

IN THE NATIONAL COMPANY LAW TRIBUNAL

MUMBAI BENCH

CP (IB) 2520/MB/2018

Under Section 9 of the I&B Code, 2016

In the matter of

Valuelabs LLP,

Plot No. 41, Survey No. 64, Hi-tec City,
Phase II, Madhapur, Hyderabad, Telangana-
500081

... Petitioner

V/s

Global Energy Private Limited,

207, Gera Imperium II Patta Plaza, Panjim,
Goa- 403001

... Corporate Debtor

Order delivered on: 02.12.2019

Coram:

Hon'ble Smt. Suchitra Kanuparthi, Member (J)

Hon'ble Shri V. Nallasenapathy, Member (T)

For the Petitioner: Mr. Vaibhav Bhure Adv. a/w Adv. kunal Kanungo

For the Corporate Debtor: Mr. Pulkit Sharma Adv. i/b Adv. Abhishek Adke

Per: Suchitra Kanuparthi, Member (Judicial)

ORDER

1. Valuelabs LLP (hereinafter called 'Petitioner') has sought the Corporate Insolvency Resolution Process against Global Energy Private Limited (hereinafter called the 'Corporate Debtor') on the ground that the Corporate Debtor committed default to the extent of Rs. 3,92,29,844/-, as provided under Section 9 of Insolvency and Bankruptcy Code, 2016 (hereafter called

the 'Code') read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

2. Pursuant to the solar power purchase agreement, the Corporate Debtor defaulted in payment of several invoices in respect of supply of power. The list of 14 invoices wherein the outstanding amounts remained unpaid is enclosed along with the Petition. The supply of power commenced in the year 2016 and it was agreed as per the terms of the agreement that the Petitioner will raise the invoice on the Corporate Debtor after adjustments of units and the consumers (end customers), electricity bill of Discom facilitator (grid) and only to the extent of units adjusted in the consumer bills. Accordingly, the Corporate Debtor would make payments to the Petitioner within 10 days from the receipt of the Invoice
3. The Petitioner has generated and supplied power to end customer through the grid settlement report. The said reports are generated by the grid are available, duly signed of by the purchaser (end customer), seller (Petitioner) and AP Transco/ TS Transco Grid. The settlement reports are annexed to the petition and constitute adequate proof of supply of power under the contract. However, despite supply of power duly supported by signed settlement reports, the Corporate Debtor has defaulted in making payment of outstanding dues under the invoices amounting to Rs. 3, 92,29,844/- the Power purchase agreement also envisages levy of interest @24% p.a. from the date of default in respective invoices. Thus, the amount of Rs. 5,67,70,860/- is amount payable towards interest.
4. The Petitioner issued demand notice dated 08.05.2018 to the Corporate Debtor. The notice was served on the Corporate Debtor on 14.05.2018. The Corporate Debtor replied to the demand notice on 01.06.2019, which is beyond a period of 10 days as envisaged under Section 9 (1) of the Code and merely stated that reconciliation of accounts has not been carried out and hence denied the outstanding dues.

5. The Corporate Debtor filed reply and denied the averments made by the Petitioner. The Corporate Debtor confirmed that the tariff of payment agreed by the parties was at Rs. 5.30/ kwh. And further an amendment to the agreement dated 09.10.2014 the tariff was revised to Rs. 5.10/ kwh. An addendum was drawn by the parties on 10.07.2015 to extend the terms of agreement till 30.06.2015 and the tariff was amended and modified @Rs. 5.30/ kwh for a period of 01.11.2014 to 30.06.2015 and @5/ kwh for a period of 01.07.2015 to 31.12.2015. The Corporate Debtor further stated that vide Email dated 13.12.2016 the parties have agreed to a price of RS. 3.70 for the supply of power and contrary to this the Petitioner has proposed a billing structure vide an Email dated 17.04.2017 and charged two different rates for supply of power. The Corporate Debtor reiterated its stand that the basic intention of performance of agreement for purchase of solar power cannot be differentiated between banked units and consumer units and the sale takes place on the basis of generation credit notes (GSN) issued by the generator on month wise basis. The Petitioner unilaterally out of its volition, decided to charge under the head of normal and banked units respectively.
6. On 09.01.2018, the Corporate Debtor invited the Petitioner for amicably resolving the matter, but the meeting was not held. The Corporate Debtor further invoked arbitration clause as per provisions of the agreement and issued notice dated 31.10.2018 to the Petitioner. The Corporate Debtor further stated that on account of non-crystallisation of liabilities owing to disputed price of supply of electricity, the present proceeding before the Hon'ble Tribunal is premature.
7. The Corporate Debtor has also filed its additional affidavit and categorically stated that the entire mechanism of renewable energy is undertaken on the principals of banking of energy prevailing in the state, where the solar power generated gets injected in the grid of Discom, they spontaneously utilise the injected units for its own consumer base. There is a definitive

