NATIONAL COMPANY LAW APPELLATE TRIBUNAL

AT CHENNAI

(APPELLATE JURISDICTION)

Company Appeal (AT) (CH) (Ins) No. 148/2022
(Under Section 61 of the Insolvency and Bankruptcy Code, 2016)

(Arising out of the Impugned Order dated 21/03/2020 in CP/5/CHE/2021, passed by the 'Adjudicating Authority', National Company Law Tribunal, Division Bench – I, Chennai)

In the matter of:

Mr. B.V. Gautam,
Director of M/s. Saheli Exports Pvt. Ltd.
Residing at No.3 Swasthi Apartment, 4th Avenue, Harrington Road
Chetpet, Chennai – 600 031 …Appellant

Versus

M/s Clarke Energy India Pvt. Ltd.
Represented by its authorised representatives
Having their registered office at Shivkiran,
Plot No. 160, Lane No. 4, Dahanukar colony,
Kothrud, Pune – 411038. …Operational Creditor / 1st Respondent

M/s Saheli Exports Pvt. Ltd.
Represented by Its Interim Resolution Professional Mr. Ramasamy Shanmuggam,
Having their registered office at
New No. 25/old No. 10,
Sir Madhavan Nair road,
Mahalingapuram. Nungambakkam,
Chennai, Tamil Nadu – 600034 …Corporate Debtor / 2nd Respondent

Present:

For Appellant : Mr. T.K Bhaskar, Advocate
For Mr. Vikram Jain & Mayan Jain, Advocates

For Respondents : Mr. Yogesh Kanna, Advocate, for R1
Mr. AG Sathiyanarayana, Advocate, for R2

<u>J U D G E M E N T</u>
<u>(Virtual Mode)</u>

<u>[Per: Shreesha Merla, Member (Technical)]</u>

1. Challenge in this Company Appeal (AT) (CH) (Ins) No. 148 of 2022 is to the Impugned Order dated 21/03/2022, passed in CP No. 5 of 2021 by National Company Law Tribunal, Division Bench – I, Chennai, by which Impugned Order the Application was filed by M/s Clarke Energy India Pvt. Ltd. / 'Operational Creditor', under Section 9 of the 'Insolvency and Bankruptcy Code, 2016' (hereinafter referred to as 'the Code'.), has been admitted by the 'Adjudicating Authority', observing as follows:

> *"14. In so far as the submissions made by the Learned Counsel for the Respondent, it is seen that as per the MOU they are required to pay the amount to the Operational Creditor in 6 instalments, however the stand taken by the Respondent in the present case that since no revenue has been generated and hence, they are not in a position to pay the amount to the Corporate Debtor would not fall under the term 'dispute' as per Section 8 of IBC, 2016. Further, the terms of the MOU clearly stipulates that the Operational Creditor is required to make the payment irrespective of whether the said engine is in operation or not at the time of payment dates. Thus, the 'operational debt' and the Corporate Debtor has committed 'default' in repayment of such operational debt. Also, the alleged disputes as submitted by the Learned Counsel for the Corporate Debtor in relation to non-payment of*

money is not sustainable in terms of provisions of IBC, 2016.

15. Further, this said debt amount claimed by the Operational Creditor amounting to Rs. 2,25,62,360/- (Rupees Two Crores Twenty Five Lakhs Sixty Two Thousand Three hundred and Sixty only) falls well within the purview of the pecuniary limit fixed by the central government vide Notification S.O. 1205(E) dated 24.3.2020 issued by the Ministry of Corporate Affairs, Government of India.

16. Further, it is also pertinent to note that the default arising in the present Application is much prior to the advent of the Covid-19 pandemic and hence the Corporate Debtor also cannot seek shelter under Section 10A of IBC, 2016. Under the said circumstances, this Tribunal is left with no other option than to proceed with the present case and initiate Corporate Insolvency Resolution Process in relation to the Corporate Debtor, which ordinarily shall get completed within 180 days, reckoning from the day this order is passed."

