

**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-IV**

CP (IB) 63/MB/C-IV/2019

Under section 9 of the Insolvency &
Bankruptcy Code, 2016

In the matter of

Nuevosol Energy Private Limited
[CIN: U74200TG2011PTC076517]
... Operational Creditor

Versus

IBC Solar Projects Private Limited
[CIN: U74999MH2012FTC236150]
... Corporate Debtor

Order pronounced on 01.01.2020

Coram:

Mr. Rajasekhar V.K. : Hon'ble Member (Judicial)
Mr. Ravikumar Duraisamy : Hon'ble Member (Technical)

Appearances:

For the Operational Creditor : Mr Akhil Mahesh i/b L & L
Partners, Advocate

For the Corporate Debtor : Mr Rahul Gaikwad a/w Ms
Nikita Abhyankar i/b Gravitas
Legal, Advocate

ORDER

Per: Rajasekhar V.K., Member (Judicial)

1. This is a Company Petition filed under section 9 of the Insolvency & Bankruptcy Code, 2016 (“**IBC**”) by Nuevosol Energy Private Limited (“**the Operational Creditor**”), a company within the meaning of section 2(20) of the Companies Act, 2013 having CIN U74200TG2011PTC076517 and registered with the Registrar of Companies, Telangana, Hyderabad, and represented by its Assistant Manager Accounts, Mr Y Chandra Sekhar, on the basis of a Board Resolution dated 17.12.2018 seeking to initiate Corporate Insolvency Resolution Process (“**CIRP**”) against IBC Solar Projects Private Limited (“**the Corporate Debtor**”). The Board Resolution has been placed on record at p.11 of the Petition.
2. The Corporate Debtor is a private company limited by shares and incorporated on 25.09.2012 under the Companies Act, 1956, with the Registrar of Companies (RoC), Maharashtra, Mumbai. Its CIN is U74999MH2012FTC236150. Its registered office is at No.614, B-Wing, 215-Atrium, Andheri-Kurla Road, Andheri (East), Mumbai 400 069, within the State of Maharashtra. Therefore, this Bench has jurisdiction to deal with this petition.
3. The present petition was filed on 21.12.2018 before this Adjudicating Authority on the ground that the Corporate Debtor failed to make payment of a sum of ₹47,37,957.00 (Rupees forty-seven lakh thirty-seven thousand nine hundred and fifty-seven

only) as principal and ₹5,46,747.00 (Rupees five lakh forty-six thousand seven hundred and forty-seven only) as interest as on 29.04.2018, which is the date of default.

4. The case of the Operational Creditor is as follows: -

- (a) The Operational Creditor and the Corporate Debtor entered into Supply Agreement *vide* Agreement dated 19.09.2016, to supply the Components in connection with the construction, installation, testing, commissioning, operation and maintenance of solar power plants and related infrastructure in the territory of India (Para A at page 16-75 of the Petition);
- (b) Under the said Agreement dated 19.09.2016, Corporate Debtor had engaged the Operational Creditor for manufacture and supply of the Components in connection with the development of the Project located in Rajasthan, India (Para B & C at page 18 of the Petition).
- (c) Invoices have been placed on record as **Exhibit A-6 (Colly)** at pp.76-215. The invoices provide for interest in case of delayed payments, to be charged at the rate of 24% per annum. Bank statements are also attached as **Exhibit A-7** at pages 216-243. The total debt due and payable to the Operational Creditor is ₹52,84,704.00 (Rupees fifty-two lakh eighty-four thousand seven hundred and four only), as mentioned at page 4 of the Petition.

5. The Operational Creditor had served a Demand Notice in Form 3 dated 17.08.2018 to the Corporate Debtor [**Exhibit A-8 (Colly)**, pp.244-264] in terms of section 8 of the IBC. The Corporate Debtor has sent a reply dated 06.11.2019, wherein they have stated that the Demand Notice is misconceived and untenable under law, as on several occasions there was a delay in supply of the materials from the side of the Operational Creditor, and for which no satisfactory response has been received from Operational Creditor. It was the responsibility of the Operational Creditor to ensure that the delivery of components is made in accordance with the agreed delivery schedule, but there was substantial delay in meeting the timelines for delivery of components. Therefore, clause 6.2(b) of the Agreement dated 19.09.2016 enabled the Corporate Debtor to levy liquidated damages on Operational Creditor. Vide email dated 17.05.2017, the Corporate Debtor specifically informed the Operational Creditor of the liquidated damages calculated as per the terms of agreement on account of the delay in deliveries which originally amounted to ₹25.89 crores pursuant to which and subject to limitation Operational Creditor was liable to pay liquidated damages amounting to ₹47,37,960/-. The reply has been annexed at **Exhibit A-9** at pp.265-269 of the Petition.
6. Mr Rahul Gailwad a/w Nikita Abhyankar i/b Gravitas Legal, Learned Counsel appeared on behalf of the Corporate Debtor and made his submissions.

