

**IN THE NATIONAL COMPANY LAW TRIBUNAL
BENGALURU BENCH**

C.P. (IB) No.181/BB/2020
U/s 9 of IBC, 2016
R/w Rule 6 of I&B (AAA) Rules, 2016

In the matter of:

Kedari Foundation

Office at Plot No.102, High Court Colony,
Vanasthalipuram, Hyderabad 500070.
Having its Corporate office at,
Rajnigandha Apartments,
Saroornagar, Hyderabad -500035.

*Rep. by its Managing Partner,
K. Sriharsha Shashank*

- Operational Creditor / Petitioner

Versus

Sri Indra Power Energies Limited

Registered office at Chikkajantikal,
Gangavathi (Taluk) Gangavathi (Taluk)
Karnataka.

Also having its Corporate Office at:
No.8-2-120/110/115,G1,
Vijaya Residency Road, No.14,
Banjara Hills,
Hyderabad 500034

- Corporate Debtor / Respondent

Order Pronounced on: 26th April, 2021

Coram:

1. Hon'ble Shri Rajeswara Rao Vittanala, Member (Judicial)
2. Hon'ble Shri Ashutosh Chandra, Member (Technical)

Parties/Counsels Present:

For the Operational Creditor :Adv. Suman K.S.
For the Corporate Debtor :Adv. S. Rajesh

ORDER

Per: Ashutosh Chandra, Member (Technical)

1. C.P. (IB) No.181/BB/2020 is filed by Kedari Foundation, a registered partnership firm (hereinafter referred to as 'Operational Creditor /Petitioner)

under Section 9 of the IBC, 2016 R/w Rule 6 of the I&B (Application to Adjudicating Authority) Rules, 2016, by inter alia seeking to initiate Corporate Insolvency Resolution Process in respect of Sri Indra Power Energies Limited (hereinafter referred to as 'Corporate Debtor/Respondent') on the ground that the Corporate Debtor has committed default for a principal outstanding amount of Rs.1,14,85,479.45 (Rupees One Crore Fourteen Lakh Eighty Five Thousand Four Hundred Seventy Nine and Paise Forty Five Only) comprising of principal due of Rs.90,00,000 (Rupees Ninety Lakh only) along with an interest of Rs.24,85,479.45 (Rupees Twenty Four Lakh Eighty Five Thousand Four Hundred Seventy Nine and Paise Forty Five only) calculated at 18%p.a till 03.02.2020. Copies of the Acknowledgment of Registration of Firm of the Petitioner, workings of computation of the claim amount and authorisation letter dated 03.08.2019 authorising Mr. K Sriharsha Shashank to file present case are annexed to the Petition.

2. Brief facts of the case, as per the Petitioner, which are relevant to the issue in question, are *inter alia* as follows:

(1) It is submitted that the Petitioner and the Respondent entered into an Agreement for Sale & Purchase of Power Plant Equipment dated 23.07.2018, wherein the Petitioner agreed to purchase the Plant and Machineries of the Biomass Power Plant located at Chikkajantakal Village, Koppal District, Karnataka for an agreed sale consideration on as is where is basis. Petitioner undertook to dismantle the said Plant and Machineries once the Respondent obtained NOC from Indian Renewable Energy Development Authority (IREDA) and issued a Letter of Authorization to that effect. Copy of the Agreement for Sale & Purchase of Power Plant Equipment dated 23.07.2018 is annexed to the Petition.

(2) It is submitted that clause 2 of the Agreement contemplated the manner in which payment was to be made by the Petitioner to the Respondent. The clause stipulated that the Respondent must obtain NOC/ Permission from IREDA for dismantling the said Plant & Machineries within two weeks from the date of payment towards the first instalment of Rs. 90 Lakh by the Petitioner and issue a Letter of authorisation to the Petitioner for

