

IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH

TCP 303/I&BP/NCLT/MAH/2017

Under Section 9 of the I&B Code, 2016

In the matter of
KJMC CORPORATE ADVISORS (INDIA) LTD.
.... Operational Creditor
v

INDIA STEEL WORKS Ltd. Corporate Debtor

Order delivered on 26.09.2017

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

For the Petitioner: Mr. Girish Thanvi, Adv. for Applicant

For the Respondent: Mr. Jairam Chandnani, Adv. for Respondent

Per B. S. V. Prakash Kumar, Member (Judicial)

ORDER

Oral order dictated in the open court on 18.09.2017

It is a winding-up Petition initially filed before the Honorable High Court of Bombay against this Corporate Debtor on the ground that this Corporate Debtor defaulted in making repayment of ₹10 lakhs out of the Contract amount of ₹1 Crore payable by this Corporate Debtor to the Petitioner/operational creditor for the services rendered

in getting the documents released of pledged shares and securities, mortgaged and pledged by the Company, Promoters and ARCIL, hence this Petition.

2. As to filing of this case, the Central Government of India issued Notification on 15.12.2016 for transfer of winding-up Petitions pending before respective High Courts to Adjudicating Authority/NCLT, where notice has not been given to Corporate Debtor, and this case is one among them transferred from Hon'ble High Court of Bombay to this Adjudicating Authority/NCLT, Mumbai for trying this case u/s.9 of I&B Code, 2016 (herein after referred as "Code"), wherein this creditor timely filed form as prescribed under the Code.

3. On perusal of this case, it appears that the Petitioner and the Corporate Debtor on 9.8.2012 entered into a Contract stating that this Petitioner agreed to render services to the corporate debtor as mentioned below:

(a) To review the background facts including the compliance by the Company of the term and conditions stipulated under the CDR System and the consent terms filed in the DRT Recovery Proceedings No.183 of 2003, with a view to ascertain possible alternative course of action that can be considered by the Company;

- (b) To take up the matter with ARCIL and in that respect to advise and vet the communications of the Company to ARCIL;*
- (c) To assist the company in all respects in interacting with ARCIL officials and generally to represent the company in meetings with ARCIL officials and other authorities such as the CDR Cell, Reserve Bank of India etc. towards amicable solution of the issue in accordance with provisions of Law and consent terms agreed between ARCIL and India Steel Works Ltd.*
- (d) The Settlement shall be achieved within 90 (ninety) days from the date of Final offer by the Investor to ARCIL. The same may be extended with mutual consent, if required.*
- (e) Generally, to assist and advise the Company in matters incidental to the proposed course of action by the company.*

4. In consideration to the above services from this Petitioner, the Corporate Debtor Company agreed to pay the Petitioner a fixed fee of ₹1crore excluding payment of Service Tax and other taxes or Cess etc. as may be applicable, which will be added by the Petitioner in its Invoices at the applicable rates as on date. Wherein it has been mentioned that the Company would initially pay non-refundable payment of ₹5,00,000 on acceptance of this Contract by the company

thereafter another ₹5,00,000 as initial refundable payment soon after reaching an acceptable solution with ARCIL and release of charges and securities mortgaged and pledged by the company, the debtor is required to pay ₹90,00,000 as final payment to the Petitioner. It has also been further agreed in between them that if this settlement is not achieved within 90 days from the date of final offer, this Contract will stand terminated and the Petitioner would refund initial payment of ₹5,00,000 and adjust the initial non-refundable ₹5,00,000 towards expenses. It is further stated under the head "Walk-away Fees", in the event, this Contract is not terminated and still subsisting, but the company proceeds in the matter at any time without involving or taking into confidence of the petitioner in the process, the debtor shall be liable to pay to the petitioner 50% of the total payment provided from the date of demand raised by the petitioner. In the process of rendition of services to the Corporate Debtor, ARCIL issued a letter on 17.5.2013, showing what payments were made and what undertakings provided by ARCIL including an undertaking to release the balance pledged shares 4,46,77,700 upon obtaining NOC from other lenders. On seeing such a letter ARCIL served upon the Corporate Debtor, the Corporate Debtor on 18.6.2013 released 60% payment and on 15.5.2014 released ₹31,06,780. There was correspondence between this Petitioner

