

**IN THE NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH – 1
VC AND PHYSICAL (HYBRID) MODE
ATTENDANCE CUM ORDER SHEET OF THE HEARING HELD ON
09-07-2024 AT 10:30 AM**

**CP(IB) No 77/7/HDB/2022
AND
IA (IBC) 1091/2024 & Inv. Petn (IBC) 21/2024 in
CP(IB) No 77/7/HDB/2022
u/s. 7 of IBC, 2016**

IN THE MATTER OF:

IDBI Bank

...Financial Creditor

AND

M/s. Trichy Tanjavur Expressways Ltd

...Corporate Debtor

C O R A M:-

**DR. VENKATA RAMAKRISHNA BADARINATH NANDULA, HON'BLE MEMBER (JUDICIAL)
SH. CHARAN SINGH, HON'BLE MEMBER (TECHNICAL)**

ORDER

IA (IBC) 1091/2024

Orders pronounced. In the result, **this application is allowed as per the directions mentioned in the order.**

Inv. Petn (IBC) 21/2024

Orders pronounced. In the result, **this application is rejected, as not maintainable. No costs.**

Sd/-

MEMBER (T)

Sd/-

MEMBER (J)

**THE NATIONAL COMPANY LAW TRIBUNAL,
HYDERABAD BENCH - I, HYDERABAD**

**I.A. No. 1091/2024
IN
C.P. (IB) No.77/7/HDB/2022**

Under Rule 11 of The National Company Law Tribunal Rules, 2016

BETWEEN

National Highways Authority of India (NHAI)

Through (Project Director, PIU Thanjavur),
54, Natarajapuram North Colony,
Medical College Road,
Thanjavur – 613004.

...Applicant

VERSUS

M/s. Trichy Thanjavur Expressway Ltd.

(Through IRP/RP)
Plot No.1129/A, 3red Floor, Road No.36
Jubilee Hills, Hitec City Road,
Hyderabad – 50033

...Respondent

Date of Order: 09.07.2024

Coram:

DR. VENKATA RAMAKRISHNA BADARINATH NANDULA

HON'BLE MEMBER (JUDICIAL)

SHRI CHARAN SINGH, HON'BLE MEMBER (TECHNICAL)

Parties/Counsels present:

For Applicant : Mr. CS Chauhan, Counsel
For Respondent : Ms. T. Sandhya, Ld. PCS for Resolution Professional
Mr. Raghu Babu Gunturu, Ld. Resolution Professional

PER BENCH

ORDER

1. This is an application filed by ‘National Highways Authority of India’ (hereinafter referred as ‘NHAI’) under Rule 11 The National Company Law Tribunal Rules, 2016 against ‘M/s. Trichy Thanjavur Expressway Ltd.’ (hereinafter referred as ‘Corporate Debtor’) represented by the Resolution Professional seeking to direct *the Ld. Arbitral Tribunal to adjudicate the Counter Claims of the Applicant filed before the Ld. Arbitral Tribunal.*
2. The Applicant states that the Corporate Debtor entered into a contract agreement dated 15.06.2006 with the Applicant for design, engineering, finance, construction, operation and maintenance of Thanjavur-Trichy Section from Km 80.000 to Km 135.750 of NH-67 in the State of Tamilnadu under NHDP Phase IIIA on Build, Operate

and Transfer (BOT) Basis. The Applicant further states that subsequent to this agreement, disputes arose between the Corporate Debtor and the Applicant and the Corporate Debtor issued a notice dated 17.03.2023 invoking Arbitration Clause contained in the contract agreement dated 15.06.2006 in respect of the disputes with the Applicant, and pursuant thereto an Arbitral Tribunal has been constituted and notified by 'Society for Affordable Redressal of Disputes (SAROD)' vide letter dated 25.04.2023.

