

**BEFORE THE ADJUDICATING AUTHORITY
NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD BENCH
COURT-1**

CP(IB) 435 of 2019

**Coram: Hon'ble Mr. HARIHAR PRAKASH CHATURVEDI, MEMBER (JUDICIAL)
Hon'ble Mr. PRASANTA KUMAR MOHANTY, MEMBER (TECHNICAL)**

**ATTENDANCE-CUM-ORDER SHEET OF THE HEARING OF AHMEDABAD
BENCH OF THE NATIONAL COMPANY LAW TRIBUNAL ON 05.06.2020**

Name of the Company: HCE Infra Projects Ltd
V/s
Jyoti Ltd

Section 9 of Insolvency and Bankruptcy Code, 2016

<u>S.NO.</u>	<u>NAME (CAPITAL LETTERS)</u>	<u>DESIGNATION</u>	<u>REPRESENTATION</u>	<u>SIGNATURE</u>
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ORDER


The case is taken up through video conferencing.

The Parties are represented through their respective counsel(s).

The case is fixed for pronouncement of order today.

The order is pronounced in open Court as order in detail is recorded vide separate sheet.


(PRASANTA KUMAR MOHANTY)
MEMBER (TECHNICAL)


(HARIHAR PRAKASH CHATURVEDI)
MEMBER (JUDICIAL)

Dated this the 5th June of 2020

**BEFORE THE ADJUDICATING AUTHORITY
(NATIONAL COMPANY LAW TRIBUNAL)
AHMEDABAD BENCH
AHMEDABAD**

C.P. (I.B.) No. 435/9/NCLT/AHM/2019

In the matter of:

HEC INFRA PROJECTS LIMITED,
Having its address at:
Sigma 1 Corporate, Corporate
House No. 6, Sindhu Bhavan
Road, Nr. Mahan Party Plot Cross
Road, Bodakdev, Ahmedabad –
380 054.

...Petitioner(OC)

Versus

JYOTI LIMITED
Having its Registered Office at:
Nanubhai Amin Marg, Industrial
Area, P.O. Chemical Industries,
Vadodara – 390 003

.....Respondent(CD)

Order delivered on 05.06.2020

**Coram: Hon'ble Mr. Harihar Prakash Chaturvedi, Member (J)
Hon'ble Mr. Prasanta Kumar Mohanty, Member (T)**

Appearance:

Ms. Amrita A Patel, Ms. Megha Jani & Aadit R. Sanjanwala,
Advocates for the Petitioner.

Mr. Navin Pahwa, Ms. Himani Chhabra & Mr. Aalay Shah for Thakkar
and Pahwa, Advocates for the Respondent.



[Per: Mr. Prasanta Kumar Mohanty, Member(T)]

1. The present Petition is filed on 21.06.2019 under Section 9 of the Insolvency and Bankruptcy Code, 2016 ('IB Code' for short) read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 ('IB Rules' for short) for initiation of Corporate Insolvency Resolution Process against the Corporate Debtor, Jyoti Limited for the unpaid Operational Debt due.

2. The Petitioner, HEC Infra Projects Limited is a company incorporated under the Companies Act, 1956. The Petitioner is having its registered office at: Sigma 1 Corporate, Corporate House No.6, Sindhu Bhavan Road, Nr. Mahan Party Plot Cross Road, Bodakdev, Ahmedabad – 380054 and is engaged in the business of **Contract work of Electro-Mechanical and Instrumentation Projects and consultancy services**. The company is also registered as a Small Enterprise under the Micro Small Medium Enterprises Development Act, 2006.

