

**THE NATIONAL COMPANY LAW TRIBUNAL
"CHANDIGARH BENCH, CHANDIGARH"
(Exercising powers of Adjudicating Authority under
the Insolvency and Bankruptcy Code, 2016)**

CP (IB) No. 200/Chd/Hry/2020

**Under Section 9 of Insolvency and
Bankruptcy Code, 2016**

In the matter of:

M/s R.S. Pabla Construction Pvt. Ltd.

9-14-1, Flat No. 503, 4th Floor
Kotu Empire, VIP Road,
Visakhapatnam-530003,
Andhra Pradesh

...Petitioner-Operational Creditor

Vs.

Isgec Heavy Engineering Limited

having its registered office at
Radaur Road, Yamuna Nagar, Haryana-135001.
CIN No. L23423HR1933PLC000097

...Respondent-Corporate Debtor

Judgment delivered on: 07.07.2023

**Coram: Hon'ble Mr. Harnam Singh Thakur, Member (Judicial)
Hon'ble Mr. Subrata Kumar Dash, Member (Technical)**

For the Petitioner- : Mr. Sumit Kumar, Advocate
Operational Creditor

For the Respondent- : Mr. Shambhu Saran, Advocate
Corporate Debtor

Per: Harnam Singh Thakur, Member (Judicial)

JUDGMENT

The present petition is filed, under Section 9 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'IBC' / 'Code'), by **M/s R.S. Pabla Constructions Pvt. Ltd.** (for brevity 'Operational Creditor' / 'Petitioner'), with a prayer to initiate Corporate Insolvency Resolution Process (CIRP) in case of **Isgec Heavy Engineering Limited** (for brevity 'Corporate Debtor' / 'Respondent').

2. The Corporate Debtor, namely, **Isgec Heavy Engineering Limited**, is a Company incorporated on 23.01.1933 under the provisions of Companies Act, 1956 with CIN No. L23423HR1933PLC000097 with its registered office at Radaur Road, Yamuna Nagar, Haryana-135001, India. Hence, the territorial jurisdiction lies with this Adjudicating Authority. Copy of master data of the corporate debtor is attached with the main petition and marked as Annexure 1.

3. The facts of the case, briefly, as stated in the petition are that the after several rounds of negotiations and deliberations, Corporate Debtor issued Letter of intent dated 02.02.2018 to Operational Creditor for chimney construction at NTPC-SAIL Power Company Limited, Durgapur (West Bengal) (hereinafter referred to as "the site"). The Corporate Debtor directed Operational Creditor in month of February, 2018 to mobilize resources. However, it could not be done due to delay on part of Corporate Debtor. On 31.08.2018 the Operational Creditor sent bill for IDLE cost for resources deployed until 31.08.2018 to the corporate debtor and in this regard meeting

was held on 01.10.2018. The corporate debtor in October,2018 revised the terms of BoQ and Operational Creditor gave the revised bill. On 10.11.2018 corporate debtor advised Operational Creditor to demobilise the site and lift up all the its belongings. There were several correspondences were exchanged between the parties regarding payment of IDLE charges. However,corporate debtor has not paid till date the admitted and acknowledges amount towards IDLE charges.

4. It is submitted by the petitioner in Form 5, Part IV that the amount claimed to be in default is Rs. 1,52,58,274.90 (Rupees one crore fifty two lakh fifty eight thousand two hundred seventy four and ninety paise Only) including interest. The default occurred on 14.03.2018 i.e. when the site was mobilised. Copy of Bank statements (Annexure-6), emails (Annexure-11,13,16,20), Letter of Intent dated 02.02.2018 (Annexure-12), minutes of meetings (Annexure-14,18,21), letters (Annexure-15,17,21,23) are attached with the main petition.