3. While things stood thus, the Corporate Debtor was put into 'Corporate Insolvency Resolution Process' (hereinafter referred as 'CIRP') by an order of this Tribunal dated 22.08.2023 in C.P. (IB) NO. 77/7/HDB/2022 and an Interim Resolution Professional was also appointed for the Corporate Debtor who had issued a publication dated 02.09.2023 inviting the claims from the creditors of the Corporate Debtor. That in pursuance of the same, the Applicant herein, filed the claims on 10.10.2023 before the Interim Resolution Professional along with relevant documents.
4. The Applicant submits that on 06.01.2024, Ld. Counsel for Corporate Debtor brought to the notice of the Ld. Arbitral Tribunal that CIRP

has been initiated in respect of the Corporate Debtor and moratorium is in force, and considering the said submission, the Ld. Arbitral Tribunal adjourned the Arbitration Proceedings to 05.02.2024 for an update regarding the status of the CIRP of Corporate Debtor. The Applicant states that in view of the order of moratorium being in force, the Ld. Arbitral Tribunal orally asked the Ld. Counsel for the Applicant to seek necessary directions from this Tribunal in respect of the adjudication of the counter claims filed by the Applicant against the Corporate Debtor before the Ld. Arbitral Tribunal, so as to enable the Ld. Arbitral Tribunal to adjudicate both the claims and counter claims which arose from the same contract agreement entered between the Applicant and the Corporate Debtor and adjourned the matter *sine die*.

5. In the above factual backdrop, the Applicant contends that the claims raised by the Corporate Debtor and counter claims raised by the Applicant before the Ld. Arbitral Tribunal, since arise out of same contract, the Ld. Arbitral Tribunal be permitted to adjudicate the claims of both sides. According to the Applicant though a counter claim is covered by moratorium under Section 14 of IBC, it would be

efficacious to adjudicate both the claims as well as counter-claims arise out of the same contract

6. Though Mr. Raghu Babu Gunturu, Ld. Resolution Professional entered into appearance on behalf of the Corporate Debtor, no counter was filed to the Application.
7. In the light of the contest put forth as above, the point that emerges for the consideration of this Tribunal is:

Point:

Whether, the Arbitral Tribunal can entertain a counter claim relating to the same dispute while the moratorium ordered under Section 14 of IBC against the claimant is in force?.

8. We have heard Mr. CS Chauhan, Ld. Counsel for Applicant, perused the record and the submissions.
9. At the outset, we wish to state that there can be no quarrel on the aspect of the power of the Arbitral Tribunal to entertain a counter claim against the claims of the claimant in Arbitration Proceedings. However, the case on hand presents an interesting situation namely, a counter claim filed post admission of the claimant in an Arbitration proceedings into CIRP, whether can be decided by the Arbitral

Tribunal, during the operation of moratorium ordered in terms of Section 14 of IBC.

10. It is not in dispute that the Arbitration Clause contained in the contract agreement dated 15.06.2006, has been invoked by one of the parties to the contract, namely the corporate debtor herein, vide notice dated 17.03.2023 and pursuant thereto an Arbitral Tribunal has been constituted and informed to the parties concerned vide letter dated 25.04.2023.

11. While it was so, post receipt of claims of the claimant by the Arbitral Tribunal, this Tribunal vide order in CP No.77/7/HDB/2022 dated 22.08.2023 had admitted the claimant who is corporate debtor into CIRP also appointed IRP and ordered moratorium as against the corporate debtor in terms of Section 14 of IBC.

12. In this backdrop, when the applicant filed counter claim, as against the claim of the corporate debtor before the Arbitral Tribunal, Ld. Arbitral Tribunal was hesitant to entertain the counter claim of the Applicant, citing order of moratorium supra, hence the applicant has approached this Tribunal, for appropriate directions to the Arbitral Tribunal, in respect of the counter claim.

13. We have carefully perused the rulings relied on by the Applicant in support of its prayer for issuing directions to the Ld. Arbitral Tribunal, to entertain counter claim of the Applicant.

14. Hon'ble NCLAT in the case of ***Jharkhand Bijli Vitran Nigam Ltd (supra)***. Almost on identical set of fact held as below:

"..... The question arises for consideration in this appeal is whether a counter claim can proceed during the period of 'Moratorium' while the Adjudicating Authority (National Company Law Tribunal) allowed the 'Corporate Debtor' to pursue the claim before the Arbitral Tribunal.

