

**IN THE NATIONAL COMPANY LAW TRIBUNAL, AHMEDABAD**  
**COURT - 2**

ITEM No.301  
**CP(IB)/212(AHM)2021**

**Order under Section 9 IBC**

**IN THE MATTER OF:**

Sri Bajrang Wind Park Developers  
Through Its authorized Balachandar V Nadar  
V/s  
Inox Wind Infrastructure Services Limited

.....**Applicant**

.....**Respondent**

**Order delivered on 13/12/2023**

**Coram:**

Mrs. Chitra Hankare, Hon'ble Member(J)  
Dr. Velamur G Venkata Chalapathy, Hon'ble Member(T)

**ORDER**

The case is fixed for pronouncement of order. The order is pronounced in open Court, vide separate sheet.

-Sd-

**DR. V. G. VENKATA CHALAPATHY**  
**MEMBER (TECHNICAL)**

-Sd-

**CHITRA HANKARE**  
**MEMBER (JUDICIAL)**

**BEFORE THE ADJUDICATING AUTHORITY  
NATIONAL COMPANY LAW TRIBUNAL  
AHMEDABAD BENCH  
COURT-2**

**C.P. (IB) No. 212 of 2021**

*[Application under Section 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016].*

**In the matter of:**

M/s. Sri Bajrang Wind Park Developers  
**Through Its Authorized Representative**  
Mr. Balachandar V. Nadar

**Having Registered Office:**

Rameshwar Park-2, Street 4,  
Opp. Balmukund Complex,  
B/H Sterling Hospital,  
Rajkot - 360007

**.....Applicant/Operational Creditor**

**VERSUS**

**1. M/S Inox Wind Infrastructure Services Limited**

**Registered Office:**

Survey No. 1837 & 1834 At MojeJetalpur,  
Abs Towers, Second Floor, Old Padra Road,  
Vadodara - 390007

**Corporate Office at:**

Inox Towers, Plot No.17,  
Sector 16A, Noida - 201301

**Through Its Directors:**

**2. Sh. Shanti Prashad Jain**

**Registered Office:**

Survey No. 1837 & 1834 At MojeJetalpur,  
Abs Towers, Second Floor, Old Padra Road,  
Vadodara - 390007

**Corporate Office at:**

Inox Towers, Plot No.17,  
Sector 16A, Noida - 201301

**3. Sh. Venkatanarayanan Sankaranarayanan**

**Registered Office:**

Survey No. 1837 & 1834 At MojeJetalpur,  
Abs Towers, Second Floor, Old Padra Road,  
Vadodara - 390007

**Corporate Office at:**

Inox Towers, Plot No.17,  
Sector 16A, Noida - 201301

**4. Sh. Manoj Shambhu Dixit**

**Registered Office:**

Survey No. 1837 & 1834 at MojeJetalpur,  
Abs Towers, Second Floor, Old Padra Road,  
Vadodara - 390007

**Corporate Office at:**

Inox Towers, Plot No.17,  
Sector 16A, Noida - 201301

**5. Sh. Vineet Valentine Davis**

**Registered Office:**

Survey No. 1837 & 1834 at MojeJetalpur,  
Abs Towers, Second Floor, Old Padra Road,  
Vadodara - 390007

**Corporate Office at:**

Inox Towers, Plot No. 17,  
Sector 16A, Noida - 201301

**6. Sh. Mukesh Rajnarayan Manglik**

**Registered Office:**

Survey No. 1837 & 1834 at MojeJetalpur,  
Abs Towers, Second Floor, Old Padra Road,

Vadodara - 390007

**Corporate Office at:**

Inox Towers, Plot No.17,  
Sector 16A, Noida - 201301

**7. Sh. Govind Prakash Rathor**

**Registered Office:**

Survey No. 1837 & 1834 at Moje Jetalpur,  
Abs Towers, Second Floor, Old Padra Road,  
Vadodara - 390007

**Corporate Office at:**

Inox Towers, Plot No.17,  
Sector 16A, Noida - 201301

.....**Respondents**

**Order pronounced on: 13.12.2023**

**Coram: Mrs. Chitra Hankare, Hon'ble Member(J)**

**Dr. Velamur G Venkata Chalapathy, Hon'ble Member(T)**

**Appearance:**

For the Applicant : Mr. Aslam Ahmed, Advocate, Ms. Ankita  
Sharma, Advocate and Mr. Harilal S.,  
Advocate

For the Respondent : Mr. Navin Pahwa, Senior Advocate a/w Mr.  
Pratik Thakkar, Advocate

**JUDGMENT**

1. This application is filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as IBC for the sake of convenience) to initiate Corporate Insolvency Resolution Process against respondent.

