

**NATIONAL COMPANY LAW TRIBUNAL
AMARAVATI BENCH
(Video Conference)**

**PRESENT: JUSTICE TELAPROLU RAJANI – MEMBER JUDICIAL
ATTENDANCE-CUM-ORDER SHEET OF THE HEARING HELD ON 17.10.2022 AT 10.30 AM**

| TC/CP. Nos. | CA/IA No. | Section/ Rule | Name of Parties |
|-------------------------|-----------|------------------|----------------------------------------------------------------------------------|
| CP(IB) No.79/9/AMR/2020 | | 9 of IBC | Godrej & Boyce Manufacturing Company Ltd Vs Vyshaka Solar Energy Systems Pvt Ltd |

Counsel for Petitioner(s):

| Name of the Counsel(s) | Designation | E-mail & Telephone No. | Signature |
|------------------------|-------------|------------------------|-----------|
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Counsel for Respondent(s):

| Name of the Counsel(s) | Designation | E-mail & Telephone No. | Signature |
|------------------------|-------------|------------------------|-----------|
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ORDER

CP(IB) No.79/9/AMR/2020 is admitted, vide separate orders.

SD/-
**JUSTICE TELAPROLU RAJANI
MEMBER JUDICIAL**

**NATIONAL COMPANY LAW TRIBUNAL
AMARAVATI BENCH AT MANGALAGIRI**

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CP (IB) No. 79/9/AMR/2020

**In the matter of a Petition under Section 9 of the Insolvency and
Bankruptcy Code, 2016 Read with Rule 6 of the Insolvency and
Bankruptcy (Application to Adjudicating Authority) Rules, 2016
AND**

**In the matter of
M/s. VYSHAKA SOLAR ENERGY SYSTEMS PRIVATE LIMITED**

Between:

Godrej & Boyce Mfg.Co.Ltd,
Pirojshanagar, Vikhroli,
Mumbai - 400079.

... Operational Creditor

AND

M/s. Vyshaka Solar Energy Systems Private Limited,
(U40300AP2013PTC085615)
19-9-3/E8, Jaya Nagar,
Tiruchanoor Road, Tirupati,
Cuddapah, AP -517501.

... Corporate Debtor

Date of Orders pronounced on: 17.10.2022

CORAM:

Justice Telaprolu Rajani, Member Judicial.

Appearance:

For Operational Creditor : Mr.Sanjay Suraneni, Advocate.

For Corporate Debtor : Dr.S.V.Rama Krishna, Advocate.

ORDER

1. This petition is filed by the Petitioner i.e., Godrej & Boyce Mfg.Co.Ltd, Operational Creditor (hereinafter referred to as OC) against the M/s. Vyshaka Solar Energy Systems Private Limited, Corporate Debtor (hereinafter referred to as CD) seeking to initiate Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor (CD) for the default committed by the CD with regard to the debt of Rs.1,32,20,587.02/- that is due to the OC.
2. Briefly, the facts as reflected in the synopsis are as follows:
 - i. The CD by a Letter of Award (LOA) and Supply Contract Agreement (“Supply Contract”) both dated 18.08.2016 engaged OC for the supply and the service of 2.2 MWp Multi-Crystalline Technology Grid Interactive Solar –PV Power Plant at MV Palli Village, Chittoor District, Andhra Pradesh (“Project”). The total value of the supply contract was Rs.10,35,00,000/- inclusive of duties and taxes.
 - ii. By another LOA and a Service Agreement (“Service Contract”) both dated 18.08.2016, CD engaged OC for the service of 2.2 MWp Multi-Crystalline Technology Grid Interactive Solar –PV Power Plant. The total value mentioned in the Service Agreement was Rs.85 Lakhs. The total value of the contract agreed between the parties was Rs.11,20,00,000/-, under the supply Contract and

Service Contract. Both the contracts were amended from time to time in respect of the scope of work, by adding additional supply of structure worth Rs.35,0000/ and by excluding the Operation & Maintenance part of the contract worth Rs.40,00,000/-. The amendments were carried out by a letter dated 10.05.2017 and an email dated 09.12.2017. The total contract value for the said project, after such amendments was Rs.10,80,35,000/-.

- iii. The date of commissioning of the project was on 31.03.2017. The CD accepted the equipment and materials after joint inspection from time to time, without any demur or protest whatsoever. The OC ensured at all times that the equipment and materials are supplied and installed in accordance with the scope of supply and service and also ensured successful commissioning of the project.
- iv. The CD issued a No Objection cum Completion Certificate dated 08.06.2017 in favour of the OC, in which the CD inter alia acknowledged that the OC has successfully completed, commissioned and handed over the project in all respects and stated that the work was executed as per the specifications and terms and conditions of the contract agreement. On 02.04.2018, the CD issued a Performance Certificate to the OC by stating that the Solar PV Plant's operation is satisfactory after its commissioning.

