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

IBA/41/2020

(filed under Section 9 of the Insolvency and Bankruptcy Code, 2016)

In the matter of **M/s. TRK Textile (India) Pvt. Ltd.**

M/s. OPG Power Generation Private Limited

Reg. Off:-

No.6, Sardar Patel Road,
Guindy,
Chennai – 600 032

... Operational Creditor

-Vs-

M/s TRK Textile (India) Pvt. Ltd.

No.11, CBC Building, M.R. Nagar,
KPN Colony Post, Dharapuram road,
Tirupur-641 608,
Coimbatore District.

... Corporate Debtor

Order Pronounced on 1st November 2021

CORAM :

**R. SUCHARITHA, MEMBER (JUDICIAL)
ANIL KUMAR B, MEMBER (TECHNICAL)**

*For Operational Creditor : Aparijitha Vishwanathan, Advocate
For Corporate Debtor : Naveen Kumar Murthi, Advocate*

ORDER

Per: R. SUCHARITHA, MEMBER (JUDICIAL)

The IBA/41/2020 has been filed by the **M/s. OPG Power Generation Private Limited** (hereinafter referred to as "Operational Creditor") against **M/s. TRK Textiles (India) Pvt.**

Ltd. (hereinafter referred to as "*Corporate Debtor*") under Section 9 of the Insolvency & Bankruptcy Code 2016 (in short, 'IBC, 2016') r/w Rule 6 of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016, to initiate Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor.

2. A perusal of Part I of the Application shows that the Petitioner is a Private Limited Company. In relation to the Corporate Debtor, the particulars of the Corporate Debtor are given in Part – II from which it is seen that the Corporate Debtor is also a Private Limited Company incorporated on 09.08.2005 and the Nominal Share Capital of the Company is Rs.23,00,00,000 and Paid-up Capital is Rs.15,00,00,000/-. The Registered office of the Corporate Debtor as per the Application is stated to be situated at No.11, CBC Building, M.R. Nagar, KPN Colony Post, Dharapuram Road, Tirupur- 641 608, Coimbatore.

3. In relation to Part III of the Application it discloses that the Operational Creditor has not proposed the name of any "Interim Resolution Professional" (IRP) and left it to the discretion of this Tribunal to appoint the IRP. Part IV details the transaction between the Operational Creditor and the Corporate Debtor leading to the debt and default and the amount which is being

claimed is Rs.47,62,315/- which includes a sum of Rs.11,26,040/- towards principal and Rs.36,36,275/- towards interest on delay of payments.

4. Part V in the prescribed Application discloses the documents based on which the claim is sought to be substantiated by the Operational Creditor as against the Corporate Debtor and the Operational Creditor has attached the following documents;

- a. Power Supply Agreement between Operational Creditor and the Corporate Debtor dated 15.09.2015 for the Supply of Power.
- b. Operational Creditor's invoices dated 01.02.2018, 01.03.2018, 31.03.2018, 24.04.2018, 04.05.2018, 30.05.2018, 30.06.2018, 01.08.2018, 31.08.2018 and 01.10.2018.
- c. Operational Creditor's various emails sent to the Corporate Debtor dated 24.01.2018.
- d. Remainder e-mails dated 23.07.2018, 24.07.2018, 27.07.2018, 28.07.2018.
- e. Debit notices issued to the corporate debtor dated 01.02.2019 for interest on delayed payments.
- f. Operational creditor letter dated 11.06.2018 to the corporate debtor to clear all the remaining dues.
- g. Demand Notice issued by the Operational Creditor dated 27.05.2019.



h. Copy of the Acknowledgement of demand notice on 30.05.2019.

5. The Learned Counsel for the Operational Creditor submitted that the Corporate Debtor approached the Operational Creditor and offered to purchase power from the Operational Creditor and in pursuance of the same, both the parties entered into a Power Supply Agreement (hereinafter referred to as "Agreement") dated 15.09.2015 in relation to the same for a period of three years, which continued thereafter on mutual understanding. Thereafter, it is submitted that the Operational Creditor has raised various invoices periodically and the Corporate Debtor was paying the dues according to the invoices; but with inordinate delay. It was submitted that as per the Agreement, the Corporate Debtor is liable to settle the dues before the due date i.e. 10 days from the date of Invoice and in case of any delay in settlement of dues, as per clause 4.2 and 4.3 of Agreement, the Operational Creditor is liable to charge interest at the rate of 3% per month.

