

**IN THE NATIONAL COMPANY LAW TRIBUNAL,
DIVISION BENCH – II, CHENNAI**

CP(IB)/8(CHE)/2021

*(filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 r/w
Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating
Authority) Rules, 2016)*

In the matter of

M/s. ORIENT GREEN POWER COMPANY LTD.

- 1. M/s. SM Milkose Limited**
Represented by its Managing Director
Mr. Sharad Maheswari,
M-10, Second Floor, Greater Kailash-II,
New Delhi-110 048
- 2. M/s. Dhruv Manufacturing Company Pvt. Ltd.,**
Represented by its Director
Mr. Sharad Maheswari,
M-10, Second Floor, Greater Kailash-II,
New Delhi-110 048
- 3. M/s. Kasganj Ispat Udyog Pvt. Ltd.,**
Represented by its Director
Mrs. Vandana Maheswari,
M-10, Second Floor, Greater Kailash-II,
New Delhi-110 048
- 4. M/s. SM Finlease Limited,**
Represented by its Director
Mr. Mukesh Kumar Sharma,
M-10, Second Floor, Greater Kailash-II,
New Delhi-110 048
- 5. Sh. Sharad Maheswari,**
S/o. Late Shri Ram Baboo Maheswari,
Mr. Sharad Maheswari,
R/O M-10, Second Floor, Greater Kailash-II,
New Delhi-110 048
- 6. Smt. Rajkumari Maheswari,**
W/o. Late Shri Ram Baboo Maheswari
Mr. Sharad Maheswari,
R/O M-10, Second Floor, Greater Kailash-II,
New Delhi-110 048

7. Mrs. Vandana Maheswari,
W/o. Sharad Maheswari,
R/O M-10, Second Floor, Greater Kailash-II,
New Delhi-110 048

8. Mr. Dhruv Maheswari,
S/o. Sharad Maheswari,
R/O M-10, Second Floor, Greater Kailash-II,
New Delhi-110 048

... Applicants/Operational Creditors

-Vs-

M/s. Orient Green Power Company Limited,
CIN: L40108TN2006PLC061665
Sigappi Achi Building, 4th Floor,
18/3, Rukmini Lakshmipathi Road,
Egmore, Chennai-600 008

Also at:

No.9, Vanagaram Road,
Ayanambakkam, Chennai-600 095

... Respondent/Corporate Debtor

Order Pronounced on 9th May, 2023

CORAM:

SANJIV JAIN, MEMBER (JUDICIAL)
SAMEER KAKAR, MEMBER (TECHNICAL)

For Operational Creditor: Mr. Manish Kaushik, Advocate
For Corporate Debtor: Mr. Vishnu Mohan, Advocate

ORDER

Per: SANJIV JAIN, MEMBER (JUDICIAL)

This application under Section 9 of the Insolvency & Bankruptcy Code, 2016 (in short "**IBC**") read with Rule 6 of The Insolvency & Bankruptcy Code (Application to Adjudicating Authority) Rules, 2016 has been filed by **M/s. SM Milkose**

Limited & 7 Others (hereinafter referred to as "**Operational Creditors**") against **M/s. Orient Green Power Company Limited** (hereinafter referred to as "**Corporate Debtor**") for initiating Corporate Insolvency Resolution Process ("**CIRP**") against the Corporate Debtor.

2. The case of the Applicant/Operational Creditor is that a Memorandum of Understanding ("MOU") dated 16.01.2008 and Shareholders' Agreement dated 26.04.2010 were executed between the Operational Creditors and the Corporate Debtor for sale of the projects/power generation plants by the Operational Creditors to the Corporate Debtor. Dispute arose among them. The Operational Creditor invoked the Arbitration Clause contained in the MOU and the Shareholders Agreement. Subsequently, the High Court of Delhi in Arbitration Petition No.116 of 2014 appointed Hon'ble Mr. Justice M.L. Mehta (Retd.) as the Sole Arbitrator to adjudicate all the claims and counter claims between the parties. The arbitrator upheld the claims of the Operational Creditors and passed an award of Rs.4,07,50,000/- (Rupees Four Crores Seven Lakh Fifty Thousand only) in favour of the Operational Creditors and against the Corporate Debtor with pendentlite simple interest @ 9% per annum payable within two months from the date of award, lest the Corporate Debtor would be liable to pay the amount along with the interest @ 18% per

