

**NATIONAL COMPANY LAW TRIBUNAL
BENGALURU BENCH**

ATTENDANCE CUM ORDER SHEET OF THE HEARING OF NATIONAL COMPANY LAW TRIBUNAL,
BENGALURU BENCH, BENGALURU, HELD ON ~~19.05.2020~~ 21.05.2020

THROUGH VIDEO CONFERENCING

CAUSE LIST

PRESENT: 1. Hon'ble Member (J), Shri Rajeswara Rao Vittanala
2. Hon'ble Member (T), Shri Ashutosh Chandra

CP/CA No.	Purpose	Sec	Name of Petitioner	Petitioner Advocate	Name of Respondent	Respondent Advocate
CP (IB) No. 372/BB/2019	For pronouncement of order	Sec 9 of I&B Code 2016	M/s I & B Engineers (P) Ltd	Rohit Sharma & Hari Babu Thota, PCS	M/s Scorpio Engineering Pvt Ltd	Maneesha Kongovi, Advocate

ADVOCATE FOR PETITIONER/s: Hari Babu Thota,

ADVOCATE FOR RESPONDENT/s: Ms. Maneesha Kongovi

ORDER

CP (IB) No. 372/2019 is dismissed by separate order


member (T)


member (J)

**IN THE NATIONAL COMPANY LAW TRIBUNAL
BENGALURU BENCH**

C.P.(IB) No.372/BB/2019
U/s 9 of IBC, 2016
R/w Rule 6 of I&B (AAA) Rules, 2016

Between

M/s. I & B Engineers (P) Limited,
Registered office at
P-70, CIT Road, Scheme:VIM,
Kankurgachi, Kolkata

West Bengal- 700054

- Petitioner/Operational Creditor
And

M/s. Scorpio Engineering Private Limited,
Registered office at No. 132,
Wheeler Road,

Bengaluru - 560005

- Respondent/Corporate Debtor

Date of Order: 21st May 2020

Coram: 1.Hon'ble Shri Rajeswara Rao Vittanala, Member (Judicial)
2. Hon'ble Shri Ashutosh Chandra, Member (Technical)

Parties/Counsels Present:

For the Petitioner : Mr. Hari Babu Thota, PCS

For the Respondent : Ms. MaheeshaKongovi

ORDER

Per: Rajeswara Rao Vittanala, Member (J)

1. C.P. (IB) No.372/BB/2019 is filed by M/s.I & B Engineers (P) Limited(hereinafter referred to as 'Petitioner/Operational Creditor') under Section 9 of the IBC, 2016,R/w Rule 6 of the I&B (Application to Adjudicating Authority) Rules, 2016, by inter alia seeking to initiate Corporate Insolvency Resolution Process in respect of M/s.Scorpio Engineering Private Limited(hereinafter referred to as 'Respondent/Corporate Debtor') on the ground that it has



committed default for total amount of 79,03,739.00/- (Rupees Seventy Nine Lakhs Three Thousand Seven Hundred and thirty Nine Only) which includes for Rs. 32,35,375.00 towards interest @ 24% p.a upto 21st June 2019.

2. Brief facts of the case, as mentioned in the Application, are as follows:

(1) M/s. I &B Engineers (P) Limited (hereinafter referred to as 'Petitioner/Operational Creditor') is an Unlisted Private Non-Government Company bearing CIN No. U45309WB2008PTC124644 having its registered office at P-70, CIT Road, Sch: VIM Kankurgachi, Kolkata, West Bengal - 700054.

(2) M/s. Scorpio Engineering Private Limited (hereinafter referred to as 'Respondent/Corporate Debtor') is an unlisted Private Non-Government company incorporated on 07.10.1986, under the Companies Act, 1956 with CIN: U40106KA1986PTC007827 having its registered office at No.132, Wheeler Road, Cox Town, Bengaluru - 560005. The Authorised Share Capital of the Company is Rs.3,50,00,000/- and Paid-up Share Capital of the Company is Rs.3,50,00,000/-.

