

IN THE NATIONAL COMPANY LAW TRIBUNAL,
NEW DELHI
COURT-VI

C.P. NO. IB-809(ND)/2019

IN THE MATTER OF:

FP India Project Management Consultancy Services Pvt. Ltd

..... **Petitioner**

v.

Parsons Brinckerhoff India Pvt. Ltd.

..... **Respondent**

SECTION: Under Section 9 of The Insolvency and Bankruptcy Code, 2016

Judgment delivered on: 17.09.2019

Coram:

(Dr.)P.S.N PRASAD, HON'BLE MEMBER (J)
DR. V.K. SUBBURAJ, HON'BLE MEMBER (T)

For the Petitioner: Mr. Pradeep Samaul, Vivek Sinha, Advocate.
For the Respondent: Mr. A. Kathpalia, Sr. Advocate, Sudhir, Sanjeev, Anirudh, Advocate.

ORDER

(Dr.) P.S.N PRASAD, HON'BLE MEMBER (Judicial

1. This is an application filed under section 9 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'the Code') read with rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (for brevity 'the Rules') with a prayer for initiation of Corporate Insolvency Resolution Process in respect of respondent

company, claimed to be the corporate debtor for the alleged default on the part of the Corporate Debtor in settling the amount of Rs. 2,81,07,882/- towards the services offered by the petitioner.

2. The pleaded case of the Operational Creditor is as under:

2.1 In December 2010 work of executing two packages (Design and Build contact) namely UAA01 and UAA05 of Chennai Metro Project was awarded by Chennai Metro Limited to Transtunnelstory- AFCONS Joint Venture here in after refereed as (TTA JV).

2.2 In August 2011 TTA JV appointed the Respondent as their design Consultants for this work.

2.3 On 22.09.2011 Parsons Brinckerhoff India Pvt. Ltd. here in after refered as PBI (For brevity "the Respondent") executed Architectural Associate Consultancy Agreement appointing the erstwhile Frischmann Prabhu India Pvt. Ltd here in after refered to as FPBI (for brevity the applicant) as their Architectural and Design Consultants for this work.

2.4 In terms of para 13.3 of the Associate Consultancy Agreement, the FPI is to receive payment within 15 working days after the date when PBI receives the payment from TTA JV. When work was in progress FPI used to get proportionate payment as above from PBI.

- 2.5 On 16.07.2014 PBI by its email asked FPI to assess time and cost impact of variations as enclosed with the email further stated that the attached list was not comprehensive FPI were to feel free to add other items that may have been missed by PBI.
- 2.6 On 05.08.2014 FPI submitted the required information to PBI, the format make available by in PBI's format. On 10.04.2015 PBI issued notice to TTA JV suspending their services to TTA JV with effect from 24.04.2015.
- 2.7 On 14.05.2015 an MOU was executed between PBI and TTA JV wherein para 2.1 has dealt variation of payment. The petitioner/ Operational Creditor has stated that the PBI did not submitted variation proposals to TTA JV in a proper manner according to MOU. Vide Para 4(f) in letter dt. 17.07.2015 from AFCONS to PBI shows that PBI failed to establish the claims of variations. Further it is also contended by the petitioner that PBI have stated that the same would be take-up by them before an appropriate forum and at proper time and stage. It was contended that this was not done by PBI and it was a serious lapse on the part of PBI.
- 2.8 On 02.06.2015 & 04.06.2015 PBI instructed FPI to continue the work but not to submit it to TTA JV. The Payment to the tune of Rs. 22,46,235 for the work done for the period of 02.06.2015 to

25.06.2015 would be made by PBI to FPI which is not yet received by FPI.

2.9 On 23.06.2015 TTA JV issued a show cause notice to PBI for termination of their main agreement with PBI.

2.10 It is also argued by the applicant that in view of show cause notice of TTA JV PBI instructed FPI to stop any work with immediate effect and asked to consolidate relevant information related to the work undertaken from 02.06.2015 to 25.06.2015. PBI had also asked FPI not to communicate with TTA JV directly. Moreover in July 2015 TTA JV terminated their main agreement with PBI.

2.11 On 29.07.2015 FPI asked the PBI about status of their pending payment. In reply of that on 03.08.2015 FPI submitted to PBI details of its outstanding payment for the variations done as an associate consultant.

