

**IN THE NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD**

COURT - II

CP (IB) 288/NCLT/AHM/2019

[Application for initiation of Corporate Insolvency Resolution Process under Section 9 of the Insolvency & Bankruptcy Code, 2016]

In the Matter of:

GMW Private Limited

**Applicant/
Operational Creditor**

Versus

Jyoti Limited

**Respondent/
Corporate Debtor**

Order Pronounced on: 11/10/2022

Coram:

**DR. DEEPTI MUKESH
MEMBER (JUDICIAL)
AJAI DAS MEHROTRA
MEMBER (TECHNICAL)**

MEMO OF PARTIES

GMW Private Limited

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

Having Registered Office at:

885, GIDC Industrial Estate,

Makarpura,

Vadodara 390 010,

Gujarat State.

... **Applicant/Operational Creditor**

Versus

Jyoti Limited

Nanubhai Amin Marg,

Industrial Area,

P.O. Chemical Industries

Vadodara 390 003

Gujarat State

... **Respondent/Corporate Debtor**

Appearance:

For Applicant : Mr. Rasesh Sanjanwala, Sr. Advocate a.w.

Mr. Shashvata Shukla, Advocate

For the Respondent : Mr. Navin Pahwa, Sr. Advocate

ORDER

1. This application is filed under Section 9 of Insolvency and Bankruptcy Code, 2016 (for brevity 'IBC, 2016') read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (for brevity 'the Rules') through Mr. Jatinder Singh Panesar, Director of **GMW Private Limited** (for brevity

‘Applicant’) authorised vide resolution dated 08.09.2018, with a prayer to initiate the Corporate Insolvency Resolution Process (CIRP) against **Jyoti Limited** (for brevity ‘Corporate Debtor’).

2. The Applicant is a private limited company incorporated under the provisions of Companies Act, 1956, duly registered with the Registrar of Companies, Ahmedabad, Gujarat having identification No. U45207GJ2005PTC046920 and having registered office at 885, GIDC Industrial Estate, Makarpura, Vadodara 390 010. The applicant is engaged in the business designing, manufacturing and supply of Stop Log Gates, Trash Racks etc.

3. The corporate debtor is a limited company, incorporated under the provisions of Companies Act, 1956 on 01.01.1943 duly registered with Registrar of Companies, Ahmedabad, Gujarat State with CIN: L36990GJ1943PLC000363, having registered office at Nanubhai Amin Marg, Industrial Area, P.O. Chemical Industries, Vadodara – 390 003, Gujarat State. The authorised share capital of the corporate debtor is Rs. 25,00,00,000/- and paid up share capital is Rs.

23,09,26,272/-. The corporate debtor is engaged in the manufacture of general purpose machineries.

4. It is submitted by the applicant that the corporate debtor vide Letter of Intent dated 17.03.2012 had approached the applicant inter alia seeking design, procurement, manufacturing, supply to site, erection, testing and commissioning of Stop Log Gates, Trash Racks and Screens required for 2 X 250 MW Lignite Base Thermal Power Project for Bhavnagar Energy Corporation Ltd. (BECL). Upon receiving confirmation from the applicant, the corporate debtor had issued detailed purchase order dated 30.04.2012 covering the complete scope of work such as design/supplies & services to be rendered at the site etc. under a single contract.

5. It is submitted by the applicant that as per purchase order dated 30.04.2012 the applicant had to erect/fix the supplied equipment within the two pump houses i.e. civil fronts, the one of which was the Circulating Water Pump House and the other was the Sea Water Pump House. As per the purchase order the corporate debtor was obliged to provide civil fronts i.e. Pump Houses after carrying out all the civil works/construction so that erection and commissioning of the

equipment supplied by the applicant could be carried out. The applicant had completed successful erection and commissioning of the Circulating Water Pump House which was the only civil front constructed and provided by the corporate debtor. The applicant had raised invoices for the same which had to be paid in full under Clause 5 of the purchase order. It is further submitted that obligation of the corporate debtor under Clause 5 of the purchase order dated 30.04.2012 to release full payment of the equipment supplied and accepted by the corporate debtor cannot in any way be said to be qualified by the requirement of erection and commissioning of the equipment, if the corporate debtor itself did not construct the pump houses and provide civil fronts for the purpose of erection and commissioning of the equipment supplied by the applicant.