(3) During the course of business, the Operational Creditor had supplied spare parts, accessories and components of the plant and machinery to the Corporate Debtor, vide Invoice dated 11th August 2016, in pursuance to Purchase Orders placed during the year 2015 and 2019. The Respondent failed to pay outstanding amount in spite of best efforts made by the Petitioner and thus fell due for a sum of Rs. 79,03,739.00 including an interest @ 24% p.a. upto 21st June 2019. The goods supplied were duly accepted by the Corporate Debtor without any dispute.

- (4) The Petitioner issued demand notice on 27th June, 2019 upon the Corporate Debtor, as per the provisions of the Code by calling upon it to pay the outstanding amount within a period of 10 days from the date of receipt of copy of demand notice. Though notice was received on 3rd July 2019, the Respondent neither replied nor paid the outstanding amount till date. Since the outstanding operational debt is impacting on the working capital of the Operational Creditor and is unpaid till date evidencing that the Corporate Debtor requires resolution as per the provisions of the code. Hence the application.
3. The Respondent/Corporate Debtor, has opposed the Petition, by way of filing statement of objections dated 31.01.2020, by inter alia contending as follows:
- (1) The Respondent Company is an engineering and manufacturing Company specializing in bulk material handling systems and equipment. It has entered into an Contract with Indian Power Corporate Haldia Limited now known as Hiranmaye Energy Limited, for a coal handling plant, and this contract was then entered into with IPCHL's associated company - Shristi Infrastructure Development Corp Limited, thus for purpose of this project, the Respondent engaged contractors, one of whom was the Petitioner.
- (2) The Petitioner was supplying pulleys, Idler Rollers and Idler Brackets, Technological structures etc and the Petitioner was making supplies for IPCHL's project. IPCHL/SIDCL would verify and confirm all vendors, who supplied material towards their project albeit through the Respondent as IPCHL/SIDCL paid to the vendors, through the Respondent, their respective billed amounts. The Respondent made no profits on the supplies made by the Petitioner to IPCHL/SIBCL. Further,



supplies were made by the Petitioner to the IPCHL/SIDCL site and payments were also made by IPCHL/SIDCL to the Petitioner, through the Respondent. In any event IPCHL/SIDCL was making the payment, the Petitioner was desirous of having the payment directly credited to it from IPCHL/SIDCL. A meeting was also held between IPCHL, the Petitioner and the Respondent on 24.11.2015 wherein, the IPCHL confirmed that it would release the balance amount to the Petitioner directly and was categorically accepted by them.

- (3) It is stated that for the purpose of security/safeguarding its interest, the Petitioner requested the Respondent to provide post-dated cheques for the amounts to be paid by IPCHL. There was an unequivocal understanding between three parties that the post-dated cheques issued by the Respondent will be returned, once IPCHL makes the required payment to the Petitioner and was consistency followed by the IPCHL as well. Further IPCHL/SDPCL made the payments to the Petitioner and the security cheque provided by the Respondent were duly returned to the Respondent by the Petitioner.
- (4) It is further stated unfortunately the IPCHL defaulted the last few payments under the Tripartite Agreement. The authorised representatives of the Petitioner sent emails to the representatives of IPHCL requesting for payments to be made at the earliest. The representatives of IPCHL also attached scanned copies of DD drawn towards the Petitioner for the said payments. Therefore, the Petitioner was clear that its dues were to be paid IPCHL, hence reminders were sent to IPCHL. However, when IPCHL failed to comply with its obligations of payment, the Petitioner with malafide intention has deposited the post-dated cheques issued by the Respondent. The Petitioner issued a false and frivolous notice under Section 138

of the Negotiable Instruments Act to the Respondent and this was responded by the Respondents vide their reply notice dated 06.04.2017. The Respondent disputed its liability to pay. Further the Petitioner had filed a criminal Complaint in Kolkata and the same was being contested by the Respondent, the Petitioner is also well aware of the same.

