

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

CP(IB)/180(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. Tech Sharp Engineering Pvt. Ltd.***

M/s. Prayag Engineering Constructions,

Ambalamugal, Cochin-682 302

Ernakulam District, Kerala

... Applicant / Operational Creditor

-Vs-

M/s. Tech Sharp Engineering Private Limited,

CIN: U74210TN199PTC038940

C-39, Second Avenue,

Anna Nagar, Chennai-600 040

Registered Address at:

A/54, Bangalore High Toad,

Chambarambakkam P.O., Pappanchatram,

Poonamallee Taluk, Chennai-600 123

... Respondent / Corporate Debtor

*Order Pronounced on **08th May, 2023***

CORAM:

SANJIV JAIN, MEMBER (JUDICIAL)

SAMEER KAKAR, MEMBER (TECHNICAL)

For Operational Creditor: Mr. Pranava Charan

For Corporate Debtor: Mr. Jayesh B. Dolia, Sr. Advocate

Ms. Varsha, 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 and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 has been filed by **M/s. Prayag Engineering Constructions** (herein referred to as "**Operational Creditor**")



against **M/s. Tech Sharp Engineering Private Limited** (hereinafter referred to as "**Corporate Debtor**") for initiating Corporate Insolvency Resolution Process ("**CIRP**") against the Corporate Debtor.

2. It is stated that the Corporate Debtor was awarded with two contracts involving Engineering Works at Offsite (Part-A) of IREP project of BPCL, Kochi by BPCL. The Corporate Debtor subcontracted the works to the Applicant/Operational Creditor vide Work Order bearing No.O/P201402/Part-A/PPG-01 dated 01.07.2014 ("Work Order 1") and Work Order bearing No.O/P201402/Part-A/PPG-05 dated 16.09.2014 ("Work Order 2"). The Operational Creditor performed the works under Work Order 1 and Work Order 2 and raised the invoices. It is alleged that the Corporate Debtor/Respondent did not make the complete payments for the work to the Applicant/Operational Creditor and as on 06.02.2018, an amount of Rs.1,44,32,876/- (Rupees One Crore Forty-Four Lakhs Thirty-Two Thousand Eight Hundred and Seventy Six only) became due. It had sent legal notices dated 05.08.2019 and 16.09.2019. It is stated that though the Respondent had replied to the notices but not made the payments. It then sent Form-3 Demand Notice on 15.10.2020 which was replied by the Respondent on 04.11.2020.

3. It is stated in Part-IV of the application that an amount of Rs.1,44,32,876/- (Rupees One Crore Forty-Four Lakhs Thirty-Two



Thousand Eight Hundred and Seventy-Six only) towards principal and interest @ 18% per annum on the invoices has become due and payable by the Respondent with effect from 06.02.2018. The date of debt falling due is stated to be as 06.02.2018.

4. With the application, the Corporate Debtor filed the copy of the demand notice dated 15.10.2020, delivery report in respect of the demand notice, copy of the invoices raised by the Applicant and the reply notice sent by the Corporate Debtor and the computation.

5. The Corporate Debtor in its counter contended that the Operational Creditor failed to complete the construction work and other contractual obligations with regard to 'Work Order 1' and abandoned the project midway without performing any work with regard to 'Work Order 2'. As a result, the Corporate Debtor was forced to get the remaining work completed through third-party agencies.

6. It is alleged that prior to receipt of Form-3 notice, the Corporate Debtor had raised the disputes vide letters dated 16.08.2019 and 04.10.2019. Even in the reply dated 04.11.2020 to the Form-3 notice dated 15.10.2020 which was received/acknowledged on 28.10.2020, it had raised disputes.

7. It is further alleged that the last payment in the 'work Order 1' was made on 10.04.2017. Thereafter, it did not receive any



invoice for the successful completion of the work by the Applicant. Invoices dated 06.02.2018 filed in the application have been fabricated by the Applicant to file this case. The alleged invoices raised in 2018 have not been certified based on any measurement sheets etc. As per Clause 11.4 of the work order, the sub-contractor/Applicant was required to be paid after the completion of the work after due deductions of any liquidated damages but no such proof has been submitted by the applicant regarding the alleged invoices dated 06.02.2018.