3. It is submitted that the Respondent Company, Jyoti Limited having its registered address at Nanubhai Amin Marg, Industrial Area, P.O. Chemical Industries, Vadodara – 390003 and is engaged in the business of **manufacturing and marketing of electrical and hydraulic engineering equipment was incorporated on**

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01.01.1943 with Identification Number:
L36990GJ1943PLC000363. The authorised Share Capital
of the company is Rs.25,00,00,000.00 and the paid up
Share Capital is Rs.23,09,26,280.00

4. It is submitted that the Corporate Debtor and Operational
Creditor have had business relations since more than a
decade. As a part of on-going business relation, Jyoti
issued a Letter of Intent dated 25.08.2009. The contract
with Jyoti was thus a back to back contract and the
payments were to be released by Corporate Debtor to
Operational Creditor in proportion to receipt of payment
from the Corporation. Though the LOI was issued earlier
the purchase orders pursuant to the said LOI were issued
only on 16.11.2009 being purchase orders bearing No.
7/C00/H1171/600328/25185/2009-10 and
7/C00/H1171/600328/25188/2009-10. The supply of
items and the work done was as per the specifications and
the work was carried out in time by Operational Creditor.
The goods and service so supplied were accepted by
Corporate Debtor without any protest or objection or any
complaint regarding the quality or otherwise.

5. It is submitted by the Petitioner that the
Respondent/Corporate Debtor has committed default in
making payments to the Applicant for the debt of



Rs.24,67,282.00 (Rupees Twenty Four Lakhs Sixty Seven Thousand Two Hundred Eighty Two Only) and compound interest of Rs.65,23,790.00 (Rupees Sixty Five Lakhs Twenty Three Thousand Seven Hundred Ninety Only) thereon i.e. the total debt as calculated up to 31.08.2018 alongwith further interest at the rate of 20.25% per annum from 01.09.2018 till its realization. The Applicant is in supply, Erection, Testing and Commissioning including Operation and Management for Electro-Mechanical work of Jashodanagar Pumping Station of Ahmedabad Municipal Corporation by the Operational creditor pursuant to the purchase orders issued by the Corporate Debtor and the invoices raised by the Operational Creditor on the Respondent from time to time.

6. It is submitted that the erection of the system as required, Corporate Debtor also issued completion certificate dated 22.11.2010 to Operational Creditor stating that the same was completed in August 2010. It also mentioned that the Operational Creditor and maintenance work would begin after two months.

7. It is submitted that the Operational Creditor raised various invoices on Corporate Debtor on various dates pursuant to erection of the system as required and the completion of Operation and Management work. The said

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bills/invoices have been accepted by Corporate Debtor without any demur or dispute. A copy of the invoice dated between 16.12.2009 to 28.02.2013 raised by the Operational Creditor on the Corporate debtor are produced at Sr. No. 9 to 26 of the list of documents. A table giving details of the invoices and the calculation of the total outstanding debt and the interest thereon as on 31.08.2018 is are produced at Sr. No. 27 of the list of documents.

8. It is submitted that the Corporate Debtor made some payments to Operational Creditor pursuant to the bills raised. However, payments for some of the bills (O&M) raised were not cleared. Operational Creditor thus sent various reminders on phone, via emails, letters and have held various meetings regarding outstanding payments from Corporate Debtor to no avail. The Operational Creditor also issued some of the letters dated 18.12.2009, 28.12.2009, 27.01.2010, 22.02.2010, 09.03.2012, 14.12.2012, 20.12.2012, 28.02.2014, 28.02.2014 while raising the bills and requesting to clear the outstanding dues.

9. It is submitted that the Respondent failed and neglected to make payment of the admitted and undisputed Operational debt owed by the Respondent to the applicant, the Applicant delivered a demand notice dated 26.12.2018

to the Respondent under Section 8(1) of the Insolvency and Bankruptcy Code, 2016 demanding payment of Rs.86,91,072.00. The notice was posted vide Registered Post Acknowledgment Due by the Operational Creditor on 26.12.2018 at the registered office of the Corporate Debtor. The Respondent replied to the said notice raising frivolous grounds vide reply dated 28.01.2019 and the Applicant replied to the same vide letter dated 22.02.2019.

10. It is submitted that the Corporate Debtor has availed the services from the Operational Creditor and failed to make Payments of the admitted outstanding debt despite admitting the same and giving commitments and making assurances. The Applicant states that there is no meaningful notice of dispute given by the Respondent relating to a dispute of the unpaid Operational debt. The Operational Creditor is entitled to payment of the entire outstanding debt along with interest.

