IN THE NATIONAL COMPANY LAW TRIBUNAL
BENGALURU BENCH

C.P. (IB) No.233/BB/2018
U/s 7 of IBC, 2016
R/w Rule 4 of I&B (AAA) Rules, 2016

In the matter of:

M/s. Mphasis Limited
Bagmane World Technology Centre,
Marathalli Outer Ring Road,
Doddanakundi Village,
Mahadevapura,
Bengaluru – 560 093. - Applicant/Financial Creditor

Versus

M/s. Strategic Outsourcing Services Pvt. Ltd.
70/25, 80 Feet Circular Ring Road,
IV Block, Koramangala,
Bangalore – 560 034. - Respondent/Corporate Debtor

Date of Order: 11th March, 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	:	Shri G.P. Madaan and Shri Ishaan Madaan
For the Respondent	:	None

ORDER

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

1. C.P.(IB)No.233/BB/2018 is filed by M/s.Mphasis Limited ('Applicant/Financial Creditor') U/s 7 of the I&B Code, 2016 R/w Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, by inter alia, seeking to initiate Corporate Insolvency Resolution Process (CIRP) in respect of M/s.Strategic Outsourcing

Services Private Limited (Respondent/Corporate Debtor) on the ground that the Corporate Debtor committed a default for an amount of Rs.4,00,00,000/- (Rupees Four Crores Only) as advanced pursuant to signing of the Settlement Agreement dated 15.07.2016.

2. Brief facts of the case, as mentioned in the Company Petition and in submissions, which are relevant to the issue in question, are as follows:

a) M/s.Mphasis Limited (Applicant/Financial Creditor) is a Company incorporated on 10.08.1992 under the provisions of the Companies Act, 1956, having its Registered Office at Bagmane Technology Centre, Marathalli Outer Ring Road, Doddanakundi Village, Mahadevapura, Bengaluru-560093. The Company is engaged, inter alia, in the business of providing Information Technology and IT Enabled Services including Infrastructure Technology, Applications Outsourcing and Analogous Services.

b) M/s. Strategic Outsourcing Services Private Limited ('Respondent/ Corporate Debtor') is a Company incorporated on 13.02.2003 under the provisions of the Companies Act, 1956, having its Registered Office at 70/25, 80 Feet Circular Ring Road, IV Block, Koramangala, Bangalore-560034. The Authorised Share Capital of the Company is Rs.5 Crores. The Paid-up Share Capital of the Company is Rs.4,50,00,000/- (Rupees Four Crores and Fifty Lakhs Only). The Company is engaged in the business of providing Information Technology solutions and services including System Integration, Information System Outsourcing, Package Implementation, Application Development and Maintenance.

c) The Respondent had been selected as one of the successful bidders in the tenders floated by the National Institute of Electronics & Information Technology (NIELIT) and accordingly, Unique Identification Authority of India (UIDAI) empanelled the Corporate

Debtor as an Enrolment Agency for collection of data in specified locations in various States.

d) The Respondent entered into a mutual arrangement with the Applicant in respect of substantial portions of the work to be carried out in different States of India. The Applicant and the Corporate Debtor entered into a Memorandum of Understanding (MoU) on 26.07.2011 and Service Agreement on 23.09.2011. Pursuant thereto, purchase orders with reference to various tasks on mutually agreed terms and conditions were issued by the Corporate Debtor to the Applicant, against which, the Applicant rendered services to the Corporate Debtor and raised its invoices on the Respondent.

e) As per the provisions of the Service Agreement, the Applicant submitted a Bank Guarantee worth Rs.4,45,41,237/- in June 2012 bearing No.0505312BG0001724 as a guarantee for execution of the project against the tender of NIELIT. Invoices for a total aggregate value of Rs.78,93,82,520/- were raised against the commitments fulfilled by the Applicant. Almost 50% of the invoices raised by the Applicant remain unpaid till date. The Corporate Debtor admitted and acknowledged that an aggregate sum of Rs.65,38,33,829/- was due and payable by the Corporate Debtor to the Applicant as on 24.07.2013.

