

BEFORE THE ADJUDICATING AUTHORITY
NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD BENCH
COURT 1

C.P. (I.B) No.355/9/NCLT/AHM/2018

Coram: MADAN B. GOSAVI, MEMBER (JUDICIAL)
VIRENDRA KUMAR GUPTA, MEMBER (TECHNICAL)

ATTENDANCE-CUM-ORDER SHEET OF THE HEARING THROUGH VIDEO CONFERENCING BEFORE THE
AHMEDABAD BENCH OF THE NATIONAL COMPANY LAW TRIBUNAL ON 02.02.2021

Name of the Company:

Hardwin Construction Pvt Ltd
V/s
ONGC Petro Additions Ltd

Section:

9 of the Insolvency and Bankruptcy Code, 2016

ORDER

The case is fixed for pronouncement of order.

The order is pronounced in open court vide separate sheet.


(VIRENDRA KUMAR GUPTA)
MEMBER (TECHNICAL)


(MADAN B GOSAVI)
MEMBER (JUDICIAL)

Dated this the 2nd day of February, 2021.

**BEFORE THE ADJUDICATING AUTHORITY
NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD BENCH
COURT 1**

CP (IB) No.355/9/NCLT/AHM/2018

In the matter between:

M/s Hardwin Construction Private Limited
B-110, Kukreja Centre,
Plot No. 13, Sector- 11,
CBD Belapur, Navi Mumbai,
Maharashtra

.....Operational Creditor.

Versus

M/s ONGC Petro Additions Limited,
Register office at:
4th Floor, 35, Nutan Bharat Co. Operative
Housing Society Ltd,
R.C. Dutt Road, Alkapuri,
Vadodara, Gujarat-390007

..... Corporate Debtor.

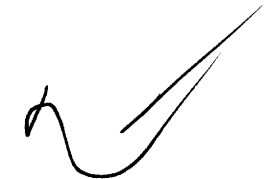
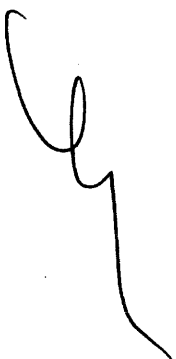
Order Reserved on: 27th day of January, 2021
Order Pronounced on: 2nd day of February, 2021

**Coram: MADAN B. GOSAVI, MEMBER (J)
VIRENDRA KUMAR GUPTA, MEMBER (T)**

Appearance:

Learned Counsel Mr. J.M. Shah appeared for the
Operational Creditor.

Learned Counsel Mr. Akshat Khare a.w Learned Counsel
Ms. Damini Gupta appeared for the Corporate Debtor.



ORDER

[Per: VIRENDRA KUMAR GUPTA, MEMBER (T)]

1. This application has been filed by M/s Hardwin Construction Pvt. Ltd. under Section 9 of Insolvency & Bankruptcy Code, 2016 (hereinafter referred to as “**IBC, 2016**”) for initiation of Corporate Insolvency Resolution Process (hereinafter referred to as “**CIRP**”) against the Corporate Debtor namely M/s ONGC Petro Additions Ltd. The total amount in default stands at **Rs. 1,51,14,649/-** (Rupees One Crore Fifty One Lac Fourteen Thousand Six Hundred Forty Nine Only).

2. The facts, in brief, are that the Operational-Creditor M/s Hardwin Construction Pvt. Ltd. got a work order from Fernas Construction India Pvt. Ltd (hereinafter referred to as “**FCIPL**”) being main contractor / supplier to M/s ONGC Petro Additions Ltd. which has been made Corporate Debtor in the present application. Services were rendered for fabrication and labour was also supplied in terms of work order issued by the said FCIPL. On the question of privity of

contract between the Operational Creditor and Corporate Debtor, our attention was drawn to two letters written by alleged Corporate Debtor on 24.03.2015 and 22.09.2016. Thereafter, it was claimed that dates of default had been mentioned in requisite form at the relevant page and it was not barred by limitation.

3. Learned Counsel for the Corporate Debtor appeared and strenuously argued that there was no privity of contract between itself and said party. In this regard, the alleged Corporate Debtor referred to relevant contractual clauses of the contract between the Operational Creditor as well as FCIPL, being the main contractor. It was also submitted that the petitioner was one of the sub-contractors engaged by FCIPL. As regard to reliance placed on these two letters, it was submitted that the said letters of assurances cannot be read independently without considering the circumstances of the case and ignoring the fact that the contract was between two different parties and one of them being the Operational Creditor and Corporate Debtor was not involved therein.

4. It was also contended that the said letters could not amount as to be a contract between the Corporate Debtor and the Operational Creditor; hence, for this reason alone, the application was liable to be dismissed. It was also vehemently argued that even if such letters were assumed to give some locus to the Operational Creditor against the Corporate Debtor then also in absence of requisite documents which were required in terms of such letters for making the payment directly to the Operational Creditor were also not provided and, therefore, on this account as well there was no merit in this application.
5. We have considered the submissions made by both the parties and material on record. In this petition, it is not in dispute that work order has been placed on the Operational Creditor by **M/s Fernas Construction India Pvt. Ltd.** (FCIPL) and not by alleged Corporate Debtor. The sole basis for filing this petition against the alleged Corporate Debtor is two letters which are reproduced as under:

(1) Ref No: OPa L/BDA/PR/IU&0/085/14-15/Hardwin

Date: 24-03-2015

To,
M/s Hardwin Construction Pvt Ltd,
B-106, Kukreja Centre, Sector – 11,
CBD Belapur,



Navi Mumbai-400 614

Kind Attn: Mr. Anil Kumar Singh

Subject: Assurance for payment to M/s Hardwin Construction Pvt Ltd

Reference- Work order nos. FCIPL/OPaL/Contracts/311 dtd. 26 Nov, 2014 (amended), FCIPL/OPaL/Contracts/325 dtd. 29 Aug, 2014 and FCIPL/OPaL/Contracts/328 dtd. 08 Sep, 2014 placed by M/s Fernas on M/s Hardwin Construction Pvt Ltd.