- v. The OC raised various invoices, for a total sum of Rs.10,35,35,025.37/- and under the Service Contract for Rs.84,99,996.77/-. By an email dated 09.12.2017, the OC sent the invoice details to the CD and one Mr.T.Sahit Reddy (MD) of the CD confirmed that the contract price does not include O & M and requested OC to deduct the O&M Price of Rs.40,00,000/- from the contract price and requested the OC to send the revised price i.e., Rs.10.80 Crores. He also gave a commitment to the OC in the said email that part payment would be transferred within 3 days and the OC has received an amount of Rs.9,79,55,807.22/- from the CD so far and Rs.1,00,79,192.78/- was outstanding as on date.
- vi. As the OC was not receiving the balance payment an email dated 16.05.2018 was sent to one Mr.T.Sahit Reddy, informing that the Sub-Contractors were demanding payment. The Operational Creditor emphasised in the said email that Mr.T.Sahit Reddy has agreed to release the payment by February, 2018, but the same is not received.
- vii. The Corporate Debtor sent an email dated 28.01.2019 by referring to the meeting held in Tirupati on 25.01.2019, relating to the release of the outstanding payment. Mr.T.Sahit Reddy informed the OC that Open Access Approval has been delayed for one year from the date of commissioning and the money was stuck in TRA account of PFC. Mr.T.Sahit Reddy gave a tentative

payment schedule for releasing the outstanding balance payment by March, April & May, 2019.

- viii. By emails dated 23.09.2019 & 30.09.2019 the OC informed Mr.Sahit Reddy that as per commitment given by him in the month of January, 2019 the OC was supposed to get all the payments by August, 2019. But however, no payments were received.
- ix. By an email dated 03.03.2020, the OC sent a balance confirmation statement to the CD requesting the CD to confirm the balance payable. However, no response was received.
- x. A demand notice was issued on 10.06.2020 which was received by the CD. But there was no reply issued for the same. No existing dispute was brought to the notice. Hence, this application seeking to initiate CIRP against the CD.

3. The CD filed counter, contending as follows:

- i. The agreements are admitted but it is stated that the OC has no experience in setting up MW level solar projects and there are many trial and errors in implementing the project. There were number of lacunae during the implementation, such as inordinate delays and defects in the plant and machinery supplied and the quality of services rendered. There were large number of emails exchanged in that regard.

- ii. The OC is a novice in handling solar power projects and this is its first venture. On 30.01.2017, the OC vide an email, furnished a tentative project schedule for execution of the solar project. But the project was not completed in time.

- iii. The OC made two misrepresentations before the Tribunal with regard to the project completion certificate dated 08.06.2017 showing the date of commissioning as 31.03.2017 and the Performance Certificate dated 02.04.2018. On persistent requests from the OC the CD issued the said certificates. But they are being used to mislead the Tribunal. Through an email dated 10.06.2017 the OC attached a blank certificate showing the date as 08.06.2017 containing pre-stated contents chosen by them under the heading "Take Completion Certificate for tender submission purpose". A format was also enclosed. Though the project was no completed by the said date, in order to accommodate the OC only for the tender purpose, a Completion Certificate was issued. Similarly, the OC vide an email dated 19.03.2018 sought another certificate by name Performance Certificate for the same purpose. The above two certificates were obtained only for tender purposes. There are pre-existing disputes with regard to the project.

- iv. The Completion Certificate (Schedule VIII) which has to be in a mandatory format, to be signed by both the parties is not yet obtained. Thereby, the project remains incomplete even today. There were number of emails from the engineers and supervisors of the OC to their higher authorities and also with the CD, showing that there were number of defects and installations. There is serious defect in the SCADA set up and the OC failed to rectify the same. Consequently the CD has been incurring huge losses. The degradation of the plant output should not exceed 2% after two years of commissioning as per the terms of the agreement but in actual terms the degradation is more than 5%.
 - v. Weather Monitoring System (WMS) installed by the OC is a complete failure, along with the Lightning Arrester (LA) and the same are not rectified by the OC. The balance confirmation letter was never given to the CD and the very blanks in the letter would show that there they are created.
 - vi. Form 3 demand notice was not received by the CD. There is a pre-existing dispute. Hence, the Petition is liable to be dismissed.
4. Rejoinder was filed by the OC, contending that the project was completed and handed over as agreed between the parties. The same is admitted by the Managing Director of the CD, not just by virtue of