- commencing the dismantling work. The second instalment was agreed to be made within 35 days from the date of issuance of the said Authorisation Letter duly enclosing the NOC obtained from IREDA by the Respondent.
- (3) In accordance of the said Agreement , the Petitioner paid the requisite amount of Rs.90 Lakh vide Demand Draft No.972001 dated 22.07.2018 and DD Nos. 972003, 972004,972005 dated 23.07.2018 of Karur Vysya Bank, Vanasthalipuram Branch, to the Respondent in pursuance of the 1st instalment. Copies of the Demand Drafts towards payment of 1st instalment as per the agreement are annexed to the Petition.
- (4) It is submitted that the Respondent upon receipt of the said amount failed to obtain NOC from IREDA and did not issue authorisation letter to the Petitioner thereby breaching the terms of the contract due to which the contract stands cancelled. The Respondent is liable to return Rs.90 Lakh paid by the Petitioner in pursuance of 1st instalment.
- (5) It is submitted that despite several requests, the Respondent has not repaid the outstanding due of Rs.90 Lakh along with interest at 18% p.a till date. The Petitioner issued Demand Notice dated 06.08.2019 under section 8(1) of IBC, 2016 which was duly served on the Respondent on 08.08.2019 but the Respondent has not made any payment towards the due amounts stated in the Demand Notice to the Petitioner till date. It is stated that the Respondent was facing financial distress and decided to dismantle the power plant. The Respondent had also availed a loan from IREDA and since the Respondent could not repay the said loan amount, the Respondent approached the Petitioner for selling its Power Plant. However, the Respondent has now restarted the functioning of the said Power Plant. Copy of Letter from IREDA to the Respondent intimating rescheduling the Loan Agreement is annexed to the Petition.
- (6) The Respondent issued Reply Notice dated 27.08.2019, which is annexed to the Petition. Relevant portion of the reply is reproduced for the sake of convenience:

“It is true that you had entered into an Agreement for sale and purchase of power plant equipment on 23.07.2018 with my client and

in terms of the said agreement under clause 2, you had specifically agreed to make the payments as per the time schedule mentioned therein. You had utterly failed to adhere to the said schedule and did not make the payment of the second installment as agreed upon. Further, my client also states that you had failed to even reply to his various mails and follow ups. Finally having fed up with your attitude and also the deliberate breach committed by you, my client through email dated 15.09.2018 very categorically mentioning the dates and the default committed by you, had specifically averred that the agreement stands cancelled and the advance already paid is forfeited. There was no reply to even this mail.

My Client states that after the email they had also filed the caveat petitions before the Hon'ble Courts at Gangavathi in State of Karnataka. Having received even the caveats, you had never replied or denied either the default or the forfeiture made by my client in terms of the agreement. Therefore you are not estopped by conduct, but also estopped in law from making any claims contrary to the acceptance. The notice of demand issued by you is not only a false claim, but also a frivolous and a fraudulent claim for which my client is entitled to claim damages and also the consequential reliefs U/s. 65 of the Insolvency & Bankruptcy Code, 2016. Apart from the provisions of the IBC, my client is also entitled to claim damages under civil law for the wrongful action of yours and for dragging my client into frivolous litigation having failed to comply in terms of the agreement.”

(7) The Petitioner has annexed NESL certificate dated 03.02.2020 with information regarding dues of Rs.90 Lakh liable to be paid to Petitioner.

3. The Respondent has filed its statement of objections to the petition with the contentions as listed herein below:

(1) It is submitted that the Petitioner has filed this petition with *malafide* intention. That as per the terms of the said Agreement in as much as the payments as

per time Schedule was not adhered by the Petitioner. As per the terms of said Agreement the Petitioner was required to pay a sum of Rs.1,20,00,000/- (Rupees One Crore Twenty Lakh only), the moment, the Respondent Company furnishes NOC from IREDA. Further, NOC dated 16.08.2018 was given to the Petitioner and had requested the Petitioner to make payments within 35 days as per the terms of the said Agreement. Copy of NOC from IREDA dated 16.08.2018 is annexed to the Objections. Relevant portion of the NOC is extracted herein below:

“We acknowledge your letter dated 25th July 2018, 27th July 2018, 9th August 2018 and 11th August 2018 with request for sale of plant and machinery as scrap and consequently payment of Rs 3.0 Cr from sales realization to IREDA for settlement of outstanding dues. Your request has been examined and competent authority in IREDA has No Objection to sell the project plant and machinery for sale consideration of minimum Rs 3.0 Cr subject to fulfilment of following condition;

- 1. The purchaser shall pay the entire sales value directly in the bank account of IREDA as communicated vide letter dated 27th July 2018*
- 2. The company shall submit the sale agreement entered with the purchaser immediately.*
- 3. The company shall pay Rs 50 Lacs and submit the Post Dated Cheques (PDC) for Rs 50 Lacs dated 30 August 2018, Rs. 1.0 Cr each for 30.09.2018 and 31.10.2018 before starting of dismantling of plant and machinery.*
- 4. IREDA shall charge interest on outstanding amount till the full repayment of loan outstanding is done. ..”*

(2) It is submitted that inspite of the NOC, the Petitioner did not make the payments as per the Agreement. Having no choice, the Respondent cancelled the agreement and as per the terms agreed vide email dated 26.09.2018. Copy of the said letter is annexed to Objections. Relevant portion of the letter is extracted below for ready reference:

“Please refer to our agreement cited above (Ref.1), we would like to inform you that, as per agreement you have to pay second installment within 35 days from the date of NOC issued by IREDA for dismantling of plant and machinery. We have submitted NOC from IREDA dt.16.08.2018

(Ref.2) through mail to you. Our Mr.Sharma has called you several times with regard to payment of 2nd installment but there is no response from your end.