6. The Learned Counsel for the Operational Creditor submitted that the Operational Creditor was unable to collect the legitimate dues pending to them from the Corporate Debtor and hence a Demand Notice under Section 8 of the Insolvency and

Bankruptcy Code, 2016 was issued by the Operational Creditor to the Corporate Debtor on 27.05.2019 and the same was delivered to the Corporate Debtor on 30.05.2019, to which, the Corporate Debtor has not sent any reply, i.e. even after the expiry of 10 days as stipulated under Section 8 of IBC, 2016. It was also submitted that the Corporate Debtor has not paid the outstanding amount as per the invoices. Under these circumstances, the Operational Creditor submitted that the Corporate Debtor has committed a default in the payment of the debt amount which is due and payable to the Operational Creditor and hence prayed for initiation of the Corporate Insolvency Resolution Process against the Corporate Debtor.

7. Before traversing to the submissions made by the Learned Counsel for the Corporate Debtor, it is necessary to extract certain clauses contained in the Power Supply Agreement dated 15.09.2015.

3. CONSIDERATION:

3.2 (i) *The Tariff per unit shall be Rs.5.75 (calculated from the prevailing TANGEDCO Energy Charge of Rs.6.35 less 9.44% discount) as illustrated in the Schedule A. Provided that in the months for which Reduction in Contracted Capacity is permitted by the Generator as per Clause 2.11 above, the Tariff per unit payable by the Member Consumer will be as per the attached Schedule B.*



(ii) The Tariff will be linked to the TANGEDCO Tariff and will be automatically revised in the following manner:

(a) If there is any escalation of the TANGEDCO Tariff or any introduction / upward revision of any of its components, whether prospective or retrospective, by a Change in Law or otherwise, the Tariff payable by the Member Consumer to the Generator shall be increased by 50% of any such revision/introduction; and/or

(b) If there is any revision (increase or decrease) in the prevailing transmission and open access charges, whether prospective or retrospective, by a Change in Law or otherwise, the Tariff payable by the Member Consumer shall be increased or decreased (as the case may be) by a value equalling 50% of the said revision.

Any such increase will be done automatically by the Generator and will take effect immediately upon the revised TANGEDCO Tariff or any of its components or the revised transmission or open access charge, as the case may be, takes effect. Any such additional payment due by the Member Consumer on account of Clause 3.2(a) and (b) shall be claimed through the issuance of an Invoice by the GENERATOR. The Tariff applicable for all sales/allotment of power to the Member Consumer will be computed by the above methodology for the entire term of the Power Supply Agreement.

4. BILLING AND PAYMENT:

4.1. The GENERATOR shall submit to the Member Consumer:

a. The Commercial Invoice for any Billing Period for the entire Contracted Capacity, after the end of that Billing Period and

b. A Supplementary Invoice, as and when required, for interest and all other amounts due from the Member Consumer in accordance with this Agreement.



- 4.2. *The Member Consumer shall make payments on or before the Due Date of any Invoice(s) issued by the GENERATOR either by Demand Draft payable at Chennai or by RTGS. All charges associated with any payment are to be borne by the Member Consumer. The account details for the payment shall be specified to the Member Consumer by the GENERATOR ("Designated Account"). The Member Consumer shall notify the Generator of its payment of any Invoice(s) into the Designated Account on the same day of payment. In the event of delay in payment of an Invoice by the Member Consumer beyond its Due Date, the Member Consumer shall be liable to pay to the GENERATOR interest at the rate of 3% per month on the amount of outstanding payment on a day to day basis from the Due Date to the day of payment.*
- 4.3. *All payments made by the Member Consumer (whether under any of the Invoice(s)) shall be received and accounted for by the GENERATOR in the following order of priority:*
- a. Towards late payment interest amounts, if any.*
 - b. Towards any previous unpaid Invoice(s), if any.*
 - c. Towards any current Invoice(s)*

11. MISCELLANEOUS PROVISIONS:

- 11.4. *No variation, waiver or modification of any of the terms of this Agreement shall be valid unless reduced to writing and signed by both the Parties.*
- 11.8. *In the event of Change in Law and/or change in price of fuel for the Power Plant or change in transmission or wheeling losses and charges, the GENERATOR shall have right to revise terms of this Agreement especially relating to Price, mode, method, billing and Contribution towards Energy.*

12. GOVERNING LAW AND ARBITRATION:

- 12.1. *This Agreement shall be governed by and construed in accordance with the laws of India.*