8. Emphasising the above facts, the Respondent contended that this application has been filed after four years from the date of the alleged dues and is barred by limitation. Moreover, the Respondent has pre-existing disputes with the Applicant which can be seen from the replies dated 16.08.2019 and 04.10.2019. Hence, the claim is untenable and the application is not maintainable in law.

9. Ld. Counsel for the Applicant reiterated what has been stated in the application and contended that the Respondent in the reply notices sent on 16.08.2019 and 04.10.2019 did not enclose any record of payment of operational debt as per Section 8(2)(b) of IBC, 2016, nor stated that there are no such bills which have been raised. Ld. Counsel stated that the cause of action is continuing and subsisting as on the date of issuance of legal notices by the Applicant. There are clear admissions vide emails dated



11.05.2017 that the works have been completed as per the approved drawings and specifications. No claim was ever raised by the Respondent against the Applicant. Ld. Counsel stated that the Applicant abandoned Work Order 2 because the Respondent was not adhering to its commitments.

10. It is further contended that the Respondent during the proceedings on 12.04.2022 had tried to settle the matter when the matter was about to be admitted. This shows that the Respondent had to pay the debt and it committed the default in payment of debt. Further, argued that the notice disclosing the amount of debt is sufficient to initiate the process of CIRP against the Corporate Debtor and there is no requirement under the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 to file the copy of the invoices/bills. Ld. Counsel also referred to the memo showing the details of invoices under Work Order 1/PPG-01 and Work Order 2/PPG-05 showing the total amounts due against the above-said work orders as Rs.82,82,180.16/- and Rs.61,50,696.060 respectively exceeding the threshold limit of Rs.1.00 Crore.

11. *Per contra* Ld. Counsel for the Respondent reiterated that the last invoice raised by the Applicant was on 08.04.2017. The last payment was made by the Respondent was on 10.04.2017. The invoices dated 06.02.2018 are cooked-up invoices as the



Respondent had never received any bills after RA No. 16 dated 10.04.2017 which itself was paid in 2017. Ld. Counsel stated that with respect to Work Order 2, it did not receive any bill after RA 05 dated 02.04.2015. The reply letters dated 16.08.2019 and 04.10.2020 were clearly disputing the liability of the Respondent.

12. We have given thoughtful consideration to the rival contentions and perused the records of the case. At the outset, it is necessary to refer to the relevant provisions of IBC, 2016 and the respective rules thereof.

13. Section 8 of IBC provides that an (i) Operational Creditor may, on the occurrence of a default, deliver a demand notice of unpaid operational debt or copy of an invoice demanding the payment of the amount involved in the default to the Corporate Debtor in such form and manner as may be prescribed. Regulation 5 of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016, provides as follows:

"Regulation 5. (1) *An operational creditor shall deliver to the corporate debtor, the following documents, namely: --*

- (a) *a demand notice in Form-3; or*
- (b) *a copy of invoice attached with a notice in Form 4.*

(2) *The demand notice or the copy of the invoice demanding payment referred to in sub-section (2) of section 8 of the Code, may be delivered to the corporate debtor,*



- (a) *at the registered office by hand, registered post or speed post with acknowledgement due; or*
- (b) *by electronic mail service to a whole-time director or designated partner or key managerial personnel, if any, of the corporate debtor.*

(3) A copy of the demand notice or invoice demanding payment served under this rule by an operational creditor shall also be filed with an information utility, if any."

14. Section 9 of IBC provides that after the expiry of period of 10 days from the date of delivery of the notice or invoice demanding payment under sub-section (1) of Section 8 if the Operational Creditor does not receive payment from the Corporate Debtor or notice of the dispute under sub-section (2) of Section 8, the Operational Creditor may file an application before the Adjudicating Authority for initiating a Corporate Insolvency Resolution Process. Section 9(3)(a) of IBC provides that the Operational Creditor, along with the application furnish a copy of the invoice demanding payment or demand notice delivered by the Operational Creditor to the Corporate Debtor.

15. The above provisions clarify that the invoices demanding the payment should be properly served to the debtor and also be a part of the Demand Notice and the application.