2. The Learned Counsel submitted that the 1st Respondent / 'Operational Creditor' is the only supplier and service provider of 'GE Gas Engines' in India, where the spares and maintenance of the Engines were directly done. However, the 1st Respondent rather than providing the maintenance services by themselves, engaged 'SAS EPC Solutions Private Limited' ('SAS EPC') to carry out maintenance of the GE Engines supplied to the Corporate Debtor. The 'Operational Creditor' simultaneously entered into Agreements dated 08/09/2011 with 'SAS EPC' for supply of spares and also for services for maintenance of GE-1 Engines and similar Agreements dated 21/12/2012 for GE-2 Engines.

Simultaneously, SAS EPC also entered into an agreement with the Corporate Debtor to supply spares and provide 'Operations and Maintenance' (O&M) Services. It is submitted that operational Creditor defaulted in their obligation to repair the GE-2 Engine that had broken down since April 2017, resulting in huge revenue loss to the 'Corporate Debtor'. Subsequently, 'Operational Creditor' suspended their ties with 'SAS EPC' in November 2019. It is submitted that the 'Operational Creditor' then chose to supply the spares and do the 30K maintenance of the said GE-1 Engine by themselves directly, rather than involve 'SAS EPC' because of the huge cost involved and also because the payment would be made directly by the Corporate Debtor. The Corporate Debtor placed purchase Order dated 13/06/2018 with the 'Operational Creditor' for the spares and maintenance to be performed at 30K running hours of GE-1 Engine, for which the delivery was stipulated to be within 8-10 weeks. An 'MoU' was entered into between the 'Corporate Debtor' and the 'Operational Creditor' on 11/07/2018 for the purpose of carrying out 30K maintenance of GE-1 Gas Engine. It is submitted by the Learned Counsel that the 'MoU' was a composite contract for both supply of goods and for the provision of services. The Payment terms as per the said 'MoU' are reflected in Para 1(b) of the 'MoU'. The Learned Counsel drew our attention to the said clause which is extracted below:

> *"Notwithstanding anything contrary contained elsewhere in this MOU, the Service recipient shall pay the dues of the Service Provider after repayment of Bank Loan dues for that month. If any*

> *shortfall arises in the said month for paying Service Provider after clearing the bank dues, the shortfall will be paid in the immediate next month. In the months of shortfall, service recipient agrees to provide bank statements of all banks to Service Provider to support collection during the month, bank loan repayment and shortfall in making payment to service provider."*

3. It is submitted that from the aforenoted clause, it is clear that the payment is dependent on the Commercial Viability of the Engine and when the Engine is in a position to generate income when put in commercial operation. The Engine had become commercially operational only on 05/04/2019 and the 'Operational Creditor' had committed a default. Even at the time of commissioning the engine, the G-2 Engine which was also supplied by the 'Operational Creditor' was not running for almost 28 months as on 1st September 2019, which had led to huge revenue loss for the Corporate Debtor and hence, the non-payment was only because of the fault of the 'Operational Creditor' and the same was explained by the 'Corporate Debtor', vide e-mail dated 11/09/2019 stating that when there is no generation or less generation of power, and expected revenue was not made, the question of payment of dues does not arise. In the meanwhile, GE-1 Engine which was overhauled by the 'Operational Creditor' started giving trouble due to defective spares. It is contended that the 'Corporate Debtor', vide email dated 07/11/2019, 17th & 18th December 2019 and 14th and 28th January 2020 had pointed out various disputes for defective valve and higher lube consumption, delayed commissioning, not achieving the maximum utilisation and these defects in the Engine and the spare supplied became evident only after 5834 hours of operation after the maintenance. Despite noting the defects in the Engine and also agreeing to adhere to the defects on top priority as per their e-mail dated 17/12/2019, the ‘Operational Creditor; failed to rectify the defects.

