

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH, (COURT-I)
KOLKATA**

CP (IB) No. 1391/KB/2020

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:

Puravankara Limited

...Operational Creditor

Versus

Simplex Infrastructure Limited
[CIN: L45209WB1924PLC004969]

...Corporate Debtor

Date of pronouncing the order: 09.04.2024

Appearances (through hybrid mode):

For the Operational Creditor : Mr. Joshua Samuel, Adv

For the Corporate Debtor : Mr. Snehashis Sen, Adv.
Mr. Donyal Ahmed, Adv.

Coram:

Rohit Kapoor : **Member (Judicial)**

Balraj Joshi : **Member (Technical)**

ORDER

Per : Balraj Joshi, Member (Technical)

1. This Court convened through hybrid mode.
2. This is a Company Petition filed 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 by Puravankara Limited ("***Operational Creditor***"), represented by **Mr. S. John Vijayakumar** (Executive Vice President-

Legal), authorized through a Board Resolution dated 27th October, 2020¹ seeking to initiate Corporate Insolvency Resolution Process (“CIRP”) against Simplex Infrastructure Limited (“*Corporate Debtor*”).

3. It is submitted that Part-I of this petition contains particulars of the Operational Creditor. Part-II of this petition contains particulars of the Corporate Debtor.
4. Part-IV of the petition contains details of operational debt for an amount of **INR.10,74,51,296/-** (Ten Crores Seventy Four Lakhs Fifty One Thousand Two Hundred and Ninety Six) only, is due under the Arbitral dated 04.08.2018 (which was subsequently corrected on 08.08.2018 and 10.09.2018), along with interest as awarded till date. Part V of the Form V deals with the Particulars of the Operational debt including the documents records and evidence of default.
5. The Corporate Debtor was incorporated on 19 December, 1924 having CIN: L45209WB1924PLC004969, under the Companies Act, 1956. Therefore, this Bench has jurisdiction to deal with this petition. Its Authorized Capital is Rs. 75,00,00,000 and Paid-up Capital is Rs.11,42,85,640.

Submissions on behalf of the Petitioner

6. On the 10th of January, 2006, the Operational Creditor (hereinafter referred to as 'OC') issued tenders soliciting proposals for the construction of a Pile Foundation utilizing the Bored Cast-in-situ Pile Foundation Technology.
7. Subsequently, on the 18th of January, 2006, the Corporate Debtor (hereinafter referred to as 'CD') responded to the tender by proposing an alternative methodology involving the utilization of 'Precast Segmental Piles'. CD assured OC that the suggested technology was optimal, economically advantageous, and, as pioneers in this field, they guaranteed its efficacy. CD further provided various assurances and warranties

¹ Annexure A1 of the Petition

pertaining to the reliability of the proposed load-bearing capacity, assuming responsibility for delivering a dependable pile foundation.

8. On the 8th of February, 2006, the OC issued a Work Order to the CD based on the assurances provided by the latter. During the construction process, certain defects were brought to the attention of the CD by the Geo Technical Engineers. Despite these notifications, the CD continued to reassure the OC that the identified defects were minor and inconsequential, citing the passing of Load Tests conducted by the CD on the driven piles.
9. On the 18th of December, 2006, subsequent to the completion of the Pile Foundation, the OC observed defects in the foundation. Upon evaluation, it became evident that the technology employed by the CD had failed, rendering the foundation incapable of bearing the intended load capacity for the proposed building. Experts recommended the reconstruction of the foundation using the original Bored Cast-in-situ technology. The OC, having already remitted a substantial amount to the CD for the foundation, was compelled to expend additional substantial amounts towards rectifying the defective Pile Foundation.
10. On the 16th of May, 2008, the OC issued a legal Notice demanding that the CD reimburse various sums expended by them due to the defective technology recommended and implemented by the CD.
11. On the 19th of July, 2008, the CD issued a letter expressing regret over the arising differences and proposed resolution through mutual discussions. Upon the failure of the parties to reach an amicable resolution, the disputes were referred to an Arbitral Tribunal comprising three (3) Arbitrators.
12. On the 4th of August, 2018, the Hon'ble Arbitral Tribunal, chaired by Mr. Justice Shivaraj V Patil, former Judge of the Supreme Court of India, along with Mr. Justice S. Venkataraman, former Judge of the High Court of Karnataka, and Mr. Justice T.N.C Rangarajan, former Judge of the High Court of Madras and Andhra Pradesh, issued an

