

**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, COURT - II**

C.P. (IB) 323/MB/2023

Under Section 7 of the Insolvency and Bankruptcy Code, 2016 r/w Rule 4 of the Insolvency & Bankruptcy (Application to Adjudicating Authority Rules, 2016)

In the matter of

Hpcl-Mittal Pipelines Limited

Through Its Authorized Signatory
Having Its Registered Office- At
Inox Towers, Plot No. 17 Sector 16 A,
Noida -201301

..... Petitioner/ Financial Creditor

Versus

**Coastal Marine Construction And
Engineering Limited**

Having Its Registered Office- At 402
Madhavabandra, Kurla Complex,
Bandra (East) Mumbai
Maharashtra- 400051

..... Respondent/Corporate Debtor

Order Delivered on :- 22/01/2024

Coram:

Mr. Anil Raj Chellan
Member (Technical)

Mr. Kuldip Kumar Kareer
Member (Judicial)

Appearances:

For the Financial Creditor : Adv. Kartik Nayar

For the Corporate Debtor : Adv. Ridhi Nyati

ORDER

Per: -Mr. Kuldip Kumar Kareer, Member (Judicial)

1. The present petition has been filed under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "IBC") by **Hpcl-Mittal Pipelines Limited**. (hereinafter called as "Financial Creditor") praying inter-alia for initiation of Corporate Insolvency Resolution Process (CIRP) against **M/s Coastal Marine Construction And Engineering Limited** (hereinafter called as "Corporate Debtor") by invoking the provisions of Section 7 of the Insolvency and Bankruptcy Code (hereinafter called " the Code") for resolution of an unresolved Financial Debt of Rs. 14,99,51,429.95/- as on 31.07.2022.

The submissions of the Financial Creditor are as follows:

2. The Financial Creditor is a company incorporated on 07.01.2008 bearing CIN U60101PB2008PLC031563 and is a wholly owned subsidiary of HPCL-

Mittal Energy Limited. The Financial Creditor is inter alia engaged in the business of storage and transportation of crude oil and other petroleum products.

3. The Financial Creditor had invited bids for conducting operation and maintenance works of its SPM Terminal and associated facilities at the Mundra Port in June 2011. The Corporate Debtor, being an interested party, submitted its bid and the Financial Creditor had issued a Letter of Award in favour of the Corporate Debtor on 14.06.2012. A Detailed Letter of Award was issued subsequently on 16.07.2012 and the Contract was executed between the Parties on 17.07.2012 for a period of 2 years.
4. During the subsistence of the Contract there were various gross defaults and breaches by the Corporate Debtor including but not limited to delayed commencement of works, etc. and the said defects and defaults were never cured by the Corporate Debtor. Owing to the aforesaid the Financial Creditor was compelled to terminate the Contract.
5. Owing to the loss and damage caused to the Financial Creditor by the Corporate Debtor, the Financial Creditor was constrained to invoke arbitration against the Corporate Debtor for its various claims. The arbitral proceedings culminated into the Award dated 14.01.2020 which clearly held that the Corporate Debtor had failed to comply with its obligations under the Contract and had caused loss and damage to the Financial Creditor. It is stated that vide the said Award of 14.01.2020, majority of the Financial Creditor's claims were allowed and granted by the Tribunal and a sum of Rs. 13,56,25,814 was awarded by the Arbitral Tribunal to the Financial Creditor along with interest at the rate that is 2% higher than the then prevalent interest

rate from 14.01.2020 (7.15% p.a. (as the then prevalent interest rate was 5.15% p.a.)) in case the Corporate Debtor failed to pay the awarded sum within three (3) months from the date of the Award (hereinafter '**Award Amount**')

6. It is further stated that the Corporate Debtor has filed an application under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter 'Act') bearing OMP (Comm) 200 of 2021 titled as Coastal Marine Construction and Engineering Limited v. HPCL-Mittal Pipelines Limited before the Hon'ble Delhi High Court. So far no orders have been passed affecting the validity or the enforceability of the said Award. Moreover, the Financial Creditor has also filed an application under Section 34 of the Act bearing *OMP (Comm) 538 of 2020 titled as HPCL Mittal Pipelines Limited v. Coastal Marine Construction and Engineering Limited* before the Hon'ble Delhi High Court challenging the Award dated 14.01.2020 on the limited aspect that it does not prescribe for pre and pendente lite interest on the amounts so awarded. The said challenge by the Financial Creditor is for further enhancement of the amounts and not a challenge to the merits of the Award. Lastly, the Financial Creditor has also preferred an execution petition under Section 36 of the Act bearing *OMP (Enf) (Comm) 95 of 2021 titled as HPCL-Mittal Pipelines Limited v. Coastal Marine Construction and Engineering Limited* before the Hon'ble Delhi High Court.
7. It is submitted that as on 31.07.2022, the Corporate Debtor has failed to pay the financial debt of Rs. 14,99,51,429.95. It is stated that the Corporate Debtor has been in default as even though the Award was rendered on 14.01.2020, the Corporate Debtor has failed to pay any part of the said financial debt till date and has continued to default on the same

