

**IN THE NATIONAL COMPANY LAW TRIBUNAL
ALLAHABAD BENCH,
PRAYAGRAJ**

CP (IB) No.286/ALD/2019

An application under Section 9 of the Insolvency & Bankruptcy Code, 2016 read with Rule 6 of Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016

IN THE MATTER OF:

M/s. Slipform Projects

Having its registered office at
Village + P.O. –Purbadakshin Moyna, P.S. – Moyna, District –
Purba Medinipur, Pin – 721629, West Bengal.

...Applicant/Operational Creditor

Versus

M/s. Techno Electric & Engineering Co. Ltd

Having its registered office at
C-218, Ground Floor (GR-I), Sector – 63, Noida, Gautam Buddha
Nagar, UP 201307IN.

...Respondent/Corporate Debtor

Order pronounced on 14.07.2023

CORAM:

Sh. Praveen Gupta : Member (Judicial)

Sh. Ashish Verma : Member (Technical)

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PRESENT-

Sh. Malay Dhar, Adv. : For the Operational Creditor

Sh. Shubham Agarwal, Adv. : For the Corporate Debtor

ORDER

1. The instant application is filed by M/s Slipform Projects (hereinafter referred as 'Applicant'/ 'Operational Creditor') under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred as the "I & B Code, 2016") read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (hereinafter referred as "the Rules"). The prayer made therein is to initiate Corporate Insolvency Resolution Process (hereinafter referred as 'CIRP') in respect of M/S Techno Electric & Engineering Company Limited (hereinafter referred as 'Respondent'/ 'Corporate Debtor') due to default in payment of total outstanding amount of Rs.1,17,56,595/- (Rupees One Crore Seventeen Lakh Fifty Six Thousand Five Hundred Ninety Five only).
2. Briefly stated facts of the present case as averred by the Applicant/Operational Creditor in its application filed in Form-5 containing part I, II, III, IV & V are that:-

- i. The Operational creditor, who operates in the field of constructing Civil Works, had entered into a contract with the corporate debtor in view of the Debtor's contract with Power Grid (Government of Meghalaya) for said civil works. The agreement (by way of a tender notice) was for the construction of Civil Works at three locations as part of projects undertaken by the corporate debtor on behalf of Powergrid Corporation of India Ltd., the principal company. The work orders were specifically issued for the New Shilong and Mawngap Projects located in the state of Meghalaya. The work orders for the two sites have also been annexed to the application by the applicant.
- ii. The Mawngap Projects were contracted at a price of Rs. 6,95,45,128/-, while the New Shilong Project was contracted at a price of Rs. 6,85,56,820/-. Although a formal work order was not issued for the Khahelipara Project, there was an acknowledged oral agreement, under which the petitioner also completed a portion of the work for the said project. The petitioner diligently carried out a significant portion of work

for both the New Shilong and Mawngap Projects, adhering strictly to the project requirements. Various correspondences between the petitioner and the corporate debtor confirm that the debtor also acted according to the terms of the oral contract for the Kahelipara Project. According to the contract terms, the work was expected to be completed within ten months from the commencement date.

- iii. The applicant sent a letter dated 03.05.2018 to the Corporate Debtor mentioning that he had sent the first R.A. bill amounting to Rs. 32,64,858/- for Mawngap Site and Rs.22,38,341/- for New Shilong Site. The second R.A. bill amounting to Rs. 48,32,033/- for Mawngap Site and Rs.25,69,244/- for New Shilong Site. For the Khahelipara site, first R.A. bill of Rs.8,12,138/- was raised by applicant but the respondent made no payment for any of the aforementioned bills.
- iv. A total bill of Rs. 1,37,16,595/- was raised by applicant out of which Rs.80,96,882/- was for the Mawngap Site , Rs.48,07,585/- was for New Shilong Site and Rs. 8,12,128/- was for Khahelipara Site.

