



IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-IV

CP (IB) No.677/MB-IV/2021

Under Section 9 of the IBC, 2016

In the matter of

ATLANTA LIMITED

[CIN: L64200MH1984PLC031852]

...Operational Creditor

v/s.

AMEYAS INFRAPROJECTS PRIVATE
LIMITED.

[CIN: U70101PN1985PTC018474]

...Corporate Debtor

Order Delivered on: 21.03.2023

Coram:

Mr. Prabhat Kumar
Hon'ble Member (Technical)

Mr. Kishore Vemulapalli
Hon'ble Member (Judicial)

Appearances (via videoconferencing):

For the Petitioner:

Gunjan Chaubey i/b Platina Law
Chambers, Ld. Counsel

For the Respondent:

None present.

ORDER

Per: Prabhat Kumar, Member (Technical)



1. This is a Company Petition filed under section 9 of the Insolvency & Bankruptcy Code, 2016 (IBC) ATLANTA LIMITED, (“the Operational Creditor”), seeking initiation of Corporate Insolvency Resolution Process (CIRP) against, AMEYAS INFRAPROJECTS PRIVATE LIMITED (“the Corporate Debtor”).

2. A joint venture was formed in the name of Prakash-Atlanta joint venture (PAJV) by PBA Infrastructure Limited (PBA) and Atlanta Limited (Atlanta). PAJV was awarded a contract by the National Highway Authority of India (NHAI) to construct the Lucknow by-pass. PAJV subcontracted the work to Amaya Developers Private Limited (Ameyas) under an agreement dated 23.08.2001. Ameyas gave up the above sub contract. Thereafter, on 1st July 2002, Ameyas, Atlanta and PBA entered into a partnership under the name and style of AAP construction company (AAP). By an agreement dated 5th July 2002, AAP was appointed as subcontractor by PAJV.
 - 2.1. On 1st November 2004, Ameyas gave notice to Atlanta and PBA that it was retiring from partnership (AAP) with immediate effect. Thereafter, PBA by its notice dated 8th November 2004 dissolved the partnership with effect from 31st October 2004. By letter dated 10th November 2004, Atlanta also retired. Parties then entered into MOU’s dated 6th November 2004 and 24th November 2004.
 - 2.2. The disputes were referred to an Arbitrator, one Mr. Shadilal Chopra and passed an award on 14th March 2007. The said award was challenged by Ameyas before the Hon’ble Bombay High Court. On 9th December 2011, the Bombay High Court set aside the impugned award by consent of the parties and Hon’ble Mr. Justice S.N. Variava (Retired Supreme Court Judge) was appointed as a sole Arbitrator by consent of the parties to resolve the dispute.



2.3. On 5th April 2014, the Sole Arbitrator Hon'ble Mr. Justice S.N. Variava (Retired Supreme Court Judge) passed an award and held that PBA and Atlanta are jointly entitled to a sum of Rs.4,78,82,609/- (Rupees Four Crores Seventy-Eight Lakhs Eighty Two Thousand Six Hundred and Nine Only) along with interest thereon at the rate of 18% p.a. payable from 1st September 2005 till the date of the award and thereafter till the same is paid or realized along with cost of arbitration of Rs.20,00,000/- & Rs.3,33,000/- .

2.4. The Corporate Debtor had filed a Section 34 petition under Arbitration and Conciliation Act 1996 challenging the Award dated 5th April 2015 being arbitration petition No.1341 of 2014 and the same has been dismissed on by and order dated 9th January 2020 by Hon'ble Mr. Justice G.S. Patel.

2.5. The Corporate Debtor has neither filed an appeal under Section 37 of the Arbitration and Conciliation Act, 1996 nor challenged the order dated 9th January 2020 to the knowledge of Operational Creditor i.e. Atlanta Limited.

2.6. On 6th October 2016, Atlanta Limited filed Commercial Execution Application No.41 of 2016 for the Execution of the award dated 5th April 2014 before the Hon'ble High Court, Bombay. On 23rd November 2016, Shri. D.V. Sawant, Prothonotary & Senior Master passed an order to transfer the aforesaid Commercial Execution Application No.41 of 2016 to Pune District Court under the provision of order XXI Rule 5 read with Rule 6 of C.P.C 1908 as properties to be executed mentioned in column 'J' of the abovesaid Commercial Execution Application are situated in Pune Jurisdiction.

2.7. The abovesaid Commercial Execution Application No.41 of 2016 transferred to the District Court of Pune and filed in the Court of District Judge, Pune at Pune as the Darkhast No.2943 of 2016 and the same is pending.



2.8.A demand notice dated 17.03.2021 under Section 8 of Insolvency and Bankruptcy Code, 2016 was first sent on 18.03.2021 to the registered office of the Corporate Debtor, but the same returned with the remark 'left' thereafter it was sent to its one of the directors named Shri Yashwant Patwardhan on 01.04.2021 and the same has been duly served on 05.04.2021.