f) The Corporate Debtor paid an aggregate total sum of Rs.38,25,69,942/- during June 2013-October 2013 to the Applicant towards part-payment of the total sums due and the balance amount was to be paid at a later date. After providing for all adjustments, deductions and part-payments received from the Corporate Debtor, the Corporate Debtor was liable to pay an amount of Rs.37,63,64,791/- as on 01.11.2013.

g) The Respondent induced the Applicant to enter into a Settlement, under which the Applicant was persuaded to receive a lesser amount in full and final settlement of its total claim as set out in a

Settlement Agreement. In pursuant to the Settlement Agreement dated 15.07.2016 entered into by the Applicant and Respondent, it was, inter alia, agreed that the Respondent shall pay the Applicant Rs.23,00,00,000/- (Rupees Twenty Three Crores Only) in full and final settlement of all dues owed to the Applicant. This Settlement Amount will be paid by the Respondent upon receipt of payment from NIELIT. The Settlement Agreement provides for Arbitration vide Clause (5) for resolution of disputes.

h) To manage and safeguard the flow of funds from NIELIT, the Applicant and the Respondent agreed to open a Joint Escrow Account, and Respondent agreed to advise NIELIT to make all payments only into the Escrow Account. To enable the Respondent to settle some of the dues owed to vendors and suppliers, the Applicant agreed to advance Rs.4 Crores to the Respondent soon after the Escrow Account was opened. The Parties also agreed that, from and out of the funds released by NIELIT, the Applicant would, first, be refunded the sum of Rs.4 Crores and that the Applicant and the Respondent would share the rest of the funds to be received from NIELIT in the ratio of 61% and 39% respectively until the Applicant was paid the entire Settlement Amount of Rs.23 Crores.

i) In pursuant to Clause 6 of the Settlement Agreement, the Applicant and the Respondent opened a Joint Escrow Account, bearing No.251234567878 with the IndusInd Bank Limited. Subsequently, the Respondent addressed a letter dated 25.08.2016 to NIELIT, duly furnishing the details of the Escrow Account and instructing the NIELIT to update the Bank Account details for release of necessary payments.

j) The Applicant, in compliance with its obligation under Clause 7 of the Settlement Agreement, advanced an amount of Rs.4 Crores to the Respondent so as to enable it to settle its vendor liabilities. However, after receipt of the sum of Rs.4 Crores from the Applicant, there was no communication received from the Respondent, inspite of several follow-ups, on the status of the payments being released by NIELIT.

k) On making direct enquiries with NIELIT, the Financial Creditor was informed that NIELIT had informed all the Managed Service Providers (MSPs) including the Respondent, to complete all pending documentation for release of the payments. Apparently, while most of the other service providers were submitting the relevant documents, there was no response from the Respondent. Hence, the Applicant, vide email dated 08.01.2018, called upon the Corporate Debtor to execute the necessary documentation with NIELIT for enabling release of the payments from NIELIT.

l) On 17.01.2018, the Corporate Debtor entered into 11 Addendum Agreements with NIELIT, in which the Corporate Debtor acknowledged that the project had been duly completed and that, in view of some delay, it was imposing some penalty, after which the payments would be released.

m) On 27.01.2018, the Corporate Debtor vide a letter of the same date, had requested NIELIT to make payments into another account of the Corporate Debtor instead of the Joint Escrow Account.

n) During January-February, 2018, the Financial Creditor had filed an Application U/s 9 of the Arbitration & Conciliation Act, 1996, seeking interim relief primarily against NIELIT to deposit money in the Joint Escrow Account. The Corporate Debtor responded to the same, inter alia, admitting and stating that *"there are materials evidencing the fact that there was no dispute between the Applicant and the 1st Respondent for either to settle the same through negotiations or through Arbitration."*

o) During the pendency of the Arbitration Application, NIELIT issued a letter dated 14.02.2018 stating that the Corporate Debtor had unilaterally furnished separate letter dated 25.01.2018 to NIELIT to update the bank a/c details and deposit money in an Account solely belonging to the Corporate Debtor and not the Escrow Account which was opened by the parties for the sole purpose of receiving payments from NIELIT.