- v. The Respondent/Corporate Debtor made a payment of Rs. 19,60,000/- on 29.12.2017 as an advance without interest. The debtor had also allegedly made total payment of Rs.75,63,148/- to the Vendors and suppliers of the applicant which was a violation of terms of the contract. However, no further payments were made directly to the petitioner as stated in the initial bills for the New Shilong and Mawngap Site. Additionally, the debtor failed to make any payment for the second set of bills for the aforementioned two sites and the initial bills for the Kahelipara Site. Thus, a total amount of Rs. 1,17,56,595/- was outstanding. In order to avoid making payment, the debtor informed through a letter dated 08.02.2018 that they were canceling the contract between applicant and respondent, effective from 17.02.2018.
- vi. The applicant further states that some equipment was also lying on the 2 sites of Mawngap and New shilong and the applicant demanded return of the same along with the payment of outstanding amount via demand notice sent to debtor by applicant dated 14.06.2018.

- vii. Since the earlier demand notice issued by applicant was not as per prescribed Form 3 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, a revised demand notice was sent by applicant on 03.08.2018
3. The Respondent/Corporate Debtor has submitted its reply stating that the present Insolvency and Bankruptcy (I.B.) Petition has been filed by M/s. Slipform Projects, falsely representing itself as an Operational Creditor of the Respondent in question. This petition is an abuse of the legal process and is not maintainable. The following reasons support the dismissal of this petition:
- i. The Applicant is not a partnership firm and therefore, cannot initiate any such a proceeding
 - ii. There is an existing dispute regarding the services provided by the Petitioner/Operational Creditor. The applicant has worked partly on all three sites and left work midway without informing the respondent after submission of 1st R.A. bills w.r.t New Shillong and Mawangap Site. The applicant also abandoned the Kahelipara site without submission of R.A.

bill. This was a result of the Applicant not paying its sub-vendors or labourers employed on these sites. With respect to the verbal agreement of the Kahelipara project, the applicant had confirmed the rate of materials on 17.01.2018 but it left the premises on 02.02.2018 without informing the debtor. No joint inspection was even held by the parties and in the 1st R.A bill, the applicant charged exorbitant prices.

- iii. The applicant had also not paid its sub-vendors and labourers which was the reason as to why work had ceased on those sites. The debtor requested the applicant to visit these sites and resolve the issues to restart the work. However, when the applicant failed to do so, the debtor had no option but to pay the sub-vendors and labourers from its own pockets to ensure resumption of work on the sites.
- iv. The respondent called upon the applicant to provide information on outstanding amount owed by it to applicant so that debtor could pay applicant's sub-vendors and balance the remaining amount for the purpose of reconciliation of accounts. The applicant provided information only with

regard to one site. In absence of information by applicant, debtor had no option but to pay to sub-vendors itself. Owing to such acts of negligence on the part of the applicant, the Corporate Debtor terminated the two work orders via mail on 08.02.2018.

- v. No certificate from any financial institution under Section 9 (3)(c) of the Code showing any unpaid operational debt has been furnished by the applicant.
4. The operational creditor filed a rejoinder subsequent to the reply filed by the Corporate Debtor and made the following averments:
- i. The applicant denies that an unregistered partnership firm has no right to initiate proceedings against the corporate debtor under the Insolvency and Bankruptcy Code of 2016 (Code of 2016). It states that there is no prohibition in the Code that prevents an unregistered partnership firm from being an operational creditor.
 - ii. The applicant further states that it had the intention to complete the work according to the contract terms. It is also

stated that the applicant purchased machines and equipment in West Bengal and mobilized to the sites to commence and continue the work. However, the corporate debtor did not make the payment as agreed in the first round of RA bills.