8. This deliberate and adamant refusal of the Corporate Debtor to comply with the Award for over two years had constrained the Financial Creditor to serve a notice dated 05.09.2022 upon the Corporate Debtor. As per the said notice, the Financial Creditor had demanded a sum of Rs. 14,99,51,429.95 as due to the Financial Creditor on 31.07.2022. Consequently, the Corporate Debtor vide its letter dated 12.09.2022 replied to the same and raised a frivolous ground that the said demand notice dated 05.09.2022 was addressed to "Coastal Marine and Engineering" and not to "Coastal Marine and Engineering Ltd". Resultantly, and as a measure of abundant precaution, the Financial Creditor issued another notice dated 27.09.2022 to the Corporate Debtor that has been replied on frivolous grounds by the Corporate Debtor vide its letter dated 04.10.2022. As such, no monies have been paid to the Financial Creditor by the Corporate Debtor and therefore not only is there a clear financial debt in terms of the Award of the Tribunal of 14.01.2020, but there has been a clear default by the Corporate debtor in failing to make the payments to the Financial Creditor till date and despite the receipt of the notices dated 05.09.2022 and 27.09.2022 as well.
9. It is submitted that the existence of such a default is not in dispute and the decision of the Hon'ble Supreme Court of India in *Dena Bank v. C. Shivakumar Reddy, (2021) 10 SCC 330* has laid down that any arbitral award for payment of money, if not satisfied, would constitute a financial debt, thereby enabling the Financial Creditor to initiate proceedings under Section 7 of the Code.
10. In light of the aforementioned facts and circumstances, it is submitted that the financial 'debt' owed to the Financial Creditor has not been paid despite having become due and payable, and the Corporate Debtor continues to

remain in default and therefore the Financial Creditor has been compelled to prefer the present Petition under Section 7 of the Code. Hence the present Company Petition.

Reply filed on behalf of the Corporate Debtor

11. It is submitted that the alleged claim under the Arbitral Award dated 14.01.2020 is not a 'Financial Debt'. Consequently, HPCL is not a Financial Creditor. If at all, it is merely an Operational Creditor. Merely by virtue of an alleged Award in its favour, its position does not elevate to that of a Financial Creditor. HPCL is neither a financial institution nor did it lend any money to COMACOE.
12. It is further submitted that the alleged Arbitral Award dated 14.01.2020 is not a valid enforceable award. Thus, it cannot form the basis for initiating corporate insolvency process - The alleged Arbitral Award dated 14.01.2020 does not meet the requirements of Section 31 of the Arbitration and Conciliation Act, 1996 ["**Arbitration Act**"]. Thus, neither is the Award validly enforceable nor can the underlying alleged claim be deemed to have been liquidated and crystalized. As per Section 31(1) of the Arbitration Act, the Award must be signed by all members of the Tribunal. As per Section 31(2) of the Arbitration Act, the majority may alone sign the Award provided reasons for the omitted signature is stated. The Impugned Award provides no reasons on why the Third Arbitrator was left out or why his signature does not appear on the award.
13. It is further stated that the ongoing Section 34 proceedings under the Arbitration and Conciliation Act, 1996 constitute a pre-existing dispute.

Insolvency proceedings cannot be used as a substitute for debt enforcement procedures. COMACOE has challenged the alleged Arbitral Award under Section 34 of the Arbitration Act before the Hon'ble Delhi High Court [O.M.P. (COMM) 200/2021]. Apart from Award not being validly enforceable under Section 31, there are other serious challenges to the veracity and correctness of Arbitral Award raised in the Section 34 proceedings.

14. It is denied that COMACOE has been in default or is unable to pay its debts. Pending enforcement proceedings under Section 36 of the Arbitration Act, no insolvency proceedings can lie. HPCL is duly secured for its alleged claim before the Hon'ble Delhi High Court.
15. It is submitted that the alleged Arbitral Award is insufficiently stamped and thus, unenforceable. This Hon'ble Tribunal cannot look into the Alleged Award, until sufficient stamp duty is paid. Reliance is placed on Section 34 of the Maharashtra Stamp Act, 1958.
16. It is further submitted that in the absence of a valid and enforceable Arbitral Award, HPCL's claim is barred by limitation. HPCL's alleged claim arose in 2012. More than 3 years have lapsed since then. Assuming without admitting that an Arbitral Award shall entitle HPCL a fresh period of limitation, the same is premised on the need for a valid and legally enforceable award to begin with. In the present case, as stated aforesaid, there is no valid, final, binding and legally enforceable award.
17. In the end, the Corporate Debtor has prayed for the dismissal of the Petition.

