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**IN THE NATIONAL COMPANY LAW TRIBUNAL,
DIVISION BENCH – I, CHENNAI**

**E-filing Diary No. 3305118010102022
in
CP(IB)/85(CHE)/2022**

(Filed under Section 60(5) of Insolvency and Bankruptcy Code, 2016)

In the matter of M/s. Karaikal Port Private Limited

Phoenix ARC Private Limited

(Trustee of Phoenix Trust FY16-5)

Having Registered Office at:

5th Floor, Dani Corporate Park, 158,
CST Road, Kalina, Santa Cruz (E)
Mumbai – 400 098

.. .. Applicant

Present:

For Applicant : Amit Singh Chadha, Senior Advocate
For Omkara ARC : Satish Parasaran, Senior Advocate

CORAM :

**R. SUCHARITHA, MEMBER (JUDICIAL)
SAMEER KAKAR, MEMBER (TECHNICAL)**

Order Pronounced on 3rd June 2022

ORDER

Per: R. SUCHARITHA, MEMBER (JUDICIAL)


The Applicant viz. **Phoenix ARC** has filed the present Application vide E-filing Diary No. 3305118010102022 under Section 60(5) of the Insolvency and bankruptcy code, 2016 (hereinafter referred to as 'IBC, 2016') seeking relief as follows;

- (a) *Allow the present application and direct the appropriate authority to investigate the fraudulent financial transaction effectuated between Omkara ARC, Corporate*

Debtor / Karaikal Ports Private Limited and Adani Ports & Special Economic Zone Limited;

- (b) Stay all further proceedings pursuant to order dated 28.04.2022, passed by this Hon'ble Tribunal in the present matter bearing CP(IB)/85/CHE/2022 and also stay constitution of Committee of Creditors until the investigation by the appropriate authority gets completed;*
- (c) Based on the outcome of investigation, recall order dated 28.04.2022, passed by this Hon'ble Tribunal in the present matter bearing CP(IB)/85(CHE)/2022, being an outcome of fraud and collusion;*
- (d) Pass any other or further order(s) which this Hon'ble Tribunal may deem fit and proper in the facts and circumstances of the case.*

2. One of the Financial Creditor of the Corporate Debtor viz. Omkara ARC has filed an Application under Section 7 of IBC, 2016, seeking thereof to initiate Corporate Insolvency Resolution Process (CIRP) as against the Corporate Debtor viz. Karaikal Port Private Limited. After hearing both the parties and based on the Record of Default from the Information Utility and for the reasons stated in the order, this Tribunal was satisfied that there was a 'financial debt' due by the Corporate Debtor and the Corporate Debtor has committed 'default' in the repayment of the said 'financial debt' and by its order dated 29.04.2022 had initiated the CIRP as against the Corporate Debtor.



3. Thereafter, the Applicant herein viz. Phoenix ARC who is also one of the Financial Creditor in respect of the Corporate Debtor has moved the present Application seeking relief as extracted *supra*

4. The Registry of this Tribunal upon scrutinizing the present Application has raised an issue of maintainability and has put the following note before this Tribunal;

This Bench does not have powers to reconsider, recall, revisit its own orders. An appeal has to be preferred before the NCLAT. How is this application maintainable?

The Counsel on record had since filed their reply on 23.05.2022 and resubmitted the application for re-scrutiny. In the intermittent period on 24.05.2022, one Senior Counsel had made a mention of this application before Court-1 and requested for early posting of the application. Upon directions from the Bench, the Counsel on record had filed a memo on the same day. A note based on this memo was put up for perusal of the Adjudicating Authority. Again on 25.05.2022, the Counsel on record had once again made a mention of the application and requested for early listing of the same.

Since the e-filing portal does not provide for posting of matters on maintainability without numbering of applications, the Adjudicating Authority had directed the Bench to post the matter in the Diary No. itself on 27.05.2022 (copy of note placed in file). Since the application is not being numbered, the filing of physical copies of the application by the applicant also does not arise. Hence hard copies of the application have not been produced and placed before the Bench. However, as per directions of Adjudicating Authority, a copy of the hearing notice to all the parties have been sent vide e-mail and proof of the same has also been placed in the process file.

5. Thereafter, the matter was listed for regarding maintainability before this Tribunal on 27.05.2022 and the arguments of the Learned Senior Counsel for the Applicant and Respondents were

heard in length and the matters were reserved for order on the issue of maintainability of this Application.

6. The Learned Senior Counsel for the Applicant alleged that Omkara ARC and the Corporate Debtor have conspired with Adani Ports & Special Economic Zone Limited (APSEZ) and have fraudulently made this Tribunal to pass an order dated 29.04.2022 in and by which this Tribunal admitted the Application under Section 7 of IBC, 2016 and initiated Corporate Insolvency Resolution Process as against the Corporate Debtor. Further, it was stated that in the guise of invoking the provisions of IBC, 2016, APSEZ will indirectly take over the majority voting share of 96.10% through Omkara ARC and therefore, will solely control the decision-making power of the proposed Committee of Creditor.

