IN THE NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD
DIVISION BENCH
COURT - 1

ITEM No.141
CP(IB) 819 of 2019

Order under Section 9 IBC

IN THE MATTER OF:

Bhadreshwar Vidhyut Pvt Ltd ....**Applicant**
V/s
Max Granito Pvt ltd ....**Respondent**

Order delivered on ..20/09/2022

Coram:

Dr. Madan B. Gosavi, Hon'ble Member(J)
Kaushalendra Kumar Singh, Hon'ble Member(T)

PRESENT:

For the Applicant :
For the Respondent :

ORDER

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

SD/-	SD/-
KAUSHALENDRA KUMAR SINGH **MEMBER (TECHNICAL)**	**DR. MADAN B. GOSAVI** **MEMBER (JUDICIAL)**

BEFORE THE ADJUDICATING AUTHORITY
(NATIONAL COMPANY LAW TRIBUNAL)
AHMEDABAD BENCH
Court No. I

C.P. (I.B.) No.819/NCLT/AHM/2019

(An application under section 9 of the Insolvency and Bankruptcy Code, 2016)

<u>In the matter of :</u>

M/s. Bhadreshwar Vidyut Private Limited
(Formerly known as OPGS Power Gujarat Pvt. Ltd.)
(CIN: U40101TN2007GAT063283)

Branch Office at:
B-406, Solitaire Corporate Park,
Next to Divyabhaskar Press, S. G.
Road, Makarba, Ahmedabad – 380 051

Registered Office at:
Terra 2A, Flat No.404, No.2/5,
Lavender Street Mugalivakkam,
Near PonVidyasharam School Porur,
Chennai 600 125, Tamil Nadu.

...Operational Creditor

Versus

M/s. Max Granito Private Limited
(CIN: U26933GJ2006PTC049192)

Registered Office at:
Survey No.139/Paiki, National
Highway 8-A, Morbi – 363 642

...Corporate Debtor

Order delivered on 20 September 2022.

Coram: Dr. Madan B. Gosavi, Member (Judicial)
Kaushalendra Kumar Singh Member (Technical)

Appearance:

For the Operational Creditor : Mr. Kunal Vaishnav, Ld. Adv.
For the Corporate Debtor : Mr. Vijay H Patel, Ld. Adv.

ORDER

1. The instant application is filed on 15.11.2019 by M/s. Bhadreshwar Vidyut Private Limited (formally known as OPGS Power Gujarat Pvt. Ltd.) under Section 9 of the Insolvency and Bankruptcy Code, 2016 (**'IB Code'**) to initiate the Corporate Insolvency Resolution Process (**'CIRP'**) against M/s. Max Granito Private Limited – Corporate Debtor for an outstanding amount of Rs.64,51,107/- (Rs.23,73,190/- as a principal and Rs.40,77,917/- towards the late payment surcharge).

2. The averments made by the Operational Creditor are summarised as under;

(i) The Corporate Debtor executed an agreement dated 31.03.2015 with the Operational Creditor for supplying 1.09 MW electricity for its unit at 132 KVA sub station at, Jambudia, 8/A National Highway, Morbi-363642. The Operational Creditor supplied the electricity to the Corporate Debtor and raised an invoice of Rs. 1,59,25,359.82/-for for the Month April, May, and June 2015. The Corporate Debtor used to make the payment for the supplied electricity on an Adhoc basis, and as of now an amount of Rs.64,51,107/- remains due and payable by the Corporate Debtor. In spite of repeated requests and reminders by the Operational Creditor, the Corporate Debtor failed to pay the outstanding amount. Thereafter, the Operational Creditor issued a demand notice dated 21.10.2019, but the Corporate Debtor neither replied to the demand notice nor paid the outstanding amount. Hence, it is clear that the petitioner has lost its financial substratum.

3. The Corporate Debtor filed its reply to the application on 18.02.2021 and made the averments which are summarised as under:-

(i) There is no amount due and payable as claimed by the Operational Creditor and denied the default committed by the Corporate Debtor.

(ii) The claim is barred by limitation. The last invoice was raised by the Operational Creditor on 01.07.2015 which is beyond the period of limitation i.e., 3 years. Hence, the present petition is liable to be rejected on this sole ground.

