IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
KOLKATA

IVN P. 7/KB/2021
IN
CP(IB) No. 2 /KB/2021

In the matter of:

Application under rule 11 of the National Company Law Tribunal Rules, 2016.

And

In the matter of:

Ahluwalia Contracts (India) Limited

.....Operational Creditor

-Versus-

Srishti Infrastructure Development Corporation Limited

.... Corporate Debtor

-And-

Rishima SA Investments LLC (Mauritius)

…. Intervenor/Applicant

Date of Hearing :20th April 2022
Date of pronouncing the order: 28th June 2022

Coram:
Shri Rohit Kapoor, Member (Judicial)
Shri Harish Chandler Suri, Member (Technical)

Appearances (via video conferencing/ Physical Appearing):

For Operational Creditor	:	Mr. Rudraman Bhattacharyya, Advocate Ms. Suchismita Ghosh, Advocate Mr. Sourojit Dasgupta, Advocate Ms. Amrita Panja Moulick, Advocate
For Corporate Debtor	:	Mr. Rishav Banerjee, Advocate Mr. Rajarshi Banerjee, Advocate
For Intervenor	:	Mr. Debnath Ghosh, Advocate Mr. Shushovit Dutta Majumder, Advocate Mr. Aditya Sharma, Advoate

ORDER

Rohit Kapoor, Member (Judicial):

1. This Court convened through hybrid mode.
2. This is an application under rule 11 of the National Company Law Tribunal Rules 2016 filed by the **Rishima SA Investments LLC (Mauritius)**

(hereinafter known as the Applicant) against **Ahluwalia Contracts (India) Limited** (hereinafter known as the Operational Creditor) and **Shrishti Infrastructure Development Corporation Limited** (hereinafter known as the Corporate Debtor), seeking the following reliefs:

a. *Impleadment of the Applicant to the Company Petition No. (IB)/2(KB) 2021; and*
b. *Dismissal with costs of the Company Petition No. (IB)/2(KB) 2021; and*
c. *Imposing of cost on the Operational Creditor and Corporate Debtor for maliciously filing the Company Petition No. (IB)/2(KB) 2021 for the purposes other than the resolution of the Corporate Debtor; and*
d. *In the event of admissions of the Company Petition No. (IB)/2(KB) 2021, the passing of a direction that the Applicant may be treated fairly in the resolution plan of the Corporate Debtor.*
e. *Stay of Company Petition No. (IB)/2(KB) 2021 pending the hearing of this Application*

3. Submissions on Behalf of the Applicant:

3.1. The case of the Applicant is that the Applicant has crystallized rights against the Corporate Debtor under two Arbitral Awards dated 30.04.2019 and 12.07.2020 as passed by the arbitral tribunal seated in Singapore in ICC Case No. 21674/CYK/PTA/ASB/HTG. These awards are presently being enforced by the Applicant against the Corporate Debtor before Hon’ble Delhi High Court in enforcement petitions bearing O.M.P (EFA) (Comm) No. 5 of 2019 (“OMP 5”) and O.M.P (EFA) (Comm) No. 6 of 2021 (“OMP 6”) respectively. The Applicant, as on 30.09.2021, is entitled to receive approximately Rs. 894 Crores from the Corporate Debtor under both the arbitral awards.

3.2. The Applicant apprehends and has legitimate reasons to apprehend that the Company Petition is filed by the Operational Creditor in collusion with the Corporate Debtor only to frustrate the Applicant’s crystallized rights under the said arbitral awards.

3.3. It is stated by the Counsel on behalf of the Applicant that the Corporate Debtor's special purpose vehicle (SPV), namely Sarga Hotel Pvt. Ltd. ("SHPL") was a party to the arbitration proceedings. SHPL is also a party to OMP 5. Presently, the Corporate Debtors holds 65% shareholding in SHPL.

