



**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH, (Court – II)
KOLKATA**

CP(IB)/224(KB)2022

*An application under section 9 of the Insolvency and Bankruptcy Code, 2016
read with Rule 6 of the Insolvency and Bankruptcy (Application to
Adjudicating Authority) Rules, 2016.*

In the matter of:

Baid Power Services Private Limited, (CIN: U31909WB2003PTC096498), having its registered office at 152, Block – B, Lake Town, Kolkata 700089;

...Operational Creditor

-Versus-

M/s. Bihar Medical Services and Infrastructure Corporation Limited, A Government of Bihar Undertaking, (CIN: U85100BR2010SGC015886), having its office at 4th Floor, Bihar State Building Construction Corporation Limited, Hospital Road, Shastri Nagar, Patna 800023.

...Corporate Debtor

Date of Hearing: 17/02/2023

Date of Pronouncement: 12/05/2023

Coram:

Smt. Bidisha Banerjee : **Member (Judicial)**
Shri Balraj Joshi : **Member (Technical)**

Appearances through hybrid mode:

For Operational Creditor : Mr. Vinay Kumar Jain, Adv.
Ms. Pragati Prajapati, Adv.

For Corporate Debtor : Mr. U. P. Singh, Sr. Adv.
Mr. Kumar Manish, Adv.
Mr. Surendra Kumar, Adv.



ORDER

Per: Bidisha Banerjee, Member (Judicial)

1. This Adjudicating Authority convened through hybrid mode.
2. Heard the Ld. Counsel for the Operational Creditor as well as the Ld. Senior Counsel for the Corporate Debtor.
3. This petition u/s. 9 of the Insolvency and Bankruptcy Code, 2016 (in short “**IBC 2016**”) read with rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 has been filed by **Baid Power Services Private Limited** through its Director, Mr. Anupam Baid (DIN: 01358764), vide Board Resolution dated 24/03/2022, which forms **Annexure - 6** at page 32 of the petition (hereinafter referred to as the “**Operational Creditor**”) seeking initiation of the Corporate Insolvency Resolution Process (in short “**CIRP**”) against **Bihar Medical Services and Infrastructure Corporation Limited (CIN: U85100BR2010SGC015886)**, (hereinafter referred to as the “**Corporate Debtor**”).
4. **Submissions of the Operational Creditor:**
 - 4.1 That the Corporate Debtor floated a tender for Queue Management Solution to be installed at different locations. The Operational Creditor participated in the tender process and was awarded a rate contract for the supply of Queue Management Systems, a Supply Order was issued by the Corporate Debtor. The term of payment was 95% within 30 days against supply and installation and commissioning of equipment and balance 5% on submission of bank guarantee. The Operational Creditor started executing the work of supply and installation and completed such work at 18 hospitals.
 - 4.2 Thereafter, the Operational Creditor raised invoices of Rs.75,40,031/-. The Corporate Debtor made part payments of Rs.13,62,795/-, Rs.5,24,005/- and Rs.19,85,176/- leaving a balance outstanding of Rs.36,68,005/- to be paid by it.



- 4.3 The Corporate Debtor had also submitted a Bank Guarantee of Rs.6,35,080/- valid up to 21/03/2017, which got discharged and not encashed by the Corporate Debtor. On 27/08/2018, Manager Finance of the Corporate Debtor confirmed that Queue Management System's performance was satisfactory which indicates that there was no pre-existing dispute or objection by the Corporate Debtor.
- 4.4 When the Operational Creditor realised that the Corporate Debtor is not intending to pay the outstanding principal amount, it approached West Bengal Micro Small Enterprises Facilitation Council. The WBMSE Facilitation Council after the Conciliation hearing accepted the request for Arbitration Process under section 18(3) of the Micro, Small and Medium Enterprises Dev. Act, 2006 (in short "**MSMED Act, 2006**"). That after series of hearings, the Council ultimately passed an Arbitral Award under section 31 of the Arbitration and Conciliation Act, 1996 in favour of the Operational Creditor and instructed the Corporate Debtor to pay the remaining principal amount of Rs.36,68,005/- along with interest thereon at 3 times the bank rate of RBI with monthly rests, that comes to Rs.88,44,435/- till 12/05/2021 (date of passing **arbitral award**). **A copy of the Arbitral Award dated 12/05/2021 forms Annexure – 7** at pages 33 to 43 of the petition.
- 4.5 It is alleged that the Corporate Debtor is trying to arm-twist the facts by showing dispute in the matter. That the Arbitral Award was passed on 12/05/2021 by WBMSE Facilitation Council. After that, a period of 90 days plus the discretionary period of 30 days has clearly expired, neither petition under section 34 of the Arbitration and Conciliation Act, 1996 has been filed nor has a belated petition under section 34 of the Arbitration and Conciliation Act, 1996 been filed before appropriate Appellate Authority by the Corporate Debtor. Rather a Writ Petition numbered WPA 6191/2022 was filed on 05/04/2022 before the Hon'ble High Court at Kolkata against the WBMSE Facilitation Council award in favour of the Operational Creditor after receiving the demand notice dated 21/02/2022 under section 8 of IBC 2016. It clearly shows absence of any pre-existing dispute before receiving the demand notice.