6. It is further submitted by the applicant that as far as the equipment for the Circulating Water Pump System is concerned, the applicant had duly erected and commissioned all the supplied equipment by 28.09.2016 and Erection Invoice No. 4, the last invoice, raised by the applicant was accepted by the corporate debtor. Thus, the right to demand the balance 10% payment of the remaining invoices for the equipment supplied as per Clause No. 5 (a) of the Purchase Order

accrued on 28.09.2016. It is further submitted that as far as the payment due for the equipment supplied for the Sea Water Pump House is concerned, the corporate debtor is not entitled to rely on the breach of its own obligation to provide civil fronts/civil works as an excuse to refuse payment for the equipment supplied to the corporate debtor. It is further submitted that failure to pay the balance of the admitted and partly paid debt can be described as a deliberate and wilful default of an unpaid operational debt. The total scope of work was governed by a common purchase order and the obligations of the applicant were interlined with certain obligations of the corporate debtor such as providing civil fronts at site for erection/commissioning of the equipment so as to enable the applicant to proceed to the next stage of work. Clause 2 of the Purchase Order dated 30.04.2012 expressly excludes civil works from the scope of work of the applicant under the contract. The obligation to provide civil fronts, i.e. to construct the pump houses in which the equipment supplied and accepted by the corporate debtor was to be erected was that of the corporate debtor. The civil fronts for the Circulating Water Pump House which was originally supposed to be given to the applicant in the year 2012, was provided to the applicant as late as 2014, after the guarantee period for the equipment to be erected had

expired. Guarantee/warranty clause of purchase order dated 30.04.2012 reads as under: -

“7. GUARANTEE/WARRANTY:

Material to be supplied against this order shall be guaranteed for performance against any design/manufacturing defects or faulty workmanship for a period of 18 months from the date of commissioning or 24 months from the date of despatch whichever is earlier. You have to depute your representative to attend any problems (if encountered) during the guarantee period without any additional cost to Jyoti”

On account of the corporate debtor’s failure to provide the Circulating Water Pump House in a timely manner as contemplated under the contract, erection of the equipment at the Circulating Water Pump House could be completed in September, 2016. The corporate debtor’s failure to provide the civil fronts had led to a situation where until 2016, the erection of the equipment supplied as far back as 2012, could not be carried out. Even commissioning was unreasonably delayed beyond the period of six months. When civil fronts for the Circulating Water Pump House were made available to the applicant for erection, the guarantee period as per Clause 7 of the Purchase order dated 30.04.2012 had expired as more than 24 months had elapsed from the date of dispatch of the material. Thus, the question of submitting a performance bank guarantee valid upto to the guarantee

period did not arise, as the guarantee period itself had lapsed by the time civil fronts were made available to the applicant. The applicant is entitled to get payment as per Cl. No. (5) of the Purchase Order dated 30.04.2012. Clause No. 5 (a) stipulates that balance 10% payment of the value of the equipment supplied, will be withheld until erection and commissioning. Clause No. 5 (a) further provides that “if the system commissioning is delayed for six months after completion of erection for reasons not attributable to the applicant, the payment will be released subject to satisfactory completion of erection”. Thus the amounts due to the applicant shall not be withheld by corporate debtor if commissioning is delayed beyond a period of six months.

7. The applicant has further submitted that the total amount of operational debt payable by the corporate debtor under the running account is Rs. 80,83,610/-. There is a mutual account running between the applicant and the corporate debtor whereby the applicant supplied the equipment from time to time for which invoices were raised. Such invoices were accepted and partly paid by the corporate debtor. Thus the corporate debtor had acknowledged the debt owed to the applicant in respect of the provision of goods and services i.e. the supply of

equipment. All the invoices raised by the applicant are partly paid and thus admitted by the corporate debtor.

