

**IN THE NATIONAL COMPANY LAW TRIBUNAL  
KOLKATA BENCH (Court -II)  
KOLKATA**

CP(IB) No. 648/KB/2019

*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.*

***In the matter of:***

**Trident Fabricators Private Limited**, a company incorporated under the Companies Act, 1956 and being a company within the meaning of Companies Act, 2013 and having Corporate Identification No- U29230OR2004PTC007910 and its registered office at C 31 Koel Nagar, Rourkela, Sundargarh, Odhisha-769014.

*.....Operational Creditor*

-Versus-

**Hiranmayee Energy Limited**, a company incorporated under the Companies Act, 1956 and being a company within the meaning of Companies Act, 2013 and having Corporate Identification No- U40105WB2008PLC125220 and its registered office at Plot X – 1,2 and 3, 2<sup>nd</sup> Floor, Block – EP, Sector – V, Salt Lake, Kolkata-700091, in the State of West Bengal.

*.... Corporate Debtor*

**Date of Hearing : 16<sup>th</sup> September, 2022**

**Date of pronouncing the order: 28<sup>th</sup> November, 2022**

**Coram:**

**Shri Rohit Kapoor, Member (Judicial)**

**Shri Balraj Joshi, Member (Technical)**

**Appearances (via video conferencing/ physical ):**

For Operational Creditor : Mr. Arik Banerjee, Advocate

Ms. Rajib Mullick, Advocate

For Corporate Debtor : Mr. Rakesh Sankar, Advocate  
Mr. Rishav Banerjee, Advocate  
Mr. Rajarshi Banerjee, Advocate

**ORDER**

***Rohit Kapoor, Member (Judicial):***

1. This Court convened through hybrid mode.
2. This is a Company Petition filed under section 9 of the Insolvency and Bankruptcy Code, 2016 (the Code) by **Trident Fabricators Pvt. Ltd.** (Operational Creditor), seeking to initiate Corporate Insolvency Resolution Process (“CIRP”) against **Hiranmayee Energy Limited** (“Corporate Debtor”).
3. The Corporate Debtor is a public company incorporated on 28.04.2008. The authorized share- capital of the company is ₹10,20,00,00,000/- and the paid-up share- capital of the company is ₹5,11,82,46,100/-.
4. The total amount claimed by the Operational Creditor is ₹12,77,86,304/- as on 10<sup>th</sup> March 2016.. The Demand notice under section 8 of the Code was issued by the Operational Creditor on 8<sup>th</sup> January 2019. Reply to the same was issued by the Corporate Debtor on 3<sup>rd</sup> February 2019.
5. **Submissions on behalf of the Operational Creditor:**
  - 5.1 The Corporate Debtor was earlier known as India Power Corporation (Haldia) Limited (IPCHL). The name of the Corporate Debtor was changed to Hiranmayee Engineering Limited on 15<sup>th</sup> January 2018.
  - 5.2 On 15<sup>th</sup> September 2014, one Scorpio Engineering Private Limited (SEPL) placed a purchase order worth ₹9,39,40,000/- upon the Operational Creditor for the supply of fabrication of steel structures as per

the drawings of SEPL. Later, on 14<sup>th</sup> February 2015, the said purchase order was amended and the total sum of the purchase order was increased to ₹11,20,64,000/- (excluding excise duty and Central Sales Tax @2%). The goods ordered by SEPL were to be delivered to the consignee being IPCHL(the Corporate Debtor). The consignee being IPCHL was to make direct payment within 15 days from the date of dispatch to the Operational Creditor, in respect of the invoices raised.

- 5.3 The Operational Creditor raised tax invoices addressed to the Corporate Debtor, wherein the name of SEPL has also been mentioned. The invoices raised range between 02.12.2014 and 09.03.2016. the invoices were also accompanied with weigh bill and challan cum dispatch invoice. The Corporate Debtor received the said goods without demur and protest.
- 5.4 In respect of the goods supplied, the Operational Creditor raised bill for ₹13,21,06,940/-. The last bill was raised on 09.03.2016 for ₹5,19,221/-. Out of the total bills raised, the Operational Creditor received a total sum of ₹7,86,32,182/-, out of which SEPL made a payment of ₹90,67,353/- in five tranches and the balance amount was paid by the Corporate Debtor. the last such payment was made on 2<sup>nd</sup> February 2016. The account of the Corporate Debtor with the Operational Creditor was a running and continuous one.
- 5.5 It is submitted that by virtue of the minutes of the meetings dated 28<sup>th</sup> April 2015 and 8<sup>th</sup> July 2015, it was unambiguously agreed between the Corporate Debtor and SEPL and the Operational Creditor that in respect of any dues,, the Corporate Debtor will make payment to the Operational Creditor for the bills raised. It was further decided in the meeting of 8<sup>th</sup> July 2015 that in case of dispute relating to payment, the Corporate Debtor will make payment to the Operational Creditor.