4.6 It is further asserted that since the Corporate Debtor has never contested the arbitral award and there isn't any legitimate dispute between the parties, the filing of a Writ Petition is merely intended to mislead this Adjudicating Authority, hence the Arbitral Award remains unchallenged.

4.7 It is contended that the Arbitral Awards are usually treated as Operational Debts. Under the Code, Operational Debts can only be used to initiate insolvency proceedings if the debts are undisputed. That the Hon'ble Supreme Court in **K. Kishan v. Vijay Nirman Company Ltd. (C.A.No. 21824 of 2017)** has held that *"awards against which proceedings are available for setting aside the award would not be 'final' and the debts would be considered disputed until those proceedings are disposed-off by the relevant court."*

"debts under awards cannot be used to initiate insolvency proceedings when setting aside proceedings are pending or available"

.insolvency may be initiated on the basis of an award, when either the proceedings for setting-aside have been rejected or the limitation period to file such proceedings has expired."

In view of such, the Corporate Debtor in the current matter having not challenged the Arbitral Award before the appropriate Appellate Authority, the Award remains unchallenged and thus there is no pre-existing dispute between the parties. Therefore, the Arbitral Awards passed in favour of the Operational Creditor constitute the Operational Debt under the IBC, 2016.

4.8 Further that, in **Viom Infra Ventures Limited vs. Bahula Infotech Private Limited (Company Petition (IB) No.197/KB/2021)** NCLT, Kolkata had admitted the petition and directed the initiation of CIRP against the Corporate Debtor having held that CIRP can be initiated based on unchallenged Arbitral Award.

4.9 That in a comparatively recent judgment, the Hon'ble Supreme Court in the matter of **Kotak Mahindra Bank Limited vs. A Balakrishnan & Anr. (Civil Appeal**



No.689 of 2021) has held at para 51 therein that “Applying *these principles to clause (8) of Section 5 of the IBC, it could clearly be seen that the words “means a debt along with interest, if any, which is disbursed against the consideration for the time value of money” are followed by the words “and includes”*. Thereafter various categories (a) to (i) have been mentioned. **It is clear that by employing the words “and includes”, the Legislature has only given instances, which could be included in the term “financial debt”. However, the list is not exhaustive but inclusive.** The legislative intent could not have been to exclude a liability in respect of a “claim” arising out of a Recovery Certificate from the definition of the term “financial debt”, when such a liability in respect of a “claim” simpliciter would be included in the definition of the term “financial debt”.”

“52. In any case, we have already discussed hereinabove that the trigger point for initiation of CIRP is default of claim. “Default” is non-payment of debt by the debtor or the Corporate Debtor, which has become due and payable, as the case may be, a “debt” is a liability or obligation in respect of a claim which is due from any person, and a “claim” means a right to payment, whether such a right is reduced to judgment or not. It could thus be seen that unless there is a “claim”, which may or may not be reduced to any judgment, there would be no “debt”, and consequently no “default” on non-payment of such a “debt”. **When the “claim” itself means a right to payment, whether such a right is reduced to a judgment or not, we find that if the contention of the respondents, that merely on a claim being fructified in a decree, the same would be outside the ambit of clause (8) of Section 5 of the IBC, is accepted, then it would be inconsistent with the plain language used in the IBC. As already discussed hereinabove, the definition is inclusive and not exhaustive. Taking into consideration the object and purpose of IBC, the legislature could never have intended to keep a debt, which is crystallized in the form a decree, outside the ambit of clause (8) of Section 5 of the IBC.**” (emphasis added)