- iii. Further, when a dispute arose regarding the outstanding amount payable by the corporate debtor, the corporate debtor denied participating in joint inspections of the sites and certifying the second RA bills. Mere termination of the contract through email will not set the corporate debtor free from its liability to make payment.
- iv. The applicant alleges that the corporate debtor conspired and took control over third parties, such as suppliers, sub-vendors, and workers, to continue the remaining work of the project using the machines and equipment purchased and installed by the applicant. The corporate debtor has thus, cheated the applicant of its lawful claim.
- v. In respect of the debtor's contention that applicant has not furnished the certificate as per Section 9(3)(c) of the Code of

2016, the applicant states that the recent amendment makes it directory and in the present case since no financial institution was appointed for maintaining the accounts of applicant, the certificate does not apply.

vi. Now the corporate debtor cannot evade its responsibility to settle the debt owed to the applicant for the work carried out and expenses incurred. Therefore, this is a suitable case for initiating proceedings under the 2016 Code and appointing a resolution professional to ensure that the corporate debtor fulfills its debt obligations towards the applicant.

5. We have considered the submissions made by the Ld. Counsels for the parties and perused the records. The Corporate Debtor is a contractor to whom certain projects of electricity related work were awarded by the Government of Meghalaya. Out of these projects, two work orders have been issued by the Corporate Debtor to Operational Creditor in respect of two projects namely MAWANGAP SITE and NEW SHILLONG SITE. Furthermore, execution of the civil work is also given to Operational Creditor at third project of

KAHILIPARA SITE. For all these three sites, as alleged by the Operational Creditor in its application u/s 9 of I & B Code, 2016, payment of RA bills have not been made by the Corporate Debtor for a total outstanding amount of Rs.1,17,56,595/-.

6. The first issue for consideration is whether the operational debt was disputed by the Corporate Debtor. In the present case, the Operational Creditor sent the demand notice on 03.08.2018 and corporate debtor replied to it on 14.08.2018 and has discussed the pre-existing dispute between the two parties. This is in accordance with section 8(2)(a) of the Insolvency and Bankruptcy Code, 2016 (henceforth, Code) which states that the Corporate Debtor shall bring to the notice of the Operational Creditor the existence of a dispute within ten days of receipt of the demand notice for payment.
7. Despite receiving notice of dispute, the operational creditor went ahead with filing of application thus, contravening Section 9(1) of the Code which states that the operational creditor can only make an application to the Adjudicating

Authority, if it has not received a notice of dispute from the corporate debtor.

8. We have examined the issue relating to pre-existing dispute while hearing the arguments of Ld. Counsels of both parties. In this regard, the Ld. Counsel of the Corporate Debtor pointed out that the dispute arose as early as in February, 2018 after first R.A. bill was raised by the Operational Creditor. In this regard, an e-mail dated 2nd February, 2018 was sent by the Corporate Debtor to the Operational Creditor for settling all the issues with the suppliers/labourers working at the site because it was found by the Corporate Debtor that the workers and labourers working at project site for the Operational Creditor, were not paid by the Operational Creditor. In the said e-mail dated 2nd February, 2018, it was pointed out that repeated failure from the side of the Operational Creditor to pay these labourers and suppliers, had caused a massive nuisance at site and hence, the Corporate Debtor had informed to the Operational Creditor that they would be able to release the payment only after getting all the reconciliation

with the respective agencies or against an equivalent amount of bank guarantee from the end of the Operational Creditor. However, despite sending of this e-mail, no efforts were made by the Operational Creditor to settle the dispute with the Corporate Debtor and therefore, the Corporate Debtor vide another e-mail sent on 8th February, 2018, terminated the contract in accordance with Clause No.20.2, 20.4, 20.5 of the general condition of the contract with effect from 17.02.2018 on which the termination is to take effect. In the said e-mail, it has also been asked by the Corporate Debtor to the Operational Creditor to attend a meeting on project site on 14.02.2018 to jointly take an inventory of plant and equipment and decide about what will remain to complete the works and what is to be removed and then to leave the site, removing the agreed plant and equipment before the date of termination. In response to this e-mail of the Corporate Debtor, terminating the contract with Operational Creditor, reply had been sent by the Operational Creditor dated 14.02.2018 informing to the Corporate Debtor that they were discussing the matter

