



IN THE NATIONAL COMPANY LAW TRIBUNAL  
MUMBAI BENCH-IV

**CP (IB) No.1055/MB-IV/2021**

Under Section 9 of the I&B Code, 2016

In the matter of:

**Suvarna Aabasaheb Patil**

The proprietor of

Adnya Engineering Works

...Operational Creditor/Applicant

V/s

**D.N. Wind Systems India Private Limited**

[CIN: U31909PN2007PTC130578]

...Corporate Debtor/Respondent

***Order pronounced on: 30.08.2023***

*Coram:*

Mr. Prabhat Kumar  
Hon'ble Member (Technical)

Mr. Kishore Vemulapalli  
Hon'ble Member (Judicial)

*Appearances (via videoconferencing):*

For the Petitioner(s) : Mr. Amir Arsiwala, Adv.

For the Respondent(s) : Mr. Viraj Parikh a/w Mr. Prakhar Tandon,  
Adv.

**ORDER**

***Per: Prabhat Kumar, Member (Technical)***

1. This Petition bearing C.P. (IB) No. 1055/MB/C-IV/2021 filed on 17.11.2021 by Mrs. Suvarna Abasahab Patil (The proprietor of Adnya Engineering



Works), the Operational Creditor/Applicant, under section 9 of Insolvency & Bankruptcy Code, 2016 r/w Rule 6 of the (I&B Code) for initiating Corporate Insolvency Resolution Process (CIRP) in the matter of DN wind Systems India Private Limited, Corporate Debtor. The application has been filed through Mrs. Sonali Pawar, Advocate.

- 1.1. The Operational Creditor is a proprietary concern, who carries business of manufacturing Wind Mill Towers. The Corporate Debtor has approached the Applicant for the purpose of manufacturing of Wind Mill Tower for which the Corporate debtor has issue the Work Order. The Corporate Debtor have appointed the Applicant as a sub-contractor for execution of work assigned to the Corporate Debtor by "Siemens Gamesha Renewable Power Private Limited".
- 1.2. The Applicant states that the Corporate Debtor issued the First Work Order dated 27.09.2015 and thereafter Work Orders dated 22.11.2017, 05.09.2018, 31.03.2019 and 11.08.2019 were issued.
- 1.3. The Operational Creditor raised invoices against the Work order issue by the Corporate debtor. The Corporate Debtor have availed services of the Applicant and has accepted the work completed with full satisfaction.
- 1.4. The Operational Creditor states that Corporate Debtor have received and acknowledged all the Invoices and all date the Corporate Debtor has not paid the Balance amount of raised any disputes with regards to the Invoices.
- 1.5. The Operational creditor states that the total Invoice raised by her amounted to Rs.15,11,90,872.60, against which Applicant has received total payment of Rs. 12,81,90,582.52 leaving an outstanding of 2,30,00,289.58/- (Rupees Two Crore Thirty Lakhs Two Hundred Eighty-Nine and Fifty-Eight Paise Only) along with Interest @ 18%

i.e. Rs.67,20,969.20/- (Rupees Sixty-Seven Lakh Twenty Thousand Nine Hundred Sixty-Nine and Twenty Paise Only) which makes total liability is Rs.2,97,21,258.78 (Rupees Two Crore Ninety-Seven Lakh Twenty-One Thousand Two Hundred Fifty-Eight And Seventy-Eight Paise Only).

- 1.6. The Operational creditor sent a Demand Notice dated 23.09.2021 which was received by the Corporate Debtor on 27.09.2021 but the Corporate Debtor did not respond or raise any dispute against this demand notice.
  - 1.7. The date of default as mentioned by the Applicant in part IV of the Petition is 04.08.2021.
  - 1.8. The Applicant states that last payment was received by way Cheque for an amount of Rs.8,37,000/- Dated 03.08.2021.
2. The Corporate Debtor has filed a reply dated 09.11.2022 stating that the insolvency proceedings against the Respondent and is in reality a money recovery claim.
- 2.1. The Operational Creditor has failed to serve the copy of Petition to Insolvency and Bankruptcy Board of India ("Board") prior to filing of the Petition in compliance of rule 6(1) of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 ("AA Rules").
  - 2.2. The Operational creditor has suppressed the fact of pre-existing dispute between the parties relating to diversion of corporate Debtor's business. The Petitioner, in collusion with one of the ex-employees of the Respondent has consistently diverted business opportunities from the Respondent to third parties. The Petitioner has been instrumental in stealing potential contracts worth Rs. 3.6 crores and even stealing equipment and machinery from the Respondent. This criminal act has

already been reported to the Vadgaon Police Station, Kolhapur, which has also lodged FIR No. 0328 of 2020 dated 13 September 2020.