8. The applicant has further submitted that several emails, letters and reminders were sent and several meetings in person were arranged with the corporate debtor. At all such times the corporate debtor had acknowledged the sum outstanding and payable to the applicant including acknowledgement in its books of accounts by the corporate debtor. The corporate debtor had made part payments of the debt, the last of which was on 02.12.2016. Thus, in one form or another, the corporate debtor had periodically acknowledged the debt and each acknowledgement being within three years from the last invoice or from the initial invoice on which the debt became due, the operational debt is well within the period of limitation as prescribed by the Limitation Act, 1963. Even otherwise, the applicant had erected all the equipment by 28.09.2016 for which Erection Invoice No. 4 was raised and accepted by the corporate debtor. Thus, the right to demand the balance payment for the equipment supplied as per Clause 5 (a) of the purchase order accrued on 28.09.2016.

9. The applicant had made several requests via letters, emails, telephone calls to the corporate debtor for the outstanding amount, who repeatedly assured the applicant that the outstanding invoices would be paid, however, no such payments were made. The corporate debtor had released substantial part payments of the outstanding debt which itself is evidence of the existence of unpaid operational debt.

10. The applicant has further submitted that in light of the failure of the corporate debtor to pay the outstanding dues, statutory notice under Section 8 of the IB Code in Form 3 dated 29.01.2019 was issued. The corporate debtor responded beyond the prescribed statutory period vide letter dated 11.02.2019 enclosing therewith demand draft for Rs. 5,56,200/- towards payment of the last Invoice No. Erection – 4 dated 28.09.2016 and denying payment of the retention money of other invoices.

11. Thereafter, the applicant filed the instant application under Section 9 of the Insolvency and Bankruptcy Code, 2016 on 08.04.2019.

12. The corporate debtor filed affidavit in reply inter alia stating that:
- The application is not supported by authorisation letter/Board Resolution;
 - There is no debt which is due and payable as demanded by the operational creditor;
 - There is a pre-existing dispute between the parties which would disentitle the applicant to maintain the present application;
 - Claims in respect of eight invoices are barred by limitation;
 - The operational creditor has not completed the work awarded by the corporate debtor, therefore, the operational creditor is not entitled to raise any claim seeking release of retention money;
 - The operational creditor has not produced any satisfactory erection completion certificate on record to show that the work was completed as per the terms and conditions of the purchase order;
 - The corporate debtor has made payment of 90% towards all the invoices, the remaining 10% is towards retention money. As per Clause 5 (a) of purchase order dated 30.12.2014, the operational creditor has not produced work certification by the Site Engineer of the corporate debtor meaning that the work of erection or commissioning of equipment is not completed, therefore, corporate

debtor is not liable to pay the remaining 10% amount towards the eight invoices referred to above;

- There is a delay of 2 weeks to 307 weeks in supply of equipment from operational creditor, therefore, the corporate debtor is entitled for payment of Rs. 45,15,715/- towards liquidated damages as per purchase order dated 30.04.2012;
- Because of non-erection and non-commissioning of equipment by operational creditor, non-supply of work certificate from the site engineer of the corporate debtor and non-submission of performance of bank guarantee, the corporate debtor did not receive payment from BECL. As a reason the corporate debtor is not liable to pay to the applicant.

13. The applicant filed written submissions inter alia stating that:

- Vakalatnama and Board Resolution both are filed along with the application so as to invest requisite authority in the authorised person to take all necessary steps under the Code and file the present application;
- The Insolvency application is filed within three years from the accrual of the cause of action, hence, application is within Limitation;

- There have been several written acknowledgements of debt, including reflecting of debt in the books of the corporate debtor, hence, within the period of limitation under Section 18 of the Limitation Act, 1963;
- The corporate debtor has also made part payment of the debt, the last of which was on 02.12.2016 which further extends the period of limitation as per Section 19 of the Limitation Act, 1963;
- There is no mismatch in the claim amount as alleged by the corporate debtor;
- The application is based on the unpaid retention amount on all invoices and all relevant invoices are annexed with the Insolvency Application;
- There is no dispute, contemporaneous or otherwise, raised by the corporate debtor prior to the issuance of Section 8 demand notice, within the meaning of Section 5 (b) of the Code;
- The corporate debtor is not entitled to rely on the breach of its obligation to provide civil fronts as an excuse to refuse payment for the equipment supplied by the applicant and has failed to place on record a single communication to that effect;
- The so-called dispute about liquidated damages and delay is false and finds no reference in the reply to the demand notice;