- 12.2. *All disputes and differences between the Parties arising out or in connection with this Agreement ('Disputes') shall first be tried to be settled through mutual negotiation.*
- 12.3. *In the event that any Dispute could not be resolved between the Parties pursuant to Clause 12.2, then such Dispute shall be referred to arbitration under the Arbitration & Conciliation Act, 1996 to a sole arbitrator to be appointed by the GENERATOR.*
- 12.4. *The arbitral proceedings shall be in Chennai. Notwithstanding the existence of any Disputes referred to arbitration, the Parties shall continue to perform their respective obligations under this Agreement and the Member Consumer shall not withhold, for any reason whatsoever including the pendency of arbitration proceedings, payment of any Invoice presented.*
- 12.5. *The Parties agree that, the Member Consumer shall have no right to commence or maintain any suit or legal proceedings until the Dispute has been determined in accordance with the arbitration procedure provided herein.*
- 12.6. *Each Party will bear their respective costs for arbitration proceedings including legal costs.*
- 12.7. *The courts at Chennai shall have exclusive jurisdiction to entertain any Dispute arising out of or in connection with this Agreement.*

8. The Corporate Debtor has filed its reply and it is averred in the reply that the claim of the Operational Creditor to the tune of Rs.47,62,315/- is completely fictitious claim, without any substantial proof to evidence the existence of such an amount owned as dues from the Corporate Debtor to the Operational Creditor. Further, it is stated in the counter that the Operational Creditor's claim in para 1 of Part – IV of their petition has stated

that due to unforeseen circumstances, the Operational Creditor was forced to increase per unit price of power supplied to the Corporate Debtor was completely without basis and without notice to the Corporate Debtor. Further, it is averred in the counter that there was no agreement entered into for any increase in the cost of the power being supplied by the Operational Creditor and neither was there any acceptance communicated from the end of the Corporate Debtor to increase the price of per unit of power supplied in between the terms of supply period which ends by March 2018.

9. The Learned Counsel for the Corporate Debtor submitted that they are not liable to pay the unilateral increase in price and the same was not paid in the first month of incremental billing which was made and further it was submitted that having full knowledge of the non acceptance of the Corporate Debtor in relation to the price increase, the Operational Creditor has continued to supply power in the subsequent month and hence, the same cannot be put against the Corporate Debtor for unilaterally claiming increased prices, especially after a significant period of time had passed since the unilateral increase in price by the Operational Creditor.



10. The Learned Counsel for the Corporate Debtor submitted that the Operational Creditor has sought to inflate the amount owed by the Corporate Debtor by levying an unaccounted and unverified amount of Rs.36,36,275/- as interest, without providing any substantial proof of the accrual of the same. Hence, it was submitted by the Learned Counsel for the Corporate Debtor that there is a dispute between the parties since the Corporate Debtor has not accepted the unilateral increase in price by the Operational Creditor and hence sought for the dismissal of the present Application.

11. Heard the submissions made by the Learned Counsel for both the parties and perused the file including the pleadings placed on record. The contention of the Learned Counsel for the Operational Creditor is that the Corporate Debtor has committed default in the payment of the sum which is due and payable by the Corporate Debtor to the Operational Creditor. This Adjudicating Authority, in order to come to the conclusion that the Corporate Debtor has committed default in paying the debt amount which is due to the Operational Creditor, as to the facts of the present case has to examine in detail the clauses contained in the Power Supply Agreement dated 15.09.2015 entered into between the parties. At the cost of repetition,



clause 3.2 of the Agreement dated 15.09.2015 are extracted hereunder;

3.2 (i) The Tariff per unit shall be Rs.5.75 (calculated from the prevailing TANGEDCO Energy Charge of Rs.6.35 less 9.44% discount) as illustrated in the Schedule A. Provided that in the months for which Reduction in Contracted Capacity is permitted by the Generator as per Clause 2.11 above, the Tariff per unit payable by the Member Consumer will be as per the attached Schedule B.

(ii) The Tariff will be linked to the TANGEDCO Tariff and will be automatically revised in the following manner:

(a) If there is any escalation of the TANGEDCO Tariff or any introduction / upward revision of any of its components, whether prospective or retrospective, by a Change in Law or otherwise, the Tariff payable by the Member Consumer to the Generator shall be increased by 50% of any such revision/introduction; and/or

(b) If there is any revision (increase or decrease) in the prevailing transmission and open access charges, whether prospective or retrospective, by a Change in Law or otherwise, the Tariff payable by the Member Consumer shall be increased or decreased (as the case may be) by a value equalling 50% of the said revision.

Any such increase will be done automatically by the Generator and will take effect immediately upon the revised TANGEDCO Tariff or any of its components or the revised transmission or open access charge, as the case may be, takes effect. Any such additional payment due by the Member Consumer on account of Clause 3.2 (a) and (b) shall be claimed through the issuance of an Invoice by the GENERATOR. The Tariff applicable for all sales/allotment of power to the Member Consumer will be computed by the above methodology for the entire term of the Power Supply Agreement.

