

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOCHI BENCH, KOCHI**

TIBA/14/KOB/19

Under Section 9 of IBC 2016 r/w Rule 6 of IB(A&AA) RULES, 2016

Order delivered on 25.10.2019

**Coram: 1. Hon'ble Shri Ashok Kumar Borah, Member (Judicial)
2. Hon'ble Shri Veera Brahma Rao Arekapudi, Member (Technical)**

In the matter of

M/s. Capedge Consulting Private Limited
CIN: U93000TN2013PTC092189 : Applicant/Operational Creditor.
Represented by its
Director Mr. Jacob Karukaparambil Thomas
No.4, Joiser Street, Nungambakkam,
Chennai - 600 034

Vs.

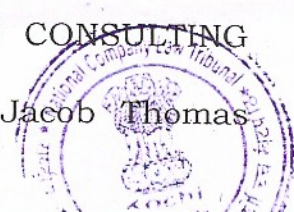
M/s. India Techs Limited
CIN : U51103KL1983PLC003770 : Respondent/Corporate Debtor.
60/2177 B, Pattathil House,
K P Vallon Road, Kadavanthara,
Ernakulam, Kochi- 682 020

Parties/Counsels Present:

For Operational Creditor/Applicant : Abraham George Jacob (Advocate)
For Corporate Debtor/Respondent : Paulose C. Abraham (Advocate)

ORDER

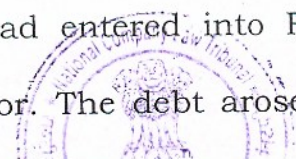
1. This application has been filed by, M/s. CAPEGE CONSULTING PRIVATE LIMITED, represented by its Director, Mr. Jacob Thomas



TIBA/14/KOB/2019

Karukaparambil (for short to be referred hereinafter as 'Operational Creditor') under Section 9 of the Insolvency and Bankruptcy Code, 2016 (for short to be referred hereinafter as the 'Code') for initiating Insolvency Resolution Process against M/s. India Techs Limited (for short to be referred hereinafter as 'corporate debtor'), a company registered under the Companies Act, 1956. The corporate debtor was incorporated on 18.08.1983 under the companies Act, 1956 and continues now its existence with CIN No. U51103KL1983PLC003770 and has its registered office at 60/2177 B, Pattathil House, K P Vallon Road, Kadavanthara, Kochi- 682 020, in the State of Kerala and therefore, the matter falls within the territorial jurisdiction of this Tribunal.

2. The Operational Creditor is engaged in the business of providing consultancy services to establishments for improving their productivity by restructuring and reorganising their financial, administrative and operational systems. The corporate debtor is in the business of dealing in services of construction equipments. The Corporate Debtor is dealing mainly in respect of sales and service of JCB machines, equipments, spare parts and lubricants for the entire Kerala region.
3. The contents of the application are supported by affidavit of Mr. Jacob Thomas Karukaparambil, the authorised representative of the Operational Creditor which is attached at Annexure -IV of the paper book. It is stated in the affidavit that the the company incurred huge losses and they engaged operational creditor in November 2015 to render assistance in resolving the issues. The Operational creditor had entered into Four consultancy agreements with the Corporate Debtor. The debt arose on



TIBA/14/KOB/2019

account of supply of services rendered are due since 01.03.2016 to 03.02.2019.