Award. The Award directed the CD to pay the OC a sum of Rs. 8,36,48,877/- along with interest at the rate of 9% per annum on the said amount, payable within 3 months. In the event of non-payment within the stipulated period, the amount would accrue interest at the rate of 12% per annum. Corrections to the Award were made on the 10th of August, 2018, and subsequently on the 10th of September, 2018, enhancing the awarded amount to Rs. 8,48,32,438/-.

13. On December 7, 2018, the Corporate Debtor (CD) challenged the Arbitral Award under Section 34 of the Arbitration and Conciliation Act, 1996, seeking a stay of the Award's operation. The Court did not grant ex-parte stay, and the application was pending consideration. Due to ambiguity regarding the applicability of amended provisions to proceedings under Section 34, where arbitration commenced prior to the amendment, the CD withdrew its application under Section 36(2) & (3) of the Arbitration Act.
14. Subsequently, the Supreme Court clarified the law's position on the amended provisions' applicability to proceedings initiated after the Arbitration Act's amendment, in the case of *BCCI Vs Kochi Cricket Club*. The introduction of Section 87 to the Arbitration Act, 1996, was struck down by the Supreme Court in *Hindustan Construction Company Ltd. Vs Union of India*. Therefore, the amended provisions of the Arbitration Act apply to the CD's Section 34 proceedings pending before the Commercial Court, Bangalore.
15. As of the present date, the debt owed by the CD to the Operational Creditor (OC) has been crystallized, with a sum of Rs. 10,74,51,296/- due and payable by the CD to the OC. Despite over 2 years passing since the Arbitral Award's issuance, there is no stay order in respect of the said Award. Consequently, the debt is admitted, crystallized, and the OC is eligible for admission of the Petition.
16. On March 3, 2020, the Operational Creditor (OC) issued a Demand Notice to the Corporate Debtor (CD), requesting payment of the admitted amount as per the Award dated August 4, 2018. Despite receiving the Demand Notice, the CD has neither made

the demanded payment nor responded to the Notice. As of the current date, the CD remains obligated to pay the OC a sum of Rs. 10,74,51,296/-.

Reply Affidavit on behalf of the Corporate Debtor

17. The application in question lacks maintainability both in law and in fact. Filed purportedly by the Operational Creditor, it essentially seeks the execution and/or enforcement of an arbitral award. It is evident that this application has been submitted with fraudulent and malicious intent.
18. Furthermore, the Corporate Debtor asserts that it holds no liability or debt towards the purported Operational Creditor. The alleged debt claimed by the Operational Creditor is baseless and made in bad faith, and the Corporate Debtor disputes its validity.
19. Substantial disputes exist regarding the purported claim of the Operational Creditor. Consequently, solely on this basis, the present application ought to be summarily dismissed with costs.
20. The present application relies on an arbitral award dated 04.08.2018, subsequently corrected on 10.08.2018 and 10.03.2018, a copy of which is annexed herewith and marked as "A." It is noteworthy to mention that the Corporate Debtor has duly filed an application for setting aside the said award under Section 34 of the Arbitration & Conciliation Act, 1996, a copy of which, excluding its annexures, is attached hereto and marked as "B." It is further pertinent to highlight that the Corporate Debtor filed its application on 07.12.2018, well in advance of the Operational Creditor's present filing, and the former application is yet to receive final adjudication.
21. The claims advanced by the purported Operational Creditor before the Arbitral Tribunal were vehemently contested by the Corporate Debtor. It is crucial to note that the Corporate Debtor, in response, lodged its counterclaim before the Learned Arbitral Tribunal, asserting a sum of Rs. 1,24,90,800/- for work completed by the Corporate Debtor, attributable to defaults committed by the purported Operational Creditor during

contract execution, along with an additional sum of Rs. 15,30,670/- for Kerala Value Added Tax owed and payable by the purported Operational Creditor, alongside interest. The counterclaim, bereft of annexures, is appended herewith and denoted as "C."