(iii) The Operational Creditor and the Corporate Debtor entered into a Memorandum of Understanding [‘**MoU’**] dated 31.03.2015 for purchasing 1.09 MW RTC power from the Operational Creditor under the Group Captive Model for a period of 6 months. The Group Captive Scheme is used in a case where one develops a power plant for collective usage of many commercial consumers like the Corporate Debtor. The primary advantage of the Group Captive Model is that cross-subsidy, additional surcharges, and electricity duty are not levied on the power procured from the private generator of electricity. The Operational Creditor has supplied electricity to the Corporate Debtor under the Group Captive Model. Under the Group Captive Model, the tariff charged by the electricity generating company is much less as compared to that of the Government Company. The units of electricity purchased under the Group Captive Model from the private entities are given as credit by the distribution company in the present case Paschim Gujarat Vij Corporation Limited [**'PGVCL']**. Therefore, the Corporate Debtor is required to pay an amount for which the PGVCL has given a credit to the Operational Creditor.

(iv) The Operational Creditor had supplied electricity to the Corporate Debtor only for a period of three months i.e. April – 2015 to June – 2015. During that period the Operational Creditor supplied 3077525 KWh electricity to the Corporate Debtor. The details of supplied electricity by the Operational Creditor are as hereunder month-wise:

Month	**Energy Scheduled Units (KWh)**	**Transmission & Wheeling Loss**	**Net Energy Units (KWh)**
April	7,21,525	13.16%	6,26,572
May	13,99,825	13.82%	12,06,369
June	9,56,175	13.70%	8,25,179
Total	**30,77,525**		**26,58,147**

For the aforesaid supplied electricity, the PGVCL has given a credit to the Operational Creditor of 26,38,558 units for the value of Rs.1,23,38,787/-. However, The Corporate Debtor has already paid an amount of Rs.1,31,82,987/-thus an amount of Rs.8,44,200/- has been paid in excess to the Operational Creditor which is required to be recovered by the Corporate Debtor from the Operational Creditor. Hence, the claim alleged to be in default by the Operational Creditor is not due and payable and, therefore, this petition is liable to be rejected.

(v) The Corporate Debtor is a debt-free company and this petition is a mere attempt on the part of the Operational Creditor to recover the outstanding amount by way of the arm twisting method.

(vi) For the adjudication of an application filed under section 9, the Adjudicating Authority is required to examine the following two aspects before passing an order of admission:-

a) There must not be any pre-existing dispute with regard to the debt claimed to be in default.

b) The Corporate Debtor has committed default in paying the debt in spite of serving of default notice.

(vii) The Operational Creditor has failed to establish against which units of electricity and unit credited by the PGVCL, the invoices have been raised. The Adjudication of this issue requires oral as well as documentary evidence which is beyond the ambit of this present application. The Operational Creditor has approached this Adjudicating Authority after 4 years from the alleged date of default itself showing that the present petition has been filed by the Operational Creditor merely for recovery of money under the guise of Insolvency petition.

(viii) Neither the Corporate Debtor nor its authorized representative has acknowledged the debt of the Operational Creditor. Hence, the assertion to the Operational Creditor that the Corporate Debtor has admitted the claim is not correct.

(ix) The Corporate Debtor is a viable company and it has great commercial prospects. At present, the authorized capital of the Corporate Debtor is Rs.9.25 Crores out of which, the issued and paid-up share capital of the Corporate Debtor is Rs.6,99,56,800/- Moreover, the Corporate Debtor is debt free company, hence, has not lost its financial substratum. In view of the above, neither of the above tests for admission of this application is satisfied. Rather there is a serious dispute with respect to the debt due and payable to the Operational Creditor.

4. The Operational Creditor filed its rejoinder and made the averments which are summarized as under:-

(i) This Adjudicating Authority vide order dated 06.01.2021 passed an order to proceed with the matter ex-parte and the Corporate Debtor failed to file the reply as on 15.02.2021. Thereafter, the Corporate Debtor served a copy of the reply to the Operational Creditor on 17.02.2021 that too without filing any application for setting aside the order of ex-parte dated 06.01.2021.

(ii) The Corporate Debtor has suppressed the material facts from this Adjudicating Authority as an undated letter was received by the Operational Creditor in September 2017 wherein the director of the Corporate Debtor has acknowledged that the Corporate Debtor has withheld an amount of Rs.67,65,986/- as on 31.03.2017 and they further informed that they agree and confirm that as and when the payment is received from PGVCL, that will be remitted to the Operational Creditor. This fact makes it clear that the amount is due and payable by the Corporate Debtor. Hence, the claim of the Operational Creditor is not time-barred as acknowledged by the Corporate Debtor in September 2017 which is within three years from the date of raising the invoices.

(iii) The Operational Creditor injected 30,77,525 units of electricity to the Corporate Debtor and after applicable transmission and distribution losses the Operational Creditor billed 26,74,303 units, accordingly, the Corporate Debtor has to consume the aforesaid units in the month of April- 2015, May-2015 and June 2015. However, instead of consuming 26,74,303 units of electricity, the Corporate Debtor has consumed 26,60,401 units of electricity only, and the remaining 13,902 units of electricity had lapsed.