- The corporate debtor has failed to show even single correspondence to suggest that they were unhappy with the performance of the applicant's equipment/services;

14. The aforesaid contentions of the operational creditor are further supported by the following authorities, copies of which are annexed to the written submission:

Sr. No.	Authority	Proposition	Paragraph Nos.
1	[2018] 94 taxman.com 66 (NCL-AT) (<i>V.V. Nagarajan v. Vishnusudha Textiles</i>)	Where corporate debtor failed to demonstrate that he had within a period of 10 days of receipt of demand notice brought to the notice of the operational creditor the existence of dispute, CIRP to be admitted	6,8
2	[2020] 116 taxman.com 978 (NCLT-Ahd) (<i>Vikas Ecotech Ltd. v. Kumar Arch Tech (P) Ltd.</i>)	Where corporate debtor failed to make payment even after demand notice and raised a dispute after one month from the date of demand notice, such dispute was not sustainable.	11,16
3	[2017] 85 taxman.com 292 (SC) (<i>Mobilox Innovations Pvt. Ltd. v. Kirsua Software Private Ltd.</i>)	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	40,43, 45,47
4	[2018] 100 taxman.com 469 (NCLAT) (<i>Rajeev K. Aggarwal v. Panipat Texo Fabs P. Ltd.</i>)	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 a sham designed to defeat the petition, Section 9 rightly admitted.	3-4
5	[2019] 107 taxman.com 403 (NCLAT) (<i>Ahluwalia Contracts (India) Ltd. v. Raheja Developers Ltd.</i>)	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 has to be admitted.	21-25
6	[2018] 97 taxman.com 403 (NCLT-New Delhi) (<i>Siddhi</i>)	In the absence of documents or particulars (i.e. contemporaneous	13-14

	<i>Interiors (P) Ltd. v. Amarpali Zodiac Developers (P) Ltd.</i>	correspondence) to support claim for existence of dispute, CIRP has to be admitted.	
7	[2020] 120 taxman.com 2669 (NCLT New Delhi) (<i>Creative Infraheights (P) Ltd. v. JBK Developers (P) Ltd.</i>)	Where in terms of work order, operational creditor carried out civil work in nature of underground tank, sewer treatment plant, sewage and drainage at corporate office of corporate debtor and raised invoices but default had occurred in payment of operational debt and so failed dispute raised by corporate debtor was merely a moonshine dispute CIRP application was to be admitted.	11,15
8	[2020] 120 taxman.com 2177 (NCLT New Delhi) (<i>Fine Group Corporation Ltd. v. Lemon Electronics Ltd.</i>)	Where only after issuance of demand notice under Section 8 of IBC corporate debtor for first time raised dispute with regard to quality of goods supplied by operational creditor, said dispute was not to be considered as pre-existing dispute.	12-13
9	[2020] 120 taxman.com 98 (NCLT –Hyd.) (<i>Andritz Hydro (P) Ltd. v. Indira Prayadarshini Hydro Power (P) Ltd.</i>)	Dispute as to quantum of debt would not affect admission of CIRP petition so long as there is default on part of corporate debtor for more than Rs. 1 lakh.	8-10
10	[2019] 110 taxman.com 221 (NCLAT) (<i>GupShup Technology India (P) Ltd. v. Interpid Online Retail (P) Ltd.</i>)	Where corporate debtor failed to produce any letter or email to suggest that prior to issuance of demand notice, a dispute was raised about SMS services provided by operational creditor, it would be said that there was no pre-existing dispute.	14,15, 19
11	[2019] 111 taxman.com 425 (NCLAT) (<i>Pedersen Consultants India (P) Ltd. v. Nitesh Estates Ltd.</i>)	A claim is a right to payment even if disputed. Merely because the corporate debtor has disputed the claim by showing that there is certain counter-claim it cannot be held to be pre-existing dispute.	8-12
12	[2020] 113 taxman.com 281 (NCLAT) (<i>Devsaria Boring (P) Ltd. v. Perfect Boring (P) Ltd.</i>)	Where civil suit was filed by the corporate debtor after three months of issuance of the demand notice, it could not be considered as a pre-existing dispute between the parties.	12,18
13	Forbes Gorak v. Central Warehousing Corporation reported in 2010 SCC online Del 369	Once there is acting upon the terms of the offer, simply writing a counter letter, but, also simultaneously performing the contract will not absolve the perform from his legal obligations under the contract by virtue of the language of Section 8 of the Contract Act.	