7. It was submitted that only two lenders are there in respect of the Corporate Debtor viz. Omkara ARC and Phoenix ARC (*the Applicant herein*) and the dues which are payable to them are as follows;

| | |
|-------------|---------------------|
| Omkara ARC | Rs.2804,55,70,549/- |
| Phoenix ARC | Rs.91,97,87,855/- |

8. The Learned Senior Counsel for the Applicant has made various allegations as against Omkara ARC in the present Application, however, it is seen that the said Omkara ARC nor the

Corporate Debtor has been made party to the present Application. Eventhough the present Application has been filed under Section 60(5) of IBC, 2016, the Learned Senior Counsel for the Applicant during the course of arguments submitted that the present Application should be construed as filed under Section 65(1) of IBC, 2016. For the sake of clarity Section 65(1) of IBC, 2016 is extracted hereunder;

65. Fraudulent or malicious initiation of proceedings. –

(1) If, any person initiates the insolvency resolution process or liquidation proceedings fraudulently or with malicious intent for any purpose other than for the resolution of insolvency, or liquidation, as the case may be, the Adjudicating Authority may impose upon a such person a penalty which shall not be less than one lakh rupees, but may extend to one crore rupees.

9. Section 65(1) of IBC, 2016 postulates that if any person initiate the insolvency Resolution process fraudulently or with a malicious intent for any purpose other than for resolution of insolvency, the Adjudicating Authority may impose upon such person a penalty which shall not be less than one lakh rupees, but may extend upto to one crore rupees. Thus, a careful reading of Section 65(1) of IBC, 2016 would manifest the fact that eventhough the Applicant prove that the CIRP has been fraudulently initiated, the consequence will be that of a monetary penalty. It has now been settled by the Hon'ble NCLAT in plethora of judgments that this Adjudicating Authority does not have powers to recall or review its own orders under Rule 11 of NCLT Rules, 2016. As such, the prayer

(b) and (c) as sought for by this Applicant as extracted *supra* transcends beyond the scope of IBC, 2016 and is not maintainable before this Tribunal.

10. In so far as prayer (a) is concerned, the Applicant has sought for a direction to investigate the fraudulent financial transaction effectuated between Omkara ARC, Corporate Debtor / Karaikal Ports Private Limited and Adani Ports & Special Economic Zone Limited. The IRP appointed by this Tribunal has filed his interim Report before this Tribunal on 20.05.2022 from which it is seen that the Applicant herein has already submitted its claim before the IRP and the IRP has also admitted the claim of the Applicant to the tune of Rs.55,00,60,000/- and as such the Applicant herein holds 3.40% voting share in the Committee of Creditors. Thus, it could be seen that the Applicant has acted in furtherance of the admission order passed by this Tribunal by submitting the claim before the IRP. If the Applicant is aggrieved by the order passed by this Adjudicating Authority, then the Applicant ought to have filed an appeal before the Hon'ble Appellate Tribunal.

11. From the submissions made by the Learned Senior Counsels for both the parties, it could be seen that there is a serious infight between the two Financial Creditors of the Corporate Debtor which resulted in filing this sort of an application. This Tribunal while

admitting the Application under Section 7 of IBC, 2016 has taken note of the Judgment rendered by the Hon'ble Supreme Court in the matter of **Innoventive Industries Limited -Vs- ICICI Bank and Anr. (2018) 1 SCC 407**, wherein it has been held that in an Application filed under Section 7 of IBC, 2016 the moment the adjudicating authority is satisfied that there exist a 'debt' and a 'default' has occurred, the application ought to be admitted.

12. Under the provisions of IBC, 2016 assuming that an Application under Section 9 by any Operational Creditor is filed, or by this Applicant under Section 7, the consequence and the outcome shall be no different. Hence, the allegations "fraudulent transactions" attributed to Omkara ARC in the present case is not maintainable. Once the CIRP commences, irrespective of who triggered the process, the CoC is formed based on the claims submitted by all the creditors. In the said circumstances we find that the Registry had been correct in placing the Application for maintainability without numbering the same in view of the relief as sought for.

13. During the course of Arguments, it was submitted by the Learned Senior Counsel for the Applicant that Omkara ARC hold almost 96% of the voting share in the CoC and they have the right to decide the outcome of the Resolution Plan of the Corporate

Debtor. Such an argument made by the Learned Senior Counsel is preposterous in view of the fact that even before the 1st CoC meeting is conducted, the present Application is filed apprehending the outcome of what might happen in the last CoC meeting. All the allegations made by the Learned Senior Counsel for the Applicant are premature and mere conjectures. Thus, we do not find any merit in apprehending, as to what might happen in last CoC meeting at this point of time, even before the 1st CoC meeting is conducted. Hence, this application is devoid of merits, in law and on facts.

14. Thus, in order to dissuade other Applicants from filing similar sought of Application and wasting the judicial time of this Tribunal, we find it fit to impost cost on the Applicant. Accordingly, the present Application filed vide E-filing diary No. 3305118010102022 stands **dismissed as not maintainable**, with cost of **Rs.5,00,000/- (Rupees Five Lakh Only)** payable to the '**PM National Relief Fund**' within a period of 10 days from the date of this order.

15. Post this matter for compliance on **17.06.2022**.

- Sd -

SAMEER KAKAR
MEMBER (TECHNICAL)

- Sd -

R. SUCHARITHA
MEMBER (JUDICIAL)

Raymond