- (5) The Petitioner claim is against IPCHL, who is liable to make such payments to the Petitioner. The Petitioner has filed the instant petition after a delay of three years without any explanation for such delay. The petition appears to be merely another method to harass the Respondent. If there existed an admitted debt, there appears no reason as to why the Petitioner has preferred the petition at such belated stage without assigning any reasons for such delay. Further the documents submitted by the Petitioner are voluminous and are being in dispute. This is a matter where the Petitioner would need to lead evidence to substantiate its claim. Therefore, the petition is untenable and is not compatible with the Provisions of the I & B Code, 2016 as well as Form 5 under Rule 6 of the I & B (AAA) Rules, 2016. Further the Petitioner along with the disputed principal amount has also claimed interest at an exorbitant rate of 24%, which is not all part of the Tripartite Agreement in question nor any other documents. Therefore, the Petitioner made yet another false and untenable claim against the respondent.

4. In pursuance to the above statement of objection, the Petitioner has also filed a Rejoinder dated 14.02.2020 by interalia contending as follows:

- 1) It has denied that the payments were received from the India Power Corporate Haldia Limited (IPCHL) through the



Respondent. Since the payment was from IPCHL the Petitioner was desirous of having the payment directly credited to it from IPCHL. The modus operandi of the business between the parties such that the Corporate Debtor would raise the work orders on the Petitioner, as per the word order the Petitioner would provide it services to the Respondent and subsequently the Petitioner raised invoices upon the Respondent. Further the Respondent on various occasions stated before the Petitioner that he is not in position to make payments and hence wanted to be made payments directly from IPCHL to the Petitioner account. At the request of the Respondent, MOM was executed on 24.11.2015 among all three parties. Further, the Respondent themselves have acknowledged the debt in their own books and have issued post-dated cheques to the Petitioner as per Annexure -1 of the petition. The Respondent themselves have made payment to the Petitioner on 16.11.2016 and 11.01.2017, after the date of the execution of the MOM.

2) The Respondents have been only trying to hold responsible someone else for its own deeds. The Respondent states that onus is on IPCHL, despite being aware that the invoices were raised on the Respondent, the goods was received by the Respondents, the work orders were issued by the Respondent, hence it cannot be admitted that the burden for payment is on someone else. The Respondent has been showing in its balance sheet for the period ending 2018-19. The Respondent not only acknowledged the outstanding debt by way of a letter but also in its financial statement.

5. Heard Shri Hari Babu Thota, learned Counsel for the Petitioner, and Ms. MaheeshaKongovi, learned Counsel for the Respondent. We have carefully perused the pleadings of both the Parties and



extant provisions of the Code and various decisions cited by the Parties on the issue.

6. Shri Hari Babu Thota, learned Counsel for the Petitioner, while reiterating various arguments made in the Petition and rejoinder, as briefly stated supra, has further filed written submission dated 17.02.2020 by interalia contending as follows:

1) The Respondent have themselves acknowledged the debt and thus issued a cheque bearing No. 516727 dated 31stDecember 2016 for Rs 46,68,364/ which was subsequently dishonoured, leading to filing of Criminal Case U/s 138 of the NI Act, before the Competent Court, which is stated to be pending.

2) The MOU in question was entered at the request of Respondent on the ground that was undergoing financial crunch and thus requested IPCHL to make payments to the Petitioner. Accordingly, IPCHL also made payments in part. The Respondent has also paid Rs. 15,00,000 on 16th November,2016 and Rs.10,00,000 on 11th January, 2017 , which are after execution of MOM dated 24.11.2015. Therefore, the Respondent alone is liable to pay the outstanding amount in question.

7. Ms. Maheesha Kongovi, learned Counsel for the Respondent, while reiterating various averments made in the Reply as briefly stated supra, has further filed Written Arguments dated 20.02.2020 by interalia stating as follows:

(1) The Respondent entered into a turn-key project with IPCHL now known as Hiranmaye Energy Limited, for a coal handling plant and this contract was entered with IPCHL associate company – Shristi Infrastructure Development Corp Limited. While initially purchase orders were place by the Respondent on the Petitioner, during the course of the project, through tripartite agreement, it was agreed that IPCHL would bear the costs of supplies made by the Petitioner by making direct



payments to them. Several meetings were held among IPCHL, Petitioner and the Respondent, on 08.07.2015, 12.08.2015 and 24.11.2015, whereby the Petitioner agreed that IPCHL would release the balance amounts to it. The Petitioner is signatory to all such minutes. It is also pointed that IPCHL has entered into similar agreements with other vendors as well and has been making direct payments.