16. It is an admitted case of the parties that the Respondent/Corporate Debtor who was awarded the work by BPCL had given the subcontracts to the Applicant/Operational Creditor and issued Work Orders PPG-01 dated 01.07.2014 and PPG-05



dated 16.09.2014. As per the subcontract/work orders, the payments were to be made on 'back-to-back' basis under Clause 11.1 of the sub-contract agreement.

17. Primarily this Tribunal intends to make sure whether the pre-requisite Demand Notice under Section 8 of IBC, 2016 was served to the Corporate Debtor along with appropriate documents:

18. Due to ambiguity in verifying invoices in the Demand Notice and the application, this Tribunal vide order dated 28.02.2023 directed the Applicant to file a list of invoices along with due dates and outstanding against each invoice. Accordingly, the Applicant filed the list vide memo dated 15.03.2023 under SR. No.1189.

19. In the above-said memo the following invoices are marked as 'Payment Not Received Yet'

4. The details of the Invoices under Work Order 2 / PPG-5 are as follows:

RA.Bill No.	Date	Total Amount	Remarks
1	03.12.2014	15,98,410.89	Received payment after deductions
2	05.01.2015	13,06,238.93	Received payment after deductions
3	05.02.2015	15,10,999.41	Received payment afterdeductions
4	05.03.2015	16,98,009.72	Received payment afterdeductions
5	02.04.2015	18,29,744.61	Received payment afterdeductions
6	06.02.2018	6,23,554.13	Payment Not Received Yet
8	06.02.2018	51,20,591.87	Payment Not Received Yet

Final Invoice as on 06.02.2018	Rs. 6,23,554.00	Not received
Final Invoice as on 06.02.2018	Rs. 51,20,592.00	Not received
Security Deposits of RA 01 to RA 15	Rs. 4,06,550.00	Not received
Total Amount	Rs. 61,50,696.00	



Taking the above on record this Tribunal on 20.03.2023, directed the applicant as follows,

"In this matter, Applicant has not produced any document as regards invoice dated 06.02.2018 in page No.37 of the Application. Applicant is directed to file proof of the same in a memo."

20. In a sequel, on 20.04.2023 after hearing the parties this Tribunal in daily order recorded as follows,

"Vide Order dated 20.03.2023, the Counsel for Applicant was directed as under; -

'In this matter, Applicant has not produced any document as regards invoice dated 06.02.2018 in page no.37 of the Application. Applicant is directed to file proof of the same in a memo'.

No memo has been filed in compliance of the order dated 20.03.2023. Counsel for the Applicant was given last opportunity to substantiate from the application, particularly, two invoices, which are no.6223 for a sum of Rs.6,23,554.13 and No.6218 for a sum of Rs.51,20,591.87. Counsel for Applicant is unable to point out from the application where the application is forming part of the Form 3 and Section 8 Notice or even the application which is bearing No.180/2021 as filed before this Tribunal. Again and again, the Counsel for the Applicant is asked to show to the Bench two respective invoices. Ultimately, Counsel for the Applicant accepts that these two invoices do not form part of the application under Section 8 Notice."

Conjoint reading the above manifest that the Applicant has not filed the copy of the invoice dated 06.02.2018 on the basis of which, an amount of Rs.51,20,591.87 was claimed by the Applicant. No proof has been substantiated by the Applicant that the alleged invoices were served to the Corporate Debtor. We find no force in the contention of the Ld. Counsel for the Applicant that



copies of the invoice/bills are not required to be filed in the demand notice.

21. It is thus clear that certain invoices against which the Applicant claims payment under the present application have neither been part of the statutory notice under Section 8 nor the application for consideration by this Adjudicating Authority. A perusal of the provisions and the supplementary rules makes it abundantly clear that the invoices against which payments are sought to be made under the proceedings contemplated under Section 9, shall form part of the invoice under Section 8. Thereafter, the said invoices have to form part of the application under Section 9. Since the above criteria are not met, this Tribunal has no option but to reject the plea of the Applicant. Here, it is also relevant to refer to the decision of the Hon'ble Appellate Tribunal in ***Ramco Systems Ltd Vs Spicejet Ltd [2019 SCC .OnLine NCLAT 354]*** wherein it was held as under:

"10. There is nothing on the record to suggest that the invoices dated 23rd July, 2014 were forwarded or received by the Respondent- 'Spicejet Limited'. Therefore, the Demand Notice issued on 24th April, 2017 as relates to invoice dated 23rd July, 2014, though it cannot be held to be barred by limitation, but in absence of specific evidence relating to invoices actually forwarded by the Appellant and there being a doubt, we hold that the Adjudicating Authority has rightly refused to entertain application under Section 9 which requires strict proof of debt and default.