22. The pendency of an application pursuant to Section 34 of the Arbitration & Conciliation Act, 1996 for adjudication as of the present date signifies that the purported debt and/or claim of the Operational Creditor has not crystallized. Therefore, the issue of default does not arise. It is established jurisprudence that 'dispute' under the Code encompasses a challenge to an arbitral award under Section 34 of the Arbitration & Conciliation Act, 1996. Consequently, the purported claim of the Operational Creditor is disputed, and such disputes are pre-existing.
23. It should be summarily dismissed at the outset, as there exists no operational debt due and payable, and further, due to the existence of material pre-existing disputes pending adjudication before the appropriate Court of Law.
24. The Corporate Debtor was contracted by the purported Operational Creditor for the execution of RCC pre-cast Segmented Piles, pursuant to a tender issued on 10.01.2006 for the latter's multi-storied residential project named 'Purva Grand Bay.' A work order dated 06.02.2006 was consequently issued by the purported Operational Creditor to the Corporate Debtor.
25. Within the duration of the contractual agreement between the parties, conflicts and discrepancies emerged, prompting the referral of disputes to a Learned Arbitral Tribunal. Said arbitration culminated in the issuance of an award dated 04.08.2018, subsequently corrected on 10.08.2018 and 10.03.2018.
26. The Corporate Debtor, feeling aggrieved and dissatisfied with the arbitral award, duly filed an application under Section 34 of the Arbitration & Conciliation Act, 1996, seeking the setting aside of said award before the Court of the Hon'ble City Civil and Sessions Judge at Bengaluru. Presently, the matter remains pending adjudication.

27. It is pertinent to assert that the procedural framework outlined within the Insolvency & Bankruptcy Code, 2016 does not serve as a mechanism for debt recovery or enforcement. It cannot be utilized to coerce the Corporate Debtor into remitting an alleged amount which is demonstrably not payable.
28. The Corporate Debtor also submits that the initiation of proceedings challenging an arbitral award under Section 34 of the Arbitration & Conciliation Act, 1996, underscores the existence of a 'pre-existing dispute' between the parties, persisting until the culmination of the adjudicatory process delineated in Sections 34 and 37 of the Arbitration & Conciliation Act, 1996. The actions undertaken by the Corporate Debtor to contest the arbitral award in the present instance manifest the disputed nature of the alleged operational debt. Moreover, the claims advanced by the Operational Creditor were contested by the Corporate Debtor through the submission of a Statement of Defense and Counterclaim before the Learned Arbitral Tribunal.
29. It is also denied by the Corporate Debtor that the piling foundation works conducted by the Corporate Debtor were unsuccessful, as purported. Similarly, the assertion that the piling foundation lacked the requisite load-bearing capacity is denied. It is emphasized that the findings rendered by the Learned Arbitral Tribunal are currently subject to challenge through an application under Section 34 of the Arbitration & Conciliation Act, 1996, initiated by the Corporate Debtor. Consequently, the notion of any debt being due and payable by the Corporate Debtor under the arbitral award, as alleged or otherwise, is disputed and rejected. The arbitral award, serving as the purported basis of the Operational Creditor's claim, is deemed erroneous. The claim that an amount of Rs. 10,74,51,296/- is in default is categorically refuted. There exists no default on the part of the Corporate Debtor, as the award is under challenge and yet to achieve finality. Therefore, it is denied and disputed that any debt owed to the purported Operational Creditor under the arbitral award has crystallized to date. Even in the absence of a stay on the operation of the arbitral award, the pendency of an application under Section 34 of the Arbitration & Conciliation Act, 1996 unmistakably indicates the presence of

material pre-existing disputes concerning the alleged claim of the Operational Creditor, which await adjudication before the appropriate Court of Law. The demand notice dated 03.03.2020 issued by the Operational Creditor is considered entirely frivolous and warrants no consideration. The presence of a pre-existing dispute regarding the award substantiates the grounds for the dismissal of the instant application.

