IN THE NATIONAL COMPANY LAW TRIBUNAL
BENGALURU BENCH

I.A No.229 of 2019 in
C.P. (IB) No.111/BB/2019
U/s 8 of the Arbitration and Conciliation Act, 1996

In the matter of:

M/s. Ozone Propex Private Limited
Regd. Off: No. 38,
Ulsoor Road,
Bangalore –560042. - Applicant/Respondent

Versus

M/s. Urban Infrastructure Trustees Limited
Regd. Off: No. 46-47,
Maker Chambers VI,
Nariman Point,
Mumbai – 400021. - Respondent/Petitioner

Date of Order: 26th August, 2019

Coram: 1. Hon'ble Shri Rajeswara Rao Vittanala, Member (Judicial)

2. Hon'ble Dr. Ashok Kumar Mishra, Member (Technical)

Parties/Counsels Present:

For the Applicant
in I.A. No. 229/2019: Shri Udaya Holla, Learned Senior Counsel
Shri Sajan Poovayya, Learned Senior Counsel
Shri Perikal K. Arjun, Advocate
Shri Kumar Kislay, Advocate
Shri Atul Madhvan, Advocate
Ms. Priyanka M.P., Advocate

For the Respondent
in I.A. No. 229/2019: Shri K.G. Raghavan, Learned Senior Counsel
Shri Arun Kumar, Learned Senior Counsel
Ms. Brigitta John, Advocate
Ms. Jomoi Joy, Advocate

ORDER

Per: Dr. Ashok Kumar Mishra, Member (Technical)

1. The Petitioner has filed an Application vide C.P. (IB) No.111/BB/ 2019 seeking initiation of Corporate Insolvency Resolution Process (CIRP) resulting from the amount in default of Rs.1164,09,64,429/- (Rupees One Thousand One Hundred and Sixty Four Crores Nine Lakhs Sixty Four Thousand Four Hundred and Twenty Nine Only) which comprises of the OCD Redemption Amount of Rs.499,40,71,621/- (Rupees Four Hundred and Ninety Nine Crore Forty Lakhs Seventy One Thousand Six Hundred and Twenty One Only) and default interest at 21% p.a. on Rs.499,40,71,621/- amounting to Rs.664,68,92,808/- as of 16.11.2018. The main Company Petition was filed on 18.01.2019 and was listed on 22.02.2019 and thereafter on 02.04.2019. On 09.04.2019, the learned Counsel for Respondent submitted that there are several Agreements executed between the parties wherein Arbitration Clause is available and the Petitioner have filed the present Petition without exhausting alternative remedy by way of Arbitration by invoking provisions of the Code and the same is not maintainable and have accordingly filed the instant I.A. No.229 of 2019 seeking to refer the disputes raised in the Company Petition to the Dispute Resolution Mechanism provided in Clause 11 of the OFCD Agreement i.e. Arbitration in view of the mandatory provision of Section 8 of the Arbitration and Conciliation Act, 1996.

2. Brief facts of the case, as mentioned in the Application, which are relevant to the issue in question, are as follows:

    (a) M/s.Ozone Propex Private Limited (Applicant herein) is a Private Limited Company incorporated on 16.11.2004 under the provisions of Companies Act, 1956 with CIN:

U74210KA2004PTC035015 and having its registered office at No. 38, Ulsoor Road, Bangalore - 560042.

(b) M/s.Urban Infrastructure Trustees Limited (Respondent herein) is a Limited Company incorporated on 14.12.2005 under the provisions of Companies Act, 1956 with CIN: U65991MH2005PLC158050 and having its registered office at 46-47, Makers Chambers VI, Nariman Point, Mumbai-400021.

(c) The Applicant does not owe any financial debt to the Respondent in terms of Section 5(8) of the Code. The relation between the Applicant and the Respondent is not of a typical Creditor-Debtor as the Respondent is a 50% Shareholder of the Applicant and is actively engaged in the management and control of the Applicant, with the right to nominate two Directors on the Board.

(d) The Applicant strongly disputes the amount claimed by the Respondent and also disputes the Respondents status as a Financial Creditor. Since, the Applicant is questioning the quantum and basis of the Respondent's claim, there exists a valid dispute. Thus, the Applicant should be relegated to the Dispute Resolution Mechanism and it must avail the remedy of arbitration which has been mutually agreed between the parties.