- (2) Pursuant to the Tripartite agreements, the Petitioner has received payments from IPCHL directly as demonstrated below:

DATE	PAYMENT
24.07.2015	IPCHL made payment to the Petitioner for Rs. 50,00,000/- (Adhoc)
10.08.2015	IPCHL made payment to the Petitioner for Rs. 50,00,000/-
04.09.2015	IPCHL made payment to the Petitioner for Rs.30,00,000/- as per MOM dated 12.08.2015
17.10.2015	IPCHL made payment to the Petitioner for Rs. 25,00,000/-
19.12.2015	IPCHL made payment to the Petitioner for Rs. 1,20,00,000/- as per MOM dated 24.11.2015
06.08.2016	IPCHL made payment to the Petitioner for 7015518/-

- (3) The Petitioner confirmed the Tripartite agreement several times in correspondence and sent reminders for payment to IPCHL and not to the Respondent. As per the Petitioner own correspondence, the Respondent was not liable to make the payments to it.
- (4) It is trite law that when there exists a pre-existing dispute, the instant Petition is not maintainable. The Petitioner makes a bare denial of the Tripartite Agreement without any explanation. The Petitioner contention requires to be tested in law and withstand the test of trial. There is no admission of



debt by the Respondent at any point in time. The Petitioner cannot claim against Respondent and its IPCPHL, who is liable to make such payments, if any. The Petitioner has filed the instant petition after the delay of three years without any explanation for such delay. The petitioner is merely another method to harass the Respondent. If there existed an admitted debt, there appears no reason why the Petitioner has preferred the petition at such belated stage and without assigning any reason for such delay.

(5) The Respondent also relied upon the following judgements in support of its case:

- i. A.D Electro Steel Private Limited & ors v.s Anil Steels (2017) 144 SCL 448 passed by the Hon'ble NCLAT
- ii. Mac Nally Sayaji Engineering Limited v.s Kee Projects Limited (2018) 148 SCL 704 passed by the Hon'ble NCLAT
- iii. IBA Health (I) Pvt. Limited vs Info Drive Systems Sdn. (2010) 10 SCC 553 passed by Hon'ble Supreme Court of India

8. In the light of rival contentions made by the Respective parties, as briefly stated supra, main issues to be considered in the instant case, are as follows:

- a) Whether the Petitioner prima facie proved that the Debt in question is liable to be paid by the Respondent;
- b) Whether the instant petition is filed with an intention to recover alleged outstanding amount or to initiate Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor;
- c) Whether any pre-existing dispute exists between the Parties before issuing statutory demand notice in question;
- d) Whether the claim in question is barred by laches and limitation.



9. As stated supra, the Respondent has entered into a turn-key project with IPCHL now known as Hiranmaye Energy Limited, for a coal handling plant and this contract was entered with IPCHL associate company - Shristi Infrastructure Development Corp Limited. Though purchase orders in question, were placed by the Respondent on the Petitioner for supply of goods in question, those are meant and delivered to ultimate customer namely, IPCHL. Therefore, ultimately, all three parties to the issue viz: the Petitioner, Respondent and IPCHL, conducted three meetings on 08.07.2015, 12.08.2015 and 24.11.2015, whereby the Petitioner agreed that IPCHL would release the balance amounts to it. Accordingly, a Minutes of Meeting (MOM) dated 24.11.2015, was duly executed by all three Parties, wherein IPCHL has agreed to release outstanding payment subject to despatch of materials mentioned therein. IPCHL has also entered into similar agreements with other vendors as well and has been making direct payments.