annum from the date of the award. Against the award, the Corporate Debtor filed an application under Section 34 of the Arbitration and Conciliation Act, 1996 before the Hon'ble High Court of Delhi, however could not obtain any stay against the award. The Operational Creditors then filed an application under Section 9 of the Arbitration and Conciliation Act, 1996 where the Hon'ble High Court of Delhi vide order dated 23.09.2019 in O.M.P.(i)(COMM.)530 of 2017 directed the Corporate Debtor to furnish a bank guarantee to secure the amount of Rs.5,76,60,692/- (Rupees Five Crores Seventy Six Lakh Sixty Thousand Six Hundred and Ninety Two only) within a period of four weeks. The Corporate Debtor did not pay the amount under the arbitration award dated 01.08.2016 which made the Operational Creditors send a legal notice dated 03.10.2020 to the Corporate Debtor demanding the unpaid debts. The Corporate Debtor sent its reply.

3. It is alleged that no possible defence was raised by the Corporate Debtor in its reply and the Corporate Debtor is liable to pay an amount Rs.8,51,39,796/- (Rupees Eight Crores Fifty One Lakh Thirty Nine Thousand Seven Hundred and Ninety Six only) being the outstanding amount along with the interest.

3. Part-I of the application contains the particulars of the Applicants/Operational Creditors whereas the Part-II contains the

particulars of the Corporate Debtor. In Part-IV of the application, amount in default has been stated as Rs.8,51,39,796/- (Rupees Eight Crores Fifty One Lakh Thirty Nine Thousand Seven Hundred and Ninety Six only) i.e. Rs.4,07,50,000/- plus interest of Rs.4,43,89,796/- till 20.10.2020. The date of default on which such debt fell due is stated as 01.08.2016. Part-V contains the list of documents/ records/evidence of default.

5. On getting notice of the application, the Respondent/Corporate Debtor filed its reply alleging that the arbitral award has been challenged in a petition under Section 34 of the Arbitration and Conciliation Act, 1996 which is pending adjudication and it constitutes a "pre-existing dispute". There is no default as the issue is yet to be adjudicated upon finally. It is stated that the Respondent had complied with the order of the Hon'ble Court of Delhi in O.M.P.(i)(COMM.)530 of 2017. In terms of the order of Hon'ble Delhi High Court dated 01.02.2021 and 12.07.2021, the Corporate Debtor had deposited a sum of Rs.5,76,60,692/- (Rupees Five Crores Seventy Six Lakh Sixty Thousand Six Hundred and Ninety Two only) in the Registry of the Hon'ble Dehi High Court by way of Demand Draft dated 12.04.2021 subject to the outcome of Section 34 petition filed by the Corporate Debtor. It is alleged that the Applicants/Operational Creditors have filed this application to mount undue pressure/coercion on the

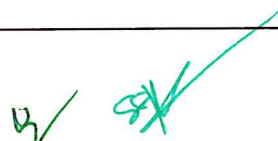
Respondent/Corporate Debtor to settle the alleged dues even while the subject-matter is *subjudice* before the Hon'ble High Court. Reference is made of a case "**K. Kishan v. Vijay Nirman Company Pvt. Ltd. (2018) 17 SCC 662 and Mobilox Innovations Pvt. Ltd. v. Kirusa Software Pvt. Ltd. (2018) 1 SCC 353**" to contend that pendency of petition under Section 34 of the Arbitration and Conciliation Act constitutes a "pre-existing dispute". It is stated that the Applicants/Operational Creditors have filed a joint application under Section 9 of IBC and in the light of the rulings in the case of "**Uttam Galwa Steel Ltd. v. DF Deutsche Forfait Ag Ltd.**" the application is not maintainable.

6. Question of limitation has also been raised alleging that alleged date of default is two months from the date of award i.e 30.09.2016 and the application has been filed beyond the limitation period of three years which provisions are also applicable under IBC. Reference is made of the case "**B.K. Educational Services (P) Ltd. v. Parag Gupta & Associates (2019) 11 SCC 633**".