3.4. SHPL, a Special Purpose vehicle of Corporate Debtor, was set up to construct and operate a five-star hotel i.e. 'The Westin, Rajarhat, Kolkata'. On 07.08.2008, the Applicant herein, the Corporate Debtor and SHPL entered into a Share Subscription and Shareholder's Agreement (SSHA), which set out the terms for the Applicant's investment of up to 35% in SHPL. As per the Agreement, the Applicant was to hold 35 % shares in SHPL pursuant to payment of an aggregate consideration of Rs. 80 crores in October 2008 and August 2009 respectively. The Corporate Debtor was to hold the balance 65 % shares in SHPL. [Annexure C]. On 12.12.2014, the Applicant invoked arbitration as per Clause 24.1(b) of the SSHA.

3.5. Thereafter, on 11.02.2016, the Applicant filed its request for arbitration with the International Chamber of Commerce ("ICC"). On 30.04.2019, the arbitral tribunal constituted for the arbitration passed the Partial Award directing, inter alia, the Corporate Debtor to pay Rs. 761 Cr to the Applicant. Accordingly, on 29.05.2019, the Applicant filed OMP 5 for enforcement and execution of Partial Award. [Annexure D]. The corporate Debtor challenged the Partial Award before Singapore International Commercial Court ("SICC"). However, the said challenge was dismissed by SICC vide Order dated 03.03.2020. Thereafter, the Corporate Debtor filed an appeal before Court of Appeal, Republic of Singapore to challenge Order dated 03.03.2020, which was subsequently deemed to have been withdrawn on 25.05.2020. On 12.07.2020, the arbitral tribunal passed the final award in the arbitration directing, inter alia, the Corporate Debtor to pay Rs. 16.18 Cr along with interest to the Applicant [Annexure E].

3.6. During the pendency of OMP 5, a different Operational Creditor of SHPL, namely, Universal International Creation Limited ("UICL") filed a collusive section 9 application at the behest of the Corporate Debtor and SHPL to admit SHPL into CIRP. The aforesaid section 9 application was registered before the Tribunal as CP(IB) No. 767/ 2020. On 12.08.2020, this Tribunal admitted SHPL into CIRP. The said order dated 12.08.2020 [Annexure A].

3.7. The Applicant herein challenged the Order dated 12.08.2020 before the Hon'ble National Company Law Appellate Tribunal, New Delhi ("NCLAT"). The Hon'ble NCLAT, *vide* judgment dated 27.08.2021, set aside the said order of this Tribunal and noted therein that there is a reasonable doubt of collusion between SHPL and the Operational Creditor therein. The Hon'ble NCLAT further noted that the conduct of SHPL inferred that SHPL appeared to be keen and waiting for admission and initiation of CIRP against itself. The said judgment dated 27.08.2020 [Annexure B].

3.8. In August 2021, the Applicant learnt that the Operational Creditor has filed the present Company Petition and the same is listed on 29.10.2021 before this Tribunal. The same arises out of a default under an Agreement dated 25.04.2012 entered into between the Operational Creditor and the Corporate Debtor.

3.9. According to the Applicant, the Corporate Debtor and SHPL are maliciously making multiple attempts to somehow initiate CIRP against themselves in order to frustrate the rights of the Applicant under the arbitral awards. The first attempt was made in CP(IB) 767/KB/2020. The second is in form of the instant company petition being CP (IB) 2/KB/2021. If the CIRP is initiated against the Corporate Debtor, the declaration of moratorium will prohibit the execution of the arbitral awards until the moratorium remains in force.

3.10. Further on perusal of the judgment dated 27.08.2021, it can be seen that Hon'ble NCLAT has made the following observations while deciding upon the admittance of SHPL into CIRP:

"27. An argument placed before us by the Appellant is the way the application for urgent mentioning by the operational creditor vide email dated 10.08.2020 sent to the Registry of NCLT was dealt. The NCLT Registry immediately replied to the operational creditor asking for a Defence Note in 15-20 lines within 24 hours, for consideration. It is quite surprising that even when the mentioning has not been made before the NCLT, the NCLT registry presumed that the mentioning would be about final hearing of the case and asked for RA Defence Note. Furthermore, after the Defence Note was sent by the Corporate-Debtor vide email dated 11.08.2020 (attached at page 27, Reply of Respondent No. 2 UICL in CA No. 892 / 2020, diary number 23628/21.11.2020), the corporate debtor proceeds to admit the operational debt of UICL without so much as a weak defence, nor did it seek the right and time to file a complete reply, as would be normally expected. Thus, without a full and proper hearing, as was desirable from the point of view of natural justice, the impugned order is passed by the Adjudication Authority (NCLT) on 12.08.2020. If anything, the events as they unfolded show the haste and alacrity with which the matter as serious as initiating CIRP against a 'going concern' was dealt with, without any regard of natural justice."