arrangement of transfer of power by generators to Discoms and end consumer and payment of the monies for consumed energy through grid settlement report generated and GSN issued.

8. The Corporate Debtor further averred that the contractual arrangements between the parties did not allowed transfer of title of the GSNs in favour of Corporate Debtor. During the entire cycle of events culminating in to the end consumers for the units injected into the grid by the generator, there was no role of Corporate Debtor in the capacity of the trader. Since adjustment and creditors and issuance of GSN was happening inter se between three parties i.e. generator, the relevant distributor licensee and the end consumer. The Corporate Debtor was nowhere party to the same nor was a privy to the unit's adjustments happening amongst the parties. The Corporate Debtor further reiterated that for the transaction to culminate into sale and purchase of sale / community the title and ownership of good/ community has to be transferred by the buyer to the seller. In the present transaction there are no regulatory mechanism contemplated under the Electricity Act wherein trading can be undertaken in GSN. Therefore, even if Corporate Debtor wanted to, he could not undertake the activity of buying and selling of GSNs. The Corporate Debtor further disputed the liability of payment on the premises of banked and non-banked units and acknowledged that it is willing to pay, discharged its obligations of payment @Rs. 3.70/- unit and further it is difficult to reconcile its accounts pretending to lots of transactions and hence amounts due and payable to the Petitioner could not be crystallised and ascertained due to breakdown of software and loss of records.
9. The Petitioner filed his rejoinder and averred that the Corporate Debtor never disputed the contents of the invoices, rates, provisions of the services, they just gave vague responses taking excuses of the software breakdown, loss of records and data at its end and neglected to pay the amount. The Petitioner reiterated that there is no pre-existing disputes

pending between the Petitioner and the Corporate Debtor and even the reply of the demand notice the Corporate Debtor only talks about only reconciliation of accounts at their end.

10. The Petitioner further stated that after the case was posted for hearing on 01.11.2018, the Corporate Debtor vide email on 01.11.2018 illegally invoked Arbitration Clause under Solar Power Agreement dated 18.06.2013 as amended from time to time. The Corporate Debtor is a habitual defaulter who has not made payment to a large number of electricity generators and is cheating both electricity generators as well as consumers. A large number of electricity consumers filed criminal complaints for cheating against the Corporate Debtor before the Economic Offences Wing, Mumbai. The Maharashtra Regulatory Commission vide its order dated 15.10.2018 ordered an enquiry against the Corporate Debtor. The Petitioner further submitted that without prejudice to his rights, the Corporate Debtor at para 4.6 vide its own admission agreed that revised price of Rs. 3.70 per unit for banked units become conclusive and effective only from 13.12.2016, which means that for the electricity supplied before the said date, the revised rates will have no relevance. In view of that the invoice no. 10027, 10028, 10029 and 10043 dated 7.01.2016, 07.01.2016, 07.01.2016 and 18.01.2017 respectively which is prior to 13.02.2016 and therefore the revised price of Rs. 3.70 per unit cannot be applied to these invoices as such an amount of Rs. 1,08,77,104/- is outstanding. These amounts exceeding Rs. 1 lac payable by the Petitioner to the Corporate Debtor, the petition filed by the Petitioner under section 9 of the IBC, 2016 merits admission.

11. The energy settlement statement issued by the transmission corporation of Andhra Pradesh Ltd makes a very clear distinction between the banked units and the other normal units. The Petitioner reiterated that the outstanding invoices which are subject matter of the petition pertains to the category of other units and do not fall under the category of banked units. Therefore, the reduced price of Rs. 3.70 per unit cannot be applied for such other units.