Prior to and after to the said MOM called as Tripartite Agreement, the Petitioner has received payments from IPCHL directly as mentioned below:

DATE	PAYMENT
24.07.2015	IPCHL made payment to the Petitioner for Rs. 50,00,000/- (Adhoc)
10.08.2015	IPCHL made payment to the Petitioner for Rs. 50,00,000/-
04.09.2015	IPCHL made payment to the Petitioner for Rs.30,00,000/- as per MOM dated 12.08.2015
17.10.2015	IPCHL made payment to the Petitioner for Rs. 25,00,000/-
19.12.2015	IPCHL made payment to the Petitioner for Rs. 1,20,00,000/- as per MOM dated 24.11.2015
06.08.2016	IPCHL made payment to the Petitioner for 7015518/-

10. It is also relevant to point out herethat the Petitioner got issued Legal Notice as early as 14.03.2017, through their Counsel M/s



Rajendra Lal Dua & Co to the Respondent. In response to the said legal notice, the Respondent, got issued a Reply dated 06.04.2017, through their Counsel by inter-alia stating that the Petitioner has agreed to receive payments directly from IPCHL; they have also paid Rs. 3,45,51,500 out of Rs. 4,71,83,890.61; and they have already authorised the Petitioner to collect defaulted amount (last) INR 46,68,364 from IPCHL. Therefore, they have made it clear that there was no existing liability between them, after amendment of contract as agreed by it, and thus requested them to return the security cheques (PDC) given by them. It is also stated that the Petitioner has already received more than 70 % of payments directly from IPCHL. By perusal of various correspondence exchanged between the Petitioner and IPCHL, as enclosed at page No. 21-28, Annexure R4 to the statement of objection, leaves no doubt about the assertion/contention of the Petitioner that the Respondent alone was liable to pay the outstanding defaulted amount, and not from IPCHL is not all tenable and baseless especially after MOM in question was duly executed and received payments too. Moreover, when the Respondent has replied the Petitioner as early as 6.04.2017, as stated supra, stating they are not liable to pay any amount to them, the Petitioner have failed to initiate any action except a Criminal petition stated to have been filed U/s 138 of NI Act, till they have issued statutory Demand notice dated 27th June, 2019, under the provisions of Code. Even as per purchase orders/ MOM in question, there is no mention about element of interest for defaulted amount. Contrary, interest is also claimed for Rs. 32,35,375/- along with principal amount of default. The Petitioner has not furnished any reasons for not taking appropriate legal action in pursuance to their earlier legal notice dated 14.03.2017.



11. It is not the case of Petitioner that the Respondent has received goods in question or received payments directly from IPCHL and used it. The contention of the Petitioner that the MOM in question would not bind them is not at all tenable and it is liable to be rejected. And all the Parties to MOM are bound by terms and conditions of it. So far as the issue of Post-dated cheques by the Respondent and their dishonour is concerned, it is for the Parties to prosecute the Criminal Case, which is stated to be pending before Competent Court, subject to merits of that case. So far as judgements cited by the Party, as cited supra, they are not squarely covered by the facts and circumstances of the case, as available in the instant case, as briefly stated supra.
12. For the aforesaid reasons and circumstance of the case, we are of the considered opinion that the Petitioner failed to make out even prima facie case about the defaulted amount to be payable by the Respondent, apart from it, the Petition is barred by laches and limitation. In addition, there is a pre-existing dispute, which cannot be gone into summary proceedings initiated under the provisions of Code, and it is initiated with an intention to recover alleged outstanding from a party, who is not liable to pay it, rather than to initiate Corporate Insolvency Resolution Process, which is the object of Code. Therefore, the Petition is liable to be dismissed.
13. In the result, C.P. (IB) No.372/BB/2019 is hereby dismissed as devoid of merits. We make it clear that this order will not come in the way of Petitioner to recover the alleged outstanding amount, by initiating appropriate proceedings, under any other permissible law.
- No order as to costs.



**ASHUTOSH CHANDRA
MEMBER, TECHNICAL**



**RAJESWARA RAO VITTANALA
MEMBER, JUDICIAL**