

**IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI COURT III**

Company Petition No. IB-732(ND)/2021

Under Section 9 of the Insolvency and Bankruptcy Code, 2016

In the matter of:

M/s. Fossil Business Solution Pvt Ltd. ...Operational Creditor

Vs.

Bharat Sanchar Nigam Ltd. ...Corporate Debtor

Judgment delivered on: 01.03.2023

Coram:

**SHRI BACHU VENKAT BALARAM DAS
Hon'ble MEMBER (JUDICIAL)**

**SHRI ATUL CHATURVEDI
HON'BLE MEMBER (TECHNICAL)**

For the Applicant : Mr. Vikram Wadehra, Advocate
For the Respondent : Mr. Dinesh Agnani, Sr. Advocate

ORDER

Per: BACHU VENKAT BALARAM DAS, MEMBER (J)

1. The present application under Section 9 of the Insolvency and Bankruptcy Code, 2016 r/w Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 has been filed by M/s. Fossil Business Solution Pvt. Ltd, (Applicant/Operational Creditor) herein seeking initiation of Corporate Insolvency Resolution Process against the Bharat Sanchar Nigam Limited, (Respondent/Corporate Debtor).

- 2.** The Applicant/OC herein is a company incorporated under the Companies Act, 2013 and also registered MSME under the Micro, Small & Medium Enterprise Development Act, 2006. The Corporate Debtor is a Government owned telecommunication service provider under the ownership of Department of Telecommunication, Ministry of Communication, Government of India.
- 3.** The Applicant/OC and the Corporate Debtor entered into seven different agreements for execution of PLB pipe laying cable pulling and associated works for 7 Blocks in Sikkim, consequent to a tender notification dated 1st January 2018 issued by the Corporate Debtor, wherein the Operational Creditor was the lowest bidder in the tender process. The details of the agreements are as under:
- a. Block Dentam- vide agreement being no. B-5/17-18 dated 21st February 2018.*
 - b. Block Yuksum - vide agreement being no. B-17 / 17-18 dated 21st February 2018.*
 - c. Block Kaluk- vide agreement being no. B8 / 17-18/28 dated 21st February 2018.*
 - d. Block Rakdong Tintek- vide agreement being no. B-12/17-18/28 dated 21st February 2018*
 - e. Block Khamdung- vide agreement being no. B-9 / 17-18/28 dated 21st February 2018*
 - f. Block Sumbuk vide agreement being no. T-7 I 18-19 /21 dated 10th October 2018 2018.*
 - g. Block Namthang vide agreement being no. T-4/ 18-19/21 dated 10th October 2018.*

- 4.** Thereafter, the Corporate Debtor issued work orders in favour of the Applicant for each of the 7 (seven) blocks, which are as follows:
- a. Block Dentam- vide work order dated 21.02.2018.*
 - b. Block Yuksum- vide work order dated 21.02.2018.*
 - c. Block Kaluk- vide work order dated 21.02.2018.*
 - d. Block Rak:dong Tintek- vide work order dated 21.02.2018.*
 - e. Block Khamdong- vide work order dated 21.02.2018.*
 - f. Block Sambuk vide work order dated 11.10.2018.*
 - g. Block Namthang vide work order dated 11.10.2018.*
- 5.** It is stated that work undertaken by the Applicant was duly tested by the Corporate Debtor and to the satisfaction of the Officer in Charge and duly accepted and necessary clearance certificates were issued by the Corporate Debtor and the Applicant/OC raised separate invoices n respect of each work order aggregating to a sum of Rs. 1 7 ,85,88, 953 /- (Rupees Seventeen Crore, Eighty Five Lakh Eighty Eight Thousand Nine Hundred and Fifty Three only) on various dates. The Corporate Debtor had made payment of a sum of Rs. 6,78,18,707 (Rupees Six Crore Seventy Eight Lakh Eighteen Thousand Seven Hundred and Seven) to the Operational Creditor on different dates and the balance amount remained unpaid.
- 6.** The Applicant wrote letters to the Corporate Debtor on 25th May, 2019, 3rd June 2019 and 13th June 2019 requesting the Corporate Debtor to make payments towards its outstanding dues.
- 7.** The Applicant having not received any response from the Corporate Debtor raised a complaint with the Centralized Public Grievance Redress And Monitoring System (CPGRAMS). The Respondent/Corporate Debtor wrote a letter dated 12th December 2019 acknowledging that a sum of Rs. 9,56,37,952.00 (Rupees Nine Crore, Fifty Six Lakh Thirty Seven Thousand Nine Hundred and Fifty Two Only) is due and payable by it.

