



IN THE NATIONAL COMPANY LAW TRIBUNAL

KOCHI BENCH

KOCHI

CP(IB)/35/KOB/2022

(Under Section 9 of IBC, 2016)

In the matter of:

M/s. Prasad and company (Project Works) Private Limited

MEMO OF PARTIES:

PRASAD AND COMPANY (PROJECT WORKS) PRIVATE LIMITED,
(Formerly known as Prasad and Company (Project Works) Limited), 6-3-871,
“Snehalatha” Green Lands Road, Begumpet, Hyderabad, TS-500016.

...Applicant/Operational Creditor

-Versus-

THE FERTILIZERS AND CHEMICALS TRAVANCORE LIMITED, (Facts
Engineering and Design Organization), A Division of the Fertilizers and Chemical
Travancore Limited, (Government of India Enterprise), Udyoga Mandal, Kochi,
Kerala – 683 501.

... Respondent/Corporate Debtor

Coram:

Shri P. Mohan Raj : Member (Judicial)

Shri Satya Ranjan Prasad : Member (Technical)

Appearances (through video conferencing)

For Applicants : Ms. Dharmya,
Mr. Pradeep Joy,
Advocates

For Respondent : Mr. Paulose C Abraham,
Advocate

Order reserved on: 13.07.2023
Order pronounced on: .09.08.2023



ORDER

1. This application has been filed under Section 9 of the Insolvency & Insolvency & Bankruptcy Code, 2016 (hereinafter referred to as IBC) read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 by **M/s. Prasad and Company (Project Works) Private Limited** (CIN: U74210TG1983PTC003842) (hereinafter 'OC') for initiation of Corporate Insolvency Resolution Process against **The Fertilizers And Chemicals Travancore Ltd.(Fact Engineering and Design Organisation)(FEDO)**, the Corporate Debtor, (hereinafter 'CD') for alleged default in repayment of Operational Debt of ₹4,35,34,381/- (Rupees Four Crore Thirty Five Lakh Thirty Four Thousand Three Hundred Eighty One only), due and payable by the Corporate Debtor to the Operational Creditor.
2. Applicants (OC) submit that the CD is a government of India enterprise incorporated in 1943 has its registered office at Udyoga Mandal, Kochi, 683501. The paid-up capital of the CD is Rs. 647.07 Crores.

Brief facts of the petitioner are as follows:-

3. The petitioner was awarded with Annexure 1 Letter of Intent (LOI) dated 12.09.2014 and the accompanying Annexure 2 work order No.4800005418 dated 16.09.2014 by CD for construction of Academic Buildings and Library Block including external development works at NIT, Nagaland, principal employer, for an amount of Rs.95,43,27,845.52/- as part of its phase 2 construction work. As per the contract entered between OC and CD, the interim payment was to be made against the running bills for value of work executed and for which tests prescribed if any are completed after various deductions and adjustment of any amount due from contractor. The OC raised various bills on the project out of which 2 bills- Annexure 3 RA Bill No.24 dated 28.02.2019 for Rs. 2,01,40,759/- and Annexure 4 RA Bill No.25 dated 18.07.2019 for Rs. 63,32,902/- are pending for payment. As per contract, the



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CD was liable to pay GST on the same which was also paid by the OC amounting to Rs.10,69,954/-. It is stated that the CD failed to honour the bills on time as per contract and a total amount of Rs. 4,35,34,381/- is due to the OC including interest on GST and delayed payment. The OC made communications with CD for release of payments. Finally on 14.07.2021, the OC issued Annexure 5, Demand Notice was issued to CD demanding payment of aforesaid amount. The CD replied on 28.07.2021 wherein the bills were not disputed but a counter claim was raised which OC state was to defeat right of OC. CD stated that the amount under bills along with the bank guarantee furnished by the OC will be appropriated for liquidated damages by the CD on apprehension that the principal employer, NIT Nagaland would invoke liquidated damages as per contract. The OC state that as on date there are no liquidated damages levied or proposed by CD or principal employer. The OC further relied on Annexure 7 Minutes of Meeting of CD dated 09.06.2020 where the pending dues are placed in agenda for clearing to contractors/OC.