and the Corporate Debtor subsequent to ARCIL giving undertaking on 17.5.2013 when the remaining pledged shares 4,46,77,700 were not reached to the Corporate Debtor and this Petitioner having not made efforts to get them released, the Corporate Debtor started dealing with ARCIL directly so as to get the aforesaid pledged shares released to the Corporate Debtor. Here, this Corporate Debtor Counsel Mr. Jairam Chandnani says that though duty was cast upon the Petitioner to service the debtor in getting the pending shares released from ARCIL to the Corporate Debtor. But no services having been given to the Corporate Debtor subsequent to 90% payment made to the petitioner, this Corporate Debtor directly dealt with ARCIL for release of those shares and other documents. The Corporate Debtor Counsel further submits that when this petitioner made a demand for payment of remaining ₹10,00,000 the Debtor Company on 14.7.2015 categorically mentioned to this Petitioner saying that this Corporate Debtor has already released 90% of the professional fee i.e. ₹90,00,000 as to remaining ₹10,00,000, the debtor Company stated that it has not released the same because the petitioner failed to service the debtor in getting the remaining shares and other valuables released from ARCIL to the corporate debtor, the dispute for the balance payment is as follows.

(a) The Company is still in CDR and the exit from CDR is not arranged by ARCIL;

(b) ARCIL has not released all the pledged shares;

(c) ARCIL has not given satisfaction of charges on securities of our client, ISWL, till date with ROC.

5. Besides this, the corporate debtor further said that once these services being given, the Corporate Debtor would immediately release the balance ₹10,00,000 payment. The Counsel appearing on behalf of the Corporate Debtor submits that till date this Petitioner has not rendered services as sought in the letter dated 14.7.2015, instead of rendering those services, this Petitioner issued winding-up notice u/s.434 of the Companies Act, 1956, in pursuance thereof, filed a winding-up Petition saying that this Corporate Debtor defaulted in making payment of ₹10,00,000 as per the engagement letter dated 9.8.2012. The Corporate Debtor Counsel submits that the Company, not only sent letters to the Petitioner in respect to not providing services as mentioned in the engagement letter but also replied to the winding-up notice indicating that this Petitioner failed to provide services as agreed between the Petitioner and the Corporate Debtor.

6. On having this Petitioner filed Form – 5 as prescribed under Notification dated 29.6.1017, when this Bench perused this form, it is noticed that this Petitioner failed to mention in part 4 of the column as to how much amount has been in default as on the date of occurrence of default, of course subsequently filed affidavit to establish that fact.

The Petitioner filed Additional Affidavit along with written submissions to show that 90% was already paid by this Corporate Debtor to the Petitioner for the services availed by it. The petitioner counsel says that this company could not have come out with the defense in respect to payment of ₹10,00,000 to the Petitioner, thereby defense raised by the Corporate Debtor shall be rejected treating it as a defense set up to frustrate the case of the Petitioner.

On hearing the submissions on either side and by seeing the documents laid before this Bench, it appears that this Corporate Debtor on 14.7.2015 itself raised dispute in respect to payment of this ₹10,00,000 to the Petitioner making it explicitly clear that as on 14.7.2015 the Corporate Debtor is still in CDR and the exit from CDR is not arranged by the petitioner; ARCIL has not released pledged shares and ARCIL has not satisfied the charges on the securities of the Debtor till date with the Registrar of Companies. By this, it appears that despite this letter dated 14.7.2015 has been received by the petitioner; there has

not even been one letter from this Petitioner till date saying that the Petitioner has rendered the services as demanded on 14.7.2015 letter. To which reply has come from the petitioner saying that the work mentioned in the letter dated 14.7.2015 has not been included in the list of pending work given in the engagement letter dated 9.8.2012.

7. By looking to this engagement letter dated 9.8.2012, it has not been clearly specified as to what work has to be rendered by the Petitioner to the Corporate Debtor, but it has been categorically mentioned that Settlement shall be completed within 90 days from the date of their understanding, since 90% money has been paid to get clearance from ARCIL, and such clearance till date has not come to the debtor, though we may not be able to say that the debtor proved that deficiency of service is in existence, we can obviously say that there is a bonafide dispute between the petitioner and the debtor in respect to breach of terms in between them, the same is reflected in the letter dated 14.7.2015 saying that the Petitioner has failed to accomplish rendering services as agreed between them almost one year before filing the winding-up Petition, this Bench therefore has to construe that there is pre-existing dispute in respect to payment of this ₹10,00,000 to the Petitioner.

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As to dispute, since it is a winding-up petition transferred from Hon'ble High Court of Bombay, there was no occasion for this petitioner to give notice under section 8 of the Code, likewise no occasion to the Corporate Debtor to give reply, therefore, in transferred cases, the rationale given u/s.8 of Code cannot be strictly thrust upon the debtor, however in the present case the debtor has enough proof to show that preexisting dispute is in existence.

8. In view of the above reasons given, this Bench is of the opinion that this Corporate Debtor raised a dispute far before filing this Petition hence this Petition is hereby dismissed without costs.

Sd/ -

V. NALLASENAPATHY
Member (Technical)

Sd/ -

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