11. The Operational Creditor submits that in the facts and circumstances as set out hereinabove, it is clear that the Corporate Debtor has committed default in paying the Operational Debt of the Operational Creditor and has failed and neglected to clear all the dues even after issuance of Demand Notice. In such circumstances, it is just and equitable and in the interests of the justice that

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Corporate Insolvency Resolution Process be initiated against the Corporate Debtor.

12. In response to the present I.B. Petition filed by the Petitioner, the Corporate Debtor/Respondent has filed its Affidavit-in-reply/Objection as:

12.1 It is submitted that **the present petition is not maintainable and liable to be rejected as claims made are barred by limitation. The present petition is therefore liable to be rejected on this ground alone.**

12.2 It is further submitted that the prejudice to the above referred contention, no debt is due and payable as demanded by the Operational Creditor. Without prejudice, **there is a pre-existing dispute between the parties which would disentitle the petitioner to maintain the present petition. The present petition therefore also is liable to be rejected.**

12.3 It is submitted that the claim made by the petitioner even otherwise is nothing but an afterthought action and tantamount to abuse of process of law and the Court. It is stated that the Ahmedabad Municipal Corporation issued a work order dated 17.07.2009 in favour of the Corporate Debtor for SITC of Ele-Mech



Equipment with 3 years O&M for Jashodanagar Water Distribution Pumping Station. The Corporate Debtor issued a Letter of Intent dated 25.08.2009 to the Operational Creditor for the supply, erection, testing and commissioning including O&M for Electro-Mechanical Works on back to back basis. It was agreed that the Corporate Debtor would supply pump/motor/HT Panel and its spares during the O&M period. The Corporate **Debtor issued two purchase orders dated 16.11.2009.**

12.4 It is submitted that the supply, installation and erection of the system was completed in August 2010. A certificate dated 22.11.2010 issued by the Corporate Debtor to the Operational Creditor is placed on record.

12.5 It is submitted that the AMC has replaced the Operational Creditor with one M/s. Nirman Engineering Services **to undertake the operation and management services of Jashodanagar Water Pumping Station. Clause 5 of the contract stipulate as under:-**

“5. Penalty for breach of contract

Delivery schedule is essence for the project contracts and shall be strictly adhered by you. If any penalty levid by Department on account of any delay in delivery of materials/non-completion of



erection at site shall be charged to you as per tender condition on back to back basis."

As AMC has **deducted/levied amount of** Liquidated Damages, the **Operational Creditor** is not entitled to maintain **this petition**. The Corporate Debtor therefore has not made payment to the Operational Creditor which is subject matter of the present petition.

12.6 It is submitted that the Operational Creditor admits that the payments claimed by the Operational Creditor is not paid by AMC to the Corporate Debtor. The Operational Creditor to make adjustments for the claims of Corporate Debtor against the Operational Creditor was rejected as the claim of Corporate Debtor against the Operational Creditor was in respect of totally a different contract wherein the Operational Creditor had also issued post-dated cheque which upon presentation came to be dishonoured.

12.7 It is further submitted that the facts and circumstances, it is clear **that not only the petition is liable to be rejected on the ground that the petition is barred by limitation, the petition is also liable to be rejected on the ground of pre-existing dispute. The present petition as such is liable to be rejected.**

13. In response to the present I.B. Petition filed by the Petitioner, the Respondent has filed its written submission as: –

13.1 The present petition is filed before this Hon'ble Adjudicating Authority under Section 9 of the Insolvency and Bankruptcy Code, 2016 for the purpose of initiating Corporate Insolvency Resolution Process against Corporate Debtor.

13.2 It is submitted that the Operational Creditor has filed this petition claiming an amount of and amount of Rs.24,67,282.00 (principal amount) plus Rs.65,23,790.00 towards interest @ 20.25% of the period from 2009 upto 31.08.2018, totalling to Rs.89,91,072.00 towards principal besides interest.