14	Kailash Sharma v. Patna Municipal Corporation reported in 2010 SCC Online Del 369	Payment and delivery are concurrent obligations. Corporate debtor having accepted delivery of the equipment and having failed to raise any dispute must make payment in full.	
15	[2019] 112 taxman.com 229 (NCLT-New Delhi) (<i>Pragya Polytech (P) Ltd. v. Great Aid Marketing (P) Ltd.</i>)	Mere mismatch of figures will ipso facto not estop admission of CIRP when default exceeds threshold limit of Rupees One lac. (NB – This is Section 7 matter, but the principle applicable is the same as in Section 9.)	34
16	IA/341/2020 in IBA/1031/2019, NCLT, Chennai (<i>M/s. Arrowline Organic Products Pvt. Ltd. v. M/s. Rockwell Industries Ltd.</i>)	The March 24 2020 Notification enhancing the threshold value under the IBC is prospective and will not apply retrospectively to pending proceedings.	33,34

15. Corporate debtor filed written submissions inter alia stating that:

- Claims in respect of 8 invoices raised by the operational creditor pertains to the period during the period between 2012 and 2015 and thus are time barred;
- Petition qua claim in respect of 9th invoice is also not maintainable as the corporate debtor has made payment of Rs. 5,56,200/- towards invoice dated 28.09.2016 vide demand draft dated 11.02.2019 along with reply to the demand notice dated 29.01.2019 after deducting Rs. 10,800/- towards TDS. Payment made towards the 9th invoice would not revive dead/time barred claims in respect of 8 invoices;
- Claim of retention money (10% of invoices) is unsustainable and cannot be granted;

- The corporate debtor is eligible for liquidated damages as the operational creditor has not supplied Sea Water Intake System worth Rs. 13,20,000/-;
- Because of non-erection and non-commissioning of equipment by the operational creditor, non-supply of work certification by site engineer of the corporate debtor and non-submission of bank guarantee, the corporate debtor did not receive payment from BECL;
- Hon'ble Supreme Court in *Sampuran Singh and Ors. vs. Niranjana Kaur and Ors. (1999) 2 SCC 679* held that the acknowledgement, if any has to be prior to the expiration of the prescribed period for filing the suit or application. It is further held that if the limitation has already expired, it would not revive under this Section.

16. The applicant filed additional written submissions inter alia stating that:

- The present application has been filed within three years from the date on which the cause of action first accrued;
- Clause 5 (a) of the purchase order dated 30.04.2012 provides that if the commissioning of the system is delayed for 6 months after completion of erection for reasons not attributable to the operational

creditor, payment would be released subject to satisfactory completion of erection;