28. ***It would, therefore, not be far-fetched to infer that the corporate debtor appeared to be itself keen and waiting for admission of Section 9 application and initiation of CIRP against itself.***

33. ***In view of the submissions and arguments made by the Appellant and Respondents and a close perusal of documents***

submitted by the operational creditor and other parties lead us to the conclusion that the application u/s 9 was not submitted within limitation and it contained documents of doubtful origin which do not inspire confidence, and which formed the basis of admission order. The allegations of collusion between the Operational Creditor and the corporate debtor raise reasonable doubt. *Documents filed to hold debt was due, or payable do not raise confidence. Initiation of CIRP of a company which is a going concern, on the basis of a short defence note without a proper reply/defence called from the corporate debtor, and based on such documents attached with the admission application is certainly not proper and defeats the purpose and intent of the IBC in letter and spirit.*

34. In light of the discussion cited above, the Impugned Order dated 12.08.2020 is set aside..."

3.11. It is trite that under Section 65 of IBC it is incumbent upon the Tribunal to determine whether an application for CIRP is collusive and fraudulent, and thereupon impose appropriate penalty. Further, in the event the allegation against the correctness of a petition is made before an admission order is passed, then the Tribunal must adjudicate the same before admitting a corporate debtor into CIRP. Therefore, based on the settled position of law, it is expedient that the present Application are adjudicated prior to adjudication of the Company Petition, else it would lead to irreparable loss to the Applicant.

3.12. It is pertinent to note that the Applicant infused investment amount in SHPL with the object of economic gain. Further, the terms of the SSHA involved not only subscription of shares of SHPL but also repayment of investment amount at a particular time with an Internal Rate of Return of 25%. Therefore, the Applicant is a financial creditor and would be affected by any Order passed by this Tribunal in the Company Petition.

3.13. In terms of Section 65 of IBC, the Applicant may be impleaded to bring to notice of this Tribunal the collusive and fraudulent initiation of CIRP sought by the Operational Creditor vide the present Company Petition.

3.14. Owing to the myriad dilatory tactics of the Corporate Debtor, the Applicant could not attain any tangible relief even after more than five years of commencing the arbitration proceedings. The Corporate Debtor and SHPL challenged the role of the third arbitrator before the arbitral Tribunal. The said challenge was decided against them. This order was assailed by them before the Hon'ble Singapore High Court and the same was dismissed.

3.15. The Corporate Debtor and SHPL also sought to illegally terminate the SSHA but the Arbitral Tribunal decided against the Corporate Debtor in the said matter. Further, the Corporate Debtor floated a scheme of amalgamation and demerger to hive off its hotel business (including assets of SHPL) to a shell company. The Applicant herein, sought impleadment in the said matter and was allowed vide order dated 31.07.2018. the Corporate Debtor later on requested permission of the Tribunal to withdraw its application, which was allowed.

3.16. The Corporate debtor has filed a petition under sections 241, 242 of the Companies Act, 2013 alleging oppression and mismanagement by nominee directors of the Applicant herein. The reliefs claimed in said petition were rejected *vide* order dated 23.11.2017. in the said order, the Tribunal also observed the following"

> *" 62. It is also clear from the above that petition under sec. 241 and 242 is only dressed up a petition with a purpose to bypass the arbitration agreement…"*

3.17. Further, during the arbitration proceedings, SHPL illegally removed the Applicant's nominee director from its board and subsequently refused to reinstate the director or appoint a replacement. In this regard, the

Partial Award directs-the Respondents to comply with Clauses 6, 7 and 8 of the SSHA read with Schedule 3 (the rights of Applicant to nominate directors on the board of directors of SHPL, attend board and shareholder meetings, receive notices, quorum requirements, veto rights etc). Despite of the aforementioned direction, the Corporate Debtor and SHPL continue to flagrantly disregard the said directions of the Arbitral Award. Resultantly, the Applicant continues to be kept away from the business affairs of SHPL.

