

**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, COURT - II**

I.A. No. 179 of 2021

IN

C.P. 3154 of 2018

In the matter of

VKM Infrastructure Pvt. Ltd

Having its registered office at :

25, Hanspur, Gorakhpur –273005

...Applicant/

Operational Creditor

Versus

**Gammon Engineers & Contractors
Pvt. Ltd**

Having its registered office at :-

Gammon House, Veer Savarkar

Marg, P.O Box No. 9129,

Prabhadevi, Mumbai – 400025.

.... Third Party

Gammon India Private Limited

Having its registered office at :-

Gammon House, Veer Savarkar

Marg, P.O Box No. 9129,

Prabhadevi, Mumbai – 400025.

.....Corporate Debtor

Order Delivered on :-13.10.2023

Coram:

Mr. Anil Raj Chellan

Member (Technical)

Mr. Kuldip Kumar Kareer

Member (Judicial)

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Appearances:

For the Applicant : Adv. Atharv Dandekar
For the Respondent : Adv. P.G. Sabnis

ORDER

Per:- Anil Raj Chellan, Member Technical

1. The instant Interlocutory Application is filed by VKM Infrastructure Private Ltd (hereinafter called “the Operational Creditor” or “the Applicant”) to implead Gammon Engineers & Contractors Private Ltd (hereinafter called “GECPL”) as a necessary and proper party in the Company Petition No.3154 (MB)/2018 filed by the Applicant seeking to initiate Corporate Insolvency Resolution Process (CIRP) against Gammon India Ltd (hereinafter referred to as "Corporate Debtor") by invoking the provisions of Section 9 of the Insolvency and Bankruptcy code, 2016 (hereinafter called "Code"). In the alternative the Applicant sought hearing of Company Petition No.3154 (MB)/2018 without considering the reply filed by the Corporate Debtor.

Brief facts of the case.

2. The Operational Creditor had been awarded tender/work by the Corporate Debtor for completion of the Gorakhpur bypass vide Tender Document/Agreement dated 10.05.2009. In pursuance of the said documents, the Operational Creditor had been performing its obligations

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for the Corporate Debtor and accordingly raised Bills for the completed work in terms of payment agreed to between the Operational Creditor and the Corporate Debtor. The Corporate Debtor failed to make payment of Bills/Invoices when due, from March 2012, as also payment of interest at 18% on defaulted payments. The Operational Creditor, therefore, issued a Demand Notice dated 12.04.2018 in Form 4 to which the Corporate Debtor vide its reply dated 18.07.2018 raised various objections. Consequently, the Operational Creditor filed Company Petition No.3154 (MB)/2018 for initiating CIRP against the Corporate Debtor for the defaults of Rs.2,19,48,033.27 (Rupees Two Crore Nineteen Lakhs Forty Eight Thousand Thirty Three and paisa Twenty Seven only) commencing from 30.05.2010.

3. On behalf of the Corporate Debtor, the authorised person of GECPL filed the reply stating that this Tribunal vide its order dated 22.03.2017 approved a Scheme of Arrangement between GIL and GECPL for transfer of Civil EPC Business of the Corporate Debtor to GECPL with effect from 31.03.2017 (hereinafter “the Scheme”) and the project of Gorakhpur bypass stood transferred to GECPL and raised various contentions like barred by limitation etc. In the circumstances, the Operational Creditor filed the present IA to implead GECPL as a necessary party in the Company Petition No.3154 (MB)/2018.

The submissions of the Applicant/Operational Creditor:

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4. The Applicant submitted that it was not aware of demerger of the service related to the project rendered by the Applicant to GECPL under the Scheme approved by the Hon'ble Tribunal. The Applicant further submitted that a notice dated 08.11.2016 was received by the Applicant in the capacity as a shareholder of the Corporate Debtor intimating the meeting of the unsecured creditors that was to be held on 02.12.2016 but the subsequent email issued by the Applicant to the Corporate Debtor remained unanswered and hence, the Applicant continued to provide its services without any demur or protest from the Corporate Debtor/GECPL.

5. The Applicant further submitted that it was only from the reply filed by GECPL the Applicant came to know that the services related to the project rendered by the Applicant was not retained by the Corporate Debtor under the Scheme as it is not reflected in the "Details of the Other Contracts not forming part of the Civil EPC Business" annexed at Schedule to the Order of the Hon'ble NCLT, Mumbai dated 22.03.2017.

6. The Applicant further submitted that the reply to the Company Petition was filed on behalf of the Corporate Debtor by the authorised person of GECPL in collusion with each other.