Analysis and Findings:

18. We have heard the Counsel for the parties and gone through the record.
19. It has been argued on behalf of the Counsel for the Petitioner that the financial claim of the Petitioner has crystalized into the award dated 14.01.2020. According to the Counsel for the Petitioner, the award in question is equivalent to a decree which can be enforced and implemented as per law. Therefore, the nature of the debt as per Section 5(8) is of financial debt. In support of his arguments, the Counsel for the Petitioner has relied upon in the matter of *Dena Bank (Now Bank of Baroda) vs. C. Shivakumar Reddy and others (2021) 10 Supreme Court Cases 330* whereby it has been held by the Hon'ble Supreme Court that final judgement and/or decree of any court or tribunal or any arbitral award for payment of money, if not satisfied, would fall within the ambit of a financial debt. It has further been held that a judgement and/or decree for money in favour of a 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 within three years from the date of judgement and/or decree or the date of issuance of certificate of recovery. Counsel for the Petitioner has further contended that since the award in question was passed on 14.01.2020 the period of limitation would start from the date of the award as has been held by the Hon'ble Supreme Court in the cited judgement. Therefore, according to the Counsel for the Petitioner the existence of debt and default stands proved on record in this case and further that the Petition is well within the period of limitation and, therefore, the Petition be admitted and CIRP be ordered against the Corporate Debtor/Respondent.

20. On the other hand, Counsel for the Corporate Debtor has argued that the debt in question cannot be treated as a financial debt, the arbitration proceedings were initiated by the Petitioner in respect of an operational debt and, therefore, any award, if passed in arbitration proceedings to determine the liability in respect of an operational debt would by itself not convert or change the nature of the debt from operational to financial. Counsel for the Corporate Debtor has further contended that Petition is liable to be dismissed on this sole ground as the nature of the debt is not a financial debt and Section 7 does not lie at all under the circumstances.
21. Counsel for the Corporate Debtor has further argued that in this case, the nature of the claim of the Petitioner does not fall even in the category of operational debt as the claim was for damages and compensation in respect of which the award was passed. Counsel for the Corporate Debtor has further contended that even the said award has not attained finality as the same has been challenged by the Corporate Debtor under Section 34 of the Arbitration and Reconciliation Act, 1992 and a Petition under Section 34 filed by the Corporate Debtor is presently pending. Lastly, it has been contended by the Counsel for the Corporate Debtor that IBC proceedings are not meant for recovery and since the award has already been passed which, though presently under challenge, if attains finality can be enforced by the Petitioner but it is not entitled to initiate proceedings under the IBC merely for recovery of the outstanding dues which is not the purpose and object of the Code.
22. We have weighed the contentions raised by the Ld. Counsel for the parties.
23. Primarily, the question which begs for an answer in this case is as to whether the claim amount, in respect of which the present Petition has been filed, is a financial debt or not. It is not disputed that originally the claim of the

Petitioner in respect of which the arbitration proceedings were initiated, pertained to a work contract between the parties and thus it was clearly in the nature of an operational debt. The Petitioner has claimed that since the claim has culminated into the award, it should be treated as a financial debt in the light of the law laid down *Dena Bank (Now Bank of Baroda) Vs. C. Shivakumar Reddy and others (Supra)* whereby it was held that decree of any court or tribunal or any arbitral award for payment of money would be fall within the ambit of financial debt.

24. However, the aforesaid proposition of law, put forward by the Counsel for the Petitioner, does not appear to be a correct one. In this connection a reference can be made to the law laid down in *Sushil Ansal Vs. Ashok Tripathi and others, 2020 Ibclaw.in 43 NCLAT* whereby it was held that mere holding of a decree/award per se by an individual will not make it debt fall within the ambit of financial debt. *In Cholamandalam Investment and Finance Company Limited Vs. Navrang Roadlines Private Limited, 2022 ibclaw.in 331*, the Hon'ble High Court of Madras held that a decree/award of the court or tribunal is a measure of debt and mere holding of a decree per se by an individual will not make its debt fall within the ambit of financial debt. It was further held that it is the underlying claim under a decree that will decide the nature of the debt whether it is financial or operational. Undisputedly, the claim on the basis of which arbitral proceedings were initiated by the Petitioner emanated from a work contract which originally was at best an operational debt and as per the law laid down in the afore cited cases, the nature of debt would not change with the passing of a decree or an award and, therefore, simply because an award was passed in respect of an operational claim, it will not by itself metamorphose into a financial debt.

25. So far as the law laid down in *Dena Bank (Now Bank of Baroda) Vs. C. Shivakumar Reddy and others (Supra)* is concerned, in this case also the proceedings were initially pending before DRT for recovery of financial debt in respect of which a certificate for recovery was issued. Thus, the nature of the debt from the very beginning involved in the said case was a financial debt.
26. As a result of above brief discussion, we are of the considered view that since the nature of the debt in question is not a financial debt, the application under Section 7 of the IB Code,2016 cannot be maintained and on this ground alone the same is liable to be **dismissed**. It is ordered accordingly. File be closed and consigned to records.

Sd/-
ANIL RAJ CHELLAN
(MEMBER TECHNICAL)
Sushil

Sd/-
KULDIP KUMAR KAREER
(MEMBER JUDICIAL)