4.10 It is asserted that, in view of the above, the definition of Operational Debt is “a claim in respect of the provision of goods or services **including** employment



or a debt in respect of the repayment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority”. The Arbitral Award passed under Micro Small and Medium Enterprise Development Act, 2006 also falls under the ambit of Operational Debt from the plain reading of the judgment and the definition.

4.11 Further that the Hon’ble Apex Court in the matter of **Mobilox Innovations Pvt. Ltd. vs. Kriusa Software Pvt. Ltd.** on para 25 held that, *“Therefore, the adjudicating authority, when examining an application under Section 9 of the Act will have to determine:*

- (i) Whether there is an “operational debt” as defined exceeding Rs.1 Lakh (now Rs.1 crore)? (See Section 4 of the Act)*
- (ii) Whether the documentary evidence furnished with the application shows that the aforesaid debt is due and payable and has not yet been paid? And*
- (iii) Whether there is existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before the receipt of the demand notice of the unpaid operational debt in relation to such dispute?*

If any one of the aforesaid conditions is lacking, the application would have to be rejected. Apart from the above, the adjudicating authority must follow the mandate of Section 9, as outlined above, and in particular the mandate of Section 9(5) of the Act, and admit or reject the application, as the case may be, depending upon the factors mentioned in Section 9(5) of the Act.”

4.12 That only the three conditions as above need to be satisfied before the Adjudicating Authority which is examining the application under section 9 of the IBC, 2016. That Corporate Debtor never raised any dispute concerning the quality of goods and services. It never challenged the Arbitral Award. As such this Adjudicating Authority will look into the nature of the dispute, and should and be



very cautious while deciding that the contention raised by the Corporate Debtor which is frivolous attempt to divert the Hon'ble Bench from the matter in the hand.

- 4.13 Law is well settled that final judgment or decree passed by a court/tribunal would constitute a valid proof of debt for initiation of insolvency proceedings under the insolvency and bankruptcy code, 2016. Hon'ble Supreme Court in the matter of **Dena Bank (Now Bank of Baroda) vs. C. Shivakumar Ready** on 04/08/2021 at para 143 of the judgment held: *“a judgment and/or decree for money in favour of the Financial Creditor, passed by the DRT, or any other Tribunal or Court, or the issuance of a Certificate of Recovery in favour of the Financial Creditor, would give rise to a fresh cause of action for the Financial Creditor, to initiate proceedings under Section 7 of the IBC for initiation of the Corporate Insolvency Resolution Process, within three years from the date of the judgment and/or decree or within three years from the date of issuance of the Certificate of Recovery, if the dues of the Corporate Debtor to the Financial Debtor, under the judgment and/or in terms of the Certificate of Recovery, or any part thereof remained unpaid.”*

In view of such, it is clear that the Arbitral Award has given rise to a fresh cause of action for the initiation of an insolvency proceeding in the current matter. Thus the dispute that the Corporate Debtor is trying to create is spurious and moonshine defence since it neither raised any dispute on supply and services provided by the petitioner, nor on Arbitral Award passed by the WBMSE Facilitation Council. Hence this application deserves to be admitted.

5. **Per contra the Ld. Counsel for the respondent/Corporate Debtor by way of oral arguments and written submissions would submit as under:**

- 5.1 The Respondent/Corporate Debtor, a Government of Bihar Company had issued a Notice Inviting Tender (NIT) with an object to carry out survey for ascertaining the quality of equipments required for hospitals and Medical Colleges. The Operational Creditor participated in the bidding process and was declared as a



successful bidder. The parties entered into an agreement dated 04/03/2014, which governed the terms and conditions of the contract.