p) The Financial Creditor's Arbitration Application was dismissed, inter alia, on the ground that no relief could have been sought against NIELIT. The Financial Creditor challenged the dismissal of Arbitration Application 28/2018, while making both the Corporate Debtor and NIELIT as Respondents. NIELIT vide email dated 23.03.2018 affirmed that all the payments were made to the Corporate Debtor's Bank Account.

q) Since the Financial Creditor needed clarity and wanted to ensure securing of payments from NIELIT, the Arbitration Clause was invoked. However, the issue became clear when the Corporate Debtor admitted that there was no dispute. In fact, the Corporate Debtor received the payment from NIELIT in violation of the Settlement Agreement and yet failed to repay the advance of Rs.4,00,00,000/- to the Financial Creditor.

r) The Financial Creditor had filed Arbitration Applications seeking interim relief against NIELIT to secure funds in the Escrow Account and later to secure the amount of Rs.27,00,00,000/-, however, NIELIT transferred the amount to the Corporate Debtor's other account and then the Corporate Debtor also pleaded that there is no dispute to arbitrate, therefore admitting receipt of money from NIELIT and expressing its inability to pay the admitted liability in terms of the Settlement Agreement dated 15.07.2016. The Corporate Debtor had filed its objections in the Arbitration Application stating that there exist no dispute.

3. Additional City Civil and Sessions Judge, Bengaluru City has given an elaborate Order on the application filed before the Court of XXXIII Additional City Civil and Sessions Judge at Bengaluru City U/s 9 of Arbitration and Conciliation Act, 1996 to direct the Respondent No.2 (i.e.

National Institute of Electronics and Information Technology-NIEIT) to make and credit all payments that it may release in respect of the PO on account of the Respondent into the Joint Escrow Account with the concerned Bank. The Hon'ble Judge has elaborated the facts of the case in detail in his Order including the Applicant raising an issue of dues amount of Rs.37.60 Crores as of July, 2016 to the Applicant, and thereafter in pursuant to Settlement Agreement dated 15.07.2016, Respondent agreeing to pay Rs.23 Crores in full and final settlement of all dues owed to the Applicant. He has also elaborately mentioned the submissions made by the Respondent, which includes the pre-mutual filing of the case involving Respondent, who is not a party to the Agreement and also the Applicant has not come forward to resolve the dispute. Hon'ble Judge has in his elaborate judgment has clarified on the following issues *"1. Whether the Applicant (i.e. M/s. Mphasis Limited, the Petitioner as Financial Creditor, under the I&B Code in C.P. (IB) No.233/BB/2018 filed at NCLT, Bengaluru Bench on 16.10.2018) proves that he is entitled to direct the Respondent No.2 in the Application i.e. NIEIT, Mohali, to make and credit all payments into the Joint Escrow Account with the IndusInd Bank Limited?"* The Hon'ble Judge finding is in the Negative. The Hon'ble Judge has also elaborated in his judgement vide para 27 of the Judgment which reads as under:

> *"27. For the above, Applicant has failed to perform the terms and conditions as per the agreement between the applicant and first respondent. Applicant has not made any efforts to negotiate with the first respondent and wait for 60 days. Immediately after issuance of notice to the first respondent, rushed to the court. Further applicant is not entitled for the relief on the conditional/secret agreement, without mandate of law. Moreover, the said secret agreement is contrary to the main agreement between Respondent Nos.1 and 2 as Respondent No.1 had no right to sub-contract the work to the applicant. When parties entered into an agreement against any law or terms of the original agreement, parties are not entitled for the*

discretionary interim relief. Even if applicant is entitled for the relief under confidential agreement, it is entitle for the relief through arbitration proceedings against first respondent. Hence, applicant has failed to prove that he is entitled for the relief as sought for. Accordingly, I answer Point No.1 in the negative."