4. The OC state that the CD is in operational debt to the OC exceeding Rs. 1 Crore and the registered office of CD is in Kerala. The date of default is on account of RA bill dated 28.02.2019 and 18.07.2019 and GST bill on 31.10.2019. The OC has filed the following as evidence of debt :-
- (i) Letter of Intent (LOI) Vide CM(CON)—FE—CON-8144— 233, dt.12.09.2014
 - (ii) Work Order No.4800005418, dt. 16.09.2014
 - (iii) Copy of RA Bill No.24 dt. 18.07.2019
 - (iv) Copy of RA Bill No.25 dt. 27.02.2019
 - (v) Demand Notice dt. 14.07.2021
 - (vi) Reply by Corporate Debtor to the demand notice dt. 28.07.2021
 - (vii) Minutes of Meetings dt 09.06.2020



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- (viii) Copy of Ledger from 01.04.2020 to 31.03.2021
 - (ix) GST payment receipt dt. 31.10.2020
 - (x) Letters addressed to Corporate Debtor confirming the outstanding dated 21.11.2021
 - (xi) Office memorandum dated 19.02.2020
 - (xii) Office memorandum dated 13.05.2020
 - (xiii) Office memorandum dated 12.11.2020
 - (xiv) Letter addressed to Corporate Debtor confirming the outstanding dated 21.01.2021
 - (xv) Bank statement of the OC
 - (xvi) Statement of Accounts of OC from 01.10.2018 to 02.11.2018

Brief Contents of the reply are as follows: -

5. CD state that it is a central government enterprise engaged in manufacture and marketing of fertilizers and petrochemicals which is functioning under the Ministry of Chemicals & Fertilizers and it is a profit-making PSU with record turnover. The CD was selected as executing agency by NIT Nagaland, Principal employer, for civil construction works at Dimapur for which an MoU was made on 22.03.2014. In furtherance of MoU, CD engaged OC for construction of academic building and other external development works for an initial contract value of Rs. 95,43,27,845.52/- after tender process. LOI dated 12.09.2014 and work order dated 16.09.2014 was issued and Annexure B2 agreement dated 23.09.2014 was entered as per clause 12 of work order. It is stated that clause 3 of work order prescribe time of completion of contract which was 22 months from 15th day of LOI, i.e, the work was to be completed before 26.07.2016. As per clause 4 of work order, performance bank guarantee(PBG) for Rs.47716392 was submitted by OC extendable till work completion. As per clause 6, security deposit shall be deducted from each



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running bill of contractor @ 5% of gross value of RA bill. Further as per clause 3.3 of Annexure B3 General conditions of contract(GCC), the release of security deposit shall be subject to defect liability period of 12 months from completion certificate issued by CD. Clause 3.4 of GCC state that the CD reserve right to forfeit security deposit in addition to other claims in event of contractors failure to fulfil contractual obligation or termination of contract.

6. It is stated that the OC failed in completing the works issued by the CD within time period of LOI. The work was further extended till 31.03.2020 but only 38% of the work was completed. It is stated that the CD had clearly indicated that the extension was without prejudice to the terms of work order. Clause 20.1 of the GCC makes the OC liable for compensation for delay @0.5% of value of contract per week subject to maximum of 10% of value of contract and that such amount shall be adjusted against any sum payable. As per same, the OC is liable to pay 954327845.552/- as compensation of 10% of value of contract. It is stated that the CD repeatedly requested vide Annexure B5 and B6 letters to the OC to complete work which was not done.
7. The CD had finally issued Annexure B7 email dated 24.08.2020, i.e before issuance of demand notice, to the OC informing the reason for withholding the RA bills and the counter claim against compensation for delay in completion of project. It is also stated that the computed amount of compensation is exclusive of amount of PBG. It is stated that a net amount of Rs. 5.33 crore will be recoverable from the OC as liquidated damages on account of the compensation of delay. It is stated that the OC is trying to evade the payment by way of this application. The CD had replied to the demand notice of the OC on 28.07.2021 stating the aforesaid terms and that as per the computation of liquidated damages and encashment of BG, an amount of 87,49,702.36 is to be paid to CD.
8. The CD state that the OC did not comply with the conditions of the contract and did not resume the works pending. It is further stated that the OC has filed a writ petition before Hon'ble High Court of Telangana for stay of invocation



of bank guarantee. Also stated that the clause 11 of the Work order provides for Arbitration clause for dispute and liquidated damages but regardless of the same the OC proceeded to IBC process. The CD further points out the petitioner himself has admitted that the payment against running account bills for value of work executed shall be paid after deductions and due amount from contractor. It is further stated that the contract between the CD and OC is an independent contract and the terms are not contingent on action or inaction of a third party, here, the principal contractor and the contention that it is due to non-payment by principal employer the dues were not settled is baseless. The CD further disregard the annexure 12 letter dated 21.11.2020 and annexure 16 letter dated 21.01.2021 as the claim raised therein are disputed vide annexure B7 letter as early as on 24.08.2020.