- 5.2 That the Operational Creditor supplied defective materials, never completed nor executed the work in sequence in the three categories of hospitals classified as Group A, Group B and Group C. There being the breach of the terms and conditions of the contract, and partial supply of defective equipment, the Corporate Debtor withheld and forfeited about Rs.36 Lakhs.
- 5.3 The Operational Creditor filed an application under Section 18(1) of the MSMED Act, 2006 before the West Bengal Micro, Small Enterprises Facilitation Counsel (MSEFC) constituted under Section 20 of the MSMED Act, 2006, a special statute meant for the benefits of Micro, Small and Medium Enterprise. Under Section 7 of the Act the supplier must be registered under Section 8(1) by filing a Memorandum on the date of entering into agreement or commencing supplies, which is a settled issue in terms of Hon'ble Apex Court's judgments (i) **Shilpi Industries and Others vs. Kerala State Road Transport Corporation and Others, reported in AIR 2021 SC 5487;** **Gujarat State Civil Supplies Corporation Ltd. vs. Mahakali Foods Pvt. Ltd. (Init.2) & Anr., reported in AIR 2022 SC 5545.** However, the Operational Creditor though claims itself as small scale industry, registered with Industries Department of Government of West Bengal, was not registered as such under Section 8(1) of MSMED Act, 2006, and as such not a supplier as defined in the 2006 Act. The Operational Creditor got itself registered by filing a Memorandum under Section 8(1) of MSMED Act, 2006 only on 10/11/2006, still it managed to get an award dated 12/05/2021, deemed to be an award under the Arbitration and Conciliation Act, 1996 under section 18(4) of the 2006 Act.
- 5.4 That the Operational Creditor claims that the award is a 'decree' under Section 2(2) of the Code of Civil Procedure 1908 and the Operational Creditor, a decree holder as defined under Section 2(3) C.P.C, 1908 to take benefits of Section 3(10) of the Insolvency and Bankruptcy Code,2016.



- 5.5 That the Corporate Debtor has challenged the said award dated 12/05/2021 passed by West Bengal Micro Small Facilitation Council in W.P.A. No. 6191/2022 before the Hon'ble High Court at Calcutta which is pending consideration. The Operational Creditor is a Party Respondent No.3 in the aforesaid writ application.
- 5.6 That the application under Section 9(1) of I & B Code filed by the Operational Creditor is not for determination of a 'dispute' arising in terms of I & B Code, 2016 because 'disputes' have been rightly or wrongly already determined between the parties which is subject matter of challenge in the writ application filed by the Corporate Debtor before the Hon'ble High Court at Calcutta in W.P.A.No. 6191/2022.
- 5.7 That the application under Section 9(1) of I & B Code has been filed to execute the 'award' rendered by the Council as if a decree of the Civil Court. In other words, this Adjudicating Authority is to act as an Executing Court that too of an award of a statutory tribunal exercising power under a special statute, i.e., MSMED Act, 2016.
- 5.8 That the law is well settled that an 'award' under the Arbitration and Conciliation Act, 1996 by fiction is to be treated as 'decree' only for the purpose of execution by a Civil Court in accordance with the provisions of C.P.C. 1908 as provided in Section 36 of the Arbitration and Conciliation Act, 1996 and such fiction in law would not apply for any other purpose except for Section 36 of the Arbitration and Conciliation Act, 1996.
- 5.9 Further that the award is neither a 'decree' in terms of Section 3(10) of the I & B Code nor Operational Creditor is a 'decree holder'. Rather the award has been made at the instance of a person / party having no right to avail the benefits of the provisions of 2006 Act and if the applicant had no right to sue as Micro or Small Enterprises, the Council had no jurisdiction to entertain such an application and pass an award which is unenforceable, not final and is a nullity in law in view of the two judgments referred to above. Further the so-called award is not final and is sub-judice before the Hon'ble High Court at Calcutta.