2.12 On 13.08.2015 PBI approached Delhi High Court by way of Interim applications against the Associate Consultants including FPI for injunction order for restraining them from directly working with TTA JV. Hon'ble Court declined to pass any injunction order and instead directed to add TTA JV as a party Respondent. After Joining of TTA JV as a Respondent party, PBI informed the Court that they were trying to have out of court settlement with TTA JV.

2.13 On 05.07.2016 FPI reminded PBI by its letter to keep in view their outstanding payment in the proposed settlement with TTA JV.

2.14 The applicant in Para-16 of his petition has stated that on 10.03.2017 PBI and TTA JV arrived at a settlement without inviting FPI i.e the petitioner. The following are the time schedule for payment to PBI as per the settlement:

By April 2017 *Rs. 1,25,00,000/-*

By September 2017 *Rs. 1,25,00,000/-*

By January 2018 *Rs. 1,00,00,000/-*

2.15 On 29.03.2017 PBI withdrew its case from Delhi High Court in view of order dated 13.08.2015 passed by Hon'ble Court in this regard.

2.16 The applicant claims that there are various letters and emails issued by Operational Creditor to Corporate Debtor as reminders for payment of their outstanding dues, since the Corporate Debtor had received money from TTA JV as per their settlement.

2.17 On 16.03.2018 an email issued by Corporate Debtor to Operational Creditor proposing payment of Rs. 20,68,241/- only against the total claim , Operational Creditor declined to accept the said amount by their email dated 16.03.2018.

- 2.18 Operational Creditor in his petition has contended that despite receiving the services of the Operational Creditor the Corporate Debtor has failed to pay the outstanding amount.
3. Subsequently the Operational Creditor had issued a demand notice in terms of Section 8(1) dated 05.11.2018 under the Insolvency and Bankruptcy Code, 2016, to the Corporate Debtor, therein making a demand of Rs. 2,81,07,552 /-. The demand notice was duly replied by the respondent vide reply dated 11.12.2018.
4. Upon receipt of the notices issued by this tribunal as well as service of notice by the petitioner, the Respondent / Corporate debtor has appeared through its counsel and has filed a detailed reply in the matter. Gist of the Contentions of the Corporate Debtor/ Respondent are as under:
- 4.1 As per the agreement executed between the parties the payment to applicant is subject to the payment received from the Afcons joint venture.
- 4.2 The Respondent claims that Afcons joint venture has not paid any specific payment towards variations and therefore the respondent is not liable to pay any amount to the applicant operational creditor on the amount payable towards variations. The respondent has also raised an objection that a pre-existing dispute is pending between the parties

regarding variations in the amount claimed. It is stated that the said dispute was raised by respondent vide its e-mail 16.03.2018.

5. The applicant in its rejoinder has submitted that there is no pre-existing dispute existing between the parties. The applicant has further stated that vide its letter dated 19.03.2018, it has clarified the reasons for variations and shown the grounds as to why the amount due for the services rendered by him cannot be reduced.

5.1 The submissions made by the Parties show that the respondent has already settled the matter with Afoncs joint ventures and also received the agreed amount.

5.2 The applicant has also placed on record the e-mail dated 15.12.2017 sent by respondent assuring the applicant that the outstanding dues will be cleared by February, 2018, (refer to A-18 of the main paper book) as the final stage payment is expected to be received during end January, 2018. This communication establishes that there was no pre-existing dispute between the parties. The applicant in its rejoinder stated that the respondent has admitted that the payment has not been made for the services which were provided by the Operational Creditor.

6. We have heard the arguments advanced by the counsels of both the parties and perused the other documents filed by them.

7. The Corporate debtor vide its email dated 16.03.2018 has protested the claim made by the petitioner, by relying upon the terms and conditions of agreement with Associate Consultancy Services, for which the petitioner is neither a party nor signatory therefore it cannot be regarded as a pre-existing dispute in the matter. Incidentally in the said e-mail the Corporate Debtor has stated that the value of works are amounting to Rs. 2,068,241/- exclusive of GST. Further, Corporate Debtor has sought an affirmation to the sum indicated in the said e-mail, and it shows that it is not pre-existing dispute. The papers placed before the Tribunal denotes that the Corporate Debtor has received the money from AJV and even on this score he has obligation to pay the amount due to the petitioner.
8. From the definition of “Operational creditor” and “Operational Debt”, it can be seen that the applicant has provided services to the respondent and has placed sufficient documents evidence to prove its claim. There is a default in payment of claimed amount, and the respondent failed to establish the fact that there is a pending dispute between the parties in respect of the amount claimed. In light of the same, such application deserves to be admitted for triggering Corporate Insolvency Resolution Process against the respondent corporate debtor. An application under Section 9 of the Code is