internally with their wider team and would revert to the Corporate Debtor shortly. The Operational Creditor also requested in the said email that the meeting proposed at the project site might be reconsidered and an alternative more convenient location within Kolkata Techno Office at Park Street might be called at a date and time that could be suitable to both parties. However, no such meeting took place between the Operational Creditor and the Corporate Debtor but the Operational Creditor sent a notice through its counsel vide letter dated 14.06.2018 (annexed as at **Annexure E** of the Section 9 application), asking the Corporate Debtor to release the due payment of the bill amount raised by the Operational Creditor in respect of the work done in the three projects on which Corporate Debtor was working. In this notice, payment of the due amount of Rs. 1,17,56,956/- was demanded within a period of 15 days from the date of receipt of the notice failing which, appropriate legal proceeding, was said to be started for recovery of the due amount. In the said notice, the Operational Creditor also made a request to return the various plants and

equipments owned and used by the Operational Creditor, which were lying on three sites.

9. This notice has been replied back by the Corporate Debtor through its Ld. Counsel vide letter dated 24.07.2018 disputing all the claims made by the Operational Creditor in the letter dated 14.06.2018 sent through its Ld. Counsel. In this reply made by the Ld. Counsel of the Corporate Debtor, it was stated that the Operational Creditor had abandoned the sites in the midst of ongoing construction work after submission of first RA bill, in respect of said MAWANGAP SITE and NEW SHILLONG SITE. It was also mentioned that the Operational Creditor also abandoned the KAHILIPARA SITE without submission of RA bill. Reason for such abandonment of the work is mentioned to be due to failure on part of the Operational Creditor to pay the outstanding dues of their own appointed sub-vendors, workers and material suppliers for all the said sites. It was also stated in the said reply that these outstanding liabilities incurred were the dues of the contractors who had been appointed by the Operational

Creditor for materials procurement and labourers supply for the aforesaid sites as well as for the purpose of execution of the said civil work in terms of the said work orders. Other various details of failures on part of the Operational Creditor to execute the project work, had been discussed in detail in this reply and it had been mentioned that the Corporate Debtor having no other option, had been forced and compelled to settle the issue of said outstanding dues by way of making “on account” payment for and on behalf of the Operational Creditor to various vendors, labourers, suppliers who were appointed by the Operational Creditor for all the said three sites, under intimation to the Operational Creditor. The Corporate Debtor also mentioned in the said reply about the request made earlier for determination of pending dues which remained unpaid to the Operational Creditor but no such information was provided for all the three sites except information for new Shillong site. It was reiterated in the said reply that **inspite of repeated request made by the Corporate Debtor, the Operational Creditor did not visit**

the said all three sites to resolve the disputes with its vendors, contracts, labourers, about their claim and for accounts reconciliation in respect of said purported running bills and abandoned and left all the three projects, doing only part job and had avoided to visit the concerned sites till the date of reply i.e. 24.07.2018.

10. In the reply dated 24.07.2018 sent by the Ld. Counsel of the Corporate Debtor claim of Rs. 1,17,56,595/- has also been disputed stating that question of payment by the Corporate Debtor to Operational Creditor as purportedly claimed in the notice sent by the Ld. Counsel of the Operational Creditor, does not and cannot arise at all and hence, the Operational Creditor has no cause of action to initiate any legal proceedings against the Corporate Debtor. As regards removal of the plants and equipment, reference to earlier correspondences made by the Corporate Debtor with the Operational Creditor, has been made in which, it was asked to remove all the plants and equipment owned by the Operational Creditor lying at the site. The Ld. Counsel of the Corporate

Debtor mentioned that it is clearly written in the e-mail dated 8th February, 2018 while terminating the contract with Operational Creditor that the Operational Creditor must leave the site, removing the agreed Plant and equipment before the date of termination, however, no such action was taken by the Operational Creditor. As regards the request of the Operational Creditor to conduct the meeting at Corporate Office at Calcutta, it has been mentioned in the said reply that as the entire records were available at respective sites and hence, request was made to conduct the meeting at respective project site to resolve the dispute pending for a long time. Both the letters dated 14.06.2018 sent by the counsel of the Operational Creditor and the reply letter dated 24.07.2018 sent by the counsel of the Corporate Debtor are annexed at **Annexure E** of Section 9 Application.

