

**IN THE NATIONAL COMPANY LAW TRIBUNAL,
SPECIAL BENCH – II, CHENNAI**

IA(IBC)/861(CHE)/2022

in

CP(IB)/36(CHE)/2022

*(Under Section 8 of the Arbitration and Conciliation Act, 1996 read with
Regulation 44 of the Company Law Board Regulations, 1991)*

In the matter of **M/s. Sonata Information Technology Limited**

Express Publications (Madurai) Private Limited
Represented by its Company Secretary
Regd Office:
2nd Main Road, Ambattur Industrial Estate,
Chennai – 600 058

... Applicant / Corporate Debtor

Versus

Sonata Information Technology Limited
Regd Office:
No. 208, TV Industrial Estate,
K. Ahire Marg orli,
Mumbai – 400 030
Also at:
No. 1/4, APS Trust Building,
1st Floor, Bull Temple Road,
NR Colony Bangalore – 560 019

... Respondent / Operational Creditor

Order Pronounced on 9th September, 2022

CORAM:

**BACHU VENKAT BALRAM DAS, MEMBER (JUDICIAL)
SAMEER KAKAR, MEMBER (TECHNICAL)**

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*For Applicant : Mr. S.Vijayaragavan, Advocate
For Respondent : Ms. Apoorva, Advocate*

ORDER

Per: SAMEER KAKAR, MEMBER (TECHNICAL)

The present application has been preferred by the Corporate Debtor (M/s. Sonata Information Technology Limited under Section 8 of the Arbitration and Conciliation Act, 1996 r/w Regulation 44 of the Company Law Board Regulations, 1991 seeking for the following relief;

" It is therefore humbly prayed that this Hon'ble Tribunal may be pleased to refer the parties viz., Applicant and the Respondent to arbitration in respect of the matters raised in the present Company Petition under sec - 8 of the Arbitration and Conciliation Act, and thus render justice."

2. It can be seen from the records that the Respondent / Operational Creditor had filed CP(IB)/36(CHE)/2022 under Section 9 of the Code against the Applicant / Corporate Debtor and is pending consideration before this Tribunal.

3. It is the case of the Applicant that the subject matter of the above application is completely part and parcel of an Agreement dated 30.03.2020 entered between the parties which provides contains the arbitration clause. It is further submitted by that the Applicant has filed a petition under Section 11(5) of the Arbitration

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and Conciliation Act, 1996 for appointment of an Arbitrator before

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Hon'ble High Court of Karnataka. It can be seen that the Hon'ble High Court vide order dated 16.08.2022 partly allowed the above petition and had appointed Sri. P. Krishna Bhat as the sole Arbitrator.

4. The Respondent has filed their reply dated 04.09.2022 under SR 5211 on 05.09.2022 before this Tribunal. The preliminary contention raised by the Respondent is that the Section 9 Application only relates to the 'Purchase Order' dated 20.11.2019 and 'Tax invoice' dated 21.12.2019. It is further submitted by the Respondent that appointment of the sole Arbitrator only pertains to the said 'Statement of Work' dated 30.03.2020 and that there is absolutely no arbitration clause governing the transaction in relation to which CIRP is sought to be initiated by the Respondent. It may be pertinent to refer to the relevant portion of the order dated 16.08.2022 passed by the Hon'ble High Court of Karnataka which is extracted as below:

"8. Admittedly, there are two agreements between the petitioner and the respondent, one as regards to the Adobe License and other as regards to the Oracle Data Base Services. The service as regards Adobe license has not been suspended, however, there is a claim made by the respondent as regards the payments due alleging that those payments were due, the services as regards the Oracle Data Base Services were suspended.

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9. As regards the license fees due under the Adobe agreement, separate proceedings have been initiated by the respondent under the Insolvency and Bankruptcy Code.