3.18. Further, during the pendency of the arbitration proceedings and in the financial year 2018-19, the Corporate Debtor sold the commercial component of the Westin Hotel, Kolkata admeasuring 1,40,600 sq. ft. for a sum of Rs. 44.3 Crore. This was not only in violation of the contractual understanding but was also in utter violation of the Order of the arbitral tribunal dated 03.07.2017. During the pendency of the arbitration and the present enforcement proceedings, the Corporate Debtor has also continued to transfer its assets to its group companies.

3.19. Considering the above, the Applicant believes that the present Company Petition is another *mala fide* attempt on part of the Corporate Debtor to frustrate the rights of the Applicant. In view thereof, nature and extent of claims raised by the Operational Creditor as well as the relation between the Operational Creditor and the Corporate Debtor ought to be properly scrutinized.

3.20. The Company Petition is liable to be dismissed as time barred and non-maintainable. The present Company Petition arises out of a default under an Agreement dated 25.04.2012 entered into between the Operational Creditor and the Corporate Debtor. As per Clause 60.11 of the GCC of this Agreement, the amount due shall be paid by the Corporate Debtor to the Operational Creditor within 75 days after the submission of the final bill by the Operational Creditor. On 13.07.2016, the Operational Creditor submitted its final bill to the Corporate Debtor. In terms of Clause 60.11, the amount due to the Operational Creditor became due and payable by 26.09.2016 and was not paid as on that date. Therefore, the default under Section 3(12) of IBC occurred on 26.09.2016.

3.21. In view of above contractual arrangement and Section 3 (12) of IBC, the limitation period of 3 years to file a Section 9 application expired on 26.09.2019. It is stated that the Operational Creditor has filed the present Section 9 Application only on 27.12.2020. Therefore, the present Company Petition may be dismissed as time barred.

3.22. Alternatively, if the date of default is taken as 19.06.2020 as stated by the Operational Creditor in its demand notice dated 26.09.2020, even then the present Company Petition is not maintainable in view of Section 10A of IBC.

4. Submissions of Behalf of the Corporate Debtor:

4.1 The Corporate Debtor has denied that the Applicant is a financial creditor of the Corporate Debtor, and has stated that it is not so in terms of the Insolvency and Bankruptcy Code, 2016 ("IBC"). It has claimed the issue of whether the Applicant is a financial creditor of the Corporate Debtor or not is immaterial in the context of the instant Company Petition and intervention Petition.

4.2 The Corporate Debtor has further denied the statement of the Applicant in paragraph 30 of the instant Intervention Petition that "*in view of the above findings of the Hon'ble NCLAT, the Applicant has sound reasons to apprehend that the present Company Petition is filed by the Operational Creditor against the Corporate Debtor only, to frustrate the rights of the Applicant under the arbitral awards*", as alleged or at all. The Corporate Debtor submits that the Applicant has extrapolated adverse observations made against SHPL by the Hon'ble NCLAT in the judgment dated 27.08.2021 to arrive at unreasonable apprehensions regarding the conduct of the Corporate Debtor in the instant matter involving a completely different set of facts and circumstances on record.

4.3 The Applicant has done so while choosing to ignore the fact that the said judgment dated 27.08.2021 reflected in part the successful efforts of the Corporate Debtor before the NCLAT in extricating SHPL from the clutches of CIRP and not just solely that of the Applicant. Both the Corporate Debtor and the Applicant were appellants who successfully challenged the admission of SHPL into CIRP vide an order dated 12.08.2020 passed by this Adjudicating Authority.