5. A demand notice in Form 3 is stated to be issued by the operational creditor on 09.01.2020 and the same has been delivered to the corporate debtor (Annexure-7) as the corporate debtor gave a reply dated 18.01.2020 to the demand notice wherein it was stated that attention was drawn towards notice dated 23.04.2019 vide which operational creditor had asked to resort to the arbitration for resolution of the dispute. The clause mentions as follows:-

“It is further submitted that the dispute of my client at present is not at all connected with the work related payment under the LOI, but is

is regarding IDLE charges payment and hence the question of approved FQAP and Drawings etc are secondary”.

From the communications, it is cleared that the Operational Creditor rescind the contract by refusing to carry out work in terms of LOI. All this process caused time and money. The Operational Creditor denied to carry out work upon receipt of approved FQAP and drawings and started demanding more money. Thereafter revised offer dated 18.10.2018 for Rs. 6,45,00,000 plus taxes for updated BOQ was submitted by the Operational Creditor whereas work was for much less amount i.e. around Rs. 5,30,00,000/-. The Operational Creditor claimed 30 days period for mobilization after receiving LOI which shows that there was no mobilization from the side of Operational Creditor at the site. There is no unpaid operational debt and Operational Creditor is not entitle to claim anything. The papers and documents submitted are not verified or certified by site incharge. Vide communications dated 30.04.2019, 01.02.2019 & 26.11.2018, it is cleared that there is an admitted and existing dispute between the parties (Annexure-8).

6. The notice of this petition has been issued to the corporate debtor to show cause as to why this petition be not admitted. The corporate debtor has filed a reply vide diary No.00964/1 dated 11.12.2020, wherein there is existence of dispute between the parties prior to demand notice issued under IBC Code. The claims were denied and disputed vide letter dated 18.01.2020 by Corporate Debtor, which were earlier denied on several occasions even before vide letters dated 10.11.2018, 26.11.2018, 01.02.2019. Operational Creditor itself admitted existence of dispute vide

letter dated 28.11.2018. The Corporate Debtor on existence of disputes itself invoked arbitration through its invocation letter dated 23.04.2019. The application is not filed by Authorized Person. The Operational Creditor has no locus to approach this Forum as there is no debt due and no default has been committed by Corporate Debtor. Vide letter of intent dated 02.02.2018 the civil work was to be carried out as per approved FQAP and drawings, however the petitioner declined and demanded more price, as a result the LOI was terminated through letter dated 10.11.2018. With reference to LOI dated 02.02.2018 there was no buying of goods or exchange of services. The Operational Creditor had sought to initiate fraudulent and malafide proceedings as there is no question of default. The calculation sheet is arbitrarily prepared. The minutes of the meeting dated 14.03.2018 cannot be treated as admission of liability by the corporate debtor. The claim is in nature of damages and cannot be considered a debt. Email dated 05.09.2018 shows that Operational Creditor has not mobilized any resources at the site. The meetings and the letters relied by the Operational Creditor cannot be treated as admission of liability and are matters of record.

7. The short written submissions have been filed by the petitioner vide Diary No.00964/3 dated 08.02.2023 and by the respondent corporate debtor vide diary No.00964/2 dated 12.09.2022.

8. We have heard the learned counsel for the petitioner and corporate debtor and have perused the records.

9. The first issue for consideration is whether the demand notice in Form 3 dated 09.01.2020 was properly served. The demand notice dated

09.01.2020 is stated to be issued by the operational creditor and the same has been delivered to the corporate debtor as the corporate debtor gave a reply dated 18.01.2020 to the demand notice. Therefore, the demand notice was duly served upon the corporate debtor.

10. The next issue for consideration is whether the operational debt was disputed by the corporate debtor. It is deposed by way of the affidavit by learned counsel for the operational creditor that (Annexure-9).

It is submitted by the corporate debtor through its reply that in reference to LOI dated 02.02.2018, there was no buying of goods or exchange of services.