10. The contention of Sri Manmohan.P.N, learned counsel for the petitioner is that by invoking the dues under the Adobe agreement, the performance of Oracle agreement has been suspended resulting in losses and damages to the petitioner. **The petitioner, firstly, does not have any dispute or a claim insofar as Adobe agreement is concerned, inasmuch it is the respondent who has initiated proceedings under the Insolvency and Bankruptcy Code...."**

5. The Respondent at para 15 of its reply had submitted as follows:

"15. Re. Para No. 3 and 4: It is reiterated that Adobe license transaction under which the debt is due and in relation to which the default has occurred has no connection to the SoW under which Oracle services were provided. The Corporate Debtor has attempted to combine the same to scuttle the above proceedings. It is further stated that the Corporate Debtor initiated Arbitration proceedings only after receiving the Demand Notice dated 28.10.2021 under Section 8 of the IBC."

It is therefore the contention of the Respondent that the notice of Arbitration and the petition before the Hon'ble High Court were made **AFTER** the service of the statutory demand notice dated 28.10.2021 and that therefore this Application is an attempt to delay and frustrate the adjudication of the Section 9 Application which is pending before this Tribunal.

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6. The Respondent submits that the Applicant has no basis for seeking reference of the subject matter to Arbitration proceedings by placing reliance on the judgement of the Hon'ble Supreme Court in the case ***Indus Biotech Private Limited v. Kotak India Ventures (Offshore) Fund and Anr [(2021) 6 SCC 436]***, wherein the Court while deciding the maintainability of an application under Section 8 of the Arbitration and Conciliation Act, 1996 had held that this Adjudicating Authority is duty bound to first decide the application under Section 7 of the Code. Although the Hon'ble Supreme Court has laid down the ratio while dealing with an application under Section 7 of the Code, it is squarely applicable in the case of an application under Section 9 as well.

7. The Hon'ble NCLAT while dealing with an identical issue in the matter of ***Sodexo India Services Pvt. Ltd. -Vs- Chemizol Additives Pvt. Ltd [2021 SCC OnLine NCLAT 18]***, had observed as follows;

"3. On a plain reading of this provision, it emerges that the Adjudicating Authority is required either to admit the Application, if the same is complete, there is no payment of the unpaid operational debt, the invoice or notice for payment has been delivered to the Corporate Debtor and no notice of dispute has been received by the Operational Creditor or there is no record of dispute in the information utility. The Adjudicating Authority may reject the Application, if the Application is incomplete or that the operational debt stands paid, or the Creditor has not delivered the invoice or notice for payment to Corporate

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Debtor or that the notice of dispute has been received by the Operational Creditor, or there is a record of dispute forthcoming from the information utility. It is abundantly clear that the Adjudicating Authority has only two options, either to admit Application or to reject the same. No third option or course is postulated by law.

4. In the instant case, Mr. Gaurav Mitra, Advocate representing the Appellant - Operational Creditor has, while taking us through the impugned order, invited our attention to the fact that the Adjudicating Authority has taken note of the fact that the Respondent - Corporate Debtor has not responded to the Demand Notice dated 18th December, 2018 demanding the outstanding amount in respect of the four invoices noticed in paragraph-5 of the impugned order. Mr. Mitra further invited our attention to paragraph-10 of the impugned order, where the Adjudicating Authority has observed that mere acceptance of the debt in question by the Respondent would not automatically entitle the Appellant to invoke the provisions of the Code, unless the debt and default is undisputed and proved to the satisfaction of the Adjudicating Authority. In view of this factual position, as noticed in the impugned order, the Adjudicating Authority should have, in absence of any dispute contemplated under Section 8(2) having been raised by the Respondent - Corporate Debtor as a pre-existing dispute or that the claim of Appellant - Operational Creditor had been satisfied, proceeded to admit the Application, as no dispute had been raised before it, justifying its disinclination to admit the Application. Instead, the Adjudicating Authority proceeded to make out a case for the Respondent-Corporate Debtor on the premise that the Appellant-Operational Creditor has not invoked other remedies available under law. We cannot understand as to how the availability of alternate remedy would render the debt and default disputed. In absence of pre-existing dispute having been raised by the Corporate Debtor or it being demonstrated that a suit or arbitration was pending in respect of the operational debt, in respect whereof Corporate Debtor was alleged to have committed default,