.....
3. *As the claim of the Corporate Debtor can be determined only after determination of counter claim made by the Appellant in the same very arbitral proceeding and if counter claim or part of it is set off with the claim made by the Corporate Debtor, we are of the view that both the claim and the counter claim of parties should be heard together by the Arbitral Tribunal in absence of any bar under Insolvency and Bankruptcy Code, 2016.*

4. *However, on determination, if it is found that the Corporate Debtor is liable to pay certain amount, in such case, no recovery can be made during the period of moratorium."*

Similarly, Hon'ble High Court of Delhi, in ***SSMP Industries (supra)*** held as below:

5. *A ld. Single Judge of this Court in Power Grid Corporation (supra) has held that embargo of Section 14(1)(a) of the Code would not apply in all circumstances. The observation of the Court is as under:*

“14. Hence for following reasons I conclude the present proceeding would not be hit by the embargo of Section 14(1)(a) viz., (a) „proceedings“ do not mean „all proceedings; (b) **moratorium under section 14(1)(a) of the code is intended to prohibit debt recovery actions against the assets of corporate debtor;** (c) continuation of proceedings under section 34 of the Arbitration Act which do not result in endangering, diminishing, dissipating or adversely impacting the assets of corporate debtor are not prohibited under section 14(1)(a) of the code; (d) term „including“ is clarificatory of the scope and ambit of the term „proceedings“; (e) **the term „proceeding“ would be restricted to the nature of action that follows it i.e. debt recovery action against assets of the corporate debtor;** (f) the use of narrower term "against the corporate debtor" in section 14(1)(a) as opposed to the wider phrase "by or against the corporate debtor" used in section 33(5) of the code further makes it evident that section 14(1)(a) is intended to have restrictive meaning and applicability; (g) the Arbitration Act draws a distinction between proceedings under section 34 (i.e. objections to the award) and under section 36 (i.e. the enforceability and execution of the award). The proceedings under section 34 are a step prior to the execution of an award. Only after determination of objections under section 34, the party may move a step forward to execute such award and in case the objections are settled against the corporate debtor, its enforceability against the corporate debtor then certainly shall be covered by moratorium of section 14(1)(a).”

6. **A perusal of the judgment shows that until and unless the proceeding has the effect of endangering, diminishing, dissipating or adversely impacting the assets of corporate debtor, it would not be prohibited under Section 14(1)(a) of the Code.**

7. In ***Jharkhand Bijli*** (supra), the NCLAT has, in similar circumstances, held that until and unless the counter claim is itself determined, the claim and the counter claim deserve to be heard together and there is no bar on the same in the Code. The observations of the NCLAT are as under:

“3. As the claim of the Corporate Debtor can be determined only after determination of counter claim made by the Appellant in the very same arbitral proceedings and if the counter claim or part of it is set off with the claim made by the Corporate Debtor, were of the view that both the claim and the counter claim of parties should be heard together by the Arbitral Tribunal in the absence of any bar under Insolvency and Bankruptcy Code, 2016.

4. However on determination, it is found that the Corporate Debtor is liable to pay certain amount, in such case, no recovery can be made during the period of moratorium.”

.....

9. The nature of a counter claim is such that it requires proper pleadings to be filed, defences and stands of both parties to be considered, evidence to be recorded and then issues have to be adjudicated. The proceedings before NCLT are summary in nature and the RP does not conduct a trial. The RP merely determines what payment can be made towards the claims raised, subject to availability of funds. The NCLT/RP cannot be burdened with the task of entertaining claims of the Defendant which are completely uncertain, undetermined and unknown. Moreover, the question as to whether the Defendant is in fact entitled to any amounts, if determined by the NCLT, prior to the adjudication of the plaintiff's claim for recovery, would result in the possibility of conflicting views in respect of the same transaction. Under these circumstances, this court is of the opinion that the Plaintiff's and the defendant's claim ought to be adjudicated comprehensively by the same forum. At this point, till the defence is adjudicated, there is no threat to the assets of the corporate debtor and the continuation of the counter claim would not adversely impact the assets of the corporate debtor. Once the counter claims are adjudicated and the amount to be paid/recovered is determined, at that stage, or in execution proceedings, depending upon the situation prevalent, Section 14 could be triggered. At this stage, due to the reasons set out above, the counter claim does not deserve to be

stayed under Section 14 of the Code. The suit and the counter claim would proceed to trial before this Court.”

