

**NATIONAL COMPANY LAW TRIBUNAL  
AHMEDABAD BENCH  
COURT-2**

**CP (IB) 624 of 2019**

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

**In the matter of:**

**M/s. GMW Private Limited**

**...Applicant/Operational Creditor**

**Versus**

**JMC Projects (India) Limited**

**...Respondent/Corporate Debtor**

**Order Pronounced on: 16/02/2022**

**Coram:**

**DR. DEEPTI MUKESH,  
HON'BLE MEMBER (JUDICIAL)  
KAUSHALENDRA KUMAR SINGH,  
HON'BLE MEMBER (TECHNICAL)**

**MEMO OF PARTIES**

**M/s. GMW Private Limited**

[Formerly known as General Mechanical Works Pvt. Ltd.]

Through it's Director

Mr. Jatinder Singh P. Panesar

Registered Office at:

885, GIDC Industrial Estate,

Makarpura, Vadodara,

Gujarat- 390010.

**...Applicant/Operational Creditor**

**Versus**

**JMC Projects (India) Limited,**

Registered Office at:

A-104, Shapath- 4,

Oppl Karnavati Club,

S.G. Road, Ahmedabad,

Gujarat- 380051.

**...Respondent/Corporate Debtor**

**Present:**

For the Applicant: Mr. Sharvil Majumdar, Adv. With Mr. Shashvata Shukla, Adv.

For the Respondent: Mr. Jay Kansara, Adv.

**ORDER**

**Per: Dr. Deepti Mukesh, Member (Judicial)**

1. The instant Application is filed by M/s. GMW Private Limited (for brevity 'Applicant') through Mr. Jatinder Singh P. Panesar, Director, authorized through board resolution dated 24.06.2019, under

Section 9 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'Code') read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 against JMC Projects (India) Limited (for brevity 'Corporate Debtor').

2. The Applicant [GMW Private Ltd.] is private limited company, incorporated under the provisions of the Companies Act, 1956, registered with Registrar of Companies, Gujarat with CIN: U45207GJ2005PTC046920 and registered office is located at: 885, GIDC Industrial Estate, Makarpura, Vadodara, Gujarat- 390010.
3. The Corporate Debtor [JMC Projects (India) Ltd.] is a Limited Company, incorporated under the provisions of the Companies Act, 1956 on 05.06.1986, duly registered with Registrar of Companies, Gujarat with CIN: L45200GJ1986PLC008717 and its registered office is located at: A-104, Shapath- 4, Oppl Karnavati Club, S.G. Road, Ahmedabad, Gujarat- 380051. The authorized share capital of the Corporate Debtor is Rs. 50,00,00,000/- and Paid-up share capital of the Company is Rs.33,58,10,336/-.
4. The applicant is engaged in the business of execution of technological structural steel works, piping systems, fuel oil handling systems & storage tanks, balance of plant (BOP) and fire protection systems for thermal power projects etc. and the applicant is a small engineering firm and executes sub-contracts by taking packages from all major companies/clients and executing

them to their complete satisfaction.

5. In this case Applicant Submitted that Bharat Heavy Electrical Limited("BHEL") floated a tender for civil, structural and architectural work for the main power block along with auxiliaries and balance of plant 2 x 250 MW expansion project at GSECL sikka thermal power station at Jamnagar. In furtherance of the same, Memorandum of Understanding dated 29.02.2008 was entered into between the Corporate Debtor [JMC Projects (India) Ltd.] and the Applicant which was followed by signed minutes of meeting dated 29.02.2008 and a pre-tender tie-in Agreement dated 08.03.2008. It was agreed and understood between the parties that the Respondent corporate debtor would be the main contractor to BHEL and the Applicant was to be the sub-contractor responsible for only the structural steel portion of the total package. The responsibility of the overall package to BHEL remained with Respondent corporate debtor.
6. On the date 12.05.2008 BHEL issued Letter of Intent being LOI No./BHE/PW/PUR/SKT-CVL/564/LOI upon the Respondent corporate debtor. Following this, the Corporate Debtor issued LOI No. JMC/SKKA/2008/LOI/1 dated 16.05.2008 to the Applicant. The Applicant responded vide LOA No. GMWPL/J.3004/0866/08.
7. The Corporate Debtor issued a work order bearing No. JMC/BHEL/SIKKA/2008/01 on 30.04.2009 to the Applicant. The

work order was for the execution of structural steel works for main power block like TG, Boiler, ESP and control room, bunker bay, etc. for unit 3 and 4 of 2 x 250 MW Sikka Thermal Power Station, GSECL, Sikka, Distt-Jamnagar, Gujarat.