**Facts of the case:**

2. The applicant submitted that the Operational Creditor is engaged in the business of setting up Wind Projects and Real Estate infrastructure support capability services. The Operational Debtor engaged Operational Creditor for works related to 50MW Wind Power Project at Sadala, Gujarat Project which was awarded to OD. The Operational Debtor issued various purchase work orders. The operational creditor raised various invoices from time to time regarding products supplied and works undertaken and completed installation work in time till May 2019. The operational debtor has not made complete payment but only made part payments towards discharging its outstanding liability. Despite issuing various emails, the outstanding amount against the invoices raised was to the tune of Rs. 25,72,70,275/- only along with interest at the rate of 24% per annum from the date of default. The operational debtor never raised any issue with respect to the work done. The operational debtor acknowledged joint measurement depicting completion of work but only sought time to make payment due. Statement of accounts maintained by the operational creditor shows receipt of

only part payments from Corporate Debtor. Till date entire payment is not made.

3. The operational creditor issued demand notice dated 02.07.2019. By its reply dated 17.07.2019 operational debtor denied any debt being due. Thereafter maliciously he had issued notice dated 04.02.2020 claiming amount of Rs. 54,50,00,000/- from the operational creditor. He had also sought to invoke arbitration wrongly. The website of SJBNL shows completion of work. Thus, the operational creditor has carried out work to the satisfaction of operation debtor and discharged its duties. The operational debtor is attempting to create delay in making payments. There is no pre-existing dispute. The amount outstanding is Rs. 42,49,84,942/- including principal amount with interest at the rate of 24% per annum.

**Reply of Operational Debtor:**

4. The respondent submitted that the petition is defective and not maintainable. The operational creditor has no specific address of registered office and there is no evidence that the firm is in existence as different address is mentioned in Form no. 5 and in resolution. No partnership agreement is produced on record. The resolution filed by the applicant is specific for recovery and not for initiation of any CIRP. The present Forum is not a recovery

forum and the demand notice has been issued without any authority. The person who issued the demand notice is neither partner of the firm nor authorised in the authority letter. He further stated that Form no. 5 is defective and the applicant has not complied with Sections 9(3)(c), 9(3)(d) and 9(3)(e) of the Code. So also the applicant has not mentioned any date of default.

5. The Corporate Debtor further stated that the Corporate Debtor entered into the memorandum dated 07.01.2016 with the applicant for execution of infrastructure services and electrical works at Sadala, Surendranagar. Similarly, he had earlier entered into separate Memorandum of Understanding with Shri Maruti Wind Park (India) Private Limited for execution of contract for three different areas dated 29.01.2013, 18.05.2013 and 16.10.2013. The operational creditor also have other companies having same office premises and doing similar business. List of such 10 companies is given. The partners of the operational creditor and Shri Maruti Wind Park Developer are same and thus debt due to partners of Shri Maruti Wind Park Developers would be applicable towards partners of operational creditor. All these entities are common entities. The consolidated outstanding of all the firms of the operational debtor is claimed by the operational creditor through other companies.

6. It is further stated that there were pre-existing disputes for numerous reasons which were communicated to operational creditor from time to time. As per the MoU, Operational Creditor was to conclude entire project of 100 locations by December 2016. The operational creditor failed to conclude and complete the work within the given time frame. Some projects were partly concluded. He has submitted chart showing pending work by Operational Creditor. Due to delay in work progress the Corporate Debtor has faced liquidated damages and other additional expenses in compliance of newly enforced GST. Majority of the payments was made by the Corporate Debtor to the vendors of operational creditor as the operational creditor failed to make their payments. The operational creditor has not provided supporting documents demanded after raising invoices. The invoices are for payment made to third parties for acquiring right of pathway, transfer of ownership etc. which cannot be paid without supporting documents. The Corporate Debtor is not liable for this payment as the invoices were rejected prior to issuance of demand notice.
7. On 17.08.2018, Corporate Debtor communicated to the Operational Creditor to resolve the tax issue along with other issues to release revised order. The operational creditor returned