12. Heard the arguments, the issue between the parties is whether there is any distinction drawn between other normal units and banked units under the power purchase agreement. The Petitioner reiterated that the whole of outstanding invoices which are subject matter of this petition pertain to the category of other units i.e. units consumed by the end consumers of the Corporate Debtor and do not fall under the category of banked units as evidenced by the Energy Settlement/ Report itself and therefore the reduced price of Rs. 3.70 per unit cannot be applied for such other units. The solar power purchase agreement executed between the parties expressly states that the Petitioner agreed to sell the energy to the Corporate Debtor. At clause 4.2, the parties envisaged an energy accounting system wherein, it was agreed procedure that energy delivery measurement and accounting will be in accordance with the prevalent norms and procedure of RPC/RLDC/SLDC/DISCOM, the energy supplied by the Petitioner during the month will be based on the regional energy account/ settlement procedure prescribed by the State Regulatory Authority/ DISCOM provisions for settlement (Credit note) issued by DISCOMs as the case may be and will form the basis of final settlement.
13. At clause 5 of the agreement, the Corporate Debtor has agreed to pay the Petitioner a tariff for energy generated/ supplied at schedule A. In accordance to clause 6 of the agreement, the Petitioner was required to raise a monthly invoice within 10 days of each month along with the proof of delivery and monthly credit notes certified by DISCOM. The Corporate Debtor had obligation to pay to the Company within 15 days of receipt of invoice. As per the schedule A annexed to the power purchase agreement, it was agreed that the Corporate Debtor would pay an amount of Rs. 5.30 per KWH for a period from 1st July 2013 to 31st March 2014.
14. The Petitioner and the Corporate Debtor executed a fresh solar power purchase agreement on 03.10.2014 for a period of 3 months, wherein it was

agreed a tariff of Rs. 5.30 KWH would apply for a period of 1st November 2014 to 31st January 2015. Under the said agreement, the Petitioner was to raise the invoice and the Corporate Debtor within 10 days would make the payment.

15. The parties have further executed addendum to the solar power purchase agreement which extended the term of agreement till 30.06.2015. addendum II to the agreement was executed by the parties and the agreed tariff as captured is as follows: -

SCHEDULE – A		
S. NO.	PERIOD	RS. KWH
1.	1-Nov-2014 to 30-June-2015	5.30
2.	1-July-2015 to 31-Dec-2016	5

16. All the above agreements and addendums do not talk about two different units of rates/ tariffs as agreed between the parties. The Petitioner for the first time vide its email on 13.12.2016 confirmed the price for banked energy as follow;

*"From: Naveen- (<mailto:naveen@globalenergy.net.in>)
Sent: Tuesday, December 13, 2016 6: 25 PM
To: Siva Ram Kumar
Cc: Benarjee tsp
Subject : Re: Confirmation for Banked energy price*

Ok Sir,

Thanks

Naveen. M

On Tue, Dec 13, 2016 at 6:21 p.m., Siva Ram Kumar <sivaram.meruga@valuelabs.com>wrote:

Hello Naveen,

As discussed, for Banked units price @ 3.70/- per unit.

With Regards,

Siva Ram Kumar"

In view of the above mail, it can be said that there was an agreement regarding applicability of price for Banked units @ 3.70 per unit.

17. Further, upon perusal of the agreed terms of the power purchase agreement, it is clear that the electricity generated by the Petitioner through its solar power plant could be injected into the electricity grid maintained by the DISCOM to be consumed by various consumers. Thereafter, the DISCOM acknowledges the receipt of particular of renewable energy and issues Generation Credit Note (GCN). Then on the basis of energy settlement / Report, the Petitioner raises the invoice as per the units consumed by the end consumer. The Corporate Debtor is liable to pay these invoices raised by the Petitioner whether they are banked units or other units as per to the agreed terms and conditions of the power purchase agreements and addendums executed between the parties. According to the Petitioner the mechanism of the banked units is that the total electricity generated by the generator during a period is more than the electricity actually consumed by the end consumer, the excess electricity is called banked units i.e. unconsumed electricity will go to the bank and are called banked units. He relied on the energy settlement/ Report statement for the month of August 2017 which captures the column of bank units separately. Thus, the Energy Settlement / Report talks about two different units i.e. other units and bank units. Whereas the Corporate Debtor claims that the energy generated by the Petitioner is directed injected to the DISCOM and is banked and agreed and thus, there is no distinction between the normal units and the banked units.