4. The ‘Operational Creditor’ had issued a ‘Demand Notice’, received on 28/02/2020, claiming a total amount of Rs. 2,25,62,360/- (Rupees Two Crores Twenty Five Lakhs Sixty Two Thousand Three Hundred and Sixty Only) from the ‘Corporate Debtor’ for which the ‘Corporate Debtor’ replied vide letter dated 02/03/2020 bringing out the existence of dispute in relation to the defective products and enclosed all the relevant e-mails as well. Despite the issuance of the Reply dated 02/03/2020 and bringing the pre-existing dispute to the forefront, the ‘Adjudicating Authority’ admitted the Section-9 Petition, considering the e-mails dated 07/11/2019, 17/12/2019, 18/12/2019, 14/01/2020 & 28/01/2020 which were all part of the Reply to the Demand Notice. The Learned Counsel placed reliance on the Judgment of the Hon’ble Supreme Court of India in the matter of ***‘Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software Pvt. Ltd’*** reported in ***[(2018) 1 SCC 353]*** in which it was held that if any pre-existing dispute exists, the ‘Adjudicating Authority’ need not examine the merits of the dispute, but only the fact that the dispute ‘truly exists’, which the ‘Adjudicating Authority’ did not examine in the instant Case.

5. It is submitted that the Corporate Debtor did not file any 'Counter' to the Application of the 'Operational Creditor' and that the same cannot be said to be a part to establish the pre-existing dispute. It is strenuously contended that the Adjudicating Authority failed to consider the contention of the Corporate Debtor that the purchase Order dated 13/06/2018 and the 'MoU' dated 11/07/2018 are intrinsically connected and form a composite contract for goods and services. The Learned Counsel placed reliance on the following Judgments in support of his Contentions.

i. *Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software Pvt Ltd* ***[(2018) SCC 353] @ Para 51***

ii. *Kay Bouvet Engineering Ltd. Vs. Overseas Infrastructure Alliance (India) Pvt. Ltd.* ***[(2021) 10 SCC 483]***

iii. *Agricultural Produce Marketing Committee Bangalore vs. The State of Karnataka & Ors.* ***Civil Appeal Nos. 1345-1346 of 2022 @ Para 8.4***

iv. *M/s Brand Realty Services Ltd. Vs M/s Sir John Bakeries India Pvt. Ltd.* ***(Company Appeal (AT) (Ins) No. 958/2020)***

v. *Mr. Praveen Kumar Sharma Vs. Arcee Trading Corporation* ***(Company Appeal (AT) (Ins) No. 213 of 2020) @ Para 13***

vi. *Rajratan Banulal Agarwal Vs. Solartex India Pvt. Ltd. and Ors. AIR2022SC5493* ***@ Para 48, 59, 60, 62***

vii. *S.S. Engineers and Ors. Vs. Hindustan Petroleum Corporation Ltd. [2022] 234 Comp Cas95(SC)* ***@ Para 17, 30, 31 & 32***

viii. *Continuous Dyeing & Printing Mills Vs. Bhavika Apparels Pvt. Ltd.* ***(Company Appeal (AT) (Insolvency) No. 301 of 2022) @Para 14 & 20***

ix. *Rajaratan Babulal Agarwal Vs Solartex India Pvt. Ltd. and Ors.* ***AIR2022SC5493@ Para 73 to 77***

6. The Learned Counsel Mr. Yogesh Khanna appearing for the '1st Respondent'/ 'Operational Creditor' submitted that the 'Memorandum of Understanding' dated 11/07/2018 provided periodic timelines for payment towards supply of spares and the instalments towards supply of spares which were specifically payable on the debts due whether the engine is in operation or not. It is submitted by the Learned Counsel that the maintenance and service agreement qua GE-1 Engine dated 08/09/2011 was between the Operational Creditor and one SAS EPC and that the said Agreement is admittedly not executed between 'Operational Creditor' and the 'Corporate Debtor' nor is it connected with supply of spares in any manner which was purchased through order dated 13/06/2018. In its response to the 'Demand Notice', under Section 8, the 'Corporate Debtor' had sent a cryptic reply which does not raise any such dispute as being admitted in this Appeal. The only defence set up by the Corporate Debtor was to the effect that two spare parts were ill-fitted and not working up to the maximum efficiency.