(iv) The Operational Creditor raised invoices for an amount of Rs.1,59,25,359.82/- against which Rs. Rs.23,73,190/- is outstanding excluding the late payment surcharge. Moreover the credits given by the PGVCL on units consumed by the Corporate Debtor is for Rs.1,69,26,429.88/- and this fact has been suppressed by the Corporate Debtor from this Adjudicating Authority. The credit unit given by the PGVCL and its value are as under:-

Month	Credit Units	Value of unit Credited in Rs.
Apr-2015	6,28,853	Rs.39,14,074.46/-
May-2015	12,06,369	Rs.77,39,110.22/-
Jun-2015	8,25,179	Rs.52,73,245.21/-
Total	**Units: 26,60,401**	**Rs.1,69,26,429.89/-**

As regard the Cross-subsidy surcharge and additional surcharge charged by the PGVCL, the Operational Creditor has already given credit to the Corporate Debtor which has already been entered in the Ledger Statement furnished by the Operational Creditor.

5. Heard the learned counsel for both sides and perused the material on record. It is noted that the Operational Creditor supplied the electricity to the Corporate Debtor in the month of April to June and raised 8 invoices for an amount of Rs.1,59,25,360/- .The Corporate Debtor served the demand notice dated 21.10.2019 issued on 22.10.2019 and the same was delivered on 28.10.2019 to the Corporate Debtor. But the Corporate Debtor neither replied to the Demand Notice nor paid the outstanding amount to the Operational Creditor.

6. It is noted that the contention that the claimed amount is beyond the period of limitation to initiate the CIRP against the Corporate Debtor does not sustain as on 26.09.2017 the Corporate Debtor has acknowledged an amount of Rs.67,65,986/- as at 31.03.2017 withheld by it on account of gross subsidy charge, additional surcharge and electricity supplied, which is duly signed by Shri Sukhdevbhai L Patel Director of the Corporate Debtor.

7. For the adjudication of an application filed under Section 9 of the IB Code, the Adjudicating Authority is required to see that the application is complete and payment has been not made by the Corporate Debtor to the Operational Creditor and the demand notice or invoice is served upon the Corporate Debtor. For ready reference we reproduce section 9 of the IB Code hereunder;

> ***"Section 9 Application for initiation of corporate insolvency resolution process by operational creditor.***

XXXXXXXXX

(3) The operational creditor shall, along with the application furnish--

(a) a copy of the invoice demanding payment or demand notice delivered by the operational creditor to the corporate debtor;

(b) an affidavit to the effect that there is no notice given by the corporate debtor relating to a dispute of the unpaid operational debt;

(c) a copy of the certificate from the financial institutions maintaining accounts of the operational creditor confirming that there is no payment of an unpaid operational debt [1] [by the corporate debtor; if available;]

(d) a copy of any record with information utility confirming that there is no payment of an unpaid operational debt by the corporate debtor, if available; and

(e) any other proof confirming that there is no payment of an unpaid operational debt by the corporate debtor or such other information, as may be prescribed.]

(4) An operational creditor initiating a corporate insolvency resolution process under this section, may propose a resolution professional to act as an interim resolution professional.

(5) The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), by an order

(i) admit the application and communicate such decision to the operational creditor and the corporate debtor if,--

(a) the application made under sub-section (2) is complete;

(b) there is no [3] [payment] of the unpaid operational debt;

(c) the invoice or notice for payment to the corporate debtor has been delivered by the operational creditor;

(d) no notice of dispute has been received by the operational creditor or there is no record of dispute in the information utility; and

(e) there is no disciplinary proceeding pending against any resolution professional proposed under sub-section (4) if any;

(ii) reject the application and communicate such decision to the operational creditor and the corporate debtor, if--

(a) the application made under sub-section (2) is incomplete;

(b) there has been [3][payment] of the unpaid operational debt;

(c) the creditor has not delivered the invoice or notice for payment to the corporate debtor;

(d) notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility; or

(e) any disciplinary proceeding is pending against any proposed resolution professional:

Provided that Adjudicating Authority, shall before rejecting an application under sub-clause (a) of clause (ii) give a notice to *the applicant to rectify the defect in his application within seven days of the date of receipt of such notice from the Adjudicating Authority.*

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(6) The corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (5) of this section.”