18. There is no provision or discussion regarding the normal units and the banked units in the entire solar power purchase agreement and addendums executed between the parties. Evidently, there has been an agreement of sale of electricity and purchase of electricity by and between the Petitioner

and the Corporate Debtor. During the course of business a new term called banked units were introduced and were agreed to be paid at certain rates/tariffs. The unpaid invoices raised by the Petitioner vide the invoice no. 10027, 10028, 10029 and 10043 dated 7.01.2016, 07.01.2016, 07.01.2016 and 18.01.2017 respectively amounting to Rs. 1,08,77,104/- is outstanding. And the unpaid invoices from 21.02.2017 to 20.04.2018 (annexures 122 – 131 of the Petition) amounts to Rs. 2,09,81,027/- remain outstanding.

19. There is a clear liability of payment of unpaid invoices in terms of the solar power purchase agreement and addendums between the parties, wherein the Corporate Debtor has agreed to buy the energies generated and supplied to the DISCOMs under the definitive arrangements and with the obligation to pay the said amounts within the stipulated agreed time. The liability of the Corporate Debtor cannot be absolved under the premise that they are liable to pay only @ 3.70 per unit basing on the distinction drawn between the banked units and the other/ normal units.
20. M.A. 3120/2019 IN C.P. 2520/2019 was filed by the Manager Administration of the Corporate Debtor seeking to intervene and implead as a party in the above matter cannot be entertained and is thus, dismissed on the ground that this is an application filed by the Petitioner in the capacity of Operational Creditor under section 9 of the IBC, 2016 as he has not received the payment of the outstanding dues under unpaid invoices raised by the Operational Creditor under the terms and conditions of the Solar Power Purchase Agreement and addendums thereto. Therefore, neither an intervenor be impleaded as party nor can he be allowed to be heard in an application under section 9 of IBC, 2016. The legislature has envisaged the recourse of workmen / employees during the resolution process.
21. This Adjudicating Authority, on perusal of the documents filed by the Creditor, is of the view that the Corporate Debtor defaulted in paying the outstanding unpaid invoices raised by the Petitioners in terms of the Power

Purchase Agreement and addendums thereto and also placed the name of the Insolvency Resolution Professional to act as Interim Resolution Professional and there being no disciplinary proceedings pending against the proposed resolution professional, therefore the Application under of Section 9 is taken as complete, accordingly this Bench hereby admits this Petition prohibiting all of the following of item-I, namely:

- I.
 - (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 (SARFAESI Act);
 - (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.
- II. That the supply of essential goods or services to the Corporate Debtor, if continuing, shall not be terminated or suspended or interrupted during moratorium period.
- III. That the provisions of sub-section (1) of Section 14 shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.
- IV. That the order of moratorium shall have effect from 02.12.2019 till the completion of the corporate insolvency resolution process or until this Bench approves the resolution plan under sub-section (1)

of Section 31 or passes an order for liquidation of Corporate Debtor under Section 33, as the case may be.

V. That the public announcement of the corporate insolvency resolution process shall be made immediately as specified under Section 13 of the Code.

VI. That this Bench hereby appoints, Mr. L V Shyamsundar, having address at 3rd Floor, No.17, Gandhi Road, Alwarthirunagar, Opp. to Vinayagar Temple & Above Samyuktha Scans ,Chennai,Tamil Nadu ,600087 having Registration No. IBBI/IPA-002/IP-N00262/2017-18/10775 as Interim Resolution Professional to carry the functions as mentioned under Insolvency & Bankruptcy Code.

22. Accordingly, this Petition is admitted.

23. The Registry is hereby directed to communicate this order to both the parties and the Interim Resolution Professional immediately.

Sd/-
V. Nallasenapathy
Member (T)

Sd/-
Suchitra Kanuparthi
Member (J)