4. The counsel for operational creditor further stated that the Corporate Debtor had availed all the services of the Operational Creditor without any complaint or reservation as per its requirements but had failed to clear the amounts due to the operational Creditor. Thereby Operational Creditor issued several e-mail correspondences to the Corporate Debtor as reminders to clear the pending dues.
5. Thereafter, the Operational Creditor issued a Demand Notice on 11.02.2019 demanding the payment of the unpaid operational debt to the tune of Rs. Rs.1,71,74,366/- (Rupees One crore Seventy-One Lakhs Seventy-Four Thousand Three hundred and sixty-six Only) including an amount of Rs.46,90,657/- (Rupees Forty-Six Lakhs Ninety Thousand Six Hundred and Fifty-Seven only) as interest on the overdue amount.
6. It is stated that the Corporate Debtor has neither given a reply stating that there exists a dispute which is pre-existing and bonafide nor repaid the entire debt, therefore the Operational Creditor is filing this application to initiate Corporate Insolvency Resolution Process under IBC.
7. The Corporate Debtor had submitted that they have entered into certain consultancy Agreements dated 15.11.2015, 23.12.2015 and 23.12.2016 with the Operational creditor by which they had agreed to certain points which are clearly specified in Annexure R -1 appended with counter statement.



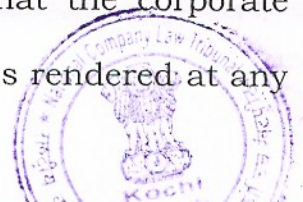
TIBA/14/KOB/2019

8. The Corporate debtor further submitted that the Operational Creditor went astray from the terms and conditions in the Agreement and they had never rendered any services that were promised by them. Further through the e-mail communication dated 15.02.2018 it was informed to the Operational creditor to furnish the details of work done in the invoices raised for accounting purposes, even then the Operational Creditor do not divulge any of the services rendered on the basis of which the invoices were raised. Therefore, the Corporate Debtor claims that they do not owe any debt to the Operational Creditor.
9. The Corporate debtor in the Counter statement also stated that the Operational creditor had entered into two separate loan agreements dated 28.02.2016 and 29.02.2016 with M/s. Telsa Marketing Pvt Ltd, which has Mrs. Elizabeth Thomas as the Managing Director and Mr. Thomas George Thayyil as the Director and borrowed a sum of Rs.1,38,00,000/- each. (Annexure R-3 to the Counter). They further submitted that Mr. George Vinci Thomas, who is the husband of Mrs. Elizabeth Thomas is the Managing Director of Corporate Debtor and Mrs. Elizabeth Thomas and Mr. Thomas George Thayyil are the only remaining directors of Corporate Debtor. For repaying the above said amount operational creditor issued two Cheque bearing No.1845504 and 184554, both dated 28.02.2018 for an amount of Rs.1,38,00,000/- each. However, both the cheques were dishonoured vide Cheque return memo dated 28.05.2018. Aggrieved by this M/s Telsa Marketing Pvt Ltd had filed two separate complaints under section 138 of Negotiable Instruments Act dated 20.07.2018 which was registered as CMP No.10713 of 2018 and CC No. 3132 of 2019.



TIBA/14/KOB/2019

10. The corporate Debtor claimed that the Operational creditor communicated them to settle the complaint case filed under Negotiable Instruments Act, but the settlement terms were not amicable for the Corporate Debtor. They further claim that the object of this application is not to realise the operational debt due, but to pressurize the Corporate debtor to withdraw the complaints filed against him by M/s. Telsa Marketing Pvt Ltd. The present application under I&B Code, against the Corporate Debtor is filed as a counter blast of the complaint filed under NI Act.
11. The corporate debtor further submitted that no report or documents have been produced by the Operational Creditor to corroborate the work done by them. It merely indicates that the said invoice has been raised as per the Agreement. It was claimed that no sufficient evidence had been laid before this Bench in the prescribed manner under the Code. Thereby, pleaded to reject the application as non-maintainable and devoid of merits. In reliance to the averments of a plausible dispute, the counsel quoted the Hon'ble Supreme Court's judgement in *Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software (P) Limited and K. Kishan Vs. M/S Vijay Nirman Company Pvt. Ltd.*
12. In the rejoinder filed by the operational creditor, it is stated that there were four agreements entered into by the parties and not three. The copy of agreement dated 15.11.2016 executed between both the parties, which was not produced by the Corporate debtor was produced along with the Rejoinder (Annexure VII). It was further submitted that the corporate debtor had never raised a dispute regarding the services rendered at any



TIBA/14/KOB/2019

time before, either during the tenure of the agreement or after completion of the same.

