

**IN THE NATIONAL COMPANY LAW TRIBUNAL**

**NEW DELHI (COURT NO. IV)**

**IA-761/ND/2021**

**IN**

**CP- IB 782/ND/2020**

(Under Rule 11 of NCLT Rules,2016 read with 8 of the Arbitration  
& Conciliation Act, 1996)

**IN THE MATTER OF:**

**ANURATAN TEXTILES PRIVATE LIMITED**  
...Operational Creditor

Versus

**AMAIRA INTERNATIONAL PRIVATE LIMITED**  
...Corporate Debtor

**Pronounced on:15.06.2021**

**CORAM:**

**DR. DEEPTI MUKESH**

**HON'BLE MEMBER (Judicial)**

**MS. SUMITA PURKAYASTHA**

**HON'BLE MEMBER (Technical)**

**For the Applicant:** Ms Sonali Joon, Advocate

*IA-761/ND/2021*

**ORDER**

**Per-Dr. Deepti Mukesh, Member (J)**

1. The instant application is filed by Amaira International Private Limited (for brevity corporate debtor) against Anuratan Textiles Private Limited (for brevity operational creditor) under Section 8 of the Arbitration and Conciliation Act, 1996 for disposing off the Section 9 Application being not maintainable in view of the Arbitration Agreement entered into between the parties, inter alia for following prayers:
  - i. Allow the present Application and refer the parties to Arbitration in the interest of justice.
  - ii. Dispose-off the present section 9, Insolvency Bankruptcy Code, 2016 Application filed by the operational creditor as being not maintainable in view of the arbitration clause present in the Invoices; and
2. It is submitted by the corporate debtor that the Operational Creditor has filed the present Application under Section 9 to initiate Corporate Insolvency Resolution Process under Section 9 of Insolvency and Bankruptcy Code, 2016 and the application is at the initial stage, is pending adjudication before this Tribunal.
3. It is submitted that the Corporate Debtor is invoking the Arbitration Clause contained in the Invoices as per terms and conditions mentioned under Section 8 (1) of Arbitration and Conciliation Act, 1996. The matter is subject to the arbitration agreement, as the invoices contain arbitration clause, which

states as follows:

*'In case of any dispute regarding this bills shall be referred to the Arbitration of Delhi Hindustani Mercantile Association, Chandani Chowk, Delhi and the award of sole arbitration shall be final and binding on the parties'* Henceforth, as specified by the Arbitration clause 'any dispute' regarding the invoice should be referred to Arbitral Tribunal.

4. The corporate debtor submits that this application is being filed before submitting the first statement by the corporate debtor on the substance of disputes between the parties which is *'the invoices'*. That facts regarding the presence of Arbitration clause in the invoices have been deliberately and intentionally hidden/not disclosed in the Application filed before this tribunal by the operational creditor. It is further relied by the corporate debtor on the judgment passed by the Hon'ble Bombay High Court in the matter of *Rakesh Malhotra vs Rajinder Kumar Malhotra* which is of utmost relevance here, where it was held that the power to refer the disputes in a petition that is mischievous, vexatious, malafide and *dressed up to* arbitration ways retained. It is submitted that the present case is an example where the Operational Creditor has filed a *dressed up* Application with the intention of avoiding Arbitration for which they themselves have come into an Agreement.
5. It is further submitted by the corporate debtor that the matter of dispute is Arbitrable in nature as held in the matter of *'Booz Allen and Hamilton Inc*

*vs SBI Home Finance Limited & others* wherein the Hon'ble Supreme Court has held as follows:

*The term 'arbitrability' has different meaning in different contexts. The three facets of arbitrability, relating to the jurisdiction of the arbitral tribunal, are as under:- (a) whether the disputes are capable of adjudication and settlement by arbitration? (b) Whether the disputes are covered by the arbitration agreement? (c) Whether the parties have referred the disputes to arbitration?". A dispute, even if it is capable of being decided by arbitration and falling within the scope of arbitration agreement, will not be 'arbitrable' if it is not enumerated in the joint list of disputes referred to arbitration, or in the absence of such joint list of disputes, does not form part of the disputes raised in the pleadings before the arbitral tribunal.*

Therefore, in the present matter the subject matter of the suit is 'arbitrable' in nature, as it comes within the ambit of 'right in personam' and the dispute is also well within the ambit of the Arbitration Agreement mentioned in the Invoices raised by the Operational Creditors.