4.4 The Applicant has, till date, not even filed any application against the Corporate Debtor and/or SHPL before this Adjudicating Authority for specifically adjudicating any allegations pertaining to the alleged first "attempt" of SHPL and Corporate Debtor through the said admission order dated 12.08.2020 to "*deceitfully initiate CIRP proceedings against themselves (sic) by fraudulently colluding with their creditors*," as alleged by the Applicant in the instant Intervention Petition, that can warrant the levy of penalty under section 65 of the IBC.

4.5 The Corporate debtor has submitted that it has already filed an exhaustive Affidavit in Reply, running into three (3) volumes and around three hundred and sixty-three (363) pages in **CP (IB) 2/KB/2021** filed by the Operational Creditor. A perusal of the Order dated 07.03.2022 in the said Company Petition will establish that this Tribunal has been pleased to take the same Affidavit-in-Reply onto its records.

4.6 The Corporate Debtor had even disputed the validity of the purported statutory demand notice under section 8 of the Insolvency and Bankruptcy Code,2016 ("IBC") itself and had issued a detailed reply to the purported statutory demand notice issued by the Operational Creditor under section 8 of the IBC wherein it had canvassed all the pre-existing disputes between itself and the Operational Creditor that had been duly and diligently notified by it to the Operational Creditor much prior to its receipt of the said statutory demand notice. These pre-existing disputes had been duly and diligently highlighted in the said Affidavit-in-Reply and include a host of disputes/concerns regarding quality as well as the levy of liquidated damages amounting to as much as Rs. 4, 79, 92, 247/- (Rupees Four Crore Seventy-Nine Lakhs Ninety-Two Thousand Two Hundred and Forty-Seven only) on the Operational Creditor for admitted delays.

4.7 The Corporate Debtor has also highlighted the fact that the affidavit purported by the Operational Creditor to be an affidavit under section 9(3)(b) of the IBC contains misstatements regarding the reply duly sent by the Corporate Debtor to the purported statutory demand notice sent by the Operational Creditor.

4.8 The Corporate Debtor has expressly submitted via the said Affidavit-in--Reply that the instant Company Petition filed by the Operational Creditor is not maintainable and liable to be dismissed on account of several grounds including the fact that it is barred by limitation.

4.9 Regarding the NCLAT judgment dated 27.08.2021 relied upon by the Applicant in the instant intervention petition, it has been submitted that the Corporate Debtor itself had preferred an appeal, being C.A.(AT)(Ins.) No. 892 of 2020, before the Hon'ble National Company Law Appellate Tribunal ("NCLAT") against the admission Order dated 12.08.2020 passed by this Tribunal admitting Sarga Hotel Private Limited ("SHPL") into CIRP. The appeal preferred by the Corporate Debtor culminated in the common judgment dated 27.08.2021 allowing both the appeals filed by the Applicant and the Corporate Debtor against the said admission Order dated 12.08.2020. This is apparent from a perusal of the very judgment dated 27.08.2021 relied upon by the Applicant in the instant intervention petition. The Corporate Debtor and SHPL are separate legal entities and the Corporate Debtor has successfully appealed against the said admission order dated 12.08.2020 admitting SHPL into CIRP.

4.10 A perusal of paragraphs 31 and 32 of the said NCLAT Judgment dated 27.08.2021 will show that "a matter raised by the Appellant the Applicant is for initiation of section 65 proceedings against," SHPL and the Corporate Debtor (Shristi Infrastructure Development Corporation Limited) and the NCLAT had desisted from commenting anything further on this matter beyond its observation that this Tribunal/Adjudicating Authority "is the correct forum to agitate this issue."

4.11 A perusal of the said Affidavit-in-Reply by this Tribunal will establish that the Corporate Debtor is strenuously seeking to have the instant Company Petition dismissed on multiple, forcefully urged grounds. . The Corporate Debtor specifically denies and disputes the vacuous and misdirected submission of the Applicant that "the Corporate Debtor is colluding with the Operational Creditor to initiate CIRP against itself just to frustrate Applicant's rights under the Arbitral Awards," as alleged or at all. Any apprehension to this effect that have been purported to have been harboured by the Applicant is actually a misapprehension that does not warrant imposition of any costs/penalty on the Corporation Debtor, whether under section 65 of the IBC or any other section.