- 8.** Despite the said acknowledgement and repeated reminders sent by the Applicant, the Corporate Debtor did not make any payment towards the outstanding dues and thereafter, the Applicant/OC which is registered MSME initiated proceedings under the Micro and Small Enterprises Facilitation Council (MSEFC', West Bengal) in accordance with Section 18 of the said Act. An award was passed on 3rd February 2021 in the said proceedings wherein the Corporate Director was directed to pay a sum of Rs. 10,44,00,726/- (Rupees ten crore forty four lakh seven hundred and twenty six) only towards the principal amount along with interest @ 3 times the bank rate of RBI compounded with monthly rests till realisation of the entire amount.
- 9.** In spite of such award, the Corporate Debtor failed to make any payments towards its liability. The Corporate Debtor acknowledged and admitted its liability in its letter dated 27th July, 2021 for dues amounting to Rs.10,65,36,000/- (Rupees Ten Crores Sixty Five Lakhs and Thirty Six Thousand only) being the principal amount due towards work done by the Applicant in Sikkim.
- 10.** The Applicant issued a statutory notice under Section 8 of the Insolvency and Bankruptcy Code, 2016 on 4th August 2021 demanding a sum of Rs. Rs. 14,79,43,404/- (Rupees Fourteen Crore Seventy Nine Lakh Forty Three Thousand Four Hundred and Four only) which is inclusive of the interest provided for under the award dated 3rd February 2021. After service of the said notice, the Corporate Debtor made payments amounting to Rs. 9,58,80,930.00 (Rupees Nine Crore Fifty-Eight Lakh Eighty Thousand Nine Hundred and thirty only) but failed to make the entire amount due and payable by it.
- 11.** The Corporate Debtor filed reply affidavit denying the allegations made by the Applicant. The Corporate Debtor submitted that in the Arbitral Award which was passed under the MSME Act, the principal amount which was found due and payable was a sum of Rs.10,44,00,726/-. The penal interest also was awarded in favour of the Applicant under

the provisions of MSME Act, though there was no agreement between the parties for payment of any such penal interest nor does the invoices stipulate payment of penal interest.

12. Further, the Applicant has filed execution / enforcement proceedings before the Hon'ble High Court of Judicature at Kolkata for enforcement of the Arbitral Award before the issuance of Notice under Section 8 of the IBC, which are pending.
13. The Corporate Debtor has submitted that after issuance of the Demand Notice, several payments have been made totaling to Rs.9,58,80,930/- against principal amount of Rs.10,44,00,726/-, as adjudicated by the Arbitrator towards principal amount which goes to show that a balance of Rs. 85,19,796/- is outstanding towards the principal amount and process has been initiated for payment of the said amount shortly. The Corporate Debtor has therefore submitted that the principal amount as on the date of filing of the present petition was Rs. 85,19,796/- which is below the threshold and therefore, the present petition filed under Section 9 of IBC is not maintainable.
14. The Corporate Debtor further submitted that the penal interest awarded by the Arbitrator would not qualify as an "operational debt". It is further stated that the Arbitral Award cannot be treated as a debt under the provisions of the IBC and the Corporate Debtor cannot be held liable to pay the same.
15. The Ld. Counsel for the Corporate Debtor submitted that the amount involved in this application is below the threshold limit of one crore and therefore not maintainable.
16. In this regard, he relied upon the decision of the Hon'ble NCLAT in the case of **Sushil Ansal Vs. Ashok Tripathi & ors in Company Appeal (AT) (Insolvency) No. 452/2020** dated 14.08.2020. Reliance is also being placed in the decision of the Hon'ble NCLAT in the case of Jumbo Paper Products vs. Hans Raj Agro Fresh Pvt. Ltd- Company Appeal (AT) (Ins) No. 813 of 2021.