7. It is submitted that the value of two spares termed as defective by the Corporate Debtor is Rs.1,16,484/- (Rupees One Lakh Sixteen Thousand Four Hundred and Eighty-Four Only) whereas the total unpaid value of the 12 spares availed by the Corporate Debtor is Rs.2,25,62,630/- (Two Crore Twenty Five Lakhs Sixty Two Thousand Six Hundred and Thirty Only). It is argued that even if two spare parts were ill fitting and not working to their maximum efficiency, the Corporate Debtor had no reason to withhold payment of the remaining 118 spare parts for which admittedly there was no issue raised by the Corporate Debtor. This issue of ill-fitting spare parts was only raised by the Corporate Debtor for the first time after 13 months of supply of spare parts on 23/10/2018 and after 7 months of engine being made operational on 03/04/2019.

8. The Learned Counsel also contended that the issues on delayed commissioning and not achieving maximum utilization have nothing to do with the MoU dated 11/07/2018 as the MoU is purely a contract for supply of spares only. The Learned Counsel drew our attention to the e-mail dated 11/09/2019 in support of his case that there was an admission of debt on behalf of the Corporate Debtor. The MoU dated 11/07/2018 had specified a payment schedule which was to be strictly adhered to. The Plea as to payment of dues being dependent upon the generation of revenue and services of bank loan was never taken up by the Corporate Debtor ever before in any of their communications. The reference made by the Appellant to alleged non obstante clause or Section 102 of Evidence Act is misconceived as the Corporate Debtor cannot wriggle out of admissions of liability detailed in the emails.

<u>Appraisal</u>:

9. The brief point for consideration which arises in this Appeal is whether the Adjudicating Authority is justified in admitting the Section 9 Application preferred by the Operational Creditor, keeping in view the emails addressed to by the Appellant / Corporate Debtor in the 'Reply' to the Section 8 Admission Notice.

10. The Learned Counsel for the Appellant contended that the Adjudicating Authority has not taken into consideration the emails dated 07/11/2019, 17/12/2019, 18/12/2019, 14/01/2020 and 28/01/2020, whereby the Appellant had raised disputes regarding the performance of the Engine and the quality of the spares that were supplied. The Learned Counsel drew our attention to the emails dated 17/12/2019 & 18/12/2019 and the reply to the email dated 17/12/2019 given by the Respondent. For better understanding of the case, the same has been reproduced hereunder:

> ***From***: *Operations Saheliexports*
> *operations@saheliexports.com*
> ***Sent*** *: 17 December 2017 07:22 PM*
> ***To*** *: Pankaj Kaushik*
> *<Punit.Garg@clarke-energy.com>*
> ***Cc*** *: Punit Garg*
> *<Punit.Garg@Clarke-energy.com>;*
> *DVPReddy Saheliexports***,**
> *dvpreddy@saheliexports.com.;*
> *Control Room saheliexports,*
> *controlroom@saheliexports.com.;*
> *Hemanth Reddyhemanth@sasepc.com*

***Subject**: (EXT) Abnormal Valve Growth – Defective Spares supply*

Kind Attention: Mr. Pankaj Kaushik – Director Service & Mr. Punit Garg (Managing Director)

Dear Sir,

Following our mail on 14.12.2019 on the subject of high lube oil consumption in the GE-1 Engine, we want to post you another abnormality noted during the 38K maintenance check done on 07.12.2019. As per the Engine maintenance, Schedule valve growth measurement must be carried out once in 4000hrs of operation after 30K overhaul. And it is mentioned in the manual that if the valve growth exceeds 1.5mm, it is advised to increase the valve growth check frequency by doing once in 2000hrs interval and the maximum limit for valve growth given as 2.5mm. Valve growth is one of the important checks which will indicate the wear of Valves or Valve Seats.