- 5.6 Thereafter, in another meeting dated 12<sup>th</sup> January 2016, it was recorded that after dispatch of items, SEPL and the Operational Creditor would visit the office of the Corporate Debtor and the Corporate Debtor would release the money to SEPL which in turn would make the payment to the Operational creditor. However, the said arrangement was not acted upon by any of the parties and as such the earlier arrangement was followed by the parties.
- 5.7 As per the Operational Creditor, the entire dispatch was completed by 09.03.2016 and the payment was to be completed within 15 days from the date of dispatch. However, the Corporate Debtor failed to make payment for the balance amount of ₹5,34,74,758/- in principal to the Operational Creditor.
- 5.8 As such, the Operational Creditor sent demand letters by way of emails on 22<sup>th</sup> January 2017, 16<sup>th</sup> February 2017, 20<sup>th</sup> April 2017, 14<sup>th</sup> December 2018 and 19 April 2018. Vide email 19<sup>th</sup> April 2018, the Corporate Debtor acknowledged its liability towards the Operational Creditor. Further, the Corporate Debtor has never denied its liability to pay the sum due to the Operational creditor being ₹5,34,74,758/- and never contended that they are not liable to pay the said sum to the Operational Creditor. However, in spite of several meetings between the parties till January 2019, no amount was paid by the Corporate Debtor.
- 5.9 It is pertinent to mention that the Operational Creditor is a registered organization under Micro, Small and Medium Enterprises Act, 2006 and therefore is entitled to compound interest on the sums due at the rate of three times the bank rate notified by the Reserve Bank of India. Therefore, the Operational Creditor is entitled to interest at the rate of 10.70% @ 12x3 calculated till 01.12.2018 which amounts to a total sum of ₹7,86,32,182.00/- on and from 10<sup>th</sup> March 2016.

- 5.10 The invoices were also acknowledged by the Corporate Debtor in the “Form C under Rule 12(1) of the Central Sales Tax (Registration and Turn Over) Rules, 1957”. Further, since the parties used to maintain a running and continuous account, the default as of date is continuing and the Operational Creditor has a running cause of action against the Corporate Debtor.
- 5.11 The Operational Creditor had served upon the Corporate Debtor (in its earlier name) a demand notice under section 8 of the Code on 8<sup>th</sup> January 2019, which was received by the Corporate Debtor on 24<sup>th</sup> January 2019/ The Corporate Debtor replied to the said demand notice *vide* reply dated 3<sup>rd</sup> February 2019 wherein it took the defence that the Operational Creditor had not privity of contract with the Corporate Debtor. Further, it was falsely claimed that SEPL was liable to release payments to the Operational Creditor according to the minutes of the meeting dated 12<sup>th</sup> January 2016. Further, it was falsely contended therein that since SEPL did not successfully complete the project of the IPCHL, IPCHL was not liable to pay money to the Operational Creditor.
- 5.12 The said reply letter dated 3<sup>rd</sup> February 2019 of the Corporate Debtor is false and frivolous in nature and made in order to mislead the Adjudicating Authority. The defence taken therein is spurious, feeble, sham in nature and moonshine and no cognizance should be taken thereof.
- 5.13 Further, the letter dated 3<sup>rd</sup> February 2019 containing the denial of the claims of Operational Creditor on false and frivolous grounds will act as acknowledgment under section 18 of the Limitation Act, 1963.
- 5.14 Further, since from the reply notice of 3<sup>rd</sup> February 2019 the Operational Creditor for the first time came to know that IPCHL had changed its name, the Operational Creditor, *vide* letter dated 12<sup>th</sup> February 2019, issued a similar demand notice to the Corporate Debtor in its new name.

5.15 The Operational Creditor has relied on the following documents to support his claims:

- a. Certificate of incorporation evidencing the change of name of the Corporate Debtor, being Annexure A;
- b. Purchase Orders, being Annexure B;
- c. Unpaid invoices raised from 22.05.2015 to 09.03.2016, being Annexure C;
- d. Minutes of meeting dated 28.04.2015 and 08.07.2015, being Annexure E;
- e. Emails dated 20.01.2017, 16.02.2017, 28.04.2017 14.12.2018 and 19.04.2018 being Annexure H;
- f. Email issued by the Corporate Debtor on 19.04.2018 being Annexure I;
- g. Demand notice dated 08.01.2019 along with the reply dated 03.02.2019, being Annexure L.