- 90% of the three erection invoices are paid by the corporate debtor and the fourth erection invoice has been paid in full on 11.02.2019 in response to the demand notice dated 29.01.2019. Thus it cannot be disputed by the corporate debtor that erection and commissioning of the Circulating Water Pump has been completed by the applicant on or before 28.09.2016 which is the date on which the last erection invoice No. 4 was raised. Hence, calculating a period of six months from the said date, the date on which cause of action first occurred i.e. the date of default is 28.03.2017 as stated in the application. Therefore, present application filed on 08.04.2019 is within limitation;
- The corporate debtor has admitted and acknowledged the debt extending the period of limitation. There was a current running account between the parties whereby part payments were made by the corporate debtor from time to time. There have been several written acknowledgements of debt, including in the books of the corporate debtor to extend the period of limitation under Section 18 of the Limitation Act, 1963. A perusal of the books of accounts of the corporate debtor would also reveal that the unpaid operational debt has been shown to be outstanding and payable to the applicant, part

payments of the debt on 02.12.2016 and Email dated 23.10.2017 is one such clear acknowledgement of debt. Thus, in one form or another the corporate debtor has periodically acknowledged the debt to be outstanding and each acknowledgement being within three years from the last or from the initial invoice on which the debt became due;

- The contention raised by the corporate debtor that the application is based only on 9 invoices is incorrect. All the relevant invoices are annexed to the application. Narration in part IV, Form 5 clearly refers to all the 12 unpaid invoices;
- Under the purchase order dated 30.04.2012, the applicant had to erect/fix the supplied equipment within the two pump houses i.e. civil fronts, one of which was the Circulating Water Pump Houser and the other was the Sea Water Pump House. The corporate debtor was obliged to provide these civil forms i.e. Pump Houses after carrying out civil construction works so that erection of the equipment supplied by the applicant could be carried out as stated in the purchase order. The applicant had completed successful erection as per the agreement at the Circulating Water Pump House which was the only civil front which was constructed and provided to the applicant. Accordingly, the applicant had raised invoices for the same which are liable to be paid in full as per Clause 5 of the purchase order.

17. As per part IV, Form 5 total amount of debt is Rs. 80,83,610/- (Rupees eighty lacs eighty-three thousand six hundred ten only) and date of default is 28.03.2017. The application is filed on 08.04.2019, which is within limitation and not barred by law.

18. Registered office of the corporate debtor is situated in Vadodara, Gujarat State and, therefore, this Tribunal has jurisdiction to entertain and try this application.

19. Heard submissions and perused the documents on record. The present application is based on the claim arising out of 10% retention charges withheld by the corporate debtor against 12 invoices raised by the applicant during the period from 26.09.2012 to 28.09.2016.

20. The arguments of both sides are dealt with as under:
 - (a) The first objection raised by the corporate debtor is that eight invoices raised by the applicant pertains to the period between 2012 to 2015 and thus are time barred.

It is contended by the applicant that there was a current running account between the parties whereby part payments were made by the corporate debtor from time to time. Last such payment was made by the corporate debtor on 02.12.2016. Thus, in one form or another, the corporate debtor has always periodically acknowledged the debt to be outstanding and each acknowledgement being within three years from the last or from the initial invoice on which the debt became due, the amount of operational debt is well within the period of limitation as prescribed by the Limitation Act, 1963. On perusal of the records it is found that there have been written acknowledgements of debt, including in the books of the corporate debtor which extend the period of limitation under Section 18 of the Limitation Act, 1963. Email dated 23.10.2017 is one such clear acknowledgement of debt.

Thus we accept the contention of applicant as the claim is within limitation and not barred by Law of Limitation.

- (b) The applicant has annexed to the application a table containing details of outstanding payments to be received from the corporate debtor which is reproduced below:

Date	Invoice No.	Amount Rs.	5% retention charges	5% retention charges
26/9/2012	Supply/01	28,29,000/-	1,41,450/-	1,41,450/-
26/10/2012	Supply/02	1,45,50,000/-	7,27,500/-	7,27,500/-
08/11/2012	Supply/03	57,00,000/-	2,85,000/-	2,85,000/-
24/12/2012	Supply/04	1,50,79,100/-	7,53,955/-	7,53,955/-
31/01/2013	Supply/05	93,00,000/-	4,65,000/-	4,65,000/-
18/02/2013	Supply/06	1,86,00,000/-	9,30,000/-	9,30,000/-
30/09/2014	Supply/07	45,31,000/-	2,26,550/-	2,26,550/-
28/03/2015	Supply/08	34,49,000/-	1,72,450/-	1,72,450/-
01/08/2015	Erection/01	1,41,000/-	7,050/-	7,050/-
21/09/2015	Erection/02	1,41,000/-	7,050/-	7,050/-
02/10/2015	Erection/03	4,14,000/-	20,700/-	20,700/-
28/09/2016	Erection/04	5,40,000/-	27,000/-	27,000/-
Total Amount		7,52,74,100/-	37,63,705/-	37,63,705/-
Total retention outstanding				75,27,410/-
Add. Invoice No. Erection -04 dated 28.09.2016				5,56,200/-
Net Outstanding				80,83,610/-

