

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency)No. 1395 of 2019

[Arising out of Order dated 25th October, 2019 passed by the Adjudicating Authority (National Company Law Tribunal) Kochi Bench, Kochi in TIBA/14/KOB/19]

IN THE MATTER OF:

**George Vinci Thomas,
S/o M.V. Thomy
R/o 26/507A, Yatch Club Enclave,
Konthuruthy,
Thevara P.P. Kochi – 682013, Kerala.**

.....Appellant

Vs.

**1.M/s. Capedge Consulting Pvt. Ltd.
CIN: U93000TN2013TC0921
89, through its director
Mr. Jacob Karukaparambil
Thomas, No. 4 Joiser Street, Nungambakkam,
Chennai – 600 034,
Tamilnadu.**

**2.M/s. India Tech Private Limited,
CIN: U51103KL1983 PLC003770, 60/2177B,
Pattathil House,
K.P Vallon Road, Kadavanthara,
Ernakulam,
Kochi – 682 020
Kerala.**

**3. Mr. Sasitharan Ramaswamy
Resolution Professional
M/s India Tech Private Limited,
60/2177B, Pattathil House,
K.P. Vallon Road,
Kadavanthara,
Ernakulam,
Kochi – 682 020, Kerala.**

.....Respondents

Present :

For Appellant: Mr. Harshad V.Hameed, Advocate

For Respondents: Mr. Avrojyoti Chatterjee, Mr. Rajiv S.Roy, Mr. Udayan Agarwal, Ms. Jayasree Saha, Advocates

O R D E R

16.03.2020 - Heard Learned Counsel for Appellant and Counsel for Respondent No. 1 ('Operational Creditor'). Respondent No. 1 'M/s. Capedge Consulting Pvt. Ltd.' ('Operational Creditor') filed an application u/s 9 of the Insolvency & Bankruptcy Code, 2016 ('I&B' Code, for short) against Respondent No. 2 'M/s India Techs Private Ltd.' ('Corporate Debtor') before Adjudicating Authority ('National Company Law Tribunal' Kochi Bench) TIBA/14/KOB/19. Appellant claims to be the Managing Director of the 'Corporate Debtor' and has filed this appeal as the application u/s 9 came to be admitted vide Impugned Order dated 25.10.19.

2. The 'Operational Creditor' filed the application through its Director Jacob K. Thomas. The application claimed that the 'Operational Creditor' was in the business of providing consultancy services to establishments for improving their productivity by restructuring and re-organising their financial, administrative and operational systems. It was claimed that the 'Corporate Debtor' is in the

business of dealing in services of construction equipments. The 'Operational Creditor' claimed that the 'Corporate Debtor' had suffered huge losses and engaged the 'Corporate Debtor' in November, 2015 to render assistance in resolving issues. The 'Operational Creditor' entered into four consultancy agreements with the 'Corporate Debtor'. It was claimed that the 'debt' arose on account of dues of supply of services rendered between 1st March, 2013 and 3rd February, 2019.

3. It is the case of 'Operational Creditor' that Demand Notice dated 11.2.2019 was sent for unpaid operational debt to the extent of Rs. 1,71,74,366/-. The 'Operational Creditor' claimed that there was no reply to the notice.

4. The 'Corporate Debtor' appeared before the Adjudicating Authority and the case put up by the 'Corporate Debtor' is that the service of 'Operational Creditor' were indeed taken by the 'Corporate Debtor' by way of the agreements which are claimed to be executed, but that there was an existing dispute.

5. It is the case that the Jacob K. Thomas of 'Operational Creditor' was Managing Director in yet another Company, 'M/s. Capedge Metals & Minerals Pvt. Ltd.' and also one 'M/s. Capedge Energy Pvt. Ltd.'. It is argued by the Learned Counsel for the Appellant making reference to the agreement at Annexure A6(P-74) that one other Company 'M/s. Telsa Marketing Pvt. Ltd.' and 'M/s. Capedge Metals & Minerals Pvt. Ltd.' had entered into agreement whereby Jacob K. Thomas took loan from that sister concern. It is stated that Mrs. Elizabeth Thomas shown in the document as Managing Director of 'M/s. Telsa

Marketing Pvt. Ltd.’ in Annexure A6 is also Managing Director in ‘Corporate Debtor’.

6. Learned Counsel for Appellant submits that because of this transaction with the sister concern, a confusion has got created between ‘Operational Creditor’ and ‘Corporate Debtor’ on one side and the other Company ‘M/s. Telsa Marketing Pvt. Ltd.’ and ‘ M/s. Capedge Metals & Minerals Pvt. Ltd.’ Counsel states that ‘M/s. Telsa Marketing Pvt. Ltd.’ had also filed one complaint u/s 138 of Negotiable Instrument Act against ‘M/s. Capedge Energy Pvt. Ltd.’ copy of which is at Annexure A13 and another complaint against ‘ M/s. Capedge Metals & Minerals Pvt. Ltd.’ which is at page – 102 of the paper book. Learned Counsel for the Appellant fairly states that these criminal complaints are not directly connected with the present parties but it shows foundation on the basis of which the ‘Corporate Debtor’ is claiming that there was existence of dispute.