the invoices informing that they cannot attach original work completion certificate in all the invoices. Also there is a dispute regarding non-handing over of original documents, lack of interest in completing the pending activities, losses, idle charges etc. The Corporate Debtor has suffered huge losses on account of non-performance by the operational creditor. The SJVN Limited has deducted liquidated damages to the tune of Rs. 33,20,76,452/- with GST of Rs. 6,95,72,580/- . ReNew and Green Infraven Energy Limited and Dejemal Pani Group have also deducted liquidated damages for delay in completion of project. Thus, corporate debtor has suffered various liquidated damages and other losses.

8. It has issued arbitration notice dated 04.02.2020 to operational creditor. The actual amount to be claimed by the Corporate Debtor against operational creditor remains to be finalised. Subject to pending litigations before the learned Arbitral Tribunal as well as the on-going negotiations with the customers, the process of arbitration against operational creditor has been kept at halt. There are also recovery dues by the Corporate Debtor from the operational creditor in respect to other projects at different places. MARUTI and Operational Creditor are common entities and only for billing purpose

separate MoUs were signed. The relationship of Maruti and Bajrang can be drawn out by way of MoM dated 07.11.2015 and 09.11.2015. He further stated that the present petition is filed to extort money from Corporate Debtor.

### **Arguments**

9. Heard the learned counsel for the applicant as well as the learned counsel for the respondent also perused the written submissions filed by both of them.
  
10. Learned advocate for the applicant submitted that the Corporate Debtor has only made part payments though all the notices were admitted. He has pointed out emails dated 13.11.2018 and 22.11.2018 which states that *"The comments and acceptance of qty is based on the invoices submitted. This is not the final amount considered as we have not considered LD, Generation Loss and ideal charges which Inox has paid to its customers. This needs to be discussed separately at the time of final reconciliation"* and submitted that the reconciliation in the email dated 22<sup>nd</sup> November is insignificant as the invoices were accepted and the Corporate Debtor in its statement of claim filed before arbitrator between Corporate Debtor and SGVNL

summarises the reasons for delay. The Corporate Debtor also admitted the completion of work. It has not pointed out discrepancies as alleged in email. The costs ask were extraneous. These are not qualifying defenses. He has further pointed that the Corporate Debtor in its reply rejected certain invoices amounting to Rs.3,60,71,169/- only.

11. Learned Advocate for the applicant further submitted that in the reply to demand notice the Corporate Debtor has not referred any existing dispute. He has further submitted that the date of default is not required to be mentioned in the notice under Section 8 of the IBC and delayed payment will not amount to default. He has relied upon: ***Mobilox Innovations Pvt. Ltd. v. Kirusa Software Pvt. Ltd. (2018) 1SCC 353 para 34*** wherein **it held that:**

*“The adjudicating authority, when examining an application under Section 9 of the Act will have to determine:*

- (i) Whether there is an "operational debt" as defined exceeding Rs. 1 lakh? See Section 4 of the Act)*
- (ii) Whether the documentary evidence furnished with the application shows that the aforesaid debt is due and payable and has not yet been paid? and*
- (iii) Whether there is existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before the receipt of the demand notice of the unpaid operational debt in relation to such dispute?”*

12. He further argued that Corporate Debtor invoked arbitration vide notice dated 04.02.2020 that is belatedly after issuance of demand notice thus, it will not qualify as a defence. He has further argued that the objection raised by Corporate Debtor that the Operational Creditor has filed a counter claim before the Arbitral Tribunal is ill-premised objection. This Tribunal is not intended for recovery. In view of Section 9, the application by Operational Creditor is to be compulsorily admitted. Statement of claim has no nexus with the invoices. The Corporate Debtor has not checked alleged discrepancies. The Corporate Debtor is indebted and is unable to pay the admitted dues.
13. He relied upon ***Ahluwalia Contracts (India) Limited V/s. Rahela Developers Limited reported in 2019 SCC Online NCLAT 942*** observing that:

*“the arbitration proceeding was initiated by the Respondent vide notice dated 24 May, 2018 i.e. after about one month from the date of issuance of demand notice under Section 8(1) which was Issued on 28th April, 2018. Therefore, the 'Corporate Debtor cannot rely on arbitration proceeding to suggest a pre-existing dispute. There is nothing on the record to Suggest that the Corporate Debtor raised any pre-existing dispute relating to quality of work performed by Appellant”*

He further relied upon **Consolidated Construction Consortium Limited V/s. Hitro Energy Solutions Private Limited reported in (2022) 7 SCC 164** wherein it was held that:

*“Thus, a debt which arises out of advance payment made to a corporate debtor for supply of goods or services by it, held, would be considered as an operational debt”*

14. Learned advocate for the Corporate Debtor submitted that the application is not maintainable as there is no evidence of existence of partnership firm and registration of partnership. Also date of default is not mentioned in the petition. The invoices claimed in the petition starts from 20.07.2018 to 14.05.2019. While the 365 days to turn the invoice as “default” will be from 20.07.2019 till 14.05.2019 respectively. However, the demand notice is dated 02.07.2019 that is before default occurred. As there was no default on the date of demand notice, the date is not mentioned in the petition. He further submitted that the demand notice issued was for 5 work orders while there were 10 work orders in the invoices. On some of the invoices wrong date of work order was mentioned. He has pointed out that the Operational Creditor himself argued that the Corporate Debtor had returned invoices due to discrepancies. Thus, the

reconciliation of invoices of the Operational Creditor are still pending.

15. The Corporate Debtor relied upon:

**Sabarmati Gas Limited V/s. Shah Alloys Limited**

**MANU/SC/0008/2023 wherein it is held that:**

*“once the operational creditor has filed an application, which is otherwise complete, the adjudicating Authority must reject the application Under Section 9(5)(2) (d) if notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility. It is clear that such notice must bring to the notice of the operational creditor the "existence" of a dispute or the fact that a suit or arbitration proceeding relating to a dispute is pending between the parties. Therefore, all that the adjudicating Authority is to see at this stage is whether there is a plausible contention which requires further investigation and that the "dispute" is not a patently feeble legal argument or an assertion of fact unsupported by evidence. It is important to separate the grain from the chaff and to reject a spurious defense which is mere bluster. However, in doing so, the Court does not need to be satisfied that the defense is likely to succeed. The Court does not at this stage examine the merits of the dispute except to the extent indicated above. So long as a dispute truly exists in*

*fact and is not spurious, hypothetical or illusory, the adjudicating Authority has to reject the application.”*

16. He further argued that it is admitted fact that the Corporate Debtor has invoked arbitration on 04.02.2020 while present petition is filed on 21.10.2021. The arbitration is still pending before the Hon’ble Justice T.K. Jain, wherein the Corporate Debtor has filed statement of claim while Operational Creditor has filed counter claim also. He has further pointed that there are disputes regarding non-compliance of work, tax issues invoice issues etc. Prior to issuance of demand notice the Corporate Debtor also produced documents showing that he has suffered liquidated damages and legal proceedings due to delay in work by operational creditor. He has made various payments to the vendors of Operational Creditor and also had incurred direct expenses to conclude the incomplete work of Operational Creditor and thus, there are numerous disputes between the parties. He relied upon the order of NCLT in **CP (IBC)37/KOB/2022 in Bangalore Sales Corporation V/s. Sark Spice Products Pvt. Ltd.** observing that “ *The proceedings before the Tribunal is a suit attracts section 69(2) of the Partnership Act, 1932*”

**Reasons**

17. One of the objections taken by the Corporate Debtor is regarding registration of partnership firm of Operational Creditor. In view of rulings in ***Rourkela Steel Syndicate vs. Metistech Fabricators Pvt. Ltd. Company Appeal (AT) (Insolvency) No. 924 of 2022*** by NCLAT and ***OPJK Paper Company V/s. International Print-o-Pac Ltd. [C.P.(IB)-240/ND/2022***, cited by Operational Creditor, the application under Section 9 of Insolvency and Bankruptcy Code, 2016 are proceedings and has not a suit. Therefore, the provisions of Partnership Act will not be applicable and the petition is maintainable. Apart from this, the Operational Creditor also filed a document regarding registration of their partnership firm by filing IA No.1244 of 2023. Therefore, the contention of Corporate Debtor that the petition is not maintainable holds no water.
  