15. In re, ***Jharkhand Bijli Vitran Nigam Ltd (supra)*** held that in the absence of any bar under IBC, both the claim and counter claim of the parties should be heard together by the Arbitral Tribunal. Thus, holding Hon’ble NCLAT, further ordered that on determination if it is found that corporate debtor is liable to pay certain amount, in such case no recovery can be made during the period of moratorium.

Hon’ble High Court of Delhi, in re ***SSMP Industries (supra)*** held that the scope and ambit of Section 14(1)(a) have come to the conclusion that adjudication of a dispute by an Arbitral Tribunal being a stage which is a step prior to execution of the award if any passed which can be executed, enforceability of execution of such Award can remain covered by the order of moratorium.

16. Therefore, in the light of the rulings above and considering the fact that prayer of the Applicant is only for a direction to entertain counter claim of the Applicant by the Arbitral Tribunal, we are of the view that, direction in line with the rulings of Hon’ble NCLAT in ***Jharkhand Bijli Vitran Nigam Ltd.*** can be issued in this case.

Hence following order is passed. Learned Arbitral Tribunal is hereby directed to receive the counter claim of the Applicant and after determination of the claims, if Arbitral Tribunal finds that the corporate debtor is liable to pay certain amount, the said Award shall be kept in abeyance till completion of CIRP or till further orders of this Tribunal.

17. Accordingly, Application is allowed.

SD

Charan Singh
Member (Technical)

SD

Dr. Venkata Ramakrishna Badarinath Nandula
Member (Judicial)

Anil/pavani

**THE NATIONAL COMPANY LAW TRIBUNAL,
HYDERABAD BENCH - I, HYDERABAD**

**Inv. No. 21/2024
IN
I.A. No. 1091/2024
IN
C.P. (IB) No.77/7/HDB/2022**

Under Rule 11 of The National Company Law Tribunal Rules, 2016

BETWEEN

Kamma Srinivasa Rao

Suspended Director of M/s Trichy Thanjavur Expressway Ltd.

S/o. Kamma Nageshwara Rao,

R/o/ Plot No. 1129/A, 3rd Floor, Road No. 36,

Hitech City Road, Jubilee Hills, Hyderabad – 500033

...Applicant

VERSUS

M/s. Trichy Thanjavur Expressway Ltd.

(Through IRP/RP)

Plot No.1129/A, 3rd Floor, Road No.36

Jubilee Hills, Hitec City Road,

Hyderabad – 50033

...Respondent No.1/Corporate Debtor

National Highways Authority of India (NHAI)

Through (Project Director, PIU Thanjavur),

54, Natarajapuram North Colony,

Medical College Road,

Thanjavur – 613004.

...Respondent No.2

Coram:

DR. VENKATA RAMAKRISHNA BADARINATH NANDULA

HON'BLE MEMBER (JUDICIAL)

SHRI CHARAN SINGH, HON'BLE MEMBER (TECHNICAL)

Parties/Counsels present:

For Applicant : Mr.H.K.Chethurvedi, Learned Counsel

For Respondents : NA

PER BENCH

ORDER

1. This is an application filed by Mr. Kamma Srinivasa Rao, the suspended Director of 'M/s. Trichy Thanjavur Expressway Ltd.' (hereinafter referred as 'Corporate Debtor') under Rule 11 The National Company Law Tribunal Rules, 2016 seeking a relief to allow the Applicant herein to get impleaded in I.A. No. 1091 of 2024 in C.P. (IB) No. 77/7/HDB/2024 as a proper and necessary party.
2. The Corporate Debtor was put into 'Corporate Insolvency Resolution Process' (hereinafter referred as 'CIRP') by an order of this Tribunal dated 22.08.2023 in C.P. (IB) NO. 77/7/HDB/2022 and appointed an Interim Resolution Professional of the Corporate Debtor.