11. For the reasons aforesaid, no relief can be granted. However, the order passed by this Appellate Tribunal or the Adjudicating Authority will not come in the way of the



Appellant to move before the Court of Competent Jurisdiction for appropriate relief.”

22. Be that as it may, we advert into the next thing to be looked into is whether any explicit dispute existed between the parties before the issuance of the demand notice.

23. From the submission of the Ld. Counsels of both the parties and from the records it is noted that prior to the demand notice dated 15.10.2020, the applicant had caused two legal notices dated 05.08.2019 and 16.09.2019 demanding to pay Rs.57,78,599.89/- and Rs.57,44,145,13/- respectively. In turn, the Corporate Debtor vide letters dated 16.08.2019 and 04.10.2019 disputed the above claims as follows,

[extract of letter dated 16.08.2019, page 38 of the counter]

“...

1. *The notice fails to state that the said invoices needs to be certified based on the measurement sheet, documents and other parameters/clauses as per your client’s work order. There is no certification of invoice by undersigned based on measurement sheet, documents and clauses of the work order.*

...


4. *The notice and claim amounts are completely arbitrary and unreasonable for the reason that reconciliation of the project is yet to complete in its entirety as per the satisfaction of the undersigned i.e. M/s. Techsharp Engineers Pvt. Ltd.,*

...”

[extract of a letter dated 04.10.2019 page 41 of the counter]

...

“We find your notice showing an amount of Rs.57,44,145.13/- raised by your client as their final invoice



and outstanding liability. Without doing any work, your client is raising frivolous claims in order to unjustly enrich itself. We completely reject this claim and amount as we find the claim totally arbitrary and unjustified without any documentation."

It is also noted that in the reply letter dated 04.11.22020 to the Demand Notice, the Corporate Debtor had pointed out that it had disputed the claims of the applicant in earlier communication dated 16.08.2019 and 04.10.2019.

24. It has been held in the case of ***Mobilox Innovations Private Limited V. Kirusa Software Pvt. Ltd., - Civil Appeal No. 9405 of 2017***" that once the Operational Creditor has filed an application which is otherwise complete, the Adjudicating Authority must reject the application under Section 9(5)(2)(d) if notice of dispute had been received by the Operational Creditor or there is a record of dispute in the Information Utility. In the present case, possible contentions have been raised by the Corporate Debtor which requires investigation. The dispute is not a patently feeble legal argument or an assertion of fact. In this case, the demand notice sent by the Applicant was disputed by the Respondent in its replies. Going by the aforesaid test of the existence of a dispute, it is clear that the Respondent has raised the possible contentions and the said defence cannot be said to be spurious. In the case of ***"Continuous Dyeing & Printing Mills V. Bhavika Apparels Pvt. Ltd., - Company Appeal (AT) (Ins) No. 301 of 2022"***, the Corporate Debtor in reply to the legal notice/demand notice had



alleged the notice of demand as unwarranted and frivolous alleging pre-existing dispute. The Operational Creditor ignored the same and filed the present application. In view of the above, this tribunal finds that there was a clear existence of a dispute between the Applicant and the Corporate Debtor and the Petitioner is not entitled to the relief claimed.

25. For the aforesaid reasons, we are of the view that the Applicant/Operational has failed to make out the case for initiating CIRP against the Respondent/Corporate Debtor. There existed disputes even prior to sending the Form-3 notice and the present application.

26. Accordingly, the application is **dismissed**.



-Sd-

SAMEER KAKAR
MEMBER (TECHNICAL)

Suguna



-Sd-

SANJIV JAIN
MEMBER (JUDICIAL)