Hence, the Petition has been dismissed as aforesaid with elaborate judgment.

4. Subsequently, the Petitioner in C.P. (IB) No.233/BB/2018, the same Applicant as stated in the above Appeal, has filed Civil Miscellaneous Petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 in the Hon'ble High Court of Karnataka at Bangalore.

5. Heard Shri G.P. Madaan along with Shri Ishaan Madaan, learned Counsel for the Petitioner. We have carefully perused the pleadings of the party along with material papers on file and the extant provisions of the Code.

6. We are of the firm view that the Party is using multiple judicial forum for realising his payments and is only interested in his payments, as we have observed from the Order dated 03.03.2018 of XXXIII Additional City Civil & Sessions Judge at Bengaluru City, and thereafter filing a Petition in the Hon'ble High Court of Karnataka at Bangalore. Now, in the present I&B Code Petition, which he has filed as Financial Creditor, he is also only chasing for payment. Applicant has filed the Petition U/s 7 of the Code in the Hon'ble NCLT, Bengaluru Bench, where mentioning an amount of Rs.4 Crores as amount advanced by the Applicant to the Corporate Debtor in terms of the Settlement Agreement dated 15.07.2016 and is claiming U/s 7 of the Code as Financial Creditor.

7. Although the present Petition is towards a claim of Rs.4 Crores for advance payment, along with that, he has enclosed the copies of all the MoU, Service Agreement and Settlement Agreement.

8. On perusing of the Petition, it seems that M/s.Mphasis Limited, Applicant/Financial Creditor herein, is engaged in the business relating to Information Technology and Information Technology Enabled Services including providing sales and service of Computer Software and Hardware. Whereas, the Corporate Debtor i.e. M/s.Strategic Outsourcing Services Private Limited, is engaged in the business of providing Information Technology solutions and services including Systems Integration, Information System Outsourcing, Package Implementation, Application Development and Maintenance, etc.

9. This reflects that the Financial Creditor has given that amount of Rs.4 Crores towards advance payment is against a business agreement, and it is nowhere related to the terminology of "Financial Debt" as defined U/s 5(8) of the I&B Code, 2016. While going through the Settlement Agreement also a Clause on resolving the disputes that this Settlement Agreement encompasses all the earlier Agreements/MoUs of the Parties and supersedes all previous negotiations, understandings and agreements between the Parties.

10. It is amply clear that the present Petition/Application is also in respect of chasing of payments. He is also proceeding with the trial of Suits at multiple forums, as is evident from the Petition filed before the XXXIII Additional City Civil & Sessions Judge at Bengaluru City.

11. The present Petition is covered by Section 10 and 11 of the Code of Civil Procedure, 1908 and both the Sections bars the trial in multiple forums, where directly and substantially the issue is same between the same parties and one of them under the same title and first subsequent such Suit which such issue has been subsequently raised, finally heard and decided by the Court. Therefore, the present Petition is barred by principles of res judicata.

12. As far as the Insolvency and Bankruptcy Code, 2016 is concerned, it is not meant for chasing of payments. It is a settled position of law that

the provisions of Code cannot be invoked for recovery of outstanding amount but it can be invoked to initiate CIRP for justified reasons as per the Code. The Hon'ble Supreme Court in the case of *Mobilox Innovations Private Limited Vs. Kirusa Software Private Limited*[1], has inter alia, held that IBC, 2016 is not intended to be substitute to a recovery forum.

13. And moreover, the advance payment is not covered in the definition of Financial Debt and it is covered under the Operational Debt. Hence, the Petition deserves to be rejected, and accordingly, C.P.(IB) No.233/BB/2018 is hereby rejected, and the Registry is directed to communicate the Order to the Applicant and the Corporate Debtor.

(ASHOK KUMAR MISHRA)
MEMBER, TECHNICAL

(RAJESWARA RAO VITTANALA)
MEMBER, JUDICIAL

Krishna

[1] (2018) 1 SCC 353