3. During the pendency of CIRP of Corporate Debtor, the Respondent No.2 herein filed an application vide I.A. No. 1091 of 2024 in C.P. (IB) No. 77/7/HDB/2024 seeking a relief of directions to the Ld. Arbitral Tribunal before which the claim of Corporate Debtor and the Counter Claim of Respondent No.2 were pending for adjudication during the operation of moratorium of Corporate Debtor. The Applicant herein is seeking to get impleaded in the said application filed by Respondent No.2 stating that the Applicant is a necessary and a proper party.
4. It was submitted that the Applicant herein preferred an appeal vide Company Appeal (AT) (INS) No. 310 of 2023 before the Hon'ble NCLAT, Chennai Bench against the order of this Tribunal dated 22.08.2023 in C.P. (IB) NO. 77/7/HDB/2022. It was submitted that the Hon'ble NCLAT vide order dated 10.10.2023 granted a stay over the CoC proceedings of the Corporate Debtor which is as follows:

“This ‘Tribunal’ is of the earnest view that the matter requires further ruminati on and hence, the ‘Office of the Registry’, is directed to ‘List’ the matter on 30.10.2023, under the caption, ‘For Admission (After Notice)’ immediately after ‘Admission (Fresh Cases)’. Till such time, the CoC shall defer its proceedings, in certain issue.”
5. It was submitted that this order dated 10.10.2023 was extended by the Hon'ble NCLAT and the same is still continuing. Basing on this stay order of the Hon'ble NCLAT, it was submitted by the Applicant herein that the Applicant is having a good locus and balance of convenience to

have a favourable judgment from the Hon'ble NCLAT. It was submitted that any adverse decision in I.A. No. 1091 of 2024 in C.P. (IB) No. 77/7/HDB/2024 during the pendency of the appeal before the Hon'ble NCLAT and without hearing the Applicant herein will affect the rights of the Applicant adversely. It was submitted that the Applicant is a necessary and a proper party in I.A. No. 1091 of 2024 in C.P. (IB) No. 77/7/HDB/2024 and hence, a reasonable opportunity of being heard be given to the Applicant herein.

6. It was submitted that the reliefs sought in I.A. No. 1091 of 2024 in C.P. (IB) No. 77/7/HDB/2024 are barred by Section 14 of IBC and that moratorium applies to counter claims. It was also submitted that as there is an appeal pending before the Hon'ble NCLAT against the order of this Tribunal admitting the Corporate Debtor into CIRP, this Tribunal became *functus officio* and cannot pass directions as prayed by Respondent No.2 herein in I.A. No. 1091 of 2024 in C.P. (IB) No. 77/7/HDB/2024.
7. The position of law as to who can be impleaded as a necessary party, or a proper party in a case is already settled by various judicial forums including The Hon'ble Supreme Court. A necessary party is one whose presence is indispensable or against whom relief is sought and without whom no effective order can be passed. In ***Ramesh Hirachand Kundanmal vs Municipal Corporation of Greater Bombay***, (1992) 2 SCC 524, it was observed as follows:

“6. A necessary party is one without whom no order can be made effectively. A proper party is one in whose absence an effective order can be made but whose presence is necessary for a complete and final decision on the question involved in the proceeding. The addition of parties is generally not a question of initial jurisdiction of the Court but of a judicial discretion which has to be exercised in view of all the facts and circumstances of a particular case.”

8. In ***Moreshar Yadaorao Mahajan vs Vyankatesh Sitaram Bhedi (D)***, 2022 INSC 1027, the Hon’ble Supreme Court observed that a suit is liable to be dismissed if a necessary party is not impleaded. For being a necessary party, according to the Hon’ble Supreme Court, the following twin test has to be satisfied:

(1) there must be a right to some relief against such party in respect of the controversies involved in the proceedings;

(2) that no effective decree can be passed in the absence of such a party.

9. In the present case, the Respondent No.2 herein sought the following relief in I.A. No. 1091 of 2024 in C.P. (IB) No. 77/7/HDB/2024 in which the Applicant herein is seeking to implead:

To direct the Ld. Arbitral Tribunal to adjudicate the Counter Claims of the Applicant filed before the Ld. Arbitral Tribunal.