17. He further submitted that the Applicant has filed execution/enforcement petition before the Hon'ble High Court at Calcutta for execution of the arbitral award and therefore this petition cannot be used as a recovery forum for initiating recovery proceedings further the Applicant is trying to recover the amount awarded by the arbitrator through this proceedings. Ld. Counsel further submitted that there is no agreement between the parties with respect to the interest and therefore penal interest awarded by the arbitrator would not fall in the category of "operational debt" and/or "financial debt". The Applicant cannot be termed as Operational Creditor with respect to the Arbitral Award. The present application having already been filed for recovery of arbitral amount would not fall within the definition of "operational debt" within the meaning of Section 5(21) of IBC, 2016.

18. Ld. Counsel further relied upon the decision of this Tribunal in the case of CBRE South Asia Pvt. Ltd. vs. M/s United Concepts Solutions Pvt. Ltd – Company Petition (IB) 197 (ND) 2021 dated 17.01.2022 wherein it has been held that the interest cannot be clubbed with the principal amount of debt to arrive at the minimum threshold of Rs. 1 Crore for complying with the provisions of Section 4 of IBC, 2016.

Submissions on behalf of the Applicant:

19. Ld. Counsel appearing for the Applicant submitted that the Applicant is an MSME having been registered under the MSME Act, 2006. He refer to the provisions under Section 15 of the MSME Act, 2006 and submitted that the date of default against each agreement entered into and/or the work orders issued by the Corporate Debtor is 45 days from the date of the respective invoice raised and issued by the Applicant to the Corporate Debtor.

20. In this regard, it is pertinent to refer to Section 15 of the MSME Act, 2006 which is quoted below:

“Liability of buyer to make payment- Where any supplier supplies any goods or renders any services to any buyer, the buyer shall make payment therefore on or before the date agreed upon between him and the supplier in writing or, where there is no agreement in this behalf, before the appointed day:

Provided that in no case the period agreed upon between the supplier and the buyer in writing shall exceed forty-five days from the day of acceptance or the day of deemed acceptance.”

21. With regard to the issue as to whether the present petition meets the requirements of the threshold under the Code, the Ld. Counsel submitted that the aggregate amount for which the invoices were raised is Rs. 17,85,88,953/-. The total payment made during the period when the work was in progress is Rs. 6,78,18,707 /-, the aggregate sum that is due and payable to the Applicant by the Corporate Debtor as per the letter dated 27.07.2021 issued by the Corporate Debtor is Rs.17,85,88,953/-. The payment made by the Corporate Debtor in September 2021 upon receipt of the demand notice under Section 8 of the Code is Rs.9,58,80,930/- Thus, the debt in default by the Corporate Debtor as on the date of filing of the present petition is Rs. 1,06,55,070/- Ld. Counsel further submitted that as on the date of filing of the present proceedings an amount of Rs. 1,06,55,070/- was due and there was an admitted default on the principal amount alone which satisfies the criteria of threshold under the Code. Ld. Counsel submitted that the present proceedings have been initiated for non-payment of the contractual dues under the provisions of the Indian Contract Act, 1987. The objection raised by the Corporate Debtor that the basis of the present petition is the arbitral award passed in the proceedings initiated under the Micro

and Small Enterprises Facilitation Council (MSEFC, West Bengal) is incorrect and untenable.

- 22.** Further, the Corporate Debtor vide its letter dated 27.07.2021 has admitted its debt and acknowledged its default. He further submitted that the adjudication by the MSME Authority does not restrict the Applicant from filing the present proceedings under the IBC Code, 2016. The right or power of the Applicant to approach this Tribunal is independent.
- 23.** In this regard, Ld. Counsel relied upon the judgment passed by Hon'ble NCLAT in the case of ***Value Advisors Pvt. Ltd. Vs. Srinagar Banihal Expressway Limited (Company Appeal (AT) (Ins.) No. 1142 of 2019***) decided on 13.01.2020, wherein the Hon'ble Tribunal has held as follows:

“We have heard Counsel for both sides and going through the matter, we find that the Adjudicating Authority erred in concluding that because Operational Creditor had moved the MSME Authorities, it showed pre-existing dispute. The Appellant had a relief open under the MSME Act and only because the Appellant moved the Authority under MSME Act, it does not mean that there is a pre-existing dispute. The dispute raised by the Appellant before the MSME was that it had dues to recover and that the Respondent has not paid. This by itself does not mean that there is pre-existing dispute as far as the Respondent is concerned”.