11. Instead of settling the issue with the Corporate Debtor in the light of the reply dated 24.07.2018 from the Ld. Counsel of the Corporate Debtor, the Operational Creditor has gone ahead to issue statutory demand notice dated 03rd August, 2018 under

Section 8 of the I & B Code 2016 read with rule 5 of the Insolvency and Bankruptcy (Application To Adjudicating Authority) Rules, 2016, raising a demand of Rs. 1,17,56,595, the amount which was earlier mentioned in the notice dated 14.06.2018 and the same was disputed by the Corporate Debtor in its reply dated 24.07.2018. This demand notice is annexed at **Annexure F** of the Section 9 Application. This demand notice has been replied by the Corporate Debtor through its Ld. Counsel vide its letter dated 14.08.2018, again disputing the demand of Rs. 1,17,56,595/- stating that payment as purportedly claimed in the said notice does not and cannot arise at all and it is mentioned that the instant reply of the said notice may be treated as the dispute under Section 8(2) in respect of the said alleged notice under Section 8 of the IBC, 2016.

12.By pointing out the above conduct of the Operational Creditor as mentioned in reply dated 24.07.2018 in respect of not completing the work at project site and no efforts having been made from their side to resolve the dispute to finalise the

pending bills of outstanding amount, the Ld. Counsel of the Corporate Debtor argued about the alleged outstanding amount shown in the application u/s 9 filed by the Operational Creditor is disputed and such dispute having been raised before issuance of notice u/s 8, comes under pre-existing dispute and hence, this application is liable to be dismissed u/s 9(5)(ii)(d).

13. Looking to the above correspondences, taken place between the Ld. Counsel of both the Operational Creditor as well as the Corporate Debtor as discussed above and also all these correspondences being available, annexed with the Section 9 Application, it is evident that there is a pre-existing dispute on the demand raised by the Operational Creditor as mentioned in the Section 9 Application at an amount of Rs.1,17,56,595. The Ld. Counsel of the Operational Creditor could not deny about any such dispute being in existence except saying that such dispute are only after thought and frivolous, raised in order to deny the legal payment due to be made to the Operational Creditor. However, the facts remain that the

dispute on the payment of RA bills arose between the Corporate Debtor and Operational Creditor much before issuance of notice under Section 8. There was repeated request from the Corporate Debtor to conduct meeting at the project site to settle the issue of disputes and finalize the payment of the RA bills but instead of settling the issues under dispute, it has been found that the Operational Creditor lingered on the matter by insisting to hold the meeting in Corporate Office instead of at project site. Due to dispute between both parties, the contract has been finally terminated on 8th February, 2018 by the Corporate Debtor. After termination of the contract also, the correspondences have been exchanged between the Ld. Counsels of the Operational Creditor as well as the Corporate Debtor raising the issues under dispute but instead of settling the dispute, the demand notice under section 8 has been issued by the Operational Creditor. Therefore, we clearly find that there was a pre-existing dispute between the Operational Creditor and Corporate Debtor and the same has been raised by the Corporate Debtor much before the issuance of notice

under Section 8 and hence, the present application is liable to be rejected in view of the provisions of Section 9(5)(ii)(d), which provides that an application under Section 9 may be rejected if notice of dispute has been received by the Operational Creditor. Such notice of dispute has been found from the record in form of e-mail dated 2nd February, 2018 and 8th February, 2018 as well as in the letter dated 24.07.2018 issued by the Ld. Counsel of the Corporate Debtor as discussed above. In these e-mails/letter, the Corporate Debtor has clearly raised the dispute regarding the amounts demanded in the RA bills because these bills appeared to be raised at inflated rates and for certain works that was found to be not actually performed and also were not certified by the site-in-charge at the respective sites. The work at these sites had also ceased due to Applicant/Operational Creditor's failure to make payments to its appointed suppliers and vendors. Furthermore, because of not handling the suppliers, labourers and sub-vendors by the Operational Creditor in proper manner, the Corporate Debtor was forced in paying

them on behalf of the Operational Creditor to avoid any nuisance at the project site and accordingly, the amount raised in the RA bills were not determinable for payment. For reconciliation of the amount in the bills, the Corporate Debtor requested for a meeting with the Operational Creditor but such meeting could not take place, as it has already been discussed in details earlier. Therefore, we are inclined to accept the argument raised by the Ld. Counsel of the Corporate Debtor that there was a pre-existing dispute.