18. According to Corporate Debtor, there is pre-existing dispute. The Corporate Debtor invoked arbitration proceedings on 04.02.2020 the demand notice was issued on 02.07.2019 while this petition is filed on 21.10.2021. The Operational Creditor also appeared before arbitrator and filed its counter claim and arbitration proceedings are still pending. According to the operational creditor as the arbitration notice was issued after the demand

notice so it cannot be said to be a pre-existing dispute. To find out whether there is pre-existing dispute, it is necessary to look into the communications between the parties. The applicant filed various work orders and tax invoices along with the application while the respondent filed Memorandum of Understanding and copies of communications via e-mail between the parties. The Corporate Debtor also filed copies of arbitration awards regarding proceedings between it and some other companies relating to the same work.

19. The various correspondence between the parties shows that there was a dispute with respect to work on various counts. Also there were tax issues between them. In one of the email dated 05.12.2018, it is mentioned that "Please come and reconcile as there are many anomalies as regard to your account in totality same has to be discussed with project development and project execution along with settlement and reconciliation of Maharashtra invoices which are pending for years together. As Maruti and Bajrang are one and the same company, hence, complete reconciliation for Gujarat and Maharashtra is must to do.

20. There was also a dispute regarding amount payable which is also admitted by the Operational Creditor. It is also pertinent to note that the Operational Creditor itself admitted that some invoices were disputed by the Corporate Debtor due to discrepancies in it. So also, the account was not finalised and discussion is needed at the time of final reconciliation.
21. The term dispute is defined in Section 5(6) of IB Code, 2016 as under:
- (6)“dispute includes a suit or arbitration proceedings relating to-
- (a) The existence of the amount of debt;
  - (b) The quality of goods and services; or
  - (c) The breach of a representation or warranty;”
22. As mentioned above, the Corporate Debtor has raised the issue of pre-existing disputes and place on record a series of emails which shows that there was a dispute between them on various issues relating to the work. It appears that the notice of arbitration was issued after receiving demand notice but the Operational Creditor appeared before Arbitration Tribunal and contested the matter. It is not the defence of Corporate Debtor that only because the arbitration proceedings are initiated there were pre-existing disputes but such disputes were also raised in various correspondences between the parties. The Pre-existing

disputes can also be proved by other evidence than the arbitration proceedings. There appears that the disputes truly exist and is not the hypothetical. This fact is also brought to the notice of Creditor in the reply given by the Corporate Debtor to the demand notice which was issued within 10 days from receipt of notice. The Corporate Debtor specifically mentioned various disputes in its reply. In support, he has also produced series of emails. From this fact the pre-existing disputes evidences. *“In Mobilix, case (cited supra) it is also held that, all that the adjudicating authority is to see at this stage is whether there is a plausible contention which requires further investigation and that the "dispute" is not a patently feeble legal argument or an assertion of fact unsupported by evidence. It is important to separate the grain from the chaff and to reject a spurious defense which is mere bluster. However, in doing so, the authority does not need to be satisfied that the defense is likely to succeed. The authority does not at this stage examine the merits of the dispute except to the extent indicated above. So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application.”*

23. On perusing the application, it appears that the date of default is not mentioned in it. According to the Operational Creditor, he

has raised various invoices from time to time. In furtherance to products supplied and installation work undertaken. Those invoices were issued vide letter dated 20.07.2018 onwards. According to respondent, the invoices claimed in the petition starts from 20.07.2018 to 14.05.2019 while the 365 days to turn the invoices as default will be from 20.07.2019 till 14.05.2020 respectively. According to him, thus the demand notice is premature as issued before the default occurred and thus, there were no default at all. The date of invoices and copy of invoices placed on record by the applicant itself. No specific date of default is mentioned in the application

24. Considering the above mentioned facts, the submissions of parties and rulings cited, it is clear that the applicant has failed to prove the ingredients required for initiation of Corporate Insolvency Resolution Process against the respondent.
25. Hence, we pass the following order.

**ORDER**

The application is rejected.

CP(IB) 212 of 2021 is disposed off.

-Sd-

-Sd-

**DR. V. G. VENKATA CHALAPATHY**  
**MEMBER (TECHNICAL)**

**CHITRA HANKARE**  
**MEMBER (JUDICIAL)**