6. The corporate debtor submits that the dispute also passes the test of arbitrability laid in the above mentioned case, as the alleged disputed amount claimed by the Operational Creditor is with respect to the Invoices raised and is capable of adjudication and settlement by Arbitration as it is governed by a valid Arbitration agreement. The corporate debtor submits that the Operational Creditor

has defaulted by not referring the matter to the Arbitration Tribunal in the first instance, as any dispute arising with regards to the invoices are covered under the Arbitration Agreement.

7. That the corporate debtor further relied on following judgements passed by Hon'ble SC touching the issue of arbitrability of the dispute. The legal position was further clarified in the matter of '*Hindustan Petroleum Corporation Limited v Pinkcity Midway Petroleum*', the Hon'ble Supreme Court held that where an arbitration clause exists, the court has a mandatory duty to refer dispute arising between the contracting parties to arbitrator.

Further,

in '*Indus Biotech Private Limited v. Kotak India Venture Fund*', NCLT Mumbai Bench, considered the supremacy of Arbitration Act over Insolvency and Bankruptcy Code, 2016 based on the old principle of *generalia*

*specialibus non deroganti*. i.e. special law prevail over

general law, which was discussed in by the Supreme Court in '*Consolidated Engineering Enterprises vs Principal Secretary, Irrigation Department & others*' where it was

held that the Arbitration & Conciliation Act is a special law, consolidating and amending the law relating to arbitration and matters connected therewith or incidental thereto.

The Hon'ble Supreme Court in the matter of '*P. Anand Gajapathi Raju & Ors. v. P.V.G. Raju (Died) & Ors*', while iterating the periphery of Section 8 of the Arbitration and Conciliation Act, 1996, has said as follow:

*'The conditions which are required to be satisfied under Sub-sections (1) and (2) of Section 8 before the Court can exercise its powers are (1) there is an arbitration agreement; (2) a party to the agreement brings an action in the Court against the other party; (3) subject matter of the action is the same as the subject matter of the arbitration agreement; (4) the other party moves the Court for referring the parties to arbitration before it submits his first statement on the substance of the dispute.*

*....The language of Section 8 is per-emptory."*

Section 8 of the Arbitration and Conciliation Act, 1996 is read as:

*'Power to refer parties to arbitration where there is an arbitration agreement.-*

*1) A judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration.'*

8. In the present matter, it is an admitted fact that at the end of each invoice issued by the Operational Creditor there is an Arbitration Clause. Against these invoices Corporate Debtor had issued debit note. When the debit notes were issued, the corporate Debtor also received emails from Operational Creditor seeking clarification and contesting the issuance of Debit Note, hence, a dispute had come into existence by admitting the fact that valid invoice was existing between the parties. Subsequently, after the exchange of emails the parties have met multiple times to settle the dispute between them with respect

to the invoice amount and supply involved. At this stage we are not going into the merits of existence of per-existing dispute as defined in I & B Code, 2016 but to test whether the dispute if any needs to be sent to arbitration as per section 8 of Arbitration and Conciliation Act (as amended).

9. Further, as per the Arbitration and Conciliation (Amendment) Act, 2015, where an arbitration clause exists, the court has a duty to refer dispute arising between the contracting parties to arbitration. Section 8 reads as under:

*(i) for sub-section (1), the following sub-section shall be substituted, namely:—*

*“(1) A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists.”;*

*(ii) in sub-section (2), the following proviso shall be inserted, namely:—*

*“Provided that where the original arbitration agreement or a certified copy thereof is not available with the party applying for reference to arbitration under sub-section (1), and the said agreement or certified copy is retained by the other party to that agreement, then, the party so applying shall file such application along with a copy of the arbitration*

*agreement and a petition praying the Court to call upon the other party to produce the original arbitration agreement or its duly certified copy before that Court.”.*

10. With the above discussion we are of the view that, since the disputes are purely contractual in nature, the invocation of arbitration is justified. Once the parties are sent to arbitration, nothing survives in the insolvency application as the issues between the parties after arbitration, will decide the rights of the parties. Hence at this stage, the insolvency application in view of the parties being sent to the arbitration, has become infructuous.
11. The present application is allowed as prayed, thereby making insolvency application IB 782/ND/2020 as infructuous and hence disposed off, in terms of above order.

**Sd/-**  
**(MS. SUMITA PURKAYASTHA)**  
**MEMBER (T)**

**Sd/-**  
**(DR. DEEPTI MUKESH)**  
**MEMBER (J)**