7. Learned Counsel referred to e-mail dated 4.6.18 (Annexure A12)(p-97) to show that there was an existence of dispute. The e-mail was sent by ‘Operational Creditor’ to the ‘Corporate Debtor’ and copy was sent to ‘M/s. Telsa Marketing Pvt. Ltd.’ also. The e-mail reads as under:-

“Dear Vinci/Elizabeth

Good Day

Basis our discussions and meetings on various occasions including yesterday’s meeting to conclude

on an amicable settlement, we have decided to put across the settlement proposal together with the attached statement and settlement calculations for your review and confirmation.

Further once the settlement amounts are agreed, a settlement agreement to recap all the requirements to be translated into a settlement agreement to effect the same and the modus operandi of the accounting requirements, right off and payment will need to be discussed and agreed between all parties.

Since we have decided that all parties are not intending for any legal disputes, we request that the bounced cheques are returned to me tomorrow when we meet to agree on the settlement proposal.

*Regards
Jacob”*

8. When the e-mail was read out to us, we expressed to the Learned Counsel that the e.mail at the most indicates regarding some disputes but does not disclose what is the dispute. For the purpose of Section 9, the relevant would be whether there was dispute regarding the quality of services rendered as the present matter relates to services rendered.

9. Learned Counsel then referred to us the e.mail dated 21.1.18 (p-90) Annexure A8 which was sent by the 'Corporate Debtor' to the 'Operational Creditor'. Learned Counsel referred to this e.mail stating that the 'Corporate Debtor' had asked the 'Operational Creditor' to submit report regarding the India Techs Assets and it is submitted by the Counsel that mere sending invoices is not enough in the given agreements and submitting of report would also be necessary and such dispute was raised.

10. Learned Counsel for Respondent, however, has referred to 'Memorandum of Agreement' between parties as at Annexure A-2 (p-36). Learned Counsel referred to 'MOU' dated 15.11.2015 and took us to Clause 9 which stated that the professional fees would take the form of a combination of retainer fees and success based fees. It is argued that there was fixed retainer fees of Rs. 2 lacs per month while rest of the payments relied on success to be achieved.

11. The Learned Counsel for Respondent No.1 then took us back to the e.mail dated 21.1.18 (Annexure A8) to make further submissions. It would be appropriate to reproduce the concerned portions from the e-mail dated 21.1.18 (pg-90,91).

"Dear Jacob,

At the outset I reiterate that I have always informed you (and that was the understanding) that whatever payments that Capedge was to receive from

India Tech would have to be from the money left over with India Techs after Capedge arranged for the sale of India Techs assets and negotiated with India Techs creditors. India Techs has no money in its coffers – not then and not now- and you were aware of that from the very start. - - - - - (1) What are Capedge’s achievements and results so far regarding the India Techs project?

From the 1st payment in 2015 on 23/11 and 23/12 of Rs 78,375/- and Rs 350,000/-, and on 28/06/2016 of Rs 618,300/- and both in November 2016 when India Techs renewed the agreement and later in Aug 1st and 23rd India Techs paid Capedge Rs. 14,65,000/-, I had requested you to submit reports about the progress of the project and results achieved. You have not, to date, submitted even one report on the India Techs Project in spite of having 2 Junior Consultants who were appointed to work full time on the India Techs project.”

12. Referring to this para of the e.mail, the Learned Counsel submitted that the reference to sale of India Techs Assets is portion which relates to success fee, and report in that context. According to the Counsel if the ‘Operational Creditor’ succeeds in the effort, he gets the success fee. By reference to such portion, the

Appellant cannot state that there is existence of dispute. Alternatively, it is argued that the Agreements entered into have similar clauses. It is argued that the retainer fee would still be applicable in all the agreements which are entered between the parties and the 'debt' due in major portion is relating to non-payment of retainer fees regarding which there is no dispute and which itself is more than Rs. 1 lakh.

13. We have gone through the Impugned Order where it has dealt with this e.mail dated 21.1.18. Para 18 and 20 of the Impugned order read as under:-

“18. The Corporate Debtor had placed reliance on the letter dated 21st January, 2018 written by them to hold that there is an existence of dispute. However, on perusal of the email communication, we found that the corporate debtor is merely asking for further information on the services rendered by the operational creditor for each of the invoices raised. Can this be considered as pre-existing dispute is the moot questions.

20. Thereby, on perusal of records, it is clear that the Respondent Corporate Debtor has not raised any dispute relating to debt nor raised any dispute relating to quality of service of goods. They merely sought information regarding the services provided,

which cannot be termed as pre-existing dispute or plausible dispute. Further, the cheque bounce case of Telsa Marketing Pvt. Ltd. is not between the ‘Operational Creditor’ and the ‘Corporate Debtor’ but between some other parties which cannot be taken into consideration in the instant case.”

14. We find ourselves in the agreement with the Adjudicating Authority for these and other reasons recorded and we do not find that the ‘Corporate Debtor’ is able to show “*dispute*” with regard to quality of services rendered and thus we do not find any reason to interfere in the Impugned Order.

There is no substance in the appeal, the appeal is accordingly dismissed.

No costs.

[Justice A.I.S. Cheema]
Member (Judicial)

[V.P. Singh]
Member (Technical)

[Alok Srivastava]
Member (Technical)

ss/m