5.10 The MSMED Act, 2006 being a special statute and the Operational Creditor having availed the reliefs now cannot take recourse to Section 238 of the I & B Code having overriding effect on the provisions of the MSMED Act 2006 and Arbitration and Conciliation Act, 1996. The MSMED Act, 2006, Arbitration and Conciliation Act, 1996 and I & B Act, 2016 all are parliamentary acts and provisions are not in conflict rather provisions of special statutes override the general statute, in support, reference is made to the following judgments of the Hon'ble Apex Court:

- (a) **Macquarie Bank Limited vs. Shilpi Cable Technologies Ltd. reported in (2018) 2 SCC 674 (para 43 to 47);**
- (b) **Paramjeet Singh Patheja vs. ICDS Ltd. (2006) 13 SCC 322 reported in (paras 12, 18, 28, 29, 32, 39, 40, 41, 42);**
- (c) **Leela Hotels Limited vs. Housing and Urban Development Corporation Ltd. reported in (2012) 1 SCC 302 (paras 32, 44, 45, (where the judgment in Paramjeet Singh Patheja was considered);**
- (d) **Government of India vs. Vedanta Limited and Others reported in (2020) 10 SCC 1. Paras 65,66 & 69. Here also Paramjeet Singh Patheja case (supra) was considered along with;**
- (e) **Sundaram Finance Limited vs. Abdul Samad & Another reported in (2018) 3 SCC 622 (para 14);**
- (f) **In the case K. Kishan vs. Vijay Nirman Company Private Limited reported in (2018) 17 SCC 662 (paragraphs no. 16 to 22);**
- (g) **Cheran Properties Limited vs. Kasturi and Son Limited & Ors. reported in (2018) 16 SCC 413, para 14.4. However, so far share transfer was concerned it was to be given effect by NCLT but not an award deciding money claim for which execution u/s. 36 of Arbitration and Conciliation Act, 1996 before concerned civil court only is maintainable.**

5.11 It is contended that in view of the settled law of Hon'ble Apex Court, it is crystal clear that the object of this Tribunal under I & B Code is not to act for recovery of debts nor as an executing court, that too for execution of an award and not a decree of a court. It is well settled that a power required to be exercised by a certain authority in a certain way should be exercised in that manner or not at all



and all other modes of performance are necessarily forbidden. AIR 1976 SC 789, paragraph 18 (Hukum Chand Shyam Lal vs. Union of India (UOI) and Ors.)

5.12 That in an identical case, i.e., C.P(IB)/1258(KB)2019, Mehra Electric Company vs. Bihar State Power Holding Company Limited involving same and similar issues, this Adjudicating Authority had deferred the proceedings until final decision of the High Court

5.13 Further the Corporate Debtor would humbly submit that the Application under section 9(1) of I & B Code, 2016 filed by the Operational Creditor be dismissed with costs.

6. The rival contentions were noted.

7. The issue that crops up for determination is whether the Award under MSMED Act, 2006 could be treated as an award enforceable and executable before this Adjudicating Authority when the Award itself is under challenge before the Hon'ble High Court. But before that the decisions cited by Ld. Counsels would be necessary to be gone into.

8. Decisions relied upon by the Operational Creditor:

8.1 In **K. Kishan** (supra) Hon'ble Apex Court has clearly held that:

“debts under awards cannot be used to initiate insolvency proceedings when setting aside proceedings are pending or available.”

“insolvency may be initiated on the basis of an award, when either the proceedings for setting-aside have been rejected or the limitation period to file such proceedings has expired.”

8.2 In **Viom Infra** (supra) the Award was an arbitral award, not assailed or pending before any superior fora, hence not relevant at this juncture.

8.3 In **Kotak Mahindra** (supra) Hon'ble Court held

“51. Applying these principles to clause (8) of Section 5 of the IBC, it could clearly be seen that the words “means a debt along with interest, if any, which is



disbursed against the consideration for the time value of money” are followed by the words “and includes”. Thereafter various categories (a) to (i) have been mentioned. It is clear that by employing the words “and includes”, the Legislature has only given instances, which could be included in the term “financial debt”. However, the list is not exhaustive but inclusive. The legislative intent could not have been to exclude a liability in respect of a “claim” arising out of a Recovery Certificate from the definition of the term “financial debt”, when such a liability in respect of a “claim” simpliciter would be included in the definition of the term “financial debt”.