From the above table it is evident that the corporate debtor has withheld 10% detention charges of each bill from the initial bill dated 26.09.2012. The chart annexed to the application shows complete details of twelve invoices like date, bill No., amount, 10% retention charges etc., whereas, the chart produced by the corporate debtor is incomplete and missing details of three invoices raised on 01.08.2015, 21.09.2015 and 02.10.2015. All

the three invoices pertain to erection charges against which 90% payment has already been made by the corporate debtor.

Thus argument of the applicant is acceptable.

- (c) It is desirable to refer to Clause 5 (payment) of purchase order of the corporate debtor dated 30.04.2012 which is reproduced for easy reference:

“5. Payment:

a) Supply of Main Equipment & Mandatory Spares:

5% advance payment shall be released on submission of 1st set of GA drawings of equipment for approval against 5% Advance Bank Guarantee of equivalent amount (validity of guarantee upto completion of supplies). Balance 5% advance will be released on approval of equivalent drawings or manufacturing clearance whichever is earlier and against submission of 5% advance bank guarantee (validity of guarantee upto completion of supplies). Balance 80% payment will be released by way of L/C (Letter of Credit) with credit period of 90 days against MRN & pre-accepted sight draft. LC will be opened at the time of inspection. 5% payment will be released after completion of erection of equipment on prorata basis and work certification by our Site Engineer against submission of Performance Bank Guarantee amounting to 10% of order value and valid upto Guarantee period. Balance 5% will be released after successful commissioning of the system. If the system commissioning is delayed for six months after completion of erection for reasons not attributable to GMW (applicant), the payment will be released subject to satisfactory completion of erection”

Release of payment is subject to the submission of following documents:

1. Three copies of invoice showing description of goods, quantity, unit price and amount claimed.
2. Manufacturer's/supplier's guarantee certificate
3. Detailed packing list (Bill of Material)
4. Material despatch clearance issued by Jyoti Ltd.
5. Consignment/LR copy of bank approved transporter
6. Pre accepted sight draft & MRN

Erection:

90% payment will be made monthly on pro rata basis. 5% on pro rata basis against satisfactory completion erection of equipment and certification by our Site Engineer and balance 5% against commissioning of equipment and system upon certification by client and our Site Engineer.

From a bare reading of the above condition it can be said that even if the system commissioning is delayed for six months after completion of erection, for reasons not attributable to the applicant, the payment will be released subject to satisfactory completion of erection. The corporate debtor has never raised any contention regarding work certification by the Site Engineer in any previous correspondence and the conduct of the corporate debtor in releasing substantial payments itself shows that the stipulation in the purchase order relied upon by the corporate debtor was waived and not acted upon. It is undisputed that equipment was supplied and erected as per the purchase order and for which erection invoice No. 4 was raised and paid in full by

the corporate debtor. Thus, the defence raised by the corporate debtor is an inconsistent and appears as moonshine defence. The corporate debtor's failure to provide the civil fronts led to a situation where the guarantee period as per Clause 7 of the purchase order dated 30.04.2012 had expired as more than 24 months had elapsed from the date of dispatch of the material.

