

IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH

CP 1317/I&BP/NCLT/MAH/2017

Under Section 9 of the I&B Code, 2016

In the matter of

ELECON ENGINEERING COMPANY LTD.

.... Operational Creditor
v/s.

DUCON TECHNOLOGIES (I) PVT. LTD.

.... Corporate Debtor

Order delivered on 02.11.2017

Coram: Hon'ble Mr. B.S.V. Prakash Kumar, Member (Judicial)
Hon'ble Mr. V. Nallasenapathy, Member (Technical)

For the Petitioner: 1. Ms. Shilpa Kapil, Advocate for Operational Creditor
2. Kaushik Patel, Representative of
Elecon Engineering Company Ltd.

For the Respondent: 1. Mr. Simil Purohit, Counsel for Corporate Debtor
2. Mrs. Bharati Narichania, Adv. on record
3. Mr. Vishal Narichania, Counsel

Per B. S. V. Prakash Kumar, Member (Judicial)

ORDER

Oral order dictated in the open court on 26.09.2017

1. It is a Company Petition filed u/s.9 of Insolvency & Bankruptcy Code, 2016 by Operational Creditor, namely Elecon Engineering Company Ltd. against Corporate Debtor, namely Ducon Technologies (I) Pvt. Ltd. stating that the Corporate Debtor failed to make payment of ₹1,91,00, 663 inclusive of interest at 22% per annum from each invoice first of such invoice due date

being 22.3.2012, the Company Petition is filed to initiate Insolvency Resolution Process against the Corporate Debtor.

2. The case of the petitioner is it has executed two projects called as Aditya project and Mahan Project. The corporate debtor itself is a contractor to provide services to the end user Hindalco, the petitioner is one of the subcontractors engaged by the corporate debtor to provide services to the end user through the corporate debtor.

3. The Petitioner Counsel says that the Corporate Debtor approached the Petitioner and issued a Letter of Intent dated 1.7.2010 for Design, Engineering, Manufacturing, Supply, Structural Work, Supervision of erection, testing and commissioning of Pipe Conveyor System for Aluminum Project, for Hindalco Industries Ltd. The schedule of payment mentioned in the Letter of Intent which are as follows:

Name of the Project	Supply value in (₹)	Supervision value in (₹)
Aditya Aluminum Project	3,85,03,900	23,50,000
Mahan Aluminum Project	3,63,67,000	23,50,000
Total	7,32,84,900	47,00,000

4. The Petitioner has given the following details of dues:

- a) *An amount of ₹79,84,271 is due and payable in respect of Aditya Aluminum Project.*
- b) *An amount of ₹47,98,121 is due and payable as interest due from each invoice first of such invoice due date being 30.6.2012 in respect of Aditya Aluminum Project.*
- c) *An amount of ₹64,07,777 is due and payable in respect of Mahan Aluminum Project.*

- d) *An amount of ₹36,76,233 is due and payable as interest due from each invoice first of such invoice due date being 26.04.2012 in respect of Mahan Aluminum Project.*
- e) *An amount of ₹32,55,318 is Debit note issued for Reimbursement of CST, Manpower, Consumables, Freight and Additional Expenses on A/C Elecon.*

5. The Petitioner Counsel submits that though the invoices were raised from 2012 onwards, since payments have been done on running account, the Petitioner Counsel says this Petition is not hit by Limitation for the Corporate Debtor itself entered into minutes dated 17.1.2014 and another 5.1.2015.
6. On looking at minutes dated 17.1.2014, it appears it is minutes drawn out among Aditya, the corporate debtor, Trident, Indiana, the petitioner and Babu Construction at Lapanga, the points discussed in the said meeting were on two aspects, one on technical and two on commercial points. Since our case is limited to the petitioner claim, on technical aspects, it has been said that some replacements as to supply made by the petitioner is to be done, on commercial aspect, it has been said that subcontractors of the corporate debtor have approached Aditya, on being approached, it has been decided that the final figure payable to the petitioner as ₹59.27lakhs with a caveat that full and final spare belt and limit switch must be supplied by 25th February 2015. After having arrived how much to be paid to the petitioner (it is a subcontractor supplying material to Aditya through the corporate debtor), all these parties to the minutes agreed that Aditya would release the money directly to the subcontractors, including the petitioner, after debiting the cost to the corporate debtor from their mechanical completion bill.