- 2.3. The Petitioner never actually deposited the GST collected from the Respondent with the Exchequer. Further, the Petitioner continued to raise purported GST invoices even after its GST registration was cancelled by the authority. This entire dispute was communicated to the Petitioner by the Respondent in its letter dated 2nd December 2020. The Respondent was entitled to deduct and retain a sum of Rs. 30,56,900/- and Rs. 45,58,500/- being GST levied by the Petitioner on the Respondent for FY 2018-19 and 2019-20, but not deposited with the authorities.
- 2.4. The Petitioner has deliberately suppressed that it has received a sum of Rs. 30,00,000/- from the Respondent, which payments it has acknowledged by letters and by affidavit.
- 2.5. Pertinently, the Petitioner never disputed or denied the allegations in the aforesaid letter and accepted its liability as stated thereunder. That being so, the Petitioner is now estopped from claiming the aforesaid total sum of Rs. 84,43,044/- towards GST levied on the Respondent and a further sum of Rs. 68,97,040/- towards invoices raised after cancellation of its GST Registration. A table prepared by the Respondent to demonstrate the set-offs, deductions and illegal invoices raised by the Petitioner and their respective values is annexed hereto and marked as Exhibit "G".
- 2.6. The Respondent is entitled to set-off any liability against the losses it has suffered on account of the aforesaid diversion of business. The Respondent has suffered losses worth Rs. 3.6 crores on account of the diversion of business. The investigation is still ongoing.



3. The petitioner has filed a rejoinder stating that reply of the corporate debtor having being filed without leave of this tribunal should not be considered. That poaching an employee cannot be a ground of dispute. It is further stated that poaching of an employee cannot be the reason to withheld the admitted outstanding dues. That 'poaching of an employee' cannot be termed as 'dispute' as per the IBC. That the Respondent has nowhere denied the Invoice(s) annexed to the Petition nor has denied the amount due and payable. The Respondent has falsely claimed to have filed criminal complaint against the Petitioner however the FIR is actually filed against its employee. That the Respondent has never raised any issue with regards to the goods supplied to them.

3.1. The serving copy to the Insolvency and Bankruptcy Board of India is not mandatory for an operational creditor i.e. a Petition under Section 9 of the Code. That the same is mandatory for Section 7 Application i.e. the Application by the Financial Creditors. That the Hon'ble Supreme Court of India in Macquarie Bank v. Shilpi Cable Technologies Limited (Civil Appeal 15135/2017) has very clearly held that non-compliance of a procedural formality cannot be ground of rejection of Application.

3.2. The Applicant has got to know from her Chartered Accountant that the Respondent has wrongly claimed Input Tax Credit (ITC) from the GST authorities by showing that the Respondent has paid those Invoice. That an enquiry has been initiated against the Respondent Company as the Respondent, Company has enriched itself to the tune of more than One Crore. That as the Applicant is not party to those proceedings hence the Applicant cannot produce the copy of this GST enquiry. That the Respondent is put to strict proof of the same in case of denial.



- 3.3. The mere statement that the Respondent has suffered loss or the Respondent is eligible for any set off cannot be termed as a valid defence. In fact, the defence of the Respondent is bogus and sham. That the Respondent has paid an amount of Rs. 16,70,000/- (Rupees Sixteen Lakhs Seventy Thousand Only) after receipt of first demand notice speaks in volumes. The Respondent has never denied the receipt of Invoice or the goods. The Respondent has issued post-dated cheques which were dishonoured and against which the Applicant has filed complaint under the Negotiable Instruments Act 1881. The Respondent entered a compromise and paid the amount against the dishonour of the cheque. The Ld. Trial court vide Order dated 01.08.2021 was pleased to take on record the oral submission in all the three cases. If the Respondent had any defence of set off then the Respondent would not have settled the case or entered into settlement terms. The Respondent had continued business relation with the Applicant till 31.10. 2020 even after filing of alleged complaint. The Respondent has closed its unit and has named the Applicant as one of its sub-contractors in annexure 3 to the notice of closure, which speaks in volumes.
- 3.4. By releasing the payment post receipt of first demand notice the respondent has in fact, admitted its outstanding operational debt.
- 3.5. The Respondent has never raised any issue with regard to the quality or quantity of the goods supplied which is evidence from the fact that the Respondent released an amount of Rs. 16,70,000/- (Words- Sixty Lakhs Seventy Thousand Only) Post receipt of first demand notice. Also, the fact that an amount of Rs. 21,66,000/- (Words- Twenty-One Lakhs Sixty-Six Thousand Only) was release post termination of the contract and filing of FIR.



4. The corporate debtor has filed a sur rejoinder dated 08.07.2023 stating that, in paragraph nos. 12, 15-17 of the Reply, the Petitioner has not denied that it has diverted business of the Respondent in collusion with the Respondent's plant head, Mr. Lakundre. In fact, there is no doubt that the FIR filed by the Respondent clearly mentions the Petitioner by name. Further, it is also a matter of record that the Petitioner (through her husband) has entered into a partnership with Mr. Lakundre (through his wife) by the name of A Square Engineering since 2019, when the diversion of business commenced. Further, as already stated in the Reply, the Petitioner has given kick-backs to the Respondent's plant head during the subsistence of relationship between the parties. The above facts unequivocally demonstrate that the Petitioner has colluded with the Respondent's Plant Head to divert the Respondent's business to their own partnership