issuing the Completion Certificate but also by an email dated 31.05.2017. The delay in commencing the project as per the initially agreed timelines was solely because of the failure of the CD to furnish a letter of credit within 15 days from release of initial advance. Clause 5.1 of Supply Contract states that any delay in providing letter of credit shall entitle the OC to an extension of time, proportionately. Clause 23.12 states that time and payment is of essence in performance of obligations under the agreement. In the present case the CD was able to furnish the letter of credit only on 26.01.2017. However, discrepancies were observed in the letter of credit. The OC informed the CD by an email dated 09.02.2017. In good faith the OC agreed to amend the payment terms. If the performance was not satisfactory, the CD was well within its rights to invoke the Performance Bank Guarantees, but he did not choose to do so. The Completion Certificate was provided in terms of Clause 13.5 of the Service Contract. As per Clause 15.1 of the Service Contract Agreement, the liquidated damages shall be paid by the Contractor i.e., OC, for the delay in the project. To suggest that it was issued for other reasons in contrary to the Corporate Debtor's documents, the project was awarded to the OC after the CD conducted technical and financial due diligence. Hence, it is not correct to say that the OC does not have experience. Therefore, the OC seeks to admit the Petition.

5. Heard both the Counsel. The Counsel for the OC contends that certificates were issued by the CD certifying that the work is

completed and is satisfactory and hence, the emails pointing out the defects which were much earlier to the issuance of the Completion and Performance certificates have to be ignored. He contends that the CD cannot raise the issue of delay in commencing and completing the project, as it is due to their delay in issuing the letter of intent that the project had to commence with delay. The Counsel for the CD contends that the Completion Certificate and Performance Certificate were issued only on the specific requests made by the OC that they need the said certificates for tender purpose pertaining to the other projects that the OC proposed to take up. He contends that there were several mails sent to the OC pointing out the defects and deficiencies in the work done by them and also with regard to the delay in the progress of the project.

6. There is no doubt that there are mails sent to the OC with regard to the defects and delay in the project. A mail dated 23.04.2017 points out that only 5 to 7 men are working on Module Installation. The work progress on DC side is very slow and no committed timeline on the project hand over date was given. No information on AC, pipe line for water distribution etc., are given. It is intimated that they propose to hold opening puja on 28th of April, 2017 and if they do not complete the work by 27th April, 2017 evening they will proceed with delay clauses, as per the agreement. It is also stated that they have been telling them about the bad erection part of the civil works for both inverter room and control room. It was pointed out that the OC did not respond. It was also pointed out that there is no proper module

alignment and that it is the worst alignment they have done so far at site. It was also pointed out that the OC is bothered about the site issues. An email dated 22.05.2017 is in the form of the reminder regarding the OEs site visit in April and the OE giving a check list of the pending works at site. The OC was called upon to give compliance for the purpose of documentation. A mail dated 15.01.2018 calls upon the OC to let the CD know the exact status of sending the Security Picket & LA which is supposed to reach the site on 14.01.2018. A mail dated 17.01.2018 requests the OC to replace the LA on immediate basis and to confirm the date. A mail dated 16.01.2018 is sent by the OC stating that they would update on the LA and Security Picket. As to what were the updates given on the same is not on record. But however, after 17.01.2018, there were no mails sent by the CD to the OC in that regard. It can be seen that by virtue of the mail dated 23.04.2017 it was intimated to the OC that if the works are not completed by 27th April, 2017 the delay clauses would be invoked. But the invocation of the delay clauses is not done by the CD inspite of the same.

7. The contents of the counter can be looked into to understand the truth of the transaction and the contentions made by the CD. It is stated that the CD paid substantial amount after availing loans, which carry heavy interest burden and every day delay would be not only loss in production and revenues but is saddled with interest on loans. But yet Rs.10 Crore was paid to the OC and only small balance amount was withheld for clearance on various defects and deficiencies identified.

It is stated that oral discussions were going on to refer the matter to independent chartered engineer to identify the issues before making balance payments. It was also orally proposed to refer the matter to arbitration in terms of Clause 23.7.2. Hence, what can we understand from the said contents is that only small balance amount is withheld which would imply that the defects and deficiencies are only few. The defects are pointed out in the year 2017 itself but till date no action is taken for the delays and defects and in the meantime the Completion Certificate and the Performance Certificate got to be issued by the CD. A look at the mail requesting the issuance of the Completion Certificate would show that the instructions are to take the Completion Certificate for tender submission purpose. A format was also annexed to the said mail. In response to the said mail the Completion Certificate was issued. While the mail is dated 12.06.2017 the Completion Certificate bears the date of 08.06.2017 which is prior to the date of the mail. There is absolutely no explanation as to why a date prior to the date of mail had to be mentioned on the certificate. The date of commissioning is shown as 31.03.2017. With regard to the Performance Certificate also the mail dated 19.03.2018 shows that it is required for tender submission. It is also specified in the body of the mail that they require the above said certificate for tender submission purpose only.