**6 Submissions on behalf of the Corporate Debtor:**

- 6.1 The Corporate Debtor has contended in its reply affidavit that no specific authorization has been provided in the petition to prove that Mr. Surjit Singh has the requisite authorization to file the petition on behalf of the Operational Creditor.
- 6.2 Further, the Operational Creditor had not filed any affidavit under section 9(3)(b) of the Code and thus the instant petition is liable to be dismissed as it does not conform to the mandatory requirements laid down under the Code.
- 6.3 Further, in paragraph 18 of the petition, Mr. Surjit Singh is described as qualified to act as Insolvency Professional. However, no authorization for the same has been provided in the petition.

- 6.4 The purported demand notice issued by the Operational Creditor is not in accordance with the Rules and Regulations framed under the Code and is therefore invalid and should not be taken into consideration.
- 6.5 There is no privity of contract between the Corporate Debtor and the Operational Creditor and therefore, no operational debt is due from the Corporate Debtor
- 6.6 The instant petition is not maintainable due to there being pre-existing disputes between the Corporate Debtor and SEPL which are subject-matter of arbitration. Further, the claims of the Operational Creditor are barred by limitation and as such, the instant petition is not maintainable.
- 6.7 The Corporate Debtor had awarded a contract to SEPL involving designing, engineering, manufacturing, supply, erection commissioning in relation to coal handling plant for a thermal power project in Haldia, West Bengal. The Operational Creditor was a sub-contractor of SEPL in the aforementioned project. SEPL issued the work order/purchase order upon the Operational Creditor. Thus, there exists no privity of contract between Corporate Debtor and Operational Creditor and the Operational Creditor is not an operational creditor of Corporate Debtor in any manner. Furthermore, at no point of time ever, any bills were raised on the Corporate Debtor by the Operational Creditor. The Operational Creditor has deliberately suppressed the fact that no contract was ever executed between Operational Creditor and Corporate Debtor.
- 6.8 Furthermore, the purported demand notice was issued and the instant petition was filed against the Corporate Debtor after wilful suppression of documents by Operational Creditor. The Operational Creditor did not annex and describe the Minutes of the Meeting between Corporate Debtor, Operational Creditor and SEPL dated 12<sup>th</sup> January 2016, which is self-explanatory on the terms of the payment and according to that Minutes of

the Meeting. The Corporate Debtor is not responsible for the payments to Operational Creditor. The last agreed Minutes of Meetings dated 12<sup>th</sup> January, 2016 stated that the Corporate Debtor will release the balance amount in DD/RTGS to SEPL as per Contract and SEPL will release the full balance amount of Operational Creditor through cheque on the same day. The Corporate Debtor has no obligation to make any payment to the Operational Creditor and an obligation to pay the Operational Creditor, if any, lies on the part of SEPL. The Operational Creditor should make a claim against SEPL for the purported work executed by Operational Creditor on behalf of SEPL. The last acknowledgment on part of the Operational Creditor that there is not privity of Contract between it and the Corporate Debtor is made in letter dated 14<sup>th</sup> December 2018.

- 6.9 Further, since SEPL did not successfully conclude its obligations under the contract between it and the Corporate Debtor, the Corporate Debtor suffered huge monetary loss and damages. As such, no payment lies from the Corporate Debtor to SEPL and accordingly, the question of payment to any sub-contractor of SEPL by the Corporate Debtor does not arise. The said facts constitute pre-existing disputes between the Corporate Debtor and SEPL and are currently the subject-matter of arbitration.
- 6.10 Further, the Operational Creditor failed to supply the entire contracted amount of goods it had agreed to supply. There was a shortfall of around 32 MT of goods between the amount of goods dispatched and the amount received at the project site.
- 6.11 Due to the work at the coal handling plant being hampered on account of failure on part of SEPL in paying its subcontractors, it was decided between all the concerned parties in the meeting held on 12.01.2016 that the Corporate Debtor will make payment to SEPL based on progressive realization of project targets and the same will be given to the sub-contractors by SEPL.

6.12 The Corporate Debtor, in order to ensure that the work of the project is not hampered or delayed, made an advance payment to SEPL to facilitate the payment of its sub-contractors. The Minutes of the meetings dated 28<sup>th</sup> April 2015 and 8<sup>th</sup> July 2015 also make it evident that the Corporate Debtor insisted on SEPL and its sub- contractors to perform their obligations as per schedule.