4.12 In light of the aforesaid facts and circumstances, the Corporate Debtor states and submits that the purported apprehensions canvassed by the Applicant in the instant Intervention Petition are palpably baseless and misdirected and are better characterized as misapprehensions. Therefore, the reliefs prayed for by the Applicant on the basis of such misapprehensions cannot be granted by this Tribunal.

4.13 The Corporate Debtor further categorically denies and disputes that its "prior conduct demonstrates deployment of dilatory tactics to frustrate ongoing legal proceedings," as alleged or at all, and further states that the purported facts and submissions canvassed in paragraphs 43-44 and 46-48 of the instant Affidavit-in-reply are immaterial to the facts and circumstances of the instant matter, especially in light of the fact that the Corporate Debtor is strenuously resisting the instant Company Petition.

5. *Analysis and Findings:*

5.1 We have heard the Ld. Counsel for the Applicant and the Ld. Counsel for the Respondent and perused the record.

5.2 Regarding the objection of non-applicant regarding maintainability of this application and reliefs sought therein, we would like to refer to the Hon'ble NCLAT's decision in the matter of **SREI Infrastructure Finance Ltd v. Right Tower Pvt. Ltd[2018 SCC Online NCLAT 58]**, wherein, while upholding the right of any person to intervene, the following was held:

"4. It is submitted that if any person initiates the Insolvency Resolution Process fraudulently or with malicious intent for any purpose other than for the resolution of insolvency, the Adjudicating Authority may impose such person any penalty as stipulated under Section 65. According to 2nd Respondent (Intervener), any person can bring to the notice of the Adjudicating Authority that the Insolvency Resolution Process has been initiated by the person fraudulently and with malicious intent for the purpose other than resolution of insolvency. For bringing the aforesaid facts to the notice of the Adjudicating Authority it is not necessary that he should be a shareholder or a creditor or a debtor for the Corporate Debtor. It is submitted that the 2nd Respondent (Intervener) intends to bring certain facts to the notice of the Adjudicating Authority, to suggest that it is a case for initiating proceeding and to punish the concern person under Section 65.

5. We have heard Learned Counsel for the parties. The Corporate Insolvency Resolution Process can be initiated under Section 7 or Section 9 or Section 10 of MB Code. Section 55 to 58 of 'MB Code' also relates to initiation of Corporate Insolvency Resolution Process known as 'Fast Track Corporate Insolvency Resolution Process'. Section 65 of `I&B Code' which relates to penal provision not only covers initiation of Corporate Insolvency Resolution Process under Section 7 or 9 or 10 *but will also cover 'Fast Track Corporate Insolvency Resolution Process, if initiated under Section 55 to 58 of the 'I & B Code'.*

6. Such being the position, any person may intervene any may bring the facts to the notice of the Adjudicating Authority. So far as the Respondent (Intervener) is concerned, we leave the question open for Adjudicating Authority to decide the issues as raised and alleged by the 2nd Respondent (Intervener) keeping in mind the question of maintainability of the application as raised by the Appellant."

5.3 After perusal of the contents of this application, documents on record, objections of non-applicant thereto and position of law as noted above, we are of the view that there is material before us to allow intervention of the applicant in CP (IB) 2/KB/2021 and accordingly, the instant Application is allowed to the extent of intervention by applicant.

5.4 However, we make it clear that this shall not be construed as any manner expressing any opinion on the merits of CP 2/KB/2021 .

5.5 **IVN P. 7/KB/2021** is hereby disposed of.

5.6 List main CP(IB) No. 2/KB/2021 on **29.07.2022**.

5.7 The registry is directed to send e-mail copies of the order forthwith to all the parties and their Ld. Counsel for information and for taking necessary steps.

5.8 Certified Copy of this order may be issues, if applied for, upon compliance of all requisite formalities.

Harish Chander Suri
Member (Technical)

Rohit Kapoor
Member (Judicial)

Signed on this, the 28th day of June, 2022

SM(LRA)