(e) The genesis of the present dispute lies in the Debenture Subscription Agreement(s) dated November 14, 2006 and March 21, 2007 ('DSA 1 and DSA 2') in furtherance of which (i) Redeemable Optionally Fully Convertible Debenture Certificate dated November 14, 2006 ('November 14, OCD'); and (ii) Redeemable Optionally Fully Convertible Debenture Certificate dated March 21, 2007 ('March 21, OCD') were issued.

(f) However, the parties herein who are members either of Shareholder Group 1 (consisting of S. Vasudevan, Tuscan

Properties Pvt. Ltd., Tuscan Consultants and Developers Pvt. Ltd., CP Bothra and CP Bothra HUF collectively) or Shareholder group 2 (consisting of the Respondent herein in I.A. No.229 of 2019) re-negotiated the terms of the aforementioned debentures and consequently Certificate No.OFCD 1 and OFCD 2 dated April 1, 2008 were issued. Further, the Respondent, as per its obligations under the Shareholders Agreement and the Share Subscription Agreement infused funds in to the Applicant and Received Certificate Nos.OFCD 3, OFCD 4, OFCDS 1, OFCDS 2 and OFCDS 3 (all collectively referred to as 'OFCD Agreement(s)').

(g) Rights and Obligations of the Parties are currently governed by the OFCD Agreement(s), which contain similar terms and have novated the initial terms of DSA 1 and DSA 2.

(h) Over the past few years only Shareholder Group 1 was contributing towards raising of funds and the Respondent in I.A. No.229 of 2019/Shareholder Group 2 failed to discharge its duty to infuse funds. Thus, the parties did not want to continue with the common business ventures or transactions. Resultantly, discussions were going on between the parties to provide a complete exit to the Respondent at a fixed amount.

(i) The present dispute is not strictly a commercial dispute between typical financial creditor and corporate debtor. Rather, it is a dispute between members of different Shareholder Groups, spanning over decades and comprising of multiple complex financial transactions.

(j) Moreover, the Applicant herein is also equally aggrieved by continuous illegal acts of the Respondent herein and is entitled to initial suitable proceedings, including raising its counter-claim. Such a scenario would lead to multiplicity of proceedings and defeat the ends of justice. Hence, it is necessary that the parties resort to arbitral proceedings under OFCD Agreement(s) and bring the entire gamut of disputes before one competent body.

(k) The dispute being agitated by the Respondent before this Tribunal is squarely covered within dispute resolution clause of all the OFCD Agreement(s), with identical terms. Relevant clauses i.e., Clause 11 and Clause 12 are reads as under:

"11. Arbitration

(a) The Provisions of these Debentures shall be governed by, and construed in accordance with Indian Law.

(b) Any dispute arising under or out of or in connection with or in relation to the Debentures or any alleged breach hereof shall be determined and settled by arbitration pursuant to the Arbitration and Conciliation Act, 1996 or any statutory modification or re-enactment thereof for the time being in force. Any such dispute shall be determined by panel of three (3) arbitrators ("Arbitrators"), of which the Debenture Holders shall appoint one arbitrator and the Company shall appoint one arbitrator and the two Arbitrators so selected shall appoint the third Arbitrator (the "Arbitration Board"). Any award rendered upon such arbitration shall be final and conclusive and binding on the Parties. The place of such arbitration shall be Mumbai.

(c) The arbitral procedure shall be conducted in the English language.

(d) Each party shall fully co-operate in good faith to expedite the conduct of any arbitral proceedings commenced under this Agreement.

(e) The cost and expenses of the arbitration, including the fees of the third arbitrator on the Arbitration board, shall be borne equally by each Party to the dispute and each party shall pay its own fees, disbursements and other charges of its counsel and the arbitrators nominated by it, except as may be otherwise determined by the Arbitration Board. The

Arbitration Board would have the power to award interest on any sum awarded pursuant to the arbitration proceedings and such sum would carry interest, if awarded, until the actual payment of such amounts.

(f) Nothing shall preclude either Party from seeking interim or permanent equitable or injunctive relief, or both, from any court having jurisdiction to grant the same. The pursuit of equitable or injunctive relief shall not be a waiver of the duty of the Parties to pursue any remedy for monetary damages through the arbitration described in this Clause.

12. Jurisdiction subject to clause 11 above, the Debentures shall be subject to the jurisdiction of Courts at Mumbai."

(l) Accordingly, Section 8 of the Act mandated that a judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement, it is bound to refer the parties to arbitration, if an application is made by a party not later than when submitting his first statement on the substance of the dispute.

(m) Therefore, the Applicant is filing the present Application for referring the parties to arbitration, for resolution of any possible dispute which may have arisen and surviving between the parties as on date.

