original contract for which the line of credit was to be made available by the EXIM Bank, no more subsisted and no effective final relief prima facie could be granted in the suit for specific performance of the contract. In view of this finding of the Hon'ble High Court recorded on 27th June, 2017, which is exactly six months before the filing of Section 9 petition and having regard for the fact that no substantive relief in the nature of declaration or specific performance of contract was sought against the Respondent in the lis filed at the instance of Appellant (who was virtually non-suited by the Hon'ble High Court), it can be said without hesitation that the dispute raised in regard to existence of dispute was a spurious defence not supported by evidence. Given the frame of the suit and the nature of relief claimed therein coupled with the fact that no relief with regard to the subject matter of petition under Section 9 of I&B Code was claimed therein against the Respondent, we are of the considered view that the contention raised by the Respondent does not require further investigation and the dispute raised in reply to the demand notice is a mere bluster.

9. For the foregoing reasons, the impugned order passed by the Adjudicating Authority on 26th July, 2018 cannot be supported. The impugned order suffers from grave legal infirmity. The Adjudicating Authority seriously erred in declining to recognize Appellant as an 'Operational Creditor' and in arriving at the conclusion that there was an existence of dispute prior to filing of the petition. Having regard to the

findings recorded hereinabove the impugned order cannot be sustained and the same is set aside. The appeal is allowed. The matter is remitted back to the Adjudicating Authority to admit the petition filed by the Appellant under Section 9 of the I&B Code after giving limited notice to the Respondent – Corporate Debtor so as to enable it to settle the claim before its admission. It shall not be open to the Adjudicating Authority to consider the issues considered and settled in this appeal. The appeal is accordingly allowed. There shall be no orders as to costs.

[Justice S. J. Mukhopadhaya]
Chairperson

[Justice Bansi Lal Bhat]
Member (Judicial)

NEW DELHI

21st December, 2018

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