Dear Sir,

With reference to the Work Orders mentioned above, placed by M/s FCIPL on you with regard to supply of various items as mentioned in the WO, fabrication & erection of fire sprinklers, installation & dismantling of scaffoldings, OPaL is hereby confirming that all the conditions of the contracts will be honored and the payment w.e.f **1st September, 2014** will be paid to you directly by OPaL within 15 days from the date of receipt of invoice duly certified by M/s FCIPL and PIL.

Thanking ou,

Yours' faithfully,

K Satyanarayana

CEO-OPaL

CC: 1. Mr. V K Malhotra, ED-Projects, EIL
2. Mr. Firat, M/s FCIPL
3. Mr. Anil Kumar, RCM-FCIPL

(2) Ref No: OPa L/BDA/PR/IU&0/085/14-15/Hardwin-2

Date: 02-09-2016

To,

M/s Hardwin Construction Pvt Ltd,
B-110, Kukreja Centre, Sector-11,
CBD Belapur,
Navi Mumbai-400 614

Kind Attn: Mr. R K Patel / Mr. Anil Singh

Subject: Assurance for payment to M/s Hardwin Construction

References- Work order No. FCIPL/OPAL/CONTRACTS/502
dated 17.08.2016

Dear Sir,

With reference to the Purchase order mentioned above, placed by M/s FCIPL on you with regard to supply of labours for commissioning works of gantry & tank farm area, OPaL is hereby confirming that all the conditions of the contract will be honoured and OPaL shall make the payment directly to you once services as per aforementioned PO will be

provided and after the receipt of invoice duly certified by M/s FCIPL and EIL

The assurance Letter is applicable only for the services to be provided against the work order mentioned above.

Thanking You,

Yours faithfully,

K Satyanarayana

CEO-OPaL

CC:

- 1. ED (Projects)-EIL*
- 2. CFO-OPaL*
- 3. GM (Projects)-EIL*
- 4. Head (Projects)-OPaL*
- 5. RCM-FCIPL*

6. From the perusal of the above, we find sufficient merit in the claims made by and on behalf of the alleged Corporate Debtor as these letters merely state that the payment due to the work done by the main contractor i.e., M/s FCIPL through the Operational Creditor would be made directly to the Operational Creditor. In our considered view, this is the real substance of these two letters. Further, this also requires various formalities to be completed before such payment could be released. We also find that the direct payments were to be made for the works to be executed w.e.f. 10.09.2014 only and this arrangement has been made to complete the balance pending work. We also find that the payment as per assurance can be made only when invoices

are duly certified by the main contractor as well as Project Manager of M/s Engineers India Ltd. with the specific recommendation as to the amount which could be paid. The said assurance is not provided, hence, in our view, no liability can be imposed upon the alleged Corporate Debtor on the basis of said letters of assurance. We also find that the deduction for retention money has also been made by FCIPL as far as Operational Creditor is considered and not by the alleged Corporate Debtor. We have also taken note of the fact that neither such retention money has been deducted by the alleged Corporate Debtor nor it is a subject matter of the said letters of assurance. We also find that the main contractor has not raised the bills for the alleged outstanding amount as well as retention money nor any claim till then had been filed before the RP of FCIPL who was undergoing CIRP. We also find that the reply to notice of demand issued under Section 8 of IBC, 2016, alleged Corporate Debtor has clarified its stand and opposed the demand so raised.

7. Thus, considering the fact and circumstance of the case, we conclude that in the absence of privity of contract and non-

compliances of the submission of invoices/bills by the main contractor along with necessary back up documents required as per the contractual provisions, the said letters of assurance do not result into a cause of action against the alleged Corporate Debtor. We also find that the Corporate Debtor is Public Sector Undertaking (PSU), hence, instead of pursuing its claim with the main contractor, the Operational Creditor has chosen to file this application. Normally, in these circumstances, we could have imposed costs for abuse the process of law but considering the fact that some correspondence executed between the Operational Creditor as well as alleged Corporate Debtor, we give benefit of doubt and refrain from doing so.

8. Before parting, we may add that the Operational Creditor filed copy of only one set of certain documents through Post on 29.01.2021 whereby it has been mentioned that the same was filed in terms of direction given by this Adjudicating Authority on 05.01.2021. We have perused the our order of 05.01.2021 wherein no such directions were given. In spite of that, we have perused the documents

furnished now but those documents also do not help the cause of the Operational Creditor in any manner.

9. Accordingly, CP (IB) No. 355/9/NCLT/AHM/2018 stands dismissed and disposed of in terms indicated above.
10. Urgent certified copy of this order, if applied for, to be issued to all concerned parties upon compliance with all requisite formalities.



(Virendra Kumar Gupta)
Member (Technical)



(Madan B. Gosavi)
Member (Judicial)

Signed on this, the 2nd day of February, 2021

Rajeev Sen/Stenographer