(n) The Dispute Resolution Mechanism envisaged under Clause 11 of the OFCD Agreement(s) is the only remedy available to the Respondent. By not responding to the said Dispute Resolution Mechanism, the Respondent has attempted to overreach the binding process for resolution of disputes agreed between the parties and fraudulently invoked jurisdiction of this Tribunal.

(o) The dispute raised in the present proceeding ought to be referred to arbitration. It is submitted that no prejudice would be caused to the Respondent by such reference. On the other hand, in the event the present Application is disallowed, and the present proceedings are permitted to continue, the same will have disastrous and irreparable repercussions on the interest of the Applicant as well as its employees and around 6000+ homebuyers.

3. The Respondent herein has filed Objection dated 02.05.2019. The contentions therein,which are relevant to the issue in question, are as follows:

(a) In proceedings initiated under Section 7 of the I&B Code, 2016, the Hon'ble Tribunal has to only ascertain the existence of an outstanding debt in respect of which there has been a default. The Adjudicating Authority has to merely see the records of the information utility or other evidence produced by the Financial Creditor to satisfy itself that a default has occurred.

(b) It is settled law that an arbitration clause contained in a financial instrument, by which a loan has been extended by the Financial Creditor, cannot create any bar for initiation of CIRP U/s 7 of the I&B Code.

(c) The provisions of the Code will prevail over all other Acts, including the Arbitration and Conciliation Act, 1996. The Hon'ble Supreme Court and the Hon'ble NCLAT have in many cases already rejected the argument that the ability to invoke/ initiate arbitration proceedings in respect of the amount claimed by the Financial Creditors is a bar or an impediment to the initiation or progress of a CIRP against the debtor.

(d) The Applicant has itself stated that it has made payment of certain amount to the Respondent towards redemption of debentures. Therefore, it cannot be said that there is no debt due and payable by the Applicant.

(e) The identity of the lender is immaterial. It makes no difference in law whether the lender is the Promoter, Director or a

Shareholder of the Corporate Debtor. The amount advanced by any of the aforesaid persons would only have the character of a loan.

(f) It is immaterial whether the debt is disputed so long as the debt is "due" i.e. payable unless interdicted by some law or has not yet become due in the sense that it is payable at some future date.

(g) Despite receipt of Notice of Event of Default, the Applicant failed to remedy its default and continues to remain in breach.

(h) It is denied that the Respondent Shareholder Group failed to discharge its duties to infuse funds, as alleged. It is further denied that there are any discussions between the parties to provide a complete exit to the Respondent, at any fixed amount.

(i) It is denied that the present dispute is a shareholders dispute spanning over decades and comprising multiple complex financial transactions.

(j) It is denied that the parties must resort to arbitral proceedings on account of the Applicant allegedly wanting to raise a counter-claim, being aggrieved by continuous illegal acts of the Respondent.

(k) It is denied that the Petition and the Cause of Action thereunder are covered within the dispute resolution clause of the OFCD Agreement(s), as alleged or at all.

(l) In terms of Section 63 of the IBC, this Tribunal is the only forum that can entertain and adjudicate the Respondent's Company Petition. It is denied that the dispute resolution mechanism envisaged under Clause 11 of the OFCD Agreement(s) is the only remedy available to the Respondent. It is further denied that the Applicant has attempted to overreach the binding process for resolution of disputes agreed between the Parties, and fraudulently invoked the jurisdiction of this Tribunal, as alleged or at all.

(m) The debt is overdue and has not been paid. That being the case, all other extraneous factors and facts have to be ignored by this Hon'ble Tribunal. The Applicant is attempting to delay the commencement of the CIRP in respect of the Applicant.

4. The Applicant herein in I.A. No.229 of 2019 has filed rejoinder dated 06.06.2019 to the Objections of the Respondent herein. The contentions in the Rejoinder, which are relevant to the issue in question, are as follows:

(a) The amount which the Respondent seeks to portray as a financial debt is actually part of its financial contribution as an equity shareholder under the SHA. It is settled position that there cannot be an assured return on equity investment. Thus, the Respondent cannot claim itself to be a Financial Creditor.

(b) Any disputes between the parties will have to be ascertained by a competent fact-finding authority by undertaking a detailed examination of evidence and surrounding circumstances. In the present case, such fact-finding authority is an arbitral tribunal.

(c) The Hon'ble Tribunal has to apply judicial mind and take into consideration the relevant and surrounding facts before initiating a drastic action of CIRP under the Code, which may have grave legal ramifications on the Corporate Debtor.