On 07.12.2019 we carried out Valve Tappet Clearance check and also measured the valve growth as a part of 38K maintenance check. It is surprising to note that some of the Cylinder Heads exhaust valves stem growth is abnormal. It is unbelievable to see this much of a fast rate of valve growth that too in the recently overhauled Engine which crossed just 5834 hours of operation after the major overhaul done in GE-1 Engine at 32244 hours by Clarke Energy (CEIPL).

This observation is again indicated that the spares supplied and replaced by Clarke Energy during the 30K overhaul might be defective or could be wrong supply or not suits to our Engine operated at Natural Gas.

Note in the below table in Cylinder Heads 1,3,6 & 18 having more valve growth and importantly in Cylinder no. 6 & 18 the exhaust valve wear almost neared the maximum limit of 2.5mm.

As explained in our previous mail the modifications done in the Liners and material defective spares (Supply) replacement in our engine is the reason for higher lube oil consumption and fast wear rate of valves and valve seats. This is physically proven in the Lube oil consumption data and the Valve growth measurement data. Both the problems were existing since it is operated by the CEIPL O&M team. This valve growth problem is already identified by your O&M team in the 36K maintenance, but the data is not revealed to the customers.

Clarke Energy (CEIPL) must respond to this observation noted by us immediately as CEIPL is the sole responsible for both the higher Lube oil consumption and abnormal valve wear taking place. Clarke must take necessary action for rectification immediately.

As an immediate remedy is that Clarke Energy must supply 4 nos. of serviced Cylinder Heads for replacement in Cylinder head 1,3,6 & 18 with their service team.

Your immediate response on this subject awaited.

Reply by OC

On Tue, Dec 17, 2019 at 8:48 PM Pankaj Kaushik <Pankaj.Kaushik@clarke-energy.com>wrote:

Dear Sir,
Both referred issued 'oil consumption' and 'valve wear' will handled on top priority once we receive payment against 30K parts from Saheli and overdues from SAS.

Please arrange to release payment at the earliest. Thanks for your understanding.

Best regards,

<u>Email by Corporate Debtor dated 18/12/2019</u>

From : OperationsSaheliexports
operations@saheliexports.com
Date : Wed, Dec 18, 2019 at 10.57 AM
To : Pankaj Kaushik
Pankaj.Kaushik@clarke-energy.com
Cc : Punit Garg
Punit.Garg@clarke-energy.com,
DVP Reddy Saheliexports
dvpreddy@saheliexports.com,
Gautam Reddyb.v.gautam@gmail.com,
Akshay Saheliexports
akshay@saheli exports.com ,
Control Room saheliexports
controlroom@saheliexports.com,
Hemanth Reddy hemanth@sasepc.com,
Vishal Shah <Vishal.Shah @clarke-energy.com>,
Malhari Habby
Malhari.Habbu@clarke-energy.com,
finance saheliexports finance@saheliexports.com

Dear Sir,

It is evident that after the GE-1 30K major overhauling, the performance of the engine is deteriorated and it has invited critical problems such as High Lube Oil consumption and High Valve & Valve seat wear which is supplied and fitted in our Engine during the 30K overhauling by CEIPL. It is noticeable from the valve growth measurement that the Valves and Valve Seats replaced in the 30K overhauling are having material defect and may not suits to our Engine. Adding to it the higher lube oil consumption at higher load proves that it is purely due to the modification did in the Cylinder Liners and that too without any intimation and approval from the owner of the Engine.

Hence ultimately the purpose of the 30K overhauling is defeated due to Defective spares fitment in our Engine and change in the original design of our Engine. With this background, how do you expect us to make payment for the spares supply which ended up in performance degradation and in fact the 30K overhauling increased the risks in our Engine. Adding to it CEIPL suspended the services and demobilized the team from our plant without solving the abnormalities which arised and existed while you were operating our Engine.

Here we would like to point that till the month of Aug'19 we were operating the Engine at the load less than 50% and hence this high lube oil consumption problem not come out. It is come to know only when the load increased beyond 50%. If the GE-1 Engine is tested by you at full load as soon as 30K overhaul is completed, this problem might have surfaced in the beginning stage itself and you must have resolved these issues before our payment dues begin.