Rejoinder by the Operational Creditor

30. The contention that the Award Holder cannot be categorized as an Operational Creditor under the Insolvency and Bankruptcy Code (IBC) is baseless and misleading. An Arbitral Award constitutes a debt, and the failure to fulfill such obligation amounts to a default under the IB Code. The sum determined by the Arbitral Tribunal is unequivocally recognized as a 'debt' and qualifies as an 'Operational debt' for the purposes of invoking Section 9 of the IB Code. Therefore, the present Application under Section 9 of the IB Code is entirely maintainable.
31. The comprehensive definitions provided within the IB Code encompass the terms Debt, Creditor, Default, and Dispute, extending to amounts payable pursuant to an Arbitral Award. Consequently, a claim adjudicated upon in an Arbitral Award falls squarely within the ambit of Sections 8 and 9 of the Code. The National Company Law Appellate Tribunal (NCLAT) and the Supreme Court have consistently upheld that sums owed under an Arbitral Award constitute a Debt within the purview of the Code, thereby validating the characterization of the award holder as an Operational Creditor.
32. The assertion that the present Application primarily seeks the execution or enforcement of an Arbitral Award and thus is fraudulent and malicious is unfounded and contrary to the factual record. It is abundantly clear from the Corporate Debtor's inability to discharge debts arising from its ordinary course of business, its defaults on various loans from Banks and Financial Institutions, its outstanding obligations to statutory authorities, and its failure to satisfy judgments, decrees, Arbitral Awards, and Court Orders. The Corporate Debtor faces numerous proceedings across various forums,

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including this Hon'ble Tribunal, seeking Corporate Insolvency Resolution. Details of several Corporate Insolvency Resolution Process (CIRP) proceedings pending before this Hon'ble Tribunal against the Corporate Debtor substantiate this fact:

| Sl No. | Case No. | Particulars |
|--------|-----------------------|--|
| 01. | C.P.(IB)/132(KB)2021 | SURESH MORE SOLE PROPRIETOR OF KIRAN TRADERS Vs SIMPLEX INFRASTRUCTURE LIMITED |
| 02. | C.P.(IB)/1943(KB)2019 | HI-REACH CONSTRUCTION EQUIPMENTS PVT.LTD Vs SIMPLEX INFRASTRUCTURES LTD. |
| 03. | C.P.(IB)/1897(KB)2019 | KOTI DEEKSHITULU RACHAKONDA Vs SIMPLEX INFRASTRUCTURE LTD. |
| 04. | C.P.(IB)/1733(KB)2019 | TECH TRADING CORPORATION Vs SIMPLEX INFRASTRUCTURES LIMITED. |
| 05. | C.P.(IB)/1899(KB)2019 | VINAYAK INFRASTRUCTURE Vs SIMPLEX INFRASTRUCTURE LTD. |
| 06. | C.P.(IB)/1626(KB)2019 | TRANS LOG - SHIP PVT LTD Vs SIMPLEX INFRASTRUCTURES LTD |
| 07. | C.P.(IB)/1577(KB)2019 | VARMORA GRANITO PRIVATE LIMITED Vs SIMPLEX INFRASTRUCTURES LIMITED |
| 08. | C.P.(IB)/89(KB)2021 | M/S BIANCA EQUIPMENTS Vs SIMPLEX INFRASTRUCTURE LTD. |
| 09. | C.P.(IB)/985(KB)2020 | SL ELECTROPOWER PRIVATE LIMITED Vs SIMPLEX INFRASTRUCTURE LIMITED |
| 10. | C.P.(IB)/727(KB)2020 | DEXTRA INDIA PVT. LTD. Vs SIMPLEX INFRASTRUCTURES LIMITED |

The Operational Creditor asserts that there are over 200 cases for Corporate Insolvency Resolution Process (CIRP) pending against the Corporate Debtor (CD) before this Hon'ble Tribunal. The particulars of these cases, as hosted on the National Company Law Tribunal (NCLT) website, are hereby submitted and labeled as ANNEXURE-A8.

33. The Arbitral Tribunal diligently considered all contentions put forth by the Corporate Debtor, including its purported counter-claim, and conclusively deemed them incorrect. Consequently, the Tribunal rendered a unanimous Award instructing the Corporate Debtor to remit a sum of Rs. 8,36,48,877/- to the Operational Creditor, accompanied by an interest rate of 9% from 04.08.2018, totaling Rs. 10,74,51,296/- as of the Petition filing date, and concurrently dismissed the counter-claim. It is evident that the Corporate Debtor's assets are insufficient to fulfill its liabilities, including those delineated in the aforementioned cases and its obligation under the Arbitral Award dated 04.08.2018.