(d) Before claiming shelter U/s 7 of the Code, the Respondent must establish itself as a 'Financial Creditor'. The Respondent must demonstrate that there is an admitted debt and the Applicant has defaulted in its obligations.

(e) It is denied that it makes no difference in law whether the lender is a promoter, director or shareholder of a Corporate Debtor. The Code itself provides differential treatment for different classes of Creditors by creation of different categories of Creditors.

(f) In view of Clause 11 & 12 of the OFCD Agreement(s) entered into by the parties read with Section 8 of the Act, a judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement, is bound to refer the parties to arbitration, if an application is made by a party, not later than submitting his first statement on the substance of the dispute.

5. The learned Senior Counsels for the Applicant I.A. No.229 of 2019 have relied on the following judgements in support of this Application:

(a) *S.P. Chengalvaraya Naidu v. Jagannath &Ors., (1994) 1 SCC 1;*

(b) *K.D. Sharma v. Steel Authority of India Limited &Ors., (2008) 12 SCC 481;*

(c) *Oswal Fats and Oils Limited v. Additional Commissioner (Administration) Bareilly Division, Bareilly &Ors., (2010) 4 SCC 728;*

(d) *B.V.S Lakhsmi v. M/s. Geometrix Laser Solutions Pvt. Ltd., 2017 SCC OnLine NCLT 458;*

(e) *M/s. IBA Health (I) P. Ltd. v. M/s. Infor-Drive Systems Sdn. Bhd., CA NO. 8230/2010;*

(f) *Ammonia Supplies Corporation (P) Ltd. v. Modern Plastic Containers Pvt. Ltd., (1998) 7 SCC 105;*

(g) *Standard Chartered Bank v. Andhra Bank Financial Services Ltd. &Ors., (2006) 6 SCC 94;*

(h) *M/s. Madhusudan Govardhandas & Co. v. Madahu Wollen Industries Pvt. Ltd., 1971 (3) SCC 632;*

(i) *Sundaram Finance Limited & Anr v. T. Thankam, (2015) 14 SCC 444;*

(j) *Krishan Radhu v. The Emmar MGF Construction Pvt. Ltd., 2016 SCC OnLine Del 6499;*

(k) *K. Kishan v. M/s. Vijay Nirman Company Pvt. Ltd., 2018 SCC OnLine SC 1013;*

(l) *ICICI Bank Ltd. v. SIDCO Leathers Ltd. &Ors. (2006) 10 SCC 452;*

(m) *Shobha Limited &Ors. v. Pancard Clubs Ltd. (NCLT) CP. 593 and CP. 1085/I&BP/NCLT/MAH/17;*

(n) *R.S. Raghunath v. State of Karnataka & Anr. (1992) 1 SCC 335.*

6. The learned Senior Counsels for the Respondent in I.A. No.229 of 2019 have relied on the following judgements in support of this Application:

(a) *Marg Limited v. Tata Capital Financial Services Ltd., Company Appeal (AT) (Insolvency) No.219 of 2018;*

(b) *Anil Mahindroo & Anr v. Earth Iconic Infrastructures Pvt. Ltd., Company Petition No.(IB)–16 (PB)/2017;*

(c) *Axis Bank Ltd. v. M/s.Keti Highway Developers Private Limited, 2017 SCC OnLine NCLT 10259;*

(d) *Urban Infrastructure Trustee Limited v. Neelkanth Township and Construction Pvt. Ltd., C.P.No.69/I&BP/NCLT/MAH/2017;*

(e) *Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd. &Ors. (2011) 5 SCC 532;*

(f) *Innoventive Industries Limited v. ICICI Bank and another, (2018) 1 SCC 407;*

(g) *K.S. Oils Ltd. v. The State Trade Corporation of India Ltd. & Ors. (2018) 146 SCL 58;*

(h) *The Dhar Textile Mills Ltd. v. Asset Reconstruction Company (India) Ltd., Company Appeal (AT) (Insolvency) No.11 of 2019;*

(i) *Ashok Oswal v. UCO Bank and Ors., Company Appeal (AT) (Insolvency) No.763 of 2018;*

(j) *IFCI Limited v. Era Housing and Developers Limited, (IB)-489(PB)/ 2017.*

(k) *Swiss Ribbons Private Limited and Another v. Union of India and Others. (2019) 4 SCC 17.*

7. Heard Shri Udaya Holla, Learned Senior Counsel; Shri Sajan Poovayya, Learned Senior Counsel; Shri Perikal K. Arjun, Advocate; Shri Kumar Kislay, Advocate; Shri Atul Madhvan, Advocate and

Ms.Priyanka M.P., Advocate for the Applicant in I.A. No.229 of 2019 and Shri K.G. Raghavan, Learned Senior Counsel; Shri Arun Kumar, Learned Senior Counsel; Ms.Brigitta John, Advocate and Ms. Jomol Joy, Advocate for Respondent in I.A. No.229 of 2019. We have carefully perused the pleadings of both the parties and also the extant provisions of the Code.