As per the telephonic conversation and the personal discussion you had with our Mr. Sharma on 23.09.2018, you have promised to pay the 2nd installment of amount within two days i.e., by Tuesday 25.08.2018. However, we have not received the payment as promised by you. Though you could meet the terms of agreement, we have allowed your persons to visit the site on 24.09.2018 as requested by you.

In the above circumstances, as you could not keep up the payment terms of the agreement, the agreement executed on 23.07.2018 stands cancelled and the advance already paid is forfeited.”

(3) The Respondent places reliance on decision in *KLA Construction Technologies V. CKG Realty (2018) 208 Comp cases 2020 (NCLAT)*, to state that the money payable as advance under the contract was not an Operational Debt. It is submitted that the Respondent cancelled the contract with the Petitioner on account of breach of contract by the Petitioner and the entire amounts paid by the Petitioner are forfeited. The claim amount being in dispute, This Bench does not have jurisdiction to entertain the petition as dispute of such nature needs elaborate evidence to be recorded. In this regard, the Respondent has placed reliance on the Supreme Court decision in *K. Kishan v. M/s Vijay Nirman Company Pvt Ltd. [(2018) 1 SCC 353]* wherein it was held that IBC, 2016 cannot be invoked wherein *bonafide* disputes exists between the Parties.

(4) The Respondent submits that it is a solvent company which is functioning and has 40 employees and is capable of paying its debts hence, IBC

proceedings are not maintainable. Hence the petition deserves to be dismissed.

4. The Petitioner filed its Rejoinder bringing it to the notice of this Bench that the Petitioner:

- (1) It is submitted that as per the agreement, the Respondent was to obtain NOC from IREDA for starting dismantling of the equipment and communicate the same to Petitioner within 15 days from the date of Agreement, granting authorisation to the Petitioner for dismantling the equipment. However, NOC was never furnished to the Petitioner.
- (2) Since no NOC was furnished and no authorisation letter was issued, no payment of Rs.1,20,00,000/- which was to be made within 35 days of providing NOC was made.
- (3) Further, assuming that the said NOC letters dated 09.08.2018 and 16.08.2018 are correct, it is pertinent to note that IREDA mandated payment of all amounts by the Petitioner to it directly. Further, according to the Respondent's representation to IREDA, the said material was only valued at Rs.3 Cr by Respondent. However, the Respondent had agreed to sell the said for Rs.3.80 Crore to be paid in instalments. By not disclosing the NOC, the Respondent sought to defraud the Petitioner and siphoned off. Compliance of terms of the NOC by paying Rs.3 Cr to IREDA meant paying more than the amounts agreed as Rs.90 Lakh was already paid to the Respondent.
- (4) It is also submitted that the decision of *KLA Construction Technologies Private Limited v. CKG Realty Private Limited* has no bearing on the instant petition as the issue before Hon'ble NCLAT was whether non-payment of mobilization advance amounts amounted to operational debt. However, the present case is not one of non-payment of advance monies, but of refund of monies as per an Agreement, on failure of the Respondent to adhere to the terms mentioned in the said Agreement.
- (5) It is submitted that the law laid down in *K. Kishan v. M/s Vijay Nirman Company Limited* and *Mobilox Innovations Private Limited v. Kirusa*

Software Private Limited states that the existence of dispute and/or a suit or arbitration proceeding must be pre-existing i.e. the dispute must exist before the receipt of Demand Notice. The dispute alleged by the Respondent is neither a *bonafide*, nor a pre-existing dispute.

5. Heard Shri Suman K.S., learned Counsel for the Petitioner and Shri S. Rajesh, learned Counsel for the Respondent, through video conferencing. We have carefully perused the pleadings of the Parties, extant provisions of the Code and the Rules made thereunder.
6. The Petitioner has claimed that Respondent has failed to provide NOC from IREDA to the Petitioner after having received the initial payment of Rs.90,00,000 from the Petitioner as per the agreement. The Petitioner was to pay Rs.1,20,00,000 within 35 days of receipt of authorisation letter from Respondent to start the dismantling work of the project. However, this authorisation letter could be provided only after receipt of NOC by the Respondent from IREDA.
7. The Petitioner contends that in the absence of NOC and authorisation letter being provided by the Respondent to the Petitioner, the Petitioner cannot go ahead with the work and pay the amounts as per the agreement. On the other hand, the Respondent has annexed the NOC dated 09.08.2018 and 16.08.2018 received by the Respondent from the IREDA. However, it is imperative to state here that the Respondent has not annexed any proof of communication of the NOC letters to the Petitioner. Further, the Respondent states in the Statement of Objections that vide email dated 26.09.2018 sent to the Petitioner by the Respondent, the dates of default committed by the Petitioner have been mentioned and the Agreement dated 23.07.2018 has been cancelled on account of the Petitioner's failure to adhere to the terms of the Contract. However, it is again found on perusal of annexures that there is no email dated 26.09.2018. In place of an email, a letter addressed to the Petitioner company dated 26.09.2018 is annexed without any proof of service or acknowledgement on part of Petitioner for having received the same.