13.3 It is submitted that the Operational Creditor for Rs.24.67.282.00 arises from the letter of Intent dated 25.08.2009 issued by Corporate Debtor to Operational Creditor for the supply, erection, testing and commissioning including O&M for Electro-Mechanical Works.

13.4 It is submitted that the supply, installation and erection of the system was completed in August 2010, the limitation period to initiate the

proceedings expired in 2013. Considering the date of last invoice raised by Operational Creditor to Corporate Debtor being 28.02.2014, the limitation period **to initiate the proceedings expired in 2017. Admittedly, the Demand Notice** is issued on **26.12.2018 and the present petition is filed in the year 2019.** Therefore, the present petition being **barred by limitation is liable to be rejected.**

13.5 It is stated that as per Section 18(1) of Limitation Act, 1963, an acknowledged of liability should be expiration of prescribed period for filing a suit or application. As per Art. 137 of the Limitation Act, where there is no prescribed period of limitation then the period of limitation to file proceedings in 3 years from the date when the right to apply accrues. Section 18 and Article 137 of the Limitation Act, 1963 read as under:

Section 18: Effect of acknowledgment in writing-
(1) Where, before the expiration of the prescribed period for a suit of application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by any person through whom he derives his title or liability, a fresh period of limitation shall be computed from the time when the acknowledgment was so signed.

Articles 137 of Part III- Other Application:-

Any other application for which no period of limitation is provided elsewhere in this Division. Three years. –When the right to apply accrues.

The Hon'ble Supreme Court in the case of Sampuran Singh & Ors. Vs. Niranjana Kaur (Smt.) & Ors., reported at (1999) 2 SCC 679 has held that the acknowledgement, if any, has to be prior to the expiration of the prescribed period for filing the suit. It is further held that if the limitation has already expired, it would not revive under this Section. In the present case, admittedly the so-called acknowledgement (pg.124) is much after the expiration of prescribed period of limitation. Therefore, also the present petition which raises dead claim is time barred and liable to be dismissed.

13.6 It is submitted that the AMC has deducted/levied amount of Liquidated Damages from the Corporate Debtor on the basis of Clause 5 of the contract (pg.37) which provides for penalty for breach of contract and same is levied by Corporate Debtor to Operational Creditor on back to back basis as it is mentioned in email dated 11.07.2018 sent by Corporate Debtor to Operational Creditor (pg.116). It is submitted that the same is acknowledged by the Operational Creditor through its mail dated 13.07.2018 (pg.117) which also shows that there is pre-existing dispute between the parties.

13.7 From the above set of facts, it is evident that there are pre-existing disputes between the parties. Accordingly, as per the provisions

contained in Section 9(5)(ii)(d), the petition is liable to be rejected.

13.8 As there is no Operational debt due and payable, there is no question of payment of any interest. Without prejudice to the above the Operational Creditor is not entitled to any interest. The reasons are as under:-

There is no provision for payment of interest in the contract i.e. Purchase Orders. As such, there is no agreement between the parties for payment of interest. The petition is base only on two purchase orders. The present petition is concerned with the definition of the term "Operational Debt" as defined in Section 5(21) of IB Code.

14. The Applicant has prayed before this Adjudicating Authority for the initiation of Corporate Insolvency Resolution Process and call for the submission of claims in accordance with Clause (b) of Sub-section (1) of Section 13 read with Section 14 of the Insolvency and Bankruptcy Code, 2016 to be admitted and be pleased to pass any further order in the interest of justice.