7. The Respondent also filed an Additional Affidavit under S.R.No.1002 dated 15.02.2022.

8. We have heard Ld. Counsels for the parties and gone through the records of the case.

9. It is an admitted case of the parties that the parties had executed a Memorandum of Understanding and Shareholders Agreement for the sale of the projects/power generation plants by the Operational Creditors to the Corporate Debtor. MOU and the Shareholders Agreement contained an arbitration clause for resolution of the disputes between the parties. The Operational Creditors accordingly invoked the arbitration clause and filed a petition before the Hon'ble High Court of Delhi for appointment of arbitrator from where the arbitrator was appointed to adjudicate the claims/counter claims of the parties. The arbitrator passed an award dated 01.08.2016 for a sum of Rs.4,07,50,000/- (Rupees Four Crores Seven Lakh Fifty Thousand only) in favour of the Applicants/Operational Creditors and against the Corporate Debtor. The amount was to be paid within a period of two months with pendent lite interest failing which the Corporate Debtor was liable to pay interest @ 18% per annum from the date of award till the payment. The Corporate Debtor did not pay the amount and the Operational Creditor filed a petition under Section 9 of the Arbitration & Conciliation Act, 1996 vide O.M.P.(i)(COMM.)530 of 2017. On this petition, the Hon'ble High Court of Delhi directed the Corporate Debtor vide order dated 23.09.2019 to furnish a bank guarantee to secure the amount of Rs.5,76,60,692/- (Rupees Five Crores Seventy Six Lakh Sixty Thousand Six Hundred and Ninety Two only). The Corporate Debtor also challenged the award by



filing a petition under Section 34 of the Arbitration and Conciliation Act which is *subjudice* and **has not been finally disposed off**. In terms of the order of the Hon'ble Delhi High Court, the Corporate Debtor had also deposited the said sum in the Registry of the Hon'ble High Court by way of Demand Draft dated 12.04.2021.

10. It is not in dispute that the arbitral award which has been made the basis for filing the application under Section 9 of IBC has been challenged by the Corporate Debtor in the petition filed under Section 34 of the Arbitration and Conciliation Act before the Hon'ble High Court, Delhi. It has been held in the case of "***K. Kishan v. Vijay Nirman Company Pvt. Ltd.***" *supra* that under IBC, insofar as an operational debt is concerned, all that has to be seen is whether the said debt can be said to be disputed. Filing of a section 34 petition against an arbitral award shows that a 'pre-existing dispute' which culminates at the first stage of the proceedings in an award, continues even after the award, at least till the final adjudicatory process under Section 34 and 37 has taken place. Insolvency process can be put into operation only when the petition challenging the award is clearly and unequivocally barred by limitation.

11. There is no quarrel to the legal proposition that Article 137 of the Limitation Act, 1963 is applicable to the proceedings under IBC which clearly prescribes the time limit of three years from

the date of default for filing such application. In the case of "**B.K. Educational Services Pvt. Ltd. vs. Parag Gupta & Associates (2019) 11 SCC 663**", it was held that the limitation is applicable to the applications filed under Section 7 and 9 of the Code, default as referred to in the code which non-payment of debt i.e. due in law carries the same meaning i.e. the CIRP against the Corporate Debtor can only be initiated either by the Financial/Operational Creditor or Corporate Debtor in relation to debt which have not become time barred.

12. Admittedly, the Applicants/Operational Creditors in Part-IV of the application have stated the date of default as 01.08.2016 when the payment against the award became due as stated in the award and the application has been filed on 17.02.2021 i.e. beyond the period of three years but we cannot lose sight of the fact that the Corporate Debtor had immediately challenged the award by filing a petition under Section 34 of the Arbitration and Conciliation Act, 1996 within the period of limitation as prescribed under Section 34 of the Arbitration and Conciliation Act which petition is still *subjudice* before Hon'ble Delhi High Court and the award has not attained its finality. Even otherwise, the Applicants/Operational Creditors are protected by virtue of an order passed by the Hon'ble High Court of Delhi in a petition filed



under Section 9 of the Arbitration and Conciliation Act, 1996.
Therefore, no cause survives in the present application.

12. For the aforesaid reasons and the cases as referred *supra*,
the application of the Operational Creditors is not maintainable
since there was a 'pre-existing dispute' between the parties.

13. The petition is accordingly **dismissed** with no orders as to
costs.

-Sd-

SAMEER KAKAR
MEMBER (TECHNICAL)

Suguna

-Sd-

SANJIV JAIN
MEMBER (JUDICIAL)