8. It is pertinent to mention that the Hon'ble Supreme Court in the case of *"Mobilox Innovations Private Limited v. Kirusa Software Private Limited, (2018) 1 Supreme Court Cases 353*, held:

"All that the adjudicating authority is to see at the stage of admitting/ rejecting the application 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 authority does not need to be satisfied that the defence is likely to succeed so long as the dispute is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application, Moreover 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"

9. The Respondent has not produced sufficient documentary evidence supporting its claim that the NOC was communicated to the Petitioner and the communication regarding cancellation of agreement on account of non-payment of requisite amounts by the Petitioner to the Respondent. In absence of documentary evidence of communications in relation to disputes, the Respondent's plea appears to be bald and an attempt to avoid payment of dues. Further, the Respondent has failed to produce latest balance sheets showing that the company is an ongoing concern generating revenue and solvent.
10. The Petitioner has produced NESL Certificate dated 03.02.2020 showing record of debt of Rs.90 Lakh along with interest of Rs.24,85,479.45. Copy of letter issued by Bank stating that no amounts were received by the Petitioner from Respondent has been annexed to the Petition. Copies of Demand Drafts showing payment of Rs.90,00,000 as per the agreement establish that initial payment was made to the Respondent. The forfeiture of Rs.90,00,000 paid by the Petitioner to Respondent is not justified. No evidence has been produced to show communication of NOC. It is clear from the material on record that there

is an operational debt which has fallen due on 23.07.2018 and has not been paid. Further, the Respondent has failed to point out any substantial dispute. Despite providing sufficient opportunity, the Respondent also failed to produce its audited financial statements or any other proof of its solvency.

11. In view of the above facts and circumstances of the case and the law on the issue, by exercising powers conferred on the Adjudicating Authority, U/s 9(5)(i) of the Code, the Company petition bearing C.P. (IB) No.181/BB/2020 is hereby admitted by initiating Corporate Insolvency Resolution Process (CIRP) in respect of the Respondent Corporate Debtor, namely, **Sri Indra Power Energies Limited** with the following consequential directions:

- (1) **Mr. Gonugunta Murali**, bearing **Registration No. IBBI/IPA-001/IP-00654/2017-18/11139**, who is a qualified Insolvency Professional, is hereby appointed as Interim Resolution Professional, in respect of the Corporate Debtor to carry out the functions as mentioned under the Insolvency and Bankruptcy Code, 2016 and various rules issued by IBBI from time to time;
- (2) The following moratorium is declared prohibiting all of the following, namely:
 - (a) the institution of suits or continuation of pending suits or proceedings against the Corporate Debtor/Corporate Debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;
 - (b) transferring, encumbering, alienating or disposing of by the Corporate Debtor any of its assets or any legal right or beneficial interest therein;
 - (c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;
 - (d) The recovery of any property by an owner or lessor where such property is occupied by or in the possession of the Corporate Debtor;
 - (e) The supply of essential goods or services to the Corporate Debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period;

- (f) *The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.*
- (g) *The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process;*
- (h) *The IRP should follow all extant provisions of IBC, 2016 and the rules including fees rules as framed by IBBI. The IRP is hereby directed to file his report in the Tribunal from time to time.*
- (3) *The IRP is directed to follow all extant provisions of the IBC, 2016 and all extant rules including fees rules as framed by IBBI from time to time. The IRP is hereby directed to file progress reports to the Tribunal from time to time.*
- (4) *The Board of Directors and all the staff of Corporate Debtor/Corporate Debtor are hereby directed to extend full co-operation to the IRP, in carrying out his functions as such, under the Code and Rules made by IBBI.*
- (5) *Post the case for report of IRP on **28th May, 2021.***

Sd/-

**ASHUTOSH CHANDRA
MEMBER, TECHNICAL**

Aparna

Sd/-

**RAJESWARA RAO VITTANALA
MEMBER, JUDICIAL**