

MA 187/KOB/2020 in IBA/30/KOB/2020

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOCHI BENCH, KERALA**

IA No. 187/KOB/2020

In

IBA/30/KOB/2020

(Under Rule 11 of the NCLT Rules, 2016)

Order delivered on: 26th November, 2020

Coram:

Hon'ble Mr. Ashok Kumar Borah, Member (Judicial)

Shaji Mathew ... Applicant/Applicant in BA 30/KOB/2020

Versus

M/s Seguro Foundations & Structures Pvt.
Limited ... Respondent/Respondent in IBA 30/KOB/2020

Parties/Counsel present (through video conference)

For applicant : Shri Akhil Suresh, Advocate
For Respondent : No representation

ORDER

This Interlocutory Application No.187/KOB/2020 has been filed by Shaji Mathew (hereinafter referred as 'applicant') IBA No.30/KOB/2020 filed under Section 9 of the Insolvency and Bankruptcy Code (hereinafter called as 'I&B Code') against M/s. Seguro Foundations and Structures Pvt Ltd (hereinafter called as 'Corporate Debtor') to implead M/s Inkel Limited as Additional Corporate Debtor in the above application (hereinafter called as 'Additional Corporate Debtor').

2. The applicant submitted that he was appointed as the Project Manager by the Corporate Debtor for the modernization of Schools in Malappuram District w.e.f. 01.06.2018 vide his appointment letter dated 28.05.2018. It was agreed upon by the

MA 187/KOB/2020 in IBA/30/KOB/2020

Corporate Debtor that the applicant shall receive a consolidated salary of ₹ 80,000/- (Rupees Eighty Thousand only) for the services he will provide in his capacity as a Project Manager. The Corporate Debtor pursuant to the same has been making payments to the applicant. Despite the applicant's efficient and diligent performance, the Corporate Debtor had abruptly stopped paying salary from the month of December, 2018 without providing any notice. It is a matter of record that the Applicant has not been terminated from the employment nor has received any intimation from the Corporate Debtor providing reason for discontinuation of service. Consequently, the applicant had issued several reminders to the Corporate Debtor, requesting for the outstanding salary that is due to him. However, there was no response to those reminders and correspondences initiated. Therefore, the applicant states that he is entitled to receive a total amount of ₹10,40,000 (Ten Lakhs Forty Thousand only) from the month of December 2018 to December 2019 towards salary arrears along with interest @ 12% P.A, totalling an amount of ₹ 11,02,400 (Rupees Eleven lakhs two thousand four hundred only).

3. The applicant issued a Demand Notice on 22.01.2020, in Form 3 under Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 demanding payment of ₹ 11,02,400/-. (Rupees Eleven lakhs two thousand four hundred only). The same was sent to the Corporate Debtor at its Registered Office through speed post and he has produced proof of service of the same with the application.

4. The applicant further stated that no reply raising any dispute has been received by the Applicant within the stipulated period of ten days. It is therefore evident that despite the expiry of ten days from the date of service of the demand notice, neither the Corporate Debtor disputed the amount due, nor a repayment of the due amount has been brought to the notice of the Applicant, which clearly establishes that the

MA 187/KOB/2020 in IBA/30/KOB/2020

Corporate Debtor is not in a position to pay its debts, occurred in the normal course of business. Thus, the Applicant took steps under the Insolvency and Bankruptcy Code, 2016 for initiation of Corporate Insolvency Resolution Process, by filing IBA.

5. The applicant further submitted that the shares of the Corporate Debtor company have been acquired by M/s. Inkel Ltd. and is having a control stake of over 65% of the shares of the Corporate debtor with effect from 01.12.2017. It is also stated that the said acquisition of shares was happened in the year 2016 and the operations of Seguro was managed, controlled and operated by M/s. Inkel Limited the proposed additional respondent. The relevant portion of the report of the shareholder is extracted below:

"Subsidiary Company- Seguro Foundations & Structures Ltd.

This subsidiary where your company holds 65% of the shares was being managed by a Managing Director, who was part of the minority shareholder group and also promoter. However, the subsidiary company suffered major losses during the year, which prompted INKEL management to have a closer examination of the functioning of the company.

Faced with mounting losses and upon noticing instances of indiscretion, the Board of INKEL Limited, decided to suspend the Managing Director of subsidiary company and entrusted the Managing Director of INKEL Ltd with additional charge of the subsidiary, effective 26 February 2019.

The operational affairs of subsidiary are now being managed by INKEL executives. In addition to the ongoing projects, the Company has bagged four new projects aggregating to Rs.194 Crores in the last six months. Three of these are KIIFB funded bridge projects, the largest being a 1.1 km long bridge at Perumbalam-Panavalli in Alappuzha costing Rs 89 cr.

MA 187/KOB/2020 in IBA/30/KOB/2020

Once completed, this would be the longest bridge in Kerala with a water span of 1.1 kilometre. The companies are hopeful of achieving a turnaround in the fortunes of the subsidiary and ensure that the investments stay protected "

6. The proposed respondent had further passed a special resolution in its Annual General Meeting to provide requisite corporate guarantee in favour of The Federal Bank Limited for and on behalf of Seguro Foundations & Structures Private Limited, a subsidiary company for availing working capital limit of ₹ 90,00,00,000/- (Rupees Ninety crores) sanctioned by the bank. It is further imperative to note that the erstwhile Managing Director of Inkel Ltd, Mr. Mohammed Sagheer is in fact the Managing Director of the Corporate Debtor even as on date.