12. It is to be noted here that as per the Agreement dated 15.09.2015, the tariff was fixed at Rs.5.75 is increased by about 40p, due to the hike in fuel prices from 24.01.2018. Thus, it is clear on the facts that the Operational Creditor has raised

invoices against the Corporate Debtor for a sum of Rs.6.15/- (Rs.5.75 + Rs.0.40) tariff per unit for the electricity consumed from the month of January 2018.

13. As we browse through the clauses stipulated in Agreement dated 15.09.2015, the increase in the tariff rate is contemplated under two circumstances;

- (a) when there is a change in the TANGEDCO Tariff rate (as per Clause 3.2 of the Agreement)
- (b) when there is a rise in the fuel price (as per Clause 11.8 of the Agreement).

14. If any increase in price is contemplated as per Clause 3.2 the same will be done automatically by the Operational Creditor and the same will take effect immediately upon the revised TANGEDCO Tariff. However, on the contrary if there is any increase in price is contemplated as per Clause 11.8 of the Agreement, the same only confers a right upon the Operational Creditor to revise the terms of the Agreement in relation to the same. The increase in price does not automatically take effect as in the case of clause 3.2 of the Agreement.

15. Further the Operational creditor, have communicated to the Corporate Debtor that the rise in the tariff is due to the rise in the price of the fuel. Hence, the Operational Creditor has

effected the increase in tariff by operation of Clause 11.8 of the Agreement. In this regard, it is relevant to refer to Clause 11.4 of the Agreement states as follows;

11.4. No variation, waiver or modification of any of the terms of this Agreement shall be valid unless reduced to writing and signed by both the Parties.

16. Thus, a conjoint reading of Clause 11.8 with Clause 11.4 of the Agreement stipulates that as the Operational Creditor shall have the right to revise the terms of the Agreement pertaining to Price, mode, method, billing and Contribution towards Energy, however Clause 11.4 states that such terms, or modifications to any of the terms shall be not be valid unless they are deduced in writing and signed by both the parties.

17. Hence, it is clear that the increase in price is due to the rise in the price of the fuel, for which the Operational Creditor, if sought to increase the price, ought to have discussed the issue with the Corporate Debtor and only after a consensus reached between the parties as to the price to be charged per unit, and after the same being deduced in writing and signed by both the parties the increase in price would be given effect to.

18. Further, it is also required to be noted that simply because the Corporate Debtor has not replied to the earlier emails of the Operational Creditor, it would not wipe out the fact that a real



dispute is existing between the parties. The Supreme Court in the matter of **Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software (P) Limited**; 2017 1 SCC Online SC 353 held that the 'existence of dispute' and/or the suit or arbitration proceeding must be pre-existing

"33. The scheme under Sections 8 and 9 of the Code, appears to be that an operational creditor, as defined, may, on the occurrence of a default (i.e. on non-payment of a debt, any part whereof has become due and payable and has not been repaid), deliver a demand notice of such unpaid operational debt or deliver the copy of an invoice demanding payment of such amount to the corporate debtor in the form set out in Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 read with Form 3 or 4, as the case may be [Section 8(1)]. Within a period of 10 days of the receipt of such demand notice or copy of invoice, the corporate debtor must bring to the notice of the operational creditor the existence of a dispute and/or the record of the pendency of a suit or arbitration proceeding filed before the receipt of such notice or invoice in relation to such dispute [Section 8(2)(a)]. What is important is that the existence of the dispute and/or the suit or arbitration proceeding must be pre-existing i.e. it must exist before the receipt of the demand notice or invoice, as the case may be.."

At paragraph 51 it is held:

"51.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"



19. Thus, *prima facie* from the clauses contained in the Agreement dated 15.09.2015, the question as to whether the Operational Creditor is entitled to claim automatic increase in the price, if there is a change in the price of fuel is a question to be decided by a Civil Court after letting in sufficient evidence and also filing necessary documents, which is not possible in a summary proceedings before this Tribunal. Further, as per the decision of the Supreme Court in **Mobilox** (*supra*), this Tribunal need not be satisfied as to whether the said defence is likely to succeed or not and also need not examine the merits of the dispute. The fact that dispute truly exists between the parties in fact is sufficient for this Tribunal to reject the Application, so long as the said defence is not spurious, hypothetical or illusory.

20. Thus, in view of the discussions made *supra*, this Application stands **dismissed**. No cost.

-sd-
(ANIL KUMAR B)
MEMBER (TECHNICAL)

-sd-
(R. SUCHARITHA)
MEMBER (JUDICIAL)

Raymond