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the Adjudicating Authority would not be justified in drawing a conclusion in respect of there being dispute as regards debt and default merely on the strength of an Agreement relied upon by the Appellant - Operational Creditor, notwithstanding the fact that such Agreement provided for reference of a dispute arising between the parties in relation to a claim through arbitration. Even otherwise, Section 238 of the I&B Code, which has an overriding effect over the existing laws or any other law or contract, would not admit of the alternative remedy being a disabling provision for Operational Creditor to seek resolution of a dispute in regard to operational debt claimed against the Corporate Debtor by triggering the Corporate Insolvency Resolution Process.

5. Our attention has also been invited to some observations made by the Adjudicating Authority in paragraph 10, which reads as under:—

"10. Therefore, the Respondent Company prima facie appears to be solvent Company so as to resolve the issue of outstanding amount in question. The NCLT is conferred power, even to refer the matter pending before it, to Mediation and Conciliation, U/s 442 of the Companies Act, 2013. The Adjudicating Authority being NCLT, U/s 60(1) of the Code, can suo motto refer the matter to either Mediation and Conciliation or to Arbitration to settle the dispute. Since, this already Arbitration clause is available in the Agreement in question, the Petitioner can be permitted to invoke Arbitration clause in respect of the issue in question."

6. The Adjudicating Authority appears to have made observation in regard to the Corporate Debtor being a solvent company, ignoring the fact that it was alleged to have committed default in respect of operational debt that it owed to the Appellant-Operational Creditor and which it had failed to pay, in response to admission notice served upon it by the Operational Creditor. The

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Adjudicating Authority was concerned with the insolvency resolution qua the operational debt, which the Corporate Debtor owed to the Operational Creditor. It was immaterial whether it was solvent or insolvent qua other creditors. The I&B Code would not permit the Adjudicating Authority to make a roving enquiry into the aspect of solvency or insolvency of the Corporate Debtor except to the extent of the Financial Creditors or the Operational Creditors, who sought triggering of Corporate Insolvency Resolution Process.

7. *The Adjudicating Authority clearly landed in error by observing that the course adopted by it was warranted on the principle of ease of doing business, ignoring the fact that such course was not available to it, ease of doing business only being an objective of the legislation viz. I&B Code along with other objectives specified in the preamble, which are sought to be achieved through CIRP process.*

8. *For the aforesaid reasons, we are unable to persuade ourselves to go along and support the impugned order. The Appeal is allowed and impugned order is set aside. The Adjudicating Authority is directed to pass an order of admission in respect of the Application filed by the Appellant-Operational Creditor under Section 9 of the I&B Code within two weeks of communication of this order. However, the Adjudicating Authority shall be at liberty to provide an opportunity to the Respondent-Corporate Debtor to settle the claim of Appellant-Operational Creditor.*

9. *A copy of this order be served upon the Adjudicating Authority forthwith."*

8. In view of the discussions above, we do not find any merit in the present Application and if such recourse is adopted, it will open the floodgate to every creditor and debtor to invoke the Arbitration

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clause before this Adjudicating Authority seeking appointment of an Arbitrator, which is not the scope and object of the Code. In as much as the circumstances for the Respondent preferring the Section 9 Application, there appears to be no contract in the first place for invocation of Arbitration proceedings. Even assuming that the agreement alleged under which Arbitration is sought to be invoked, it is clear that the notice of Arbitration and the petition before the Hon'ble High Court were made after the service of the statutory demand notice. Thus, this Tribunal is of the view that there is no substance in the present Application.

9. In view of the above position, the application **IA(IBC)/861(CHE)/2021** stands **Dismissed** with a cost of **Rs.1,00,000/- (Rupees One Lakh)** payable to the "Prime Minister National Relief Fund" within 2 week from the date of this order.

10. The registry is directed to post this matter on **23.09.2022** for compliance.


SAMEER KAKAR
MEMBER (TECHNICAL)


BACHU VENKAT BALRAM DAS
MEMBER (JUDICIAL)

V.Shreekumar