“52. In any case, we have already discussed hereinabove that the trigger point for initiation of CIRP is default of claim. “Default” is non-payment of debt by the debtor or the Corporate Debtor, which has become due and payable, as the case may be, a “debt” is a liability or obligation in respect of a claim which is due from any person, and a “claim” means a right to payment, whether such a right is reduced to judgment or not. It could thus be seen that unless there is a “claim”, which may or may not be reduced to any judgment, there would be no “debt”, and consequently no “default” on non-payment of such a “debt”. When the “claim” itself means a right to payment, whether such a right is reduced to a judgment or not, we find that if the contention of the respondents, that merely on a claim being fructified in a decree, the same would be outside the ambit of clause (8) of Section 5 of the IBC, is accepted, then it would be inconsistent with the plain language used in the IBC. As already discussed hereinabove, the definition is inclusive and not exhaustive. Taking into consideration the object and purpose of IBC, the legislature could never have intended to keep a debt, which is crystallized in the form a decree, outside the ambit of clause (8) of Section 5 of the IBC.”

Therefore, undoubtedly and indubitably a claim can also said to arise of an award.

9. Decisions cited by the respondent/Corporate Debtor

9.1 In **Silpi Industries** (supra) proceedings emanating from failure of conciliation under Micro, Small and Medium Enterprises Development Act, 2006 (MSMED) were decided in favour of Claimant and also affirmed in proceedings challenging the arbitral award – Appeal filed thereafter reversed the findings. The Hon’ble Apex Court while dismissing the Appeals held:



“The provisions of Limitation Act, 1963 will apply to the arbitrations covered by Section 18(3) of the 2006 Act.”

“MSMED Act, being a special Statue, will have an overriding effect vis-à-vis Arbitration and Conciliation Act, 1956, which is a general Act. Even if there is an agreement between the parties for resolution of disputes by arbitration, if a seller is covered by Micro, Small and Medium Enterprises Development Act, 2006, the seller can certainly approach the competent authority to make its claim. If any agreement between the parties is there, same is to be ignored in view of the statutory obligations and mechanism provided under the 2006 Act”

“On a har monious construction of Section 18(3) of the 2006 Act and Section 7(1) and Section 23(2A) of the 1996 Act, counter-claim is maintainable before the statutory authoriries under MSMED Act.”

Hon`ble Court observed that *“Though the Appellant claims the benefit of provisions under MSMED Act, on the ground that the Appellant was also supplying as on the date of making the claim, as provided under Section 8 of the MSMED Act, but same is not based on any acceptable material. The Appellant cannot become micro or small enterprise or supplier, to claim the benefits within the meaning of MSMED Act, 2006 by submitting a memorandum to obtain registration subsequent to entering into the contract and supply of goods and services. If any registration is obtained, same will be prospective and applies for supply of goods and services subsequent to registration but cannot operate retrospectively. Any other interpretation of the provision would lead to absurdity and confer unwarranted benefit in favour of a party not intended by legislation.”*

“It is also not in dispute that the Appellant approached the District Industrial Centre and filed entrepreneur memorandum under Section 8 of the MSMED Act, 2006 only on 25.03.2015 and later has approached the Council invoking the provisions of MSMED Act by filing application under Section 18 of the Act. It is the specific case of the Respondent that the Appellant has abandoned the incomplete work having made deficient and defective supplies in the month of February/March 2015. In that view of the matter, Appellant not entitled to invoke the provisions of Chapter V and seek reference to arbitration under Section 18 of the MSMED Act, 2006. Further, there is an agreement for arbitration between the parties for resolution of disputes pursuant to their contract, as such, High Court



rightly allowed the application filed by the Respondent under Section 11(6) of the 1996 Act.”

In the aforesaid backdrop, in present case it is noticed that the Hon’ble High Court is seized of the issues on legality and propriety of the MSMED Award, which forms basis of the claim here. Therefore, judicial propriety demands that this Adjudicating Authority should await the outcome of said proceedings pending in a higher forum before further delving into the maintainability or merits of the matter.

10. The instant matter is therefore adjourned *sine die* with liberty to mention as and when the Hon’ble High Court decides the Writ Petition.
11. 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.
12. Certified copy of this order may be issued, if applied for, upon compliance of all requisite formalities.

(Balraj Joshi)
Member (Technical)

(Bidisha Banerjee)
Member (Judicial)

Signed on this, the 12th day of May, 2023.

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