15. Now, the Petition is filed on 21.06.2019 under the Section 9 of the Insolvency and Bankruptcy Code, 2016 for the



unpaid Operational **Debt due and defaulted** of
Rs.89,91,072.00.00

16. The case was taken up by this Adjudicating Authority and heard on 03.07.2019, 29.08.2019, 20.09.2019, 21.10.2019, 22.10.2019, 11.12.2019 & 17.12.2019. Arguments from both side were heard and concluded.
17. During the arguments, the Learned Counsel for the Operational Creditor has submitted that the Petition may be admitted and an Interim Resolution Professional appointed in accordance with the provisions of the Section 16 of the Insolvency and Bankruptcy Code, 2016. Further, it is submitted that the petition may be admitted for initiating Corporate Insolvency Resolution Process as per Section 9 of the Insolvency and Bankruptcy Code, 2016 and the moratorium period may also be declared.
18. Further, the Operational Creditor has not suggested any name of an Interim Resolution Professional ("IRP" for short). If, this I.B. Petition is admitted, an IRP needs to be appointed.

Observations

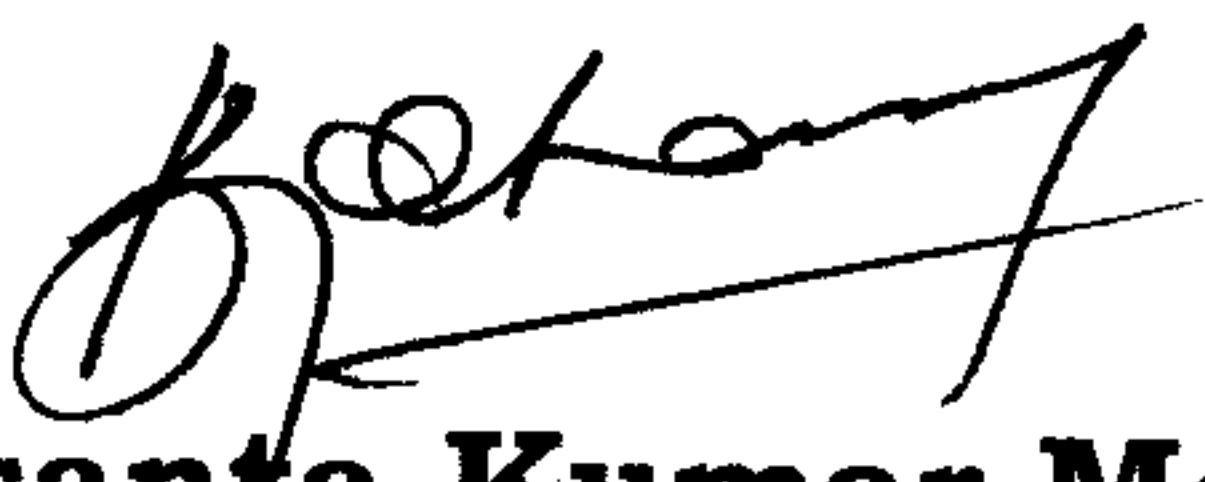
19. The work order was issued on 17.07.2009. The supply installation and erection of the system was completed in August 2010.
20. Number of Correspondence has taken place between the Operational Creditor and Corporate Debtor relating to adjustments of payments with some other work. Ahmedabad Municipal of Corporation has replaced Operational Creditor and deducted/levied amount of Liquidated damages for breach of contract.


ORDER

21. Having gone through all the papers, email correspondence, agreement of the Petitioner & the Respondent Company, the arguments of both parties and **the points mentioned Point Nos. 19 & 20** we are of **the considered view that the Application is time barred** as because the work was completed in 2010 and the **present Application is filed on 26.06.2019.**
22. We also observe that there is an existence of dispute between two parties before the Demand notice was issued by the Operational Creditor.
23. **Hence, the present petition is rejected on the ground of Limitation and existence of dispute prior to the Demand Notice issued** by the Applicant.

24. **We make it clear that any observations made in this order shall not be construed as an expression of opinion on the merit of the dispute/controversy and the right of the applicant before any other forum shall not be prejudiced on account of rejection of the instant application.**

25. The Registry is directed to communicate this order to the petitioner and respondent by Register Post/Speed Post at the earliest


(Prasanta Kumar Mohanty)
Adjudicating Authority &
Member(T)


(Harihar Prakash Chaturvedi)
Adjudicating Authority &
Member(J)