In the rejoinder dated 23.04.2019 to the reply dated 02.02.2019, the operational creditor itself has requested to resort to Arbitration at Delhi under Arbitration and Conciliation Act, 1996. The clause is produced as under-

“In case of your failure to pay the above stated amount, our Client will take legal recourse and resort to adjudication of dispute before the appropriate forum. You are requested to give your consent to resort to arbitration at Delhi under the Arbitration and Conciliation Act, 1996 for resolution of dispute between you and our Client for payment towards IDLF work force/staff equipment's for Construction of 120 M High RCC Twin. Flue Steel Lined Chimney (2x20 MW) For NTPC SAIL. Power Company Limited Durgapur, W.B. Under LOI dated 02.02.2018”.

However, it is seen from the records that in the notice dated 23.04.2019 operational creditor had asked to resort to the arbitration for resolution of the dispute. The clause mentions only about the idle charges as follows:-

“It is further submitted that the dispute of my client at present is not at all connected with the work related payment under the LOI, but is is regarding IDLE charges payment and hence the question of approved FQAP and Drawings etc are secondary”.

The dispute existed between the parties much before the issuance of the demand notice dated 09.01.2020. The dispute was also admitted by the operational creditor vide letter dated 28.11.2018. The reliance can be placed upon the judgment of Hon'ble Supreme Court **Mobilox Innovations Private Limited Vs. Kirusa Software Private Limited (2018) 1 SCC 353** wherein it was held that:

“40. It is clear, therefore, 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 has been received by the operational creditor or there is a record of dispute in the information utility. It is clear that such notice must bring to the notice of the operational creditor the “existence” of a dispute or the fact that a suit or arbitration proceeding relating to a dispute is pending between the parties. Therefore, all that the adjudicating authority is to see at this stage is whether there is a plausible contention which requires further investigation and that the “dispute” is not a patently feeble legal argument or an assertion of fact unsupported by evidence. It is important to separate the grain from the chaff and to reject a spurious defence which is mere bluster. However, in doing so, the Court does not need to be satisfied that the defence is likely to succeed. The Court does not at this stage examine the merits of the dispute except to the extent indicated above. So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application.

43.We have seen that a “dispute” is said to exist, so long as there is a real dispute as to payment between the parties that would fall within the inclusive definition contained in Section 5(6).

45. Going by the aforesaid test of “existence of a dispute”, it is clear that without going into the merits of the dispute, the appellant has raised a

plausible contention requiring further investigation which is not a patently feeble legal argument or an assertion of facts unsupported by evidence. The defense 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, and the Appellate Tribunal was wholly incorrect in characterizing the defense as vague, got-up and motivated to evade liability”.

(Emphasis Supplied)

The definition of a ‘dispute’ as provided in the Insolvency and Bankruptcy Code, 2016 is as follows-

*“5. Definitions. – In this Part, unless the context otherwise requires, –
(6) “dispute” includes a suit or arbitration proceedings relating to–
(a) the existence of the amount of debt;
(b) the quality of goods or service; or
(c) the breach of a representation or warranty;”*

Since, Operational Creditor itself in the notice dated 23.04.2019 had asked Corporate Debtor to resort to the arbitration for resolution of the dispute. Therefore, it can be concluded that there was a pre-existing dispute between the parties.

The claim is only about the idling charges, which cannot be construed as the Operational debt.

11. The other issue for consideration is whether this application is filed within limitation. A demand notice issued dated 09.01.2020 in Form 3 attached as (Annexure-7) was duly served on the corporate debtor. However, the period of limitation would begin from the date of default i.e. 14.03.2018 i.e. when the site was mobilised. This application was filed vide Diary No. 1906 on 11.03.2020. Therefore, this Adjudicating Authority finds that this application is filed within limitation.

12. As a sequel to the above discussion and the facts as well as circumstances since there is a pre-existing dispute between the parties

regarding the amount claimed by the petitioner, the petition is liable to be rejected, in terms of Section 9 of IBC, 2016. The petition consequently stands dismissed, however, with no order as to costs.

Sd/-
(Subrata Kumar Dash)
Member (Technical)

Sd/-
(Harnam Singh Thakur)
Member (Judicial)

July 07, 2023
PKA/TB