Hence it is not ethical to ask us to make payment with all these issues unresolved and all which emerged only after 30K overhauling done by CEIPL in our Engine. We request Clarke Energy (CEIPL) to resolve the issues for which only Clarke Energy is the sole responsible and after which claiming your payment pertaining to 30K spares supply is justified and valid.

Regards

C. Gowrishankar

DGM-Operations

11. It is the case of the Appellant that after reviewing the valve measurement report, it was found that the valves & the valve seats which were replaced as well as the 30K overhauling had material defects and did not suit the engine of the

Corporate Debtor. Higher oil consumption at higher rates was due to the modification done by the 1st Respondent in the cylindrical liners without any intimation or approval. The email dated 14/01/2020 once again had detailed the issues with valve stems and valve guides and the mismatch in the old valves and new valves used by the 1st Respondent and the Corporate Debtor had insisted on the replacement of the said spares. But the Adjudicating Authority did not take into consideration that these disputes were raised prior to the issuance of the Demand Notice.

12. The extract of the 'Memorandum of Understanding' which the Appellant is relying on is reproduced as herein:

> *"MEMORANDUM OF UNDERSTANDING*
>
> *This Memorandum of Understanding for doing 30K maintenance of gas engine located at Kothangudi Road, Komal West, Komal Village, KuttalamTaluk, Nagapattinam District, in the State of TamilNadu hereinafter referred to as 'MoU' made and entered into as on 11 th July, 2018. (Effective Date)*
>
> *" The recital of the MOU also states as follows:*
> *"Service Provider has proposed to carry out 30K maintenance of gas engine GGI owned by Saheli Exports Private Limited and located at Kothangudi Road, Komal West, Komal Village, KuttalamTaIuk, Nagapattinam District, in the State of TamilNadu (hereinafter referred to as the project). In this regard, the Service recipient has provided to service provider a separate purchase order no. SEPL/TECH/2018-19/004 dated 13.06.2018 for carrying out this maintenance job"*

13. Now, we address the averment of the 1st Respondent that the MoU dated 11/07/2018 is a pure contract for supply of goods and spares as it categorically provides for instalments towards supply of spares irrespective of engine being in operation. The said clause is reproduced hereunder:

> *"Notwithstanding anything contrary contained elsewhere in this MOU, the Service recipient shall pay the dues of the Service Provider after repayment of Bank Loan dues for that month. If any shortfall arises in the said month for paying Service Provider after clearing the bank dues, the shortfall will be paid in the immediate next month. In the months of shortfall, service recipient agrees to provide bank statements of all banks to Service Provider to support collection during the month, bank loan repayment and shortfall in making payment to service provider."*
>
> *(Emphasis Supplied)*

14. It is not in dispute that the 1st Respondent had entered into an MoU dated 11/07/2018, with the Corporate Debtor and that the payment terms included an advance of Rs.3,00,000/- (Rupees Three Lakhs Only) as well as balance payment which was to be paid in six instalments. It is the case of the Appellant that the amount ought to be paid only after service was done. It is the case of the Respondent that the Agreement was only for the supply of spares and has nothing to do with the performance of the Engine. Clause c of the terms and conditions of the MoU states as follows:

> *"c. Others*
>
> - *Service recipient agrees to make payments strictly as per payment terms mentioned above.*

- *Service recipient agrees to make payment irrespective of fact whether said engine is in operation or not at the time of payment dates as above.*
- *Service provider shall deliver the material as per delivery terms mentioned to purchase order. Service provider shall endeavour to minimize delivery period."*

(Emphasis Supplied)

15. From the aforenoted clause, it is clear that the service recipient *'agrees to make payment irrespective of the fact whether the said engine is in operation or not at the time of the payment dates as above.'* This term categorically binds the Corporate Debtor to the payment of instalments. At this juncture, we find it relevant to reproduce the email dated 11/09/2019 addressed by the Appellant / Corporate Debtor to the Operational Creditor.