21. The corporate debtor has cited e-mail dated 23.10.2017 (page 129) as evidence of a pre-existing dispute. The copy of page No. 129 is scanned below:

129

Sanjay Nandaniya

From: Samir Rana <samir.rana@jyoti.com>
Sent: 23 October 2017 09:43
To: 'Jatinder Singh Panesar'
Cc: mos@gmw.in; 'N P AIRTEL'; 'Sanjay Nandaniya'; os@gmw.in; as@gmw.in; jat@gmw.in
Subject: RE: BECL CW & SWI System - Required O&M Manual

Dear Sir,

First of all thanks for your wishes and happy Diwali & Happy New year to you also.

With regards to payment, we would like to inform you that as per discussion held with your MD and Director during visit at our office. It was confirm that once we will received payment from BECL same will be clear to you. Till date we have not received payment from BECL hence payment is not released to you till date.

Now we request you to submit O&M Manual at the earliest.

With Regards,

Samir Rana

From: jatinder slng h panesar [mailto:jatindersinghp@gmail.com]
Sent: 19 October 2017 09:25
To: Samir Rana
Cc: <mos@gmw.in>; N P AIRTEL; Sanjay Nandaniya; os@gmw.in; as@gmw.in; jat@gmw.in
Subject: Re: BECL CW & SWI System - Required O&M Manual

DEAR SAMIR RANA ,

First of all pl accept our heartiest Greetings on the occasion of festival of Diwali and coming Happy new year .

We shall be glad if you first provide us the status Release of all our outstanding payment from Jyoti which are being highlighted by us on several occasions by email .personal visit of our MD and Director to.your. office on nos of time .

On 18 Oct 2017 4:07 pm, "Samir Rana" <samir.rana@jyoti.com> wrote:

Dear Sir,

With reference to above subject please arrange to send O&M Manual of Travelling Water Screen, Stop Log Gate & Coarse Screen supplied vide PO No. 7/C00/G1373/600365/25023/2012-2013 dated 30.04.2012 at the earliest.

22. It is apparent from the emails which are reproduced above that the only reason given for non-payment by the corporate debtor is that “once we will received payment from BECL same will be clear to you.” No dispute about quality or performance is mentioned.

23. In light of the above discussions, it is evident that the debt is due and payable and default has occurred. The present application is admitted, in terms of section 9 (5) of IBC, 2016.

24. The applicant has not proposed the name of the Interim Resolution Professional (IRP). Therefore, we hereby appoint Mr. Sanjay B. Shah having address at B-303, Sanidhya Apartment, 3, Marutinagar, Airport Road, Rajkot 360 001 with registration No. IBBI/IPA-001/IP-P-02677/2022-23/14106 and having email ID ip@sbshah.in subject to the condition that no disciplinary proceedings are pending against him. Specific consent of the IRP in Form 2, along with disclosures as required under IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 to be filed within a period of one week from the date of this order.

25. We direct the Operational Creditor to deposit a sum of Rs. 2.00 lacs (Rupees two lacs only) with the Interim Resolution Professional, namely Mr. Sanjay Shah to meet the expenses to perform the functions assigned to him in accordance with Regulation 6 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Person) Regulations, 2016. The needful shall be done within one week from the date of receipt of this order by the Operational Creditor. The amount, however, is subject to adjustment by the Committee of Creditors, as accounted for by Interim Resolution Professional, and shall be paid back to the Operational Creditor.
26. As a consequence of the application being admitted in terms of Section 9(5) of IBC, 2016, moratorium as envisaged under the provisions of Section 14 (1) shall follow in relation to the Corporate debtor, prohibiting actions as per clauses (a) to (d) of Section 14 (1) of the Code. However, during the pendency of the moratorium period, terms of Section 14(2) to 14(4) of the Code shall remain in force.
27. A copy of the order shall be communicated to the applicant, IRP and the corporate debtor. A copy of order along with complete copy of

application be served to IRP by the applicant within 7 days of order. In addition, a copy of the order shall also be forwarded to IBBI for its records and taking steps for updating the Master Data of the corporate debtor in MCA portal and shall forward the compliance report to the Registrar, NCLT.

Sd/-

**AJAI DAS MEHROTRA
MEMBER (TECHNICAL)**

Sd/-

**DR. DEEPTI MUKESH
MEMBER (JUDICIAL)**

Nair/Abhishek LRA