Brief facts of the petitioner's rejoinder are as follows: -

9. The petitioner in his rejoinder state that the Annexure 9 minute of meeting of principal employer and CD state the NIT has not made any payment to CD from June 2017 till April 2020. Further that the payment amount of Rs.12.41 crore is due for resuming work has been advised to be paid which include the OC payments on RA bills. It is also stated in minutes that the contractors have demobilised the work at site due to nonpayment. It is further stated that the CD had informed the OC that the CD intends to foreclose the project with NIT. The amount of counter claim in guise of damages is only an effort to defeat the eligible payment due to OC. The demand notice states the apprehension that NIT may invoke liquidated damages on account of OC's failure to complete work on time which is not correct and that as of date there are no liquidated damages. It is stated that no reason is attributable to OC for delay of completion of work and that the extension of work was also carried without imposing any liquidated damages. The IC relies of clause 16.3, Force Majeure which provides for any cause or discretion of FEDO is beyond the control of the contractor. Further clause 16.4 state that "*In case delay by FEDO is of a substantial nature and has affected work or part thereof in such a manner that it cannot be proceeded with as per*



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agreed schedule for the part so affected shall be extended correspondingly, decision of engineer-in-charge shall be final in respect of any extension of time.” Further clause 16.5 state that Respondent provides a fair and reasonable extension of time for completion of work. Even non—application by the contractor for extension of time shall not be a bar for giving a fair and reasonable extension of time. And Clause 44.0 provide that Force Majeure provides failure of client/owner to hand over the entire site and/or release funds for the project, to FEDO i.e. Respondent shall constitute Force Majeure. The time for performance of the obligations by the parties shall be deemed to be extended for a period equal to the duration of Force Majeure event. Both parties shall make their best efforts to minimise the delay cause by the Force Majeure event. If the failure/delay of the client/owner in handing over the entire site and/or in releasing the funds continuous even on the expiry of the stipulated date of completion, FEDO, may, at the request of the Contractor foreclose the contract without any liability to either party. It is stated that the email dated 24.08.2020 invoking liquidated damage was replied vide letter dated 02.09.2020 with the fact that the original date of completion was extended till 31.03.2020 with supplementary work orders for valid reasons and the imposition of liquidated damages is arbitrary. It is further stated that the arbitration clause is not a bar for present application under sec 9 IBC and that the CD themselves did not resort to arbitration to realise liquidated damages but has illegally withheld the payment. It is contended that the delay in completion was purely due to fund flow crunches by principal employer and is not the OC fault. The CD release all RA bills late and that the withholding of these amounts is illegal. It is stated that hence no valid dispute is raised before section 8 demand notice. It is stated that the writ petition filed by OC for stay on bank guarantee was a step to protect its interest. As the CD is a profit making company, it is contingent upon them to honour the payments irrespective of payments from principal employer.

10. Heard arguments and perused documents on record. The point for consideration is:



I. Is there pre-existing dispute between the parties?

Here it is pertinent to note that there were previous communications between the OC and CD as early as on 24.08.2020 implying that the amount which is due to be paid by the CD is on dispute. However instead of going forward with realising the amount through the agreed arbitration process, the parties went sitting on the fence while the project was ongoing vide extensions. The fact that there is a valid invoice raised and payment is in default is not denied here. But the fact remains that the amount payable is disputed as per the agreed contract and terms of work order between the parties. The demand notice sent on 28.07.2021 was also replied with this notice of a dispute. In consequence of dispute, it is also a fact that a writ petition was filed to stay the invocation of the bank guarantee. Hence matters with respect to the contractual dispute as to whether a delay occurred on part of OC, or the amount was due and not paid by principal employer, or whether liquidated damages are to be realised under the contract are to be decided. All these questions can be decided only in civil suit or through the arbitration process which is envisaged thereunder.

11. In the situation as held by Apex court in Mobilox Innovations 2018 (1) SCC 353, the defence/dispute raised by the respondent is plausible contention requiring further investigation which is not a patently feeble legal argument or an assertion of facts unsupported by evidence. The defence 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. In fine it is answered to the point framed that pre-existing dispute prevails between the parties.
12. In the result, the petition is **DISMISSED**.
13. The Registry is hereby directed to send e-mail copies of the order forthwith to all the parties and their counsel for information and for taking necessary steps.



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14. Let the certified copy of the order be issued upon compliance with requisite formalities.

15. File be consigned to records.

SATYARANJAN PRASAD Digitally signed by SATYARANJAN PRASAD
Date: 2023.08.09 13:07:25 +05'30'

Satya Ranjan Prasad
Member (Technical)

PANDIAN MOHAN Digitally signed by PANDIAN
MOHAN RAJ
Date: 2023.08.09 14:19:36 +05'30'
RAJ

P. Mohan Raj
Member (Judicial)

Signed on this the 9th day of August, 2023.

Rohit.