From : dvpreddysaheliexports
dvpreddy@saheliexports.com
Sent : 11 September 2019 16:46
To : Vishal Shah
Cc :finance saheliexports;
Akshay Saheliexports; Gautam Saheliexports; Punit Garg; Malhari Habbu; Pankaj Kaushik; Vijay Kulkarni (EXT) Fwd: Despatch of MoU and Purchase order – reg.,

Dear Mr. Vishal

It was discussed several times with Mr. Pankaj the reason for not making payment i.e. due to want of permission from TANGEDCO for increasing the Generation from the existing quantum to revised quantum and waited for nearly 5 months. Even we got the permission with different procedures and the matter is in the court for some clarifications.

Once all is sorted out, we can start paying our due to you which can happen only after start supplying power to the new customers and after getting payment from them. Please bear till such time.

We are trying to increase more quantity than existing in a couple of days after getting clear permission from TANGEDCO.

Regards
D.V.P. Reddy

(Emphasis Supplied)

16. From the aforenoted email, it is clearly seen that no dispute regarding the quality of the spares was raised as on 11/09/2019. The MoU is dated 11/07/2018, the first supply of spare parts was made on 23/10/2018 and this email is dated 11/09/2019, from which it can be noted that a period of more than 13 months has lapsed. So, the contention of the Learned Counsel that it is only after the lapse of some time that the Engine efficiency can be ascertained and therefore, the lapse of 13 months from the date of supply of spare parts and 7 months of the Engine being made operational on 03/04/2019 for raising any dispute is justified, cannot be accepted.

17. It is significant to mention that the e-mails relied upon by the Appellant are dated 17/12/2019, 18/12/2109, 14/12/2020 & 28/12/2020, which were all sent more than a year after the supply of the spare parts. Further, the 1st email mentioned in the Reply Notice dated 02/03/2020 is 07/11/2019. It is pertinent to mention that in the interim period i.e., 11/09/2019, which is again 11 months after the expiry of the spare parts, the Appellant / Corporate Debtor has never raised a whisper of the Complaint regarding quality issues. In fact, the sum and substance of the email dated 11/09/2019 sent at 16:46 p.m., is that once they get permission from TANGEDCO, the amount would be paid by the Corporate Debtor to the Operational Creditor. The other email is on the same date at 6.23 p.m. which reads as follows:

> *"From : dvpreddysaheliexports*
> *dvpreddy@saheliexports.com*
> *Sent : 11 September 2019 16:46*
> *To : Vishal Shah*
> *Cc :finance saheliexports;*
> *Akshay Saheliexports; Gautam Saheliexports; Punit Garg; Malhari Habbu; Pankaj Kaushik; Vijay Kulkarni*
>
> *Subject: Re: (EXT) Re: Despatch of MOU and Purchase order – reg*
>
> *Dear Mr. Vishal*
>
> *Due to sudden Implementation of new procedures by TANGEDCO an delay in giving permission for enhanced quantity of power (already explained in earlier mail) the expected revenue was not made. Hence, we assured you several time and now also that once Generation of existing quantity is increased to max of another 1mw, we start repaying our dues.*
>
> *You are also fully aware another GE Engine is also not running for the last 28 months on no fault of us and there is a total revenue loss of around Rs. 60 crores so far. Further you have not repaired the engine so far. Please take immediate steps to repair the Engine 2 without any further delay.*
>
> *So, please wait to increase the existing quantum to additional quantum then we will make payment.*
>
> *Regards*
> *D.V.P. Reddy"*

18. In this subsequent email, it is raised for the first time that the Operational Creditor has not repaired the Engine No. 2, for which a reply was addressed by the Operational Creditor as follows:

"On 9/11/19, Vishal Shah Vishal.Shah@clarke-energy.com > wrote:
>Dear Sir
>
>Outstanding is against supply and payment terms were mutually agreed in MOU.
>Hence you are requested to release first four instalments as agreed.
>
>
>Vishal"

(Emphasis Supplied)

19. It is significant to examine the 'Reply by the Corporate Debtor', to the aforenoted email, which was given on the same date. The email is being reproduced to establish that the Corporate Debtor had admitted to the fact that the spares were purchased on the basis of EMI.