13. It was further submitted by the counsel for operational creditor that there are no terms in any of the agreements that cast an obligation on the operational creditor to submit formal reports to the corporate debtor. It was claimed that the operational creditor had not entered into any agreement with M/s. Telsa Marketing Pvt. Ltd. The matter relating to the transaction between M/s. Telsa Marketing Pvt. Ltd. and M/s Capedge Energy Pvt. Ltd. and M/s. Capedge Metals & Minerals Pvt. Ltd. which are separate and distinct legal entities cannot be dragged into the present proceedings.
14. The operational creditor vehemently denied all the averments in relation to the non-receipt of demand notice, sufficient evidence for filing this application and also the intention to pressurise the corporate debtor. It was further submitted that corporate debtor never requested for any documentary proof for consultancy work but only sought time to pay the amount due.
15. During the hearings on 16.10.2019, the Adjudicating authority had directed the Corporate Debtor to submit their Audited Financial Statements pertaining to the Financial Years 2015-16, 2016-17 and 2017-18 uploaded with the Registrar of Companies. However, the counsel for the Corporate Debtor has filed an affidavit informing us that the annual financial returns for the aforesaid financial years were not yet audited, hence not filed with Registrar of Companies, owing to the deficiency in



TIBA/14/KOB/2019

service by the financial consultant engaged by the respondent company. Certificate issued by the statutory auditors is also produced.

16. The CIRP Application was transferred from NCLT Chennai to this Bench and renumbered as TIBA/14/KOB/2019. We have gone through the pleadings on record and perused the submissions made by learned counsels. On a careful perusal of the documents it is noticed that the foremost objection of the Corporate Debtor regarding 'Maintainability' of this application citing non-receipt of demand notice under Section 8 of the Code is found to be irrelevant because the operational creditor has produced the original acknowledgement due card indicating receipt of Demand Notice at the office of Corporate Debtor, which indicates proof of service of notice. The counsel for corporate debtor has also not pressed on this point after going through the proof of service produced by operational creditor.

17. We have examined the claim of the Operational Creditor in the light of the landmark judgement of Hon'ble Supreme Court in "**Innoventive Industries Ltd. v. ICICI Bank and Anr. –(2018) 1 SCC 407**", to establish any pre existing dispute in the instant matter. We quote:

"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

TIBA/14/KOB/2019

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.”

From the aforesaid judgement, it will be evident that the existence of a dispute or the record of the pendency of a suit or arbitration proceedings should be pre-existing—i.e. prior to demand notice or invoice received by the ‘Corporate Debtor’. The moment there is existence of dispute, the ‘Corporate Debtor’ gets out of the clutches of the ‘I&B Code’.

18. The Corporate Debtor had placed reliance on the letter dated 21st January, 2018 written by them to hold that there is an existence of dispute. However, on perusal of the email communication, we found that the corporate debtor is merely asking for further information on the services rendered by the operational creditor for each of the invoices raised. Can this be considered as pre-existing dispute is the moot question.

19. To answer this, we relied on the judgement of Hon’ble Supreme Court in **“Mobilox Innovations Pvt. Ltd. 2017 SCC OnLine SC 1154”**

“40. 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



TIBA/14/KOB/2019

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.”

In this case, we have not come across any record which shows a dispute that was pre-existing apart from that of a hypothetical or illusory dispute which has been raised by the ‘Corporate Debtor’.

20. Thereby, on perusal of records, it is clear that the Respondent Corporate Debtor has not raised any dispute relating to debt nor raised any dispute relating to quality of service of goods. They merely sought information regarding the services provided, which cannot be termed as a pre-existing dispute or plausible dispute. Further, the cheque bounce case of Telsa Marketing Pvt. Ltd. is not between the ‘Operational Creditor’ and the ‘Corporate Debtor’ but between some other parties which cannot be taken into consideration in the instant case.