8. The Counsel for the OC, while contending that the said certificates are issued based on the completion of the work and the performance of the work, also relies on the letter dated 28.01.2019 issued by the CD

to the OC stating that a meeting was held at Tirupati on 25.01.2019 with regard to the outstanding payment to be released by them. It states that their money is stuck with PFC for some reasons like Open Access Approval being delayed by one year from the date of project commissioning date, money being stuck in PRA account of PFC for which the revenues were being adjusted to the loan. It is mentioned that with all the above major struggles with their project, they will be raising funds through other personal sources to continue good relations with Godrej. The tentative repayment schedule is mentioned as March -19 10 to 15 Lakhs April-May, 2019 10 to 15 Lakhs. It is mentioned that in similar way they will try to solve the issue at the earliest and shall be thankful if the OC shall consider the request in view of project challenges and financial crises they are into. He also relies on a letter dated 12.09.2019 issued by the Managing Director of the CD to Mr.Sudheer Saha ED (SR), PFC New Delhi requesting for release of Godrej Bank Guarantee. It mentions that since, the project has successfully commissioned and it has been three years of success of plant, the Bank Guarantees may be released at the earliest since they have expired 10 months ago and that they are not necessary for them anymore. He contends that the above would go to prove that the project was successfully completed and was performing well. The Counsel for the OC also contends that a letter was issued to the CD on 03.03.2020 calling upon them to confirm the amount due within seven days, failing which the above balance would be deemed to be correct. No reply was issued by the CD. The Counsel for the CD contends that

the said letter was not received by them. In answer to the said contention, the Counsel for the OC submits that on the same day a mail was also sent to the CD with the same content and there was no reply even for the said mail. Hence, it has to be understood that the CD, inspite of receiving the mail, did not respond, which amounts to admitting the debt. There was no reply issued even for the demand notice issued by the OC. The contention that the demand notice was not received does not seem to be true as the track record shows that the letter was delivered on 15.06.2020. There was no counter argument to the said track record. Hence, it has to be held that Form 3 notice was served on the CD. The failure of the CD in reply to the said notice mentioning about any pre-existing dispute would amount to acknowledging the debt.

9. The argument that the Completion Certificate and Performance Certificate were issued only under an obligation to keep good relations with the OC though the work is not completed, is not supported by the material on record.
10. The contention that the Completion Certificate is to be obtained in the format mentioned in Schedule VIII of the Agreement need not be considered as nowhere in the agreement it is mentioned that obtaining Completion Certificate in the said format is mandatory. In so many words if the CD certifies the completion of the project and performance of the project, there need not be any reason to ignore the said certificates. The absence of signature of the OC on the

Completion Certificate is not at all material. Though the format in Schedule VIII of the Agreement provides for the signature of the OC, it is for the CD to certify the completion of the project whose signature is very much available on the Completion Certificate and Performance Certificate. It is also evident from the pleadings that the CD is in losses which in all probability seems to be the reason for non-discharging the debt which is due to the OC. There is a clear undertaking given by the OC for repaying the debt. The contention that the said repayment is only for Rs.30 Lakhs and not for the entire debt does not hold merit as the same mail recites that they will try to solve this at the earliest in a similar way. In view of the above proved facts, this Tribunal is inclined to admit the application.

ORDER

The Company Petition is admitted. The Corporate Insolvency Resolution Process of the Corporate Debtor shall commence from this date and shall be completed within 180 days hence.

- 1. Mr. Srinivas Rao Gudla**, (Registration No. IBBI/IPA-001/IP-P-02093/2020-2021/13333), having office at 6-20-20/3, Flat No.201, Aqua Towers, East Point Colony, Back Gate, Chaitanya College, Visakhapatnam, Andhra Pradesh-530017; Mobile:8885524036; e-mail: **gudlasrinivasrao@gmail.com**; is appointed as the Interim Resolution Professional. No disciplinary

proceeding is pending against him as per the IBBI website. He is directed to file his written consent in Form No. 2 forthwith.

2. He is directed to take charge of the Corporate Debtor's management forthwith and take necessary steps in furtherance of the CIRP in terms of Sections 13(2), 15, 17, 18 and 20 of Code and Rules made thereunder.
3. Moratorium in respect of the Corporate Debtor is hereby declared in terms of Section 14 of the Code.
4. The Directors, Promoters or any other person(s) associated with the management of Corporate Debtor shall extend all assistance and cooperation to the IRP as stipulated under section 19 of the Code for effectively discharging his functions under the Code.
5. The Registry shall communicate the order to the Operational Creditor and the Corporate Debtor forthwith.
6. The Operational Creditor and the Registry shall send the copy of this order to IRP for necessary compliance.

Sd/-

JUSTICE TELAPROLU RAJANI
MEMBER JUDICIAL

Swamy Naidu