8. The instant Application is filed U/s 8 of the Arbitration and Conciliation Act, 1996, which reads as under:

> *"Power to refer parties to arbitration where there is an arbitration agreement-*
>
> *(a) A judicial authority before which an action is brought in a mater which is the subject matter of an arbitration agreement shall, if a party so applies not later than when submitted his first statement on the substance of the dispute refer the parties to arbitration.*
>
> *(b) The application referred to in Sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.*
>
> *(c) Notwithstanding that an application has been made under Sub-section (1) and that the issue is pending before the Judicial Authority, an arbitration may be commenced or continued and an arbitral award made."*

9. The main Company Petition bearing C.P. (IB) No.111/BB/2019 has been filed for seeking relief under Section 7 of the I&B Code, 2016 before the Adjudicating Authority i.e. National Company Law Tribunal (NCLT) as per Section 5(1) of the I&B Code. Section 7 of the I&B Code triggers on certain stipulations as has been enumerated by the Hon'ble Supreme Court in *Innoventive Industries Limited v. ICICI Bank 2017 SCC Online SC 1025*, wherein, the Hon'ble Supreme Court also held that:

"The non-obstante clause in the widest term possible is contained in Section 238 of the Code, so that any right of the corporate debtor under any other law cannot come in the way of the Code."

10. Further, the Hon'ble Supreme Court in *Booz Allen and Hamilton Inc. v. SBI Home Finance Limited and Others, (2011) 5 SCC 532,* stated that it is well recognised that insolvency and winding up matters along with matters such as matrimonial disputes, guardianship, etc, are non-arbitrable disputes.

11. There is thus not an iota of doubt that the provisions of the Code will prevail over the all other Acts including Arbitration and Conciliation Act, 1996 unless otherwise expressly provided. Accordingly, the arbitration clause contained in the OFCD Agreement(s) or any other agreement relied upon by the Applicant herein cannot create any bar for initiation of Corporate Insolvency Resolution Process under Section 7 of the Code. Moreover, the overriding effect has been given through the provision of Section 238 of the Code.

12. At this stage, we are not going into the merits of the main Company Petition bearing C.P. (IB) No.111/BB/2019 with regards to its admission or rejection and our views are limited to the present I.A. filed by the Applicant for initiation of Arbitration as provided under Clause 11 of the OFCD Agreement(s). Since the I&B Code does not empower vide Section 238 of the Code to opt for Section 8 of the Arbitration and Conciliation Act, 1996 in spite of mechanism being effective so far as the Dispute Resolution is concerned. Further, relying on the Hon'ble Supreme Court judgment in *Haryana Telecom Ltd. vs. Sterlite Industries (India) Limited on 13 July, 1999 in Special Leave Petition (Civil) 3695 of 1999,* wherein on a winding-up petition having been filed by the Respondent before the High Court, the Petitioner moved an application before the Hon'ble Supreme Court contending that the matter be referred to arbitration under Section 8

of the Arbitration and Conciliation Act, 1996. The Hon'ble Supreme Court rejected the said application on the ground that a claim in a petition for winding up is not for money but for the reason that the company has become commercially insolvent. Thus the Hon'ble Supreme Court held that *"An arbitrator, notwithstanding any agreement between the parties would have no jurisdiction to order the winding up of a company"*. Drawing from the decision of the Hon'ble Supreme Court in the above case, it is clear that, an application under Section 7 of the I&B Code is an application to initiate insolvency resolution process in respect of the Corporate Debtor; the power to do so is vested exclusively with the Adjudicating Authority and an arbitrator cannot have jurisdiction on such a matter.

13. Since the I&B Code is silent and has not specifically provided any provision rather through Section 238 of the Code it has clearly provided that the provision of this I&B Code overrides other laws, we cannot refer the matter to Arbitration as I&B Code is a time-bound process.

14. In the result, I.A. No.229 of 2019 in C.P. (IB) No.111/BB/2019 is hereby rejected. No order as to costs.

(ASHOK KUMAR MISHRA)
MEMBER, TECHNICAL

(RAJESWARA RAO VITTANALA)
MEMBER, JUDICIAL

Krishna