6.13 The Corporate Debtor has already paid an excess amount of ₹88.07 Lakh to SEPL and there is no further liability on part of the Corporate Debtor to make any payment whatsoever to SEPL or to any sub-contractor of SEPL. The said issue is already in dispute. The Corporate Debtor has raised a counter-claim for ₹1290.91 Crore against SEPL and the dispute is being adjudicated through arbitration at the moment. It is pertinent to mention that the Operational Creditor is fully aware of the said dispute.

**7 Rejoinder on behalf of the Operational Creditor:**

7.1 The Operational Creditor has used the instant rejoinder to bring to the record the board resolution dated 2<sup>nd</sup> March 2019, thereby authorizing Mr. Surjit Singh to file the instant petition on behalf of the Operational Creditor.

7.2 Further, the Operational Creditor has submitted that the deponent of the Reply Affidavit has not annexed any board resolution to affirm that he is authorized to file the same on behalf of the Corporate Debtor.

7.3 Further, the compliance of section 9(3)(b) of the Code is directory in nature. Nevertheless, an affidavit dated 8<sup>th</sup> March 2019, under section 9(3)(b), has been annexed to the petition.

7.4 Further, no proof or authorization for proving the authorization of Mr. Surjit Singh as insolvency professional is required under Part V of the Code.

7.5 It is again denied that there is no privity of Contract between the Corporate Debtor and the Operational Creditor. The minutes of meetings dated 28<sup>th</sup> April 2015 and 8<sup>th</sup> July 2015 contain the admission by the Corporate Debtor of its liability towards the Operational Creditor. Even the bank's letter dated 26<sup>th</sup> February 2019 establishes the Corporate Debtor's liability.

**8 Analysis and Findings:**

8.1 Heard the Ld. Counsel on behalf of the Operational Creditor and the Ld. Counsel on behalf of the Corporate Debtor and perused the record.

8.2 The Operational Creditor has submitted that it had raised around 150 invoices against the Corporate Debtor and even though some payments were made by the Operational Creditor. However, an amount of ₹12,77,86,304/- is still pending for which this petition has been preferred to initiate the Corporate Insolvency Resolution Process against the Corporate Debtor.

8.3 It has been contended that Corporate Debtor has placed number of work orders on SEPL who had further sub-contracted this work to Trident Private Limited (the Operational Creditor herein). During the Course of work, a number of tripartite meetings were held between the Operational Creditor and the Corporate Debtor herein as well as the main contractor M/s Scorpio Engineering Private Limited, wherein the progress of work has come up for discussion but nevertheless the issue of payments to the Operational Creditor have been also discussed therein. It has also been contended that in one such minutes of meeting dated 28<sup>th</sup> April 2015, the Corporate Debtor shall make payments to the Operational Creditor according to the given schedule.

8.4 Now the case of the Operational Creditor is that by virtue of the tripartite minutes of meeting in which payments terms have been agreed to by the

Corporate Debtor and also noting that some payments have already been made to the Operational Creditor by the Corporate Debtor directly, the same is tantamount to a contract between the two. Needless to say, the Corporate Debtor has denied this assertion. It is noteworthy that an interlocutory application under this petition being I.A. (IBC) No. 770/KB/2021 had been adjudicated by this Adjudicating Authority, against which an appeal was preferred before the Hon'ble National Company Law Appellate Tribunal (NCLAT). The said appeal has been dismissed by the Hon'ble NCLAT *vide* order dated 23.08.2022 wherein it had held that there is no privity of contract between the Operational Creditor and the Corporate Debtor.

- 8.5 Ld. Counsel for the Corporate Debtor started his arguments by saying that the name of the Corporate Debtor hitherto was India Power Corporation (Haldia) Limited, implying that the company in the current matter is not the Corporate Debtor. However, when question by the bench was put on the strength of this assertion, he did not press for the same but emphasised upon the fact that there was no privity of contract between the Operational Creditor and the Corporate Debtor. Referring to few emails and correspondences, he deduced that the contention of the Operational Creditor is misconceived.
- 8.6 He cited a judgment by the Hon'ble Supreme Court in the matter of ***Zonal General Manager, IRCON International Limited vs. Vinay Heavy Equipments<sup>1</sup>*** wherein in paragraph 10, the Hon'ble Supreme Court has clearly held that there is no privity of contract or jural relationship between the sub-contractor and the employer, in absence of a clear tripartite agreement and the employer will not be liable for the claims of the subcontractor against head contractor unless the main contract clearly

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<sup>1</sup> Zonal General Manager, IRCON International Ltd. vs. Vinay Heavy Equipments (06.05.2015 - SC) : MANU/SC/0584/2015

provides for the acceptance of the liability by the employer towards the claims of the sub-contractor. Excerpt from paragraph 10 of the said judgment has been reproduced hereinunder:

*“10. Insofar as the question of primary liability therein is concerned, the law on subcontracts and employer liability is amply clear. In the absence of covenant in the main contract to the contrary, the rules in relation to privity of contract will mean that the jural relationship between the employer and the main contractor on the one hand and between the sub-contractor and the main contractor on the other will be quite distinct and separate. No such clause to the contrary, existent in the main contract between Appellants and SIPCOT, has been highlighted before us by the Appellants, which would persuade us towards a deviation from the presumption of distinct and sole liability of the Appellant-Contractor as employer viz. a. viz. the Respondent-Sub Contractor.”*

8.7 No tripartite agreement or even a separate agreement between the Corporate Debtor (Employer) and the Operational Creditor (Sub-contractor) have been placed on record. Further, it has been admitted by both parties that according to the arrangement agreed upon *via* meeting dated 12.01.2016, the payment was to be handed to SEPL by the Corporate Debtor, who in turn would hand over the same to the Operational Creditor. As such, it is clear and reiterated that there was no privity of contract between the parties herein and as such **the petitioner does not qualify as an Operational Creditor** under section 5(20) of the Code and no operational debt under section 5(21) of the Code is due from the Corporate Debtor to the Operational Creditor.

8.8 For the sake of completeness the issue of demand notice by the Operational Creditor is also discussed in the ensuing text. It is clear that a demand notice was delivered to the Corporate Debtor on 24<sup>th</sup> January

2019 and the Corporate Debtor has issued a reply to the same on 3<sup>rd</sup> February 2019 thereby raising pre-existing disputes regarding the above-mentioned privity of contract and the lack of liability of the Corporate Debtor towards the Operational Creditor. The Corporate Debtor had also brought to the notice of the Operational Creditor that the matter was under arbitration.

- 8.9 Section 8 of the Code provides for the issuance of demand notice by the Operational Creditor upon the Corporate Debtor. Section 8(2)(a) of the Code further provides that the corporate debtor shall, within a period of ten days of the receipt of such demand notice bring to the notice of the operational creditor, existence of a dispute, if any, or record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoice in relation to such dispute.
- 8.10 It is also noted that the Operational Creditor was aware of the said disputes between SEPL and the Corporate Debtor as can be seen from the email dated April 19, 2018 (Page 279 of the petition).
- 8.11 In this regard, we would further like to refer to the decision of the Hon'ble Supreme Court in the matter of ***Mobilox Innovations Private Limited Vs. Kirusa Software Private Limited***<sup>2</sup> wherein it was held that:

*“The scheme of Section 7 stands in contrast with the scheme Under Section 9 where an operational creditor is, on the occurrence of a default, to first deliver a demand notice of the unpaid debt to the operational debtor in the manner provided in Section 8(1) of the Code. Under Section 8(2), the corporate debtor can, within a period of 10 days of receipt of the demand notice or copy of the invoice mentioned in Sub-section (1), bring to the notice of the operational*

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<sup>2</sup> Mobilox Innovations Private Limited vs. Kirusa Software Private Limited (21.09.2017 - SC) : MANU/SC/1196/2017

*creditor the existence of a dispute or the record of the pendency of a suit or arbitration proceedings, which is pre-existing - i.e. before such notice or invoice was received by the corporate debtor. The moment there is existence of such a dispute, the operational creditor gets out of the clutches of the Code.” (Para 29)*

The Apex Court, in ***Mobilox Innovations Private Limited*** (*Supra*) further held that:

*“...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.” (Para 40)*

8.12 Keeping in mind the aforementioned judgment and the provisions of law, we are of the opinion that the pre-existing disputes in the instant case are not mere feeble arguments and need to be adjudicated upon by a court of competent jurisdiction. Further, the Operational Creditor had notice of the said disputes before filing the instant petition. As such, in presence of pre-existing disputes, the instant petition is not maintainable.

8.13 In view of the above explanations, we hold that the petition is not maintainable considering the pre-existing disputes. Accordingly, this petition is liable to be ***rejected*** and we accordingly hold so.

8.14 File be consigned to record. The registry is directed to send e-mail copies of the order forthwith to all the parties and their Ld. Counsel for information and for taking necessary steps.

8.15 Certified Copy of this order may be issues, if applied for, upon compliance of all requisite formalities.

**( Balraj Joshi )**  
**Member (Technical)**

**(Rohit Kapoor)**  
**Member (Judicial)**

Order signed on the 28<sup>th</sup> day of November , 2022

*PJ (steno)/Suman M. (LRA)*