14. The reliance can be placed upon the judgment of Hon'ble Supreme Court, **Mobilox Innovations Private Limited Vs. Kirusa Software Private Limited (2018) 1 SCC 353** wherein it was held that:

“40. It is clear, therefore, 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

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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 defence which is mere bluster. However, in doing so, the Court does not need to be satisfied that the defence 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.

43.We have seen that a “dispute” is said to exist, so long as there is a real dispute as to payment between the parties that would fall within the inclusive definition contained in Section 5(6).

45. Going by the aforesaid test of “existence of a dispute”, it is clear that without going into the merits of the dispute, the appellant has raised a plausible contention requiring further investigation which is not a patently feeble legal argument or an assertion of facts unsupported by evidence. The defense is not spurious, mere bluster, plainly frivolous or vexatious. A dispute does truly exist in fact between the parties, which may or may not ultimately succeed, and the Appellate Tribunal was wholly incorrect in characterizing the defense as vague, got-up and motivated to evade liability”.

(Emphasis Supplied)

15. The standard convention in such projects such as this one is that to measure the quantum of work done, a joint inspection by both parties is done and then a site certificate is issued. Only after this exercise, the running bills are issued to avoid any discrepancies. In the present case, there was no joint inspection held and thus, no site certificate was issued. We will not deal with the merits of the dispute nor we will go on to adjudicate it. However, suffice it would be to say that there is certainly a pre-existing dispute which is evident from termination of the contract. What amount would be due or not till the date of termination of contract, is also not subject matter of this Tribunal to examine. As a result thereof, the operational debt, if any, could not be rightly determined.

16. The default amount due could also not be determined since the debtor made payments to operational creditor's sub-vendors and labourers. But when the debtor called upon the Operational Creditor to declare the amounts the debtor owes to the Creditor and to reconcile the accounts, the Applicant/Operational Creditor did not comply. Hence, the

amount owed by the Corporate Debtor to the Operational Creditor remained undetermined.

17. Another pertinent issue in the present case is breach of work order by the Applicant/Operational Creditor. The facts discussed in this judgment goes in great detail to show how the applicant through his actions did not hold his part of the deal and thus, it led to the debtor suffering losses at the hands of the creditor. A perusal of the work order specifically clauses 2 and 3 show that the Applicant was responsible for paying the dues owed to labourers and sub-vendors. The Applicant/Operational Creditor did not adhere to this and the Corporate Debtor, in order to ensure resumption of work at the project sites, was forced to pay the labourers and sub-vendors.

18. Another aspect of the work order was the time period stipulated under the contract which was 10 months and failure to adhere to the same was also enumerated in Clause 13 which talks about Applicant/Operational Creditor compensating the Corporate Debtor. Thus, time was of the essence in this contract and the Applicant/Operational Creditor apparently

did not comply with the same. Thus, the Corporate Debtor terminated the contract in accordance with clause 20 of the work order. We are, however, not expressing any opinion on the merits of the dispute.

19. Thus, in view of the pre-existing dispute, operational debt not being rightly determined and termination of contract by the debtor, the present application is liable to be dismissed in terms of Section 9(5)(ii)(d) of IBC, 2016.

20. Therefore, the petition CP (IB)No.286/ALD/2019 filed by the Operational Creditor is hereby dismissed.

-Sd-

(Ashish Verma)
Member (Technical)

-Sd-

(Praveen Gupta)
Member (Judicial)

Priya Agarwal
(Stenographer)