21. In the given facts and circumstances, the present application is complete in all respects and the applicant is entitled to claim its dues. The applicant succeeded in establishing the default in payment of the operational debt beyond doubt. In view of the above, **the instant petition deserves to be admitted**. We further declare moratorium under section 14 of the I&B Code with consequential directions, as mentioned below:

I. That this Bench at this moment prohibits:

a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any



TIBA/14/KOB/2019

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 Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;

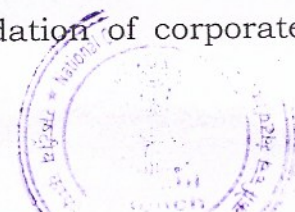
d) the recovery of any property by an owner or lessor where such property is occupied by or in possession of the corporate debtor.

II. It is further made clear that:

a. The supply of essential goods or services to the corporate debtor, if continuing, shall not be terminated or suspended or interrupted during the moratorium period.

b. That the provisions of sub-section (1) of Section 14 of IBC shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

c. That the order of moratorium shall have effect from the date of this order till the completion of the corporate insolvency resolution process or until this Bench approves the resolution plan under sub-section (1) of section 31 of IBC or passes an order for liquidation of corporate debtor under section 33 of IBC, as the case may be.



TIBA/14/KOB/2019

d. That the public announcement of the corporate insolvency resolution process shall be made immediately as specified under section 13 of IBC.

e. As the applicant has not specified the name of the resolution professional, this Bench, appoints **Mr. SASITHARAN RAMASWAMY** having registration number **IBBI/IPA-002/IP-N00519/2017-2018/11678** (e-mail address: **rsasidharan.in@gmail.com**) (**Address: TC/55/33, Saryu, Chirakara Temple Road, Kaimanam, Pappanamcode PO, Thiruvananthapuram, Kerala-695018**) as Interim Resolution Professional to carry the functions as mentioned under IBC.

22. We direct the Operational Creditor to deposit a sum of Rs. 2 lakhs with the Interim Resolution Professional namely **Mr. SASITHARAN RAMASWAMY**, to meet out the expense 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. The needful shall be done within three days for the date of receipt of this order by the Operational Creditor. The amount however be subject to adjustment by the Committee of Creditors as accounted for by Interim Resolution Professional and shall be paid back to the Operational Creditor.

23. The order of moratorium shall have effect from the date of this order till the completion of the corporate insolvency resolution process or until this Bench approves the resolution plan under sub-section (1) of Section 31 or passes an order for liquidation of corporate debtor under Section 33 as the



TIBA/14/KOB/2019

24. The Registry is directed to immediately communicate this order to the Operational Creditor, the Corporate Debtor and the Interim Resolution Professional even by way of e-mail.

25. This Application is disposed of accordingly. No order as to costs.

Dated this the 25th day of October, 2019.

Sd/-
(Veera Brahma Rao Arekapudi)
Member (Technical)

Sd/-
(Ashok Kumar Borah)
Member (Judicial)

Certified to be True Copy

Ashok Kumar Borah
Deputy Registrar 29/10/2019
National Company Law Tribunal
Kochi Bench

Memo No.TIBA/14/KOB/2019/.....

Date: 28.10.2019

1. Mr.Abraham George Jacob, Advocate, No.5, AWHO Army Building, High Court Junction, Marine Drive, Ernakulam-682031. (**Counsel for the applicant/Operational Creditor**).

2.Mr. Poulouse C. Abraham, Advocate M/s Menon & Pai, Advocates, IS Press Road, Cochin-682018 (**Counsel for the Corporate Debtor**).

3. Mr. Sasitharan Ramaswamy, No.TC/55/33, Sarayu, Chirakara Temple Road, Kaimanam, Pappanamcode PO, Thiruvananthapuram, Kerala-695018. (**Interim Resolution Professional**).