7. On looking at another email dated 15.5.2015 sent by the petitioner reflects that the outstanding payment to the petitioner from the Corporate Debtor was ₹62 lakhs as on 15.5.2015 and the petitioner agreeing to replace the spare belts for both the projects (Mahan & Aditya) and the same is laying ready at vendor work and will be dispatched to each site after getting the formal dispatch clearance from the corporate debtor/HIL with a request to the corporate debtor to intervene for release of their dues from HIL.
8. The Petitioner has taken email dated 15.5.2015 into consideration for two reasons, one to say that this Company Petition is not hit by limitation for there being minutes between the parties in the year 2014, two to make a request to the Corporate Debtor to ensure payment is released from Aditya.
9. In the minutes dated 17.1.2014, it is evident a Tripartite agreement between Aditya, the corporate debtor and the Petitioner herein along with other Contractors has been arrived at with an understanding over quantum of dues and agreement with Aditya that dues decided would be directly paid by Aditya to the subcontractors relieving the corporate debtor from paying dues to the petitioner and other subcontractors.
10. When the petitioner itself entered into minutes on 17.1.2014 with the principal company (end-user) to receive payment from the principal (end user), thereafter time and again when the petitioner itself asked this corporate debtor to interfere for release of their dues from the end user, today how this petitioner could file this petition saying that the corporate debtor defaulted in making payments to it?
11. In another email dated 8.7.2015 come from the corporate debtor to the petitioner discloses that a statement of accounts has been furnished to the petitioner incorporating the actual cost incurred by the debtor due to the delay in replacing the pipe conveyor belts at Mahan site and inviting

commercial person from the petitioner side to understand the details of debit notes and the cost incurred by the corporate debtor. To which the answer from the petitioner in email dated 7.7.2015 is that the petitioner also incurred losses, meaning thereby the corporate debtor already incurred losses. In a letter dated July 3, 2015, written by the debtor to Aditya reflects that the debtor forwarded statement of Account along with a final payment to be made to the petitioner was ₹18,18,369 subject to confirmation of receipt of PBG (Performance Bank Guarantee).

12. The Corporate Debtor Counsel issued notice u/s.434 of the Companies Act 1956 on 3rd November 2016 to say that the joint-meeting was convened on 5.1.2015 and an email came from the corporate debtor mentioning LD amount as ₹29,69,025 for Mahan project and ₹28,27,342 for Aditya Project, that was objected by the petitioner saying delay was not attributable to the petitioner.

13. Therefore by going through the correspondence, minutes of the meeting entered into between the parties, and notice sent u/s 434 of Companies Act 1956, it appears that invoices raised by this Petitioner against the Corporate Debtor over a period of time up to January, 2014, the obligation for payment to the Petitioner has been shifted to Aditya in the minutes dated 17.1.2014, thereby it cannot be said that this case is free from ambiguity in respect to whether the payment to be made by the Corporate Debtor or Aditya.

14. Moreover, since the quantum of debt, obligation to payment and delay in rendering services appear to be in dispute, we are of the view that this Bench cannot invoke jurisdiction u/s.9 to admit this Petition.

15. Other contentions raised by the Petitioner Counsel herein is, that this Corporate Debtor has not given reply to the notice issued u/s 8 of I&B Code,

2016, whereby it is to be construed that the Corporate Debtor defaulted in making payment for no reply has been given to section 8 notice. The petitioner counsel argued that as long as reply to section 8 notice has not come within 10 days from the date of receipt of notice, since cause of action arose for filing petition u/s 9 of the Code has arisen, this petition shall be allowed without looking into other aspects.

16. Here, in this case preexisting dispute has already been in existence between the parties even before section 8 notice was given by the petitioner, moreover when liability has been shifted to Aditya (Hindalco) as per minutes dated 17.1.2014, occurrence of default itself has become doubtful, how this Bench could then consider that existence of debt and occurrence of default has been proved, in view of the same, this Bench hereby holds that the petitioner failed to prove its case.

17. Accordingly, this Company Petition is dismissed.

Sd/-

V. NALLASENAPATHY
Member (Technical)

Sd/-

B.S.V. PRAKASH KUMAR
Member (Judicial)