3. On 30.08.2021, Court Notice was served on the Corporate Debtor. However, the Ld. Counsel for the Financial Creditor submits that there was no representation on behalf of the Corporate Debtor. Therefore, this Bench inclined to issue directions to take out substituted service in two daily leading newspapers. Despite paper publication, the Corporate Debtor neither appeared nor filed reply in rebuttal. Therefore, the Corporate Debtor was set *ex-parte* vide order dated 06.06.2022.

4. We have heard the counsel for the Operational Creditor and perused the material on record and after perusal of Part IV it is seen that the Operational Creditor has claimed a sum of Rs 7,82,37,327 (being amount of Rs. 2,01,10,696 due in terms of award dated 05.04.2014, Rs.11,50,000/- arbitration cost and remaining towards interest from 24.05.2021). This amount has been claimed as Operational Debt and Part-IV as well as Part-V of the application has referred to Arbitration award as the basis.

4.1. Date of default is 09.01.2020 as stated in Part-IV of the application whereas last sub-para 33 stipulates payment within 2 months from the date of award i.e. 05.04.2014. However, this award was challenged and has attained finality on 09.01.2020 and is in nature of decree pursuant to order passed by Hon'ble Bombay High Court. Accordingly, the default if any, can occur upon expiry of 2 months from the date the award attained finality i.e. 09.03.2020. Further, it is admitted fact that the applicant has filed suit for execution of the award, which is pending before District Judge Pune since



2016. In other words, the debt claimed to in default is arising from an arbitration award.

4.2. The Operational Debt is defined u/s 5 (21) of the Code to mean “*a claim in respect of the provision of goods or services including employment or debt in respect of the payment of dues arising under any law under time being in force and payable to the Central Government any State Government or any Local authority*”. Operational Creditor is defined u/s 5 (20) of the Code, to mean “*a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred*”. Further, Section 3 (10) of the Code, defines Creditor to mean “*any person to whom a debt is owed and includes a financial creditor, an operational creditor, a secured creditor, an unsecured creditor and a decree-holder*”. On bare reading of these definitions it is clear that Operational Creditor and a Decree Holder are two distinct propositions. It is settled proposition of law that a Decree Holder can be either Financial Creditor, Operational Creditor or any other Creditor and this is to be determined from the nature of debt giving rise to the decree.

4.2.1. In case of *Sushil Ansal vs Ashok Tripathi and ors CA (AT) Ins. No. 452 of 2020* the Hon’ble NCLAT laid down this proposition in the following manner –
“*The answer to the question whether a decree holder would fall within the definition of Financial creditor has to be an emphatic. No as the amount claimed under the decree is an adjudicated amount and not a debt disbursed.*”

4.2.2. This proposition of law was later on affirmed by Hon’ble Supreme Court in the Case of *Kotak Mahindra Bank Limited vs A. Balakrishnan & ANR Civil Appeal No 689 of 2021* in the following words –

“*The legislative intent could not have been to exclude a liability in respect of a “claim” arising out of recovery certificate from the definition of the term “Financial Debt”, when such a liability*



in respect of “claim” simpliciter would be included in the definition of term “Financial Debt”

4.3. On perusal of the award it is noticed that the claims and the counter claims were made before the arbitrator in relation to settlement of accounts of the partnership firm i.e. AAP on its dissolution on the retirement of the Applicant. The applicant is referred to as Respondent No.02 and the Corporate Debtor as claimant in the award. On perusal of definition of the Operational Debt u/s 5(21) of the Code, it is clear that only claim(s) arising out of provision of goods and services including employment or in respect of statutory dues are Operational Debt. In the present case the amount claim to be in default is arising from the claims for determination of sums payable to the applicant, if any, upon retirement from the partnership firm, which is neither against provision of services or goods nor arising from employment. Accordingly, the claimed amount if any is not an Operational debt and consequently the decree arising therefrom cannot said to be Operational Debt. In view of this the applicant is not an Operational Creditor and does not have any right to file an application u/s 9 of the Code.

4.4. Before we part with, we feel the present application is gross abuse of the provisions of the Code as it is an attempt to recover for which an execution proceeding is already pending.

5. In view of the aforesaid discussion that the present application is not maintainable and dismissed accordingly.

ORDER

6. The petition bearing CP(IB) 677/MB-IV/2021 filed by ATLANTA LIMITED (“the Operational Creditor”), seeking to initiate Corporate Insolvency Resolution Process (CIRP) against AMEYAS INFRAPROJECTS PRIVATE LIMITED (“the Corporate Debtor”), is **Dismissed**.



7. We make it clear that any observations made in this order should not be construed as expressing opinion on merits. The right of the petitioner before any other judicial forum shall not be prejudiced on the grounds of dismissal of the present petition as it barred by the law.

Sd/-

PRABHAT KUMAR
Member (Technical)
21.03.2023.

Sd/-

KISHORE VEMULAPALLI
Member (Judicial)