8. It is further submitted that the applicant duly and satisfactorily carried out the work under the work order dated 30.04.2009 and raised periodic bills and invoice upon the Respondent which were accepted by them and part payments were also released from time to time. The ultimate recipient for these goods and services was BHEL who issued a completion certificate on 11.08.2016. The Bank Guarantee furnished by the Applicant was also returned by the Respondent on 30.09.2018.
9. It is submitted by the Applicant that there was an open, current and mutual account running between the parties. At the foot of the ledger (including Retention Ledger) of the applicant for the amount payable by the Corporate Debtor, a total sum of INR 1,06,32,863.40 is outstanding as on 31.03.2018. Despite the satisfactory completion of work for which no dispute or other objections was ever raised by the Corporate Debtor and in spite of several reminders, the Respondent has failed and neglected to pay this amount and has thereby committed a default of an unpaid operational debt. The Corporate Debtor has on several occasions acknowledged the liability to the Applicant such as in the E-mail

dated 05.02.2019 wherein it is stated that a sum of INR 49,16,179/- is admitted to be payable to the Applicant.

10. The Applicant sent a demand notice on 02.07.2019 under section 8(1) in form 3 of the IB code demanding the unpaid debt. The Corporate Debtor replied to the demand notice disputing the claim to be absolutely false and misleading and also further stated that in the Tie-Up Agreement the applicant had agreed to execute the works with corporate debtor as an Associate. The terms of the work order governing the relationship between corporate debtor and applicant were on back to back basis as agreed by and between corporate debtor and BHEL for the works. Unless otherwise expressly stated in the said work order it means that no amount under the work order is payable to applicant by corporate debtor unless the corresponding payment is received by corporate debtor from BHEL.

11. It is submitted by the applicant that from bare perusal of the documents it is not reflecting that the payment terms were on back to back basis. This is reinforced by the fact that in the preliminary agreement dated 29.02.2008, the parties have specifically cancelled clauses 12.3 and 12.4 which stipulated payment on back to back basis and the parties have specifically made an endorsement thereon which is also signed by both parties, agreeing that the payment terms will be as per the Minute of Meetings dated

29.02.2008. This was once again reiterated in the Minutes of Meeting dated 20.04.2008. It is pertinent to note that both the Minutes of Meeting dated 29.02.2008 and 20.04.2008 form part of work order. Hence, it is not true that the payment terms were on back to back basis and Corporate Debtor is not entitled to withhold INR 36,44,441/- pertaining to the labour welfare cess pursuant to alleged deductions made by BHEL and also submitted that since the payment terms were not on back to back basis, the question of withholding any amount awaiting release from BHEL does not arise.

12. As per the applicant, Corporate Debtor on 03.08.2019 addressed a letter to one Mr. S.K. Tripathi, Deputy Managing Director & CEO, of Corporate Debtor, regarding appointment of a sole Conciliator. The applicant received the letter of appointment of sole Conciliator on 08.08.2019 and the applicant immediately responded vide email and letter dated 09.08.2019 and stated that the appointment of sole Conciliator by the Corporate Debtor is on unilateral basis.

13. Thereafter since no payment was made by Corporate Debtor, the applicant filed an application under section 9 for its unpaid debt of an amount of Rs. 1,06,32,863.40/- which is reflected in Form V of Part IV.

14. The Respondent filed reply and raised following contentions-

- a. That the Corporate Debtor replied and denied all the averments which was made in the demand notice u/s 8 of the

Code and sent by the applicant.

- b. That all the statements and averments in the application are completely arbitrary, whimsical and without, cogent evidence and applicant has miserably failed to provide any such working, for an amount claimed by it. The applicant has also failed to produce either any certificate or any relevant accounts from banks/financial institutions confirming that there is no payment of operational debt by the Corporate Debtor.
- c. That an amount of INR 49,16,187/- was outstanding in favour of the respondent after the completion of the work under the said work order. Out of the aforementioned amount, an amount of INR 36,44,441/- was to be withheld towards labour cess under BOCW Act as agreed between parties in the final Minutes of Meeting dated 12.12.2016. Therefore, an amount of INR 12,71,746/- was due and payable, which has been duly paid by the respondent corporate debtor on 14.11.2019. Further an amount of INR 4,79,401/- was also paid by the Corporate Debtor to applicant on 14.11.2019 in terms of the Final Minutes of Meeting dated 12.12.2016 towards deduction of salaries of the supervisory staff. Thus, there is no payment which is outstanding between the parties and the present proceeding is a vexatious attempt

to seek to recover the alleged amount which is admittedly disputed by the respondent.

- d. That Part-VI reveals that the case of applicant is not at all based upon any particular invoice, which has remained unpaid and/or an agreement. The applicant has miserably failed to submit any kind of computation and/or break-up and/or justification for the alleged outstanding amount of INR 1,06,32,863.40/- or otherwise. The applicant itself has contradicted its own claim/outstanding amount vide series of emails dated 02.01.2019, 03.01.2019, 04.01.2019, 08.01.2019 and 11.01.2019 and has claimed different amounts in all these e-mails, which are also annexed with the application.
- e. That the alleged claim raised by the applicant was seriously disputed by the respondent even before the issuance of demand notice. The respondent also shared all the relevant data through emails from the year 2010 till the year 2017. Applicant failed and neglected in taking any steps for reconciliation, hence categorically denying and disputing outstanding dues claimed by the applicant vide its response email dated 04.01.2019, 05.01.2019 and 05.02.2019.
- f. That during the final settlement meeting dated 12.12.2016, the applicant specifically agreed that an amount of INR

36,44,441/- was to be withheld and further the same was to be paid on back-to-back basis only upon receiving such amount by the Corporate Debtor from BHEL. Further it is not the case of the applicant that the decision taken at the final settlement meeting and agreed between the parties was retracted and/or the same was a result of any alleged misrepresentation, fraud or coercion effected by the Corporate Debtor.