Therefore, it is prudent and in the best interest of both Creditors and the public at large that Corporate Insolvency Resolution Process (CIRP) be initiated concerning the Corporate Debtor.

34. The sum/amount mandated by the Arbitral Award for payment by the Corporate Debtor to the Operational Creditor is definitively crystallized and cannot be construed, under any circumstances, as a pending or pre-existing dispute. It is well-established that an Arbitral Award entailing monetary payment necessitates that any challenge to such an award obligates the securing of the entire award amount, either through deposit or provision of security, or both, as per the Court's discretion. The Corporate Debtor consciously opted against pursuing the Application for stay, consequently relinquishing its entitlement under section 36 of the Arbitration and Conciliation Act, 1996, at its own peril. In a bid to evade the obligation of depositing or furnishing security for the award amount, the Corporate Debtor filed an Application under Section 34 of the Arbitration Act before a Court lacking jurisdiction and competence. The Operational Creditor vehemently opposed the said Application initially, contending that the Court lacked jurisdiction. Subsequently, the Hon'ble Commercial Court at Bangalore, upon deliberating upon the jurisdiction and maintainability of the Application under Section 34 of the Arbitration Act, namely Com. A.S No. 251/2018, upheld the Operational Creditor's objections, ruling that the Court lacked jurisdiction. Consequently, as of the present date, the purported Application under Section 34 of the Arbitration Act remains non-existent before any Court. In the absence of a Court Order staying the operation of the Arbitral Award dated 04.08.2018, neither at the inception of the present proceedings nor presently, there exists no impediment for this Adjudicating Authority to entertain the Petition under Section 9 of the Insolvency and Bankruptcy (IB) Code.
35. The exhaustive deliberation and adjudication of all contentions pertaining to the dispute between the parties, inclusive of claims and counterclaims, have been comprehensively addressed in a detailed and reasoned award issued by the Hon'ble Arbitral Tribunal comprised of three members. Consequently, the repetition of identical contentions

within the Statement of Objections holds no significance, as such matters cannot be re-evaluated or re-examined by the Hon'ble National Company Law Tribunal (NCLT), nor can this Hon'ble Tribunal exceed the confines delineated by the Award. The existence of a crystallized debt is incontrovertibly established by the Award, and the absence of dispute is further underscored by the fact that the purported Application under Section 34 of the Arbitration Act is not under consideration before any Court of Law. Moreover, the relinquishment of the right to seek a stay of the Award further reinforces the absence of any dispute.

36. The Corporate Debtor's endeavor to assert the pendency of an Application under Section 34, albeit filed before a Court lacking jurisdiction and competence to adjudicate upon such an application, represents a misuse of legal processes. The Corporate Debtor's attempt to invoke said application as a shield against the present proceedings warrants firm action by this Adjudicating Authority. It is emphasized, without prejudice to the aforementioned contentions, that there has been no stay of the Award at any juncture, and furthermore, the right to pursue the Application for stay has been expressly waived.

Analysis and Findings

37. We have heard the Learned Counsel appearing on behalf of the Operational Creditor and the Corporate Debtor and perused the documents on record.
38. On the question that whether arbitral award is a falling within the term 'operational debt' we find that according to Section 3(10) of the Insolvency and Bankruptcy Code, 2016:

Section 3; Definitions

(10) "creditor" means 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;

39. We would like to seek reliance on the judgment passed by the Hon'ble NCLAT in the matter of ***Ugro Capital Ltd. v. Bangalore Dehydration and Drying Equipment Co. (P) Ltd²*** which is reproduced below:

“[i]t is important to point out that the definition of creditor provided in Section 3(10) of the IB Code provides that “creditor means 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.

Based on the decree of the court this petition was filed under Section 7 of the Code. Since the definition of word creditor in IB Code includes decree-holder, therefore if a petition is filed for the realisation of decretal amount, then it cannot be dismissed on the ground that applicant should have taken steps for filing execution case in civil court.”