acceptable so long as the debt is proved to be due, there has been occurrence of existence of default and there is no pre-existing dispute between the parties. What is material is that the default is Rupees 1 lakh or more. In view of Section 4 of the Code, the moment default is of Rupees one lakh or more, the application to trigger Corporate Insolvency Resolution Process under the Code is maintainable.

9. In the aforesaid background we are satisfied that the present petition is in order and there has been default in payment of dues by the respondent. Therefore, on fulfilment of the requirements of section 9 (5) (i) (a) to (d) of the Code, the present petition warrants admission.

10. The applicant has not proposed the name of the IRP in the application. The Insolvency and Bankruptcy Board of India has recommended a panel of Insolvency Professionals for appointment as Insolvency Resolution Professional in compliance with Section 16 (3) (a) of the Code in order to cut delay. Accordingly, we appoint Mr. Chandra Prakash as an Interim Resolution Professional. His registration number is IBBI/IPA-002/IP-N00660/2018-19/12023, Email Id: cppumba24092gmail.com, Mobile: 9310403033. In pursuance of Section 13 (2) of the Code we direct that public announcement shall be made by the Interim Resolution Professional immediately (3 days

as prescribed by Regulations) with regard to admission of this application under Section 9 of the Code.

11. We also declare moratorium in terms of Section 14 of the Code. The necessary consequences of imposing the moratorium flows from the provisions of Section 14 (1) (a), (b), (c) & (d). Thus, the following prohibitions are imposed:

“(a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;

(b) Transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;

(c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;

(d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.”

12. It is made clear that the provisions of moratorium shall not apply to transactions which might be notified by the Central Government or the supply of the essential goods or services to the Corporate Debtor and may be specified, are not to be terminated or suspended or interrupted during the moratorium period. In addition as per the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018 which has come into force w.e.f. 06.06.2018, the provisions of moratorium shall not apply to the surety in a contract of guarantee to the corporate debtor in terms of Section 14 (3)(b) of the Code.

13. The Interim Resolution Professional shall perform all his functions contemplated, inter-alia, by Sections 15, 17, 18, 20 & 21 of the Code and transact proceedings with utmost dedication, honesty and strictly in accordance with the provisions of the ‘Code’, Rules and Regulations. It is further made clear that all the personnel connected with the Corporate Debtor, its promoters or any other person associated with the Management of the Corporate Debtor are under legal obligation under Section 19 of the Code to extend every

assistance and cooperation to the Interim Resolution Professional as may be required by him in managing the day to day affairs of the 'Corporate Debtor'. In case there is any violation, the Interim Resolution Professional would be at liberty to make appropriate application to this Tribunal with a prayer for passing an appropriate order. The Interim Resolution Professional shall be under duty to protect and preserve the value of the property of the 'Corporate Debtor' as a part of its obligation imposed by Section 20 of the Code and perform all his functions strictly in accordance with the provisions of the Code, Rules and Regulations.

14. The office is directed to communicate a copy of the order to the Operational Creditor, the Corporate Debtor and the Interim Resolution Professional at the earliest possible but not later than seven days from today.
15. Before parting we must notice the complaint made against Operational Creditors, in the form of discrepancies in the statement of account. We cannot determine the amount due. This function is required to be performed by the Information Utility. However, this institution is not fully functional as yet. Therefore, Resolution Professional may ask the ex-promoter/director of the Corporate

Debtor for any such correction if need be and act accordingly by placing it before the Operational Creditor as it is only fair to do so.

16. The petitioner is directed to pay a sum of Rupees two lakhs to the Interim Resolution Professional to meet out the expenses to perform the functions assigned to him in accordance with Regulation 6 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Person) Regulations, 2016. This shall however be subject to adjustment by the Committee of Creditors as accounted for by Interim Resolution Professional and shall be paid back to the petitioner.

Let the copy of the order be supplied to the parties including the Board.

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DR. V.K. SUBBURAJ,

MEMBER (T)

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(Dr.) P.S.N PRASAD,

MEMBER (J)