15. The applicant has filled additional affidavit along with followings rebuttal documents to support its claim.

- i. A copy of the amendment to the contract dated 30.03.2012.
- ii. A copy of the e-mail dated 14.08.2015.

16. The applicant has filed its written submission, reiterating the stand taken in pleading and relied on following judgments-

- i. Hon'ble Supreme Court in Mobilox Innovations Pvt. Ltd v. Kirusa Software Private Ltd. (Civil Appeal No. 9405 of 2017) dated 21<sup>st</sup> September 2017 observed that

*“A dispute must not be spurious, hypothetical or illusory. A dispute which is a patently feeble argument or assertion of facts unsupported by evidence must be rejected”.*

- ii. Hon'ble NCLAT in V.V. Nagarajan v. Vishnusudha Textiles (CA No. 30 of 2018) dated 10<sup>th</sup> May 2018 observed that

*“Where Corporate Debtor failed to demonstrate that he had within a period of 10 days of receipt of the demand notice brought to the notice of the operational creditor the existence of dispute, CIRP to be admitted”.*

iii. Hon’ble NCLAT in Rajeev K Aggarwal v. Panipat Texo Fabs(P) Ltd.

(CA No. 715 of 2018) dated 27<sup>th</sup> November 2018 observed that

*“Where Corporate Debtor had not raised dispute as regards defective goods prior to the issuance of demand notice, dispute raised as defence to defeat the petition under section 9 was just sham designed to defeat the petition, section 9 rightly admitted”.*

iv. Hon’ble NCLAT in Ahluwalia Contractors (India) Ltd. v. Raheja

Developers Ltd. (CA No. 703 of 2018) dated 23<sup>rd</sup> July 2019

observed that

*“In absence of existence of a dispute between the parties or record of pendency of suit or arbitration before receipt of demand notice, Corporate Debtor, having defaulted to pay more than Rs. 1 lakh, CIRP was to be admitted”.*

17. The respondent has also filed its written submission and relied on following judgments-

i. Hon’ble Supreme Court in Transmission Corporation of Andhra Pradesh Ltd V. Equipment Conductors and Cables

Ltd. (Civil Appeal No. 9198 of 2019) dated 22<sup>nd</sup> March, 2021 observed that

*“IBC was not intended to be a substitute to a recovery forum and that whenever there was existence of a real ‘dispute’, IBC provisions could not be invoked. The object of the code, at least insofar as operational creditors are concerned, was to initiate Insolvency Process against the Corporate Debtor only in clear cases where a real ‘dispute’ between the parties as to the ‘debt owed’ did not exist”.*

- ii. Hon’ble Supreme Court in Mobilox Innovations Pvt. Ltd v. Kirusa Software Private Ltd.(Civil Appeal No. 9405 of 2017) dated 21<sup>st</sup> September 2017 observed that

*“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. 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 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.”*

18. Heard submissions and perused the documents and judgements relied upon. It is undisputed fact that both the parties had agreed on certain terms and conditions and executed a memorandum of understanding dated 29.02.2008. On perusal of clause 12.5 of memorandum of understanding it is seen that parties have agreed that the payment for the portion of work done by the applicant shall be released with 24 hrs. of release of payment by BHEL to the corporate debtor. It is also agreed fact that the whole payment for the work done by the applicant has been duly released by the Corporate Debtor except a payment with respect to labour cess which is withheld by the BHEL to Corporate Debtor. In the final settlement meeting held on 12.12.2016 and minutes signed on 13.12.2016 by operational creditor and Corporate Debtor, both agreed on back to back payment system and thereafter payments were made by Corporate Debtor time to time. The disputes raised by Corporate Debtor time and again and even prior to issuance of

section 8 notice to Corporate Debtor through various e-mails are on record. Moreover, the Corporate Debtor has not only denied any debt due but has detailed the invoice amounts paid and balance unpaid as agreed between the parties thereafter. Thus, we are of the view that dispute raised by Corporate Debtor is not sham and the application filed under section 9 of IBC deserved to be rejected in view of the ratio of decision of Hon'ble Supreme Court in Mobilox case(supra).

19. As a sequel to above discussion the application fails and is rejected.

20. Application is disposed of in term of above order.

21. Registry is directed to communicate a copy of this order to the parties.

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**Kaushalendra Kumar Singh**  
**Member (Technical)**

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**Dr. Deepti Mukesh**  
**Member (Judicial)**