10. A perusal of above extracted relief sought by Respondent No.2 leads to the conclusion that no relief was sought by Respondent No.2 against the Applicant. The relief sought was a direction to Ld. Arbitral Tribunal before which a proceeding is pending between the Corporate Debtor and Respondent No.2. Even in the said Arbitral Proceedings, the Applicant

herein is not a party so as to at least have an apprehension that the decision of this Tribunal would affect the rights of the Applicant.

11. It can be seen that the Hon'ble NCLAT have granted a stay only on the proceedings of the CoC of the Corporate Debtor and not on the order of this Tribunal admitting the Corporate Debtor into CIRP. This stay order and the contingent apprehension of Applicant of a favourable order does not constitute an eligible criteria for the Applicant to get impleaded as a party in a proceeding.
12. This is an application filed by the suspended Director seeking for relief to implead as respondent in IA 1091/2024. According to the Applicant since the Applicant had preferred an appeal against the order of this Tribunal in CP No.77/7/2022 dated 22.08.2023, wherein the corporate debtor was a director is pending, this Application is not maintainable. Nextly, it is contended that in the absence of the present applicant being made/allowed to be a party to IA no.1091/2024 effective disposal of IA no.1091/2024 is not possible.
13. According to the learned counsel, the Applicant is necessary and proper party to the IA 1091/2024 as such the Applicant may be allowed to be impleaded. In support of this plea, Applicant relied on the following judgement:

In re, Ramesh Hirachand Kundanmal vs Municipal Corporation of Greater Bombay, (1992) 2 SCC 524, it was observed as follows:

“6..... A necessary party is one without whom no order can be made effectively. A proper party is one in whose absence an effective order can be made but whose presence is necessary for a complete and final decision on the question involved in the proceeding. The addition of parties is generally not a question of initial jurisdiction of the Court but of a judicial discretion which has to be exercised in view of all the facts and circumstances of a particular case.”

In *Moreshar Yadaorao Mahajan vs Vyankatesh Sitaram Bhedi (D)*, 2022 INSC 1027, the Hon’ble Supreme Court observed that a suit is liable to be dismissed if a necessary party is not impleaded. For being a necessary party, according to the Hon’ble Supreme Court, the following twin test has to be satisfied:

- (1) there must be a right to some relief against such party in respect of the controversies involved in the proceedings;
- (2) that no effective decree can be passed in the absence of such a party.

14. This Petition is resisted by the respondent contending, inter-alia, that Applicant is neither a necessary nor a proper party to this Application. According to the learned counsel, for deciding the plea in IA No.1091/2024 namely, direction to the Arbitral Tribunal to consider the counter claim of the Applicant, the presence of the Applicant is not necessary and his absence will no way effects the hearing. Hence liable to be dismissed.

15. In the light of the rival contentions, we have carefully examined the prayer of the Applicant, which is to allow the Applicant, to be impleaded as respondent in IA 1091/2024. Admittedly, IA 1091/2024 is filed seeking certain directions to the Arbitral Tribunal in the backdrop of order of moratorium imposed by this Tribunal under Section 14 of IBC, vide order in CP No.77/2022 dated 22.08.2023. It is pertinent to state herein that, parties to the Arbitration proceedings have right to file counter claim, if

they so choose as against the claim made by the claimant before the
Arbitral Tribunal.

16. Needless to say, that the corporate debtor which being the claimant in the Arbitration Proceedings since admitted into CIRP, can be represented only by the IRP/RP as the case may be. Moreover, the petitioner is not a privi to the Arbitration Agreement, so as to have any say in the ongoing Arbitration proceedings. Therefore, under these facts and circumstances, we are of the view that the present Applicant is neither a necessary or a proper party to this for disposal of IA no.1091/2024 and the said Application can be disposed of without the presence of the respondent.
17. Therefore, view from any angle present application is validly misconceived and is liable to be dismissed.

SD

Charan Singh

Member (Technical)

SD

Dr. Venkata Ramakrishna Badarinath Nandula

Member (Judicial)

Anil/pavani