The submissions of the Respondent:

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7. In the reply affidavit filed by GECPL it contended that (a) the Civil EPC business of the Corporate debtor was transferred to GECPL under the Scheme of Arrangement approved on 22.03.2017 and there was no cause of action against the Corporate Debtor, (b) the demand notice issued to the Corporate Debtor is not a proper notice, (c) demand notice under Section 9 of the Code was not issued to GECPL, (d) the claim, if any, against GECPL is time barred, and (e) any relief against GECPL under the Code would need to be by way of independent proceedings and cannot be raised by way of an amendment to the Company Petition.
8. In support of the above contentions, the counsel appearing for GECPL relied on the decision in *Revajeetu Builders and Developers vs. Narayanaswamy and sons and others*¹ wherein the Hon'ble Supreme Court while setting out factors to be taken into consideration when dealing with applications for amendments, stated that as a general rule, the court should decline amendments if a fresh suit on amended claims would be barred by limitation on the date of application. The Counsel further referred decisions of many benches of Hon'ble NCLT- *Universal Bamboo Vs. Hindustan Paper Corporation Ltd*², *Comfort Fincap Ltd vs. Seven Indian Heads Infrabuild Pvt Ltd*³, *State Bank of India vs. Shree Vishnu Power*

¹ (2009) 10 Supreme Court Cases 84

² IB-273 (ND)/2018- NCLT, New Delhi Bench

³ IA.2804/2022 in CP (IB) 825 (MB)/2022

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*and Energy Pvt. Ltd⁴ and Avant Grade Clean Room & Eng Solutions Pvt. Ltd.
Vs. HLL Biotech Limited.⁵*

Analysis and findings

9. We have heard the counsels appearing for the parties and gone through the records.

10. As per the records and contention of the Respondent, the Civil EPC Undertaking of Gammon India Ltd was transferred to GECPL under a Scheme approved by this Tribunal vide its order dated 22.03.2017. We, therefore, reproduce below certain definitions used in the Scheme:

‘Civil EPC Undertaking’ means Transferred Undertaking as a going concern, with all properties, pre-qualifications, rights and powers and all debts, liabilities, duties and obligations comprised in and/or pertaining to the Transferred Undertaking as on the Appointed Date...”

‘Transferred Undertaking’ means the Civil EPC Business excluding the BTA Undertaking and other contracts as per Schedule 1.

“Civil EPC Business” means Civil Engineering, Procurement and Construction business carried on by the Transferor Company in roads, hydro-power, nuclear power, tunnels, bridges but excluding other contracts as listed in Schedule 1.

⁴ IA (IB) No.116/CB/2023 in CP. No.48/CB/2022, NCLT Cuttack Bench

⁵ RA(IBC) 02/KOB/2022

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The services relating to the project rendered by the Applicant is not one of the jobs/contracts mentioned in **BTA Undertaking and other contracts as per Schedule 1 of the Scheme** and, therefore, do not form part of the jobs/contracts transferred to GECPL. At the same time, a mere reading of the definitions stated above further make it clear that the contracts/jobs transferred to GECPL are not listed out in the Scheme.

11. In this context, the following paragraphs of the Scheme derive importance to understand the arrangement under the Scheme:

“11.3 It is hereby clarified that (i) if any contract, deeds, bonds, agreements, schemes, arrangements or other instruments of whatsoever nature in relation to Civil EPC Undertaking to which Transferor Company is a party to, cannot be transferred to the Transferee company for any reason whatsoever, Transferor Company shall hold such contract, deeds, bonds, agreements, schemes, arrangements or other instruments of whatsoever nature in trust for the benefit of the Transferee company; and (ii) if any contract, deeds, bonds, agreements, schemes, arrangements or other instruments of whatsoever nature relate to the Civil EPC Undertaking as well as Transferor Company (pursuant to the transfer of the Civil EPC undertaking), Transferor Company and the Transferee company shall both be entitled to all rights and benefits and be liable for all obligations under the said arrangements, each to the extent of its respective undertaking only.”

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“ 1A. Construction- 1A.1 Any question that may arise as to whether a specified asset or liability pertains or does not pertain to the Civil EPC Undertaking or whether it arises out of the activities or operation of the Civil EPC Undertaking shall be decided by mutual agreement between the Board of Directors of GIL and GECPL”.

The above paragraphs appear to have been incorporated in the Scheme to address the issues that may arise in the identification of assets or liability transferred to GECPL.

10. Though the Scheme was approved by this Tribunal on 22.03.2017, the Applicant submitted that it continued to provide services. It is observed that the transfer of liability under the Scheme was not communicated to the Applicant even by way of a reply to the demand notice issued by the Applicant. The Respondent for the first time raised the issue of transfer of liability only in the Reply filed by an authorised person of GECPL to the Company Petition.
11. As regards the contention that the claim, if any, against GECPL is time barred, we are of the view that this aspect requires consideration in the Company Petition and not in the present application. The decisions/authorities relied by the Respondent do not really apply on the facts and circumstances of the present case.
12. Considering the above, we are of the view that GECPL is a proper and necessary party in the Company Petition and hence, **the present IA.**

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**No. 179/2021 to implead GECPL as party in the Company Petition
No.3154 (MB)/2018 is allowed.**

Sd/-

**ANIL RAJ CHELLAN
(MEMBER TECHNICAL)**

Sd/-

**KULDIP KUMAR KAREER
(MEMBER JUDICIAL)**