- 24.** The Hon'ble NCLAT further held at present, nothing is shown that there was any pre-existing dispute raised by the Respondent with regard to the services rendered by the Appellant. When this is so, only because the Appellant went to the MSME Authorities was no ground for the Adjudicating Authority to reject the Application under Section 9.

25. With respect to the ground taken by the Corporate Debtor that the Applicant has misused this Adjudicating Authority as recovery forum, the Ld. Counsel appearing for the Applicant submitted that the proceedings under the Code are independent and separate from the award passed by the MSME Authorities or the execution proceedings filed under Section 36 of the Arbitration and Conciliation Act, 1996 and therefore such an objection cannot be sustained.

Findings:-

26. We have heard the submissions of Mr. Vikram Wadehra, Ld. Counsel appearing for the Applicant and Mr. Dinesh Agnani, Ld. Sr. Counsel appearing for the Corporate Debtor and perused the records.

27. Adverting to the factual matrix of the present case, it is an undisputed fact the Corporate Debtor had issued Seven (7) different work orders in favor of the applicant, pursuant to which the applicant had rendered the services and raised the invoices in respect of each of the work orders. The Corporate Debtor had defaulted in payment of the pending invoices on various occasions, being aggrieved of which the applicant being a registered MSME had initiated proceedings before the Ld. MSEFC, West Bengal. The Ld. MSEFC, West Bengal had passed an award dated 03.02.2021 whereby an arbitral award was passed in favor of the Applicant and an execution petition for the enforcement of the Arbitral Award filed by the Applicant is pending before the Hon'ble High Court, Kolkata. The applicant had issued a demand notice under Section 8(1) of the Code, 2016 demanding outstanding operational debt of Rs.14,79,43,404/- out of which Rs.10,44,00,726/- is the Principal amount outstanding and Rs. 4,36,62,058/- is the interest outstanding. Further it is an undisputed fact, that out of the outstanding Principal Debt of Rs. 10,44,00,726/-, an amount of

Rs.9,58,80,930/- was paid off the by the Corporate Debtor to the Applicant and thereby, leaving a balance of Rs. 85,19,796/- being the principal amount, outstanding as of the date of filing the present application under Section 9 of the Code, 2016, which the Corporate Debtor in its reply admitted to be due and has undertaken to pay the same.

- 28.** As regard to the Applicant's contention with respect to the interest on Delayed Payment being an MSME, we are of the considered view that neither in the work orders nor in the invoices there exist any covenant about the interest on delayed payment nor the applicant placed on record any document that Applicant is a registered MSME. In such circumstances, the contention of the Applicant that interest can be clubbed with the principal amount of Operational Debt cannot be accepted by this Adjudicating Authority.
- 29.** Having conspectus of all facts and circumstances, we observe that the operational debt is Rs. 85,19,796/- being the principal amount outstanding, is below the pecuniary threshold limit of Rs. 1 Crore as envisaged under Section 4 of the Code, 2016.
- 30.** Further, the Hon'ble Supreme Court in **"Swiss Ribbon Pvt. Ltd. Vs. Union of India" ((2019) 4 SCC 17) observed** that IBC is not a recovery proceeding and the Application which has been filed by the appellant in the present case is only the application for recovery of balance amount of the interest and application was not filed for resolution of any insolvency of the Corporate Debtor.
- 31.** Accordingly, the present application filed under Section 9 of the Code, 2016 being non-maintainable **stands dismissed**. No orders to costs.

Sd/-
(SH. ATUL CHATURVEDI)
MEMBER (TECHNICAL)

Sd/-
(SH. BACHU VENKAT BALRAM DAS)
MEMBER (JUDICIAL)