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8. As per the submission of the Operational Creditor, the PGVCL had credited 6,28,853 units for April 2015, 12,06,369 units for May -2015 and 8,25,179 units for June 2015. However, as per the submission of the Corporate Debtor, the PGVCL had credited 6,26,572 for April 2015, 12,06,369 units for May- 2015 and 8,25,179 for June 2015. The only difference in the credited units is 2,281 for the month of April 2015. As per the statement given by the PGVCL for the credited units, all the units are credited after the deduction of transmission loss and wheeling loss units. A total of 26,60,401 units have been credited by the PGVCL and the Operational Creditor raised eight invoices of Rs. 1,59,25,360/-. The Corporate Debtor claimed that an amount of Rs. 1,31,82,987/- has been paid. As per the ledger account from 01.04..2015 to 14.10.2019 more than Rs. 23,00,000/- is still due and payable by the Corporate Debtor to the Operational Creditor. It is not a disputed fact that the Corporate Debtor has not raised any disputes with respect to the invoices raised by the Operational Creditors. Moreover, Corporate Debtor vide letter dated 26.09.2017 itself admitted that Rs. 67,65,986/- has been withheld on account of gross subsidy charges, additional surcharge and electricity supplied.

9. Accordingly, we find that the present application is defect free as per section 9 (5) of the IB Code, and the outstanding amount meets the threshold limits as section 4 of the IB Code. Hence, we allow this application with the following directions;

ORDER

i) The Corporate Debtor, viz., M/s. Max Granito Private Limited is admitted in the Corporate Insolvency Resolution Process under Section 9 of the Insolvency and Bankruptcy Code, 2016.

ii) The moratorium under Section 14 of the Insolvency and Bankruptcy Code, 2016 is declared for prohibiting all of the following in terms of Section 14(1) of the Code.

a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;

b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;

c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;

d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

iii) The order of moratorium shall have effect from the date of this order till the completion of the Corporate Insolvency Resolution Process or until this Adjudicating Authority approves the Resolution Plan under sub-section (1) of Section 31 or passes an order for liquidation of Corporate Debtor Company under Section 33 of the Insolvency & Bankruptcy Code, 2016, as the case may be.

iv) We hereby appoint **Mr. Dakshesh Pravinchandra Choksi** having **Registration No.IBBI/IPA-001/IP-P00718/2017-18/11300, (E-mail ID: ca.dakshesh@gmail.com)** to act as an IRP under Section 13(1)(c) of the Code. He shall conduct the Corporation Insolvency Resolution Process as per the provision of Insolvency and Bankruptcy Code, 2016 r.w Regulation made thereunder:

v) The IRP shall perform all his functions as contemplated, inter-alia, by Sections 17, 18, 20 & 21 of the Code. It is further made clear that all personnel connected with Corporate Debtor, its Promoter or any other person associated with management of the Corporate Debtor are under a legal obligation under Section 19 of the Code to extend every assistance and co-operation to the Interim Resolution

Professional. Where any personnel of the Corporate Debtor, its Promoter or any other person required to assist or co-operate with IRP, does not assist or Co-operate, IRP is at liberty to make the appropriate application to this Adjudicating Authority with a prayer for passing an appropriate order.

vi) This Adjudicating Authority directs the IRP to make a public announcement for the initiation of the Corporate Insolvency Resolution Process (CIRP) and call for submission of claims under Section 15 as required by Section 13(1) (b) of the Code.

vii) It is further directed that the supply of goods/services to the Corporate Debtor Company if continuing, shall not be terminated or suspended or interrupted during the moratorium period. The IRP shall be under duty bond to protect and preserve the value of the property of the 'Corporate Debtor Company' and manage the operations of the Corporate Debtor Company as a going concern as a part of the obligation imposed by Section 20 of the Insolvency & Bankruptcy Code, 2016. The Operational Creditor is directed to pay an advance of Rs.50,000/- (Rupees Fifty Thousand Only) to the IRP within two weeks from the date of receipt of this order for the purpose of smooth conduct of the Corporate Insolvency Resolution Process (CIRP) and IRP to file proof of receipt of such amount to this Adjudicating Authority along with First Progress Report. Subsequently, IRP may raise further demands for Interim funds, which shall be provided as per Rules.

viii) The Registry is directed to communicate a copy of this order to the Operational Creditor, Corporate Debtor and to the Interim Resolution Professional and the concerned Registrar of Companies, after completion of necessary formalities, within seven working days and upload the same on the website immediately after pronouncement of the order.

8. Accordingly, **CP (IB) No. 819/9/NCLT/AHM/2019** is allowed and disposed of.

SD/-	**SD/-**
Kaushalendra Kumar Singh	**Dr.Madan B. Gosavi**
Member (Technical)	**Member (Judicial)**

Ramashish/Swetambary