From :dvpreddysaheliexports dvpreddy@saheliexports.com
Sent :11th September 2019 18:43
To : Vishal Shah
Cc : finance saheliexports;
Akshay Saheliexports; Gautam Saheliexports; Punit Garg; Malhari Habbu; Pankaj Kaushik, Vijay Kulkarni
Subject :Re: (EXT) Re: Despatch of MOU and Purchase order – reg.

Dear Mr. Vishal

Spare was purchased on basis of EMI. In such case how can you expect payment when there is no generation or less generation. Payment will be

made definitely once Engine generates more generation after necessary permission and formalities are completed.
Please wait.

Regards
D.V.P. Reddy

20. It is the case of the 'Operational Creditor' that the 'spares' in entirety were supplied by 11/09/2019 and the engine was already in operation for around five months. The clauses of the 'Memorandum of Understanding' evidence that there was a strict payment schedule to be made in instalments, irrespective of the operation of the Engine. Para 51 of ***'Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software Pvt Ltd'*** (supra) relied upon by the Counsel for the Appellant is reproduced as hereunder:

> *"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 the 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. <u>It is important to separate the grain from the chaff and to reject a spurious defence which is a 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</u>*

examine the merits of the dispute except to the extent indicated above. So long as dispute truly exists in fact and is not spurious, hypothetical, or illusory, the Adjudicating Authority has to reject the application."

(Emphasis Supplied)

21. In the instant case, the material on record evidences that the dispute raised is spurious, hypothetical and illusory as it was raised only after several months of supply and further there was also a Meeting, whereby there was an attempt to make a part payment. At this juncture, this 'Tribunal' pertinently points out that although the reply of the 'Corporate Debtor' was not taken on record by the 'Adjudicating Authority', all the issues raised by the Appellant have been addressed.

22. The case of the Appellant that it was '*only after a lapse of some time'* that the engine efficiency can be ascertained and therefore, the lapse of 13 months in raising the dispute of the spare parts is justified cannot be sustained as *'there is no specific time frame'* which is established by way of technical specifications to be guided by / or which were mentioned in the MoU with respect to this issue. The fact remains that the spare parts were supplied way back on 25/10/2018 and the first issue was raised almost 11 months thereafter. There is nothing on record to establish that 11 months' time is required to ascertain the efficiency of an engine. Moreover, the MoU stipulates strict payment terms. Additionally, it is seen from the record that an amount of Rs. 5,00,000/- (Rupees Five Lakhs Only) per month was said to be paid by the Corporate Debtor to the Operational Creditor starting from April, 2020 for every 0.500 mw additional generation over and above, the generation of 2.1 mw generation, pursuant to a meeting held between the parties on 26/11/2019, whereby it was proposed to amend the payment clauses of the MoU with the aforenoted payment terms. Neither the meeting nor the proposal to amend the terms are in dispute. For all the aforenoted reasons, this Tribunal is of the considered opinion that the dispute raised by the Corporate Debtor is only illusionary and moonshine and therefore, the judgments relied upon by the Appellant are not applicable to the facts of this case.

23. The 2nd Respondent / the Interim Resolution Professional has filed a Status Report on 07/06/2023 stating that an Application seeking 'Liquidation of the Corporate Debtor' in IA No. 366 of 2023 was filed before the 'Adjudicating Authority' and is pending.

24. For all the aforegoing noted facts, we do not see any substantial grounds to interfere with the Order of the 'Adjudicating Authority' and hence this Appeal fails and is accordingly dismissed. No Order as to Costs. Connected pending Interlocutory Applications, if any, are 'closed'.

[Justice M. Venugopal]
Member (Judicial)

[Ms. Shreesha Merla]
Member (Technical)

19/06/2023
SPR/TM