7. From, the above it is clear that the proposed additional Corporate Debtor is in charge of the day to day affairs of the Company and is, therefore, responsible and liable for all the debts and liabilities that are incurred on behalf of the Corporate Debtor. It is further clear that the Corporate debtor has been acquired exclusively for the purpose of entering into agreements and to limit the liability on the proposed additional Corporate Debtor which is in contravention to the provisions of I&B Code.

8. Hence, the applicant prays that the proposed additional Corporate Debtor is to be impleaded in the IBA filed under Section 9 of IBC as it is entitled to relief which is premised on the current disputes within these proceedings.

9. To fortify the arguments, the applicant referred to the following case law, ***Mrs. Mamatha V. AMB Infrabuild Pvt. Ltd. & Ors [Company Appeal (AT) (Insolvency) No. 155 of 2018]***. In para 14 and 15 of the said decision it is stated that: -

14. If the two Corporate Debtors collaborate and form an independent Corporate unit entity for developing the land and allotting the premises to its allottee, the application under Section 7 will be maintainable against both of them jointly and not individually against one other.

15. In such case, both the 'Developer and the Land Owner, if they are corporate should be jointly treated to be one for the purpose of initiation of Corporate Insolvency Resolution Process against them.

10. This Tribunal gone through the averments made by the Operational Creditor and have also perused the whole documents placed on record. The following are the observations of this Bench: -

11. On 12.03.2020 an application has been filed under Section 9 of the I&B Code against M/s. Seguro Foundations & Structures Pvt Ltd. The matter was listed before this Tribunal on 16.09.2020. Notice was issued to the Corporate Debtor and the matter adjourned to 07.10.2020 Notice to the Corporate Debtor was served and AD card returned is on record. But the Corporate Debtor did not make representation before this Tribunal. Thereafter, the Operational Creditor filed this Interlocutory Application to implead M/s. Inkel Limited as additional Corporate Debtor in the application.

12. The question that arises for consideration is that whether the proposed party can be impleaded as an additional Corporate Debtor in an application under Section 9?

13. In order to arrive at a conclusion on the aforementioned issue, it is desirable to notice the facts stated by the applicant. The 'Directors Report to shareholders forming part of the Annual Returns filed by the proposed Respondent in the year

MA 187/KOB/2020 in IBA/30/KOB/2020

2018-2019' reveals that the Corporate Debtor is a subsidiary of M/s. Inkel Ltd. The Holding Company (M/s. Inkel Limited) have 65% of the shares in the subsidiary company managed by a Managing Director who is a part of the minority shareholder group and promoter.

14. It is seen from the records that the operational affairs of the Corporate Debtor are now being managed by INKEL executives and that the Companies are hopeful of achieving a turnaround in the fortunes of the Corporate Debtor and ensure that the investments stay protected.

15. This Tribunal had also gone through the decision in 'AMB Infrabuild' (supra) in which it is stated as follows: -

"13. Adjudicating Authority has failed to take into consideration the aforesaid facts and wrongly held that the "Corporate Insolvency Resolution" cannot be initiated against the two 'Corporate Debtors'.

14. If the two Corporate Debtors collaborate and form an independent Corporate unit entity for developing the land and allotting the premises to its allottee, the application under Section 7 will be maintainable against both of them jointly and not individually against one other.

15. In such case, both the 'Developer and the Land Owner, if they are corporate should be jointly treated to be one for the purpose of initiation of Corporate Insolvency Resolution Process against them.

16. The Adjudicating Authority having failed to notice the same, we set aside the impugned order dated 12th March, 2018 and remit the case to the Adjudicating Authority, New Delhi Bench, for admission of the case if record is complete, after notice to the parties.

17. Before admission of the case, it will be open to the Respondents to settle the matter and in such case, the Appellant may withdraw the case. The Appeal is allowed with aforesaid observations and. directions. No cost."

MA 187/KOB/2020 in IBA/30/KOB/2020

16. From the above facts it is clear that the Corporate Debtor company have been acquired by M/s Inkel Ltd. and is having a control stake of over 65% of the shares of the Corporate Debtor with effect from 01.12.2017. The operations of Corporate Debtor were managed, controlled and operated by the proposed Corporate Debtor.

17. In the light of the above decision in 'AMB Infrabuild' (supra) and considering the facts and circumstances of the case, it is clear that the proposed additional Corporate Debtor is the holding company of the M/s. Seguro Foundations and Structures Pvt Ltd. Therefore, the Application under Section 9 would be maintainable against both of them jointly. Hence, this Tribunal is of the view that M/s. Inkel Limited, should be impleaded as additional Corporate Debtor in IBA/30/KOB/2020.

18. MA/187/KOB/2020 is disposed of and *M/s. Inkel Limited having its Registered Office at Door No.7/473 ZA-5 and 6, 2nd floor, Ajiyal Complex, Kakkanad, Ernakulam-682030* is impleaded as additional Corporate Debtor in the IBA.

19. Registry is directed to carryout necessary impleadment in the IBA and issue notice to them through e-mail in addition to normal procedure. Applicant is also directed to serve notice to the newly impleaded additional Corporate Debtor along with a copy of IBA and produce proof of service with an affidavit before next date fixed. Additional Corporate debtor shall file its Counter within two weeks.

Dated this the 26th day of November 2020

Sd/-
(Ashok Kumar Borah)
Member (Judicial)