7. In its reply dated 11.09.2019, the Corporate Debtor has set up the following defence:-

- (a) The Corporate debtor states that application under section 9 of Insolvency & Bankruptcy Code, 2016 is absolutely frivolous and baseless and without any cogent legal basis. (para 2 at page 2 of the Reply);
- (b) In accordance with clause 2.1 and Schedule I of the agreement, it was the responsibility of the Operational Creditor to ensure that the delivery of the components was achieved by November 2016. Further, in terms of clause 6.2 (b), in the event of breach of the delivery schedule, the Corporate Debtor was enabled to impose liquidated damages on Operational Creditor [para 10(c) at page 6 of the Reply];
- (c) There were substantial delay in meeting the timeline for delivery of the components and there were several correspondences between the parties where dissatisfaction over the work done was specifically expressed [para 10(d) & 10(e) at page 6-7 of the Reply];
- (d) As the delay in delivery of the components, the Corporate Debtor *vide* its email dated 17.05.2017 specifically informed the Operational Creditor its right of deducting of liquidated damages pursuant to agreement dated 19.09.2016, which were computed on the basis of delayed delivery of approximately ₹25.8 crore. Pursuant to that and subject to limitation of clause

6.2(b), the Operational Creditor is liable for liquidated damages amounting to ₹47,37,960/- [para 10(f) at page 7 of the Reply];

(e) *Vide* letter dated 13.11.2017, the Operational Creditor recognised the right of the Corporate Debtor to deduct liquidated damages but also requested Corporate Debtor not to levy any liquidated damages as the end-user client of the Corporate Debtor did not impose damages upon the Corporate Debtor [para 10(k) at page 10 of the Reply].

8. We have heard the arguments of both sides and perused the records.
9. The claim of the Operational Creditor is that the amount deducted by the Corporate Debtor by way of liquidated damages ought to be paid to it, since the project of the Corporate Debtor did not suffer any delay even though there was delay on the part of the Operational Creditor to make supplies in terms of the Agreement dated 19.09.2016. To this end, it has attached a copy of the Press Release of the Corporate Debtor at p.258 of the Company Petition which states that the project was commissioned more than three months ahead of schedule. Its case is, therefore, that even though there was delay in supply of material, since the entire project itself did not suffer any delay, the Corporate Debtor is not entitled to deduct a sum of ₹47,37,957/- towards liquidated damages for the delay.

10. The Corporate Debtor has retained ten percent of the contract value to the tune of ₹47,37,960/- towards faithful performance of the Agreement, which was to be replaced by a Performance Bank Guarantee (**PBG**) after the commissioning of the project. The PBG had a validity period of twelve months until final acceptance of the project. Clause 9.1 of the Agreement at p.36 of the Petition clearly specifies that the Operational Creditor would be entitled to release of the retention amount only after successful deposit of the PBG.
11. Time was of the essence of the contract. Due to delay in delivery of various components, the Corporate Debtor exercised its right to deduct liquidated damages. In terms of clause 6.2 the liquidated damaged amounted to ₹25.9 crore. However, since there was an overall cap of 10% of the Agreement value [*i.e.*, 10% of ₹4,73,79,600/-], the Corporate Debtor deducted only that amount as liquidated damages.
12. Having regard to the totality of the circumstances and the material placed on record, we are of the considered opinion that the Operational Creditor is not entitled to claim that since the overall project did not suffer from any delays even though, admittedly, the supplies of the Operational Creditor to the Corporate Debtor was hit by delays, the Corporate Debtor ought not to exercise its right to levy liquidated damages. Further, the amount claimed by the Operational Creditor does not amount to a 'claim' within the meaning of section 3(6) of the IBC, since there is no 'right to

payment.’ The Operational Creditor is not entitled to take advantage of the Corporate Debtor’s ability to structure its project within the timelines specified by it to its own client.

13. The Corporate Debtor had put sufficient record to prove and support that liquidated damages levied are in accordance with terms of agreement dated 19.09.2016 for Components Manufacturing and Supply Agreement.
14. For the reasons stated above, the application fails and therefore, the same is rejected.
15. We make it clear that any observations made in this order should not be construed as expressing opinion on merits. The right of the petitioner before any other judicial forum shall not be prejudiced on grounds only of dismissal of the present petition by this Adjudicating Authority.
16. Let a copy of this order be communicated to the parties in terms of the provisions of section 9(5)(ii) of the IBC.

Sd/-
RAVIKUMAR DURAISAMY
Member (Technical)
01.01.2020

Sd/-
RAJASEKHAR V.K.
Member (Judicial)