40. In the present matter, it is imperative to recognize that the favorable disposition of the Decree/Award in favor of the Applicant does not per se determine the character of the Applicant's debt. While acknowledging that a Decree Holder is classified as a 'Creditor' pursuant to Section 3(10) of the Insolvency and Bankruptcy Code, 2016 (IBC), it is essential to note that a Creditor may be categorized as either an "Operational Creditor" or a "Financial Creditor". Here we refer to the Judgement of **Hon'ble NCLAT** dated 14.08.2020 passed in the matter of ***“Sh. Sushil Ansal v. Ashok Tripathi & Ors. in Company Appeal (AT) (Insolvency) No. 452 of 2020”***, wherein the following was held:

“20. A ‘decree-holder’ is undoubtedly covered by the definition of ‘Creditor’ under Section 3(10) of the ‘I&B Code’ but would not fall within the class of creditors classified as ‘Financial Creditor’ unless the debt was disbursed against the consideration for time value of money or falls within any of the clauses thereof as the definition of ‘financial debt’ is inclusive in character. A ‘decree’ is defined under Section 2(2) of the Code of Civil Procedure, 1908 (“CPC” for short) as the

² 2020 SCC OnLine NCLAT 149.

formal expression of an adjudication which conclusively determines the rights of the parties with regard to the matters in controversy in a lis. A 'decreeholder', defined under Section 2(3) of the same Code means any person in whose favour a decree has been passed or an order capable of execution has been made. Order XXI Rule 30 of the CPC lays down the mode of execution of a money decree. According to this provision, a money decree may be executed by the detention of judgment-debtor in civil prison, or by the attachment or sale of his property, or by both. Section 40 of the 'Real Estate (Regulation and Development) Act, 2016' lays down the mode of execution by providing that the RERA may order to recover the amount due under the Recovery Certificate by the concerned Authority as an arrear of land revenue. In the instant case, RERA has conducted the recovery proceedings at the instance of Respondent Nos.1 & 2 against the Corporate Debtor which culminated in issuance of Recovery Certificate and passing of order under Section 40 of the 'Real Estate (Regulation and Development) Act, 2016' directing the concerned Authority to recover amount of Rs.73,35,686.43/- from the Corporate Debtor as an arrear of land revenue. As already stated elsewhere in this Judgment, Respondent Nos.1 & 2 instead of pursuing the matter before the Competent Authority sought triggering of Corporate Insolvency Resolution Process against the Corporate Debtor resulting in passing of the impugned order of admission which has been assailed in the instant appeal. 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 against the consideration for the time value of money and does not fall within the ambit of any of the clauses enumerated under Section 5(8) of the 'I&B Code'.

41. At this juncture, it is pertinent to cite the Judgment rendered by the Honorable High Court of Madras in the case titled "***Cholamandalam Investment and Finance Company Ltd. Vs. Navrang Roadlines Private Limited O.S.A.(CAD) No.115 of 2022***".

In this ruling, the Hon'ble Court articulated the decisive factors governing the classification of a sum due under the final decree as follows:

“12Consequently, the nature of the underlying claim of the creditor, would determine the categorisation of the amount payable under the final decree passed adjudication of the same claim. The liability arising out of an arbitral award or a court decree would be categorised as either financial or operational debt depending on the nature of the underlying claim which stands crystallised through the arbitral or court proceedings.”

Moreover, the Principal Bench of the National Company Law Tribunal (NCLT), in the case of ***"M/s Jones Lasalle Building Operations Pvt. Ltd. Vs Celebration City Projects Pvt. Ltd." (IB) -652(PB)/2019***, made the following observation, drawing reference to the Judgment issued by the Hon'ble National Company Law Appellate Tribunal (NCLAT) in the matter of ***"Mukul Agarwal Vs Royale Resinex Private Limited" in Company Appeal (AT) (Insolvency) No. 777 of 2020:***

“..... In this case, the Hon'ble NCLAT had held that a decree of the civil court will not alter the basic nature of the transaction. The transaction prima facie has to be considered for the purpose of adjudicating the claim and the decree of the court is a measure of debt and that would be the manner in which it should be heard.”

42. Here again a dichotomy of sorts is encountered since if we draw upon the judgement in case of ***Cholamandalam (Supra)***, the claim is a consequence of a decretal amount, which is ostensibly for compensation of the injury caused to the client by virtue of a wrong technology being adopted by the Corporate Debtor, though approved and agreed to by the Petitioner and is therefore a monetary claim more relatable to a financial debt. Further, when seen from the lens of the definition of an Operational debt given in Section 5(21), the Operational debt means a claim in respect of the provision of goods or services which are to be provided by the operational creditor to the Corporate Debtor.

The entire scheme of section 9 is structured in a manner that the small vendors who are delivering goods and/or services to the Operational Creditors, if not paid by them can file a Petition under Section 9. This is not the underlying logic of filing this petition here by the Operation Creditor as he has not provided any goods or services to the Corporate Debtor and not the other way round. So therefore, this petition is not a proper mode to realise or recover the decree amount. It is thus a modus to get a decree executed or in other words recover the money deftly shrouded in the garb of a Section 9 Petition.

43. Secondly, we come to the question of whether there lies a pre-existing dispute and it is found that there was a filing of case by the CD in Commercial Court, Bangalore as against the Arbitral Award given to the OC (Case: COM AS no. 251/2018). It is stated that the case has been dismissed by the court stating **lack of jurisdiction** by the court. But we find no documents supporting such claim. The last given status as per the record³ is:

09.10.2020
Plff by SSP
Def by JHS
To hear on IA No.2 by Res.

Learned Counsel for Plaintiff and defendant
present. Arguments of Learned Counsel for
Plaintiff heard on IA.No.2. for arguments of
Defendant side prays time.
Call on 04.01.2021
Sd/- 09.10.2020

LXXXIII ACCJ, B'LURU

It is found that the Hon'ble Commercial Court, Bangalore considered the matter on **09.10.2020** and we find that the present Company Petition viz, CP (IB) No. 1391/KB/2020 was **filed on 10.12.2020**. Thus, it is clear that there was a dispute being settled in the background when the current petition was filed.

³ Annexure A13 of the Petition

44. In this context, we seek to reference the ruling of the Honorable Supreme Court in the case of ***Mobilox Innovations Private Limited Vs. Kirusa Software Private Limited MANU/SC/1196/2017***, wherein it was conclusively determined that:

“The scheme of Section 7 stands in contrast with the scheme Under Section 9 where an operational creditor is, on the occurrence of a default, to first deliver a demand notice of the unpaid debt to the operational debtor in the manner provided in Section 8(1) of the Code. Under Section 8(2), the corporate debtor can, within a period of 10 days of receipt of the demand notice or copy of the invoice mentioned in Sub-section (1), bring to the notice of the operational creditor the existence of a dispute or the record of the pendency of a suit or arbitration proceedings, which is pre-existing - i.e. before such notice or invoice was received by the corporate debtor. The moment there is existence of such a dispute, the operational creditor gets out of the clutches of the Code.” (Para 29)

The Apex Court, in *Mobilox Innovations Private Limited (Supra)* further held that:

“...Therefore, all that the adjudicating authority is to see at this stage is whether there is a plausible contention which requires further investigation and that the “dispute” is not a patently feeble legal argument or an assertion of fact unsupported by evidence. It is important to separate the grain from the chaff and to reject a spurious defence which is mere bluster. However, in doing so, the Court does not need to be satisfied that the defence is likely to succeed. The Court does not at this stage examine the merits of the dispute except to the extend indicated above. So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application.” (Para 40)

45. In the instant case, since a challenge to the award itself is yet to be adjudicated upon and the amount not having been crystallised both in nature and the magnitude, it does not fit the bill for filing a petition under Section 9 of the Code.

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46. In the light of the above discussions, it is apparent that there is no Operational debt as envisaged in the code and even if the same is countenanced the amount of debt has not been crystallised due to pre-existing dispute. As such **CP (IB) No. 1391/KB/2020** is **dismissed**. The petitioner however shall be at liberty to seek its remedies that may be available to it under any other law.
47. A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.
48. File be consigned to the records.

Balraj Joshi
Member (Technical)

Rohit Kapoor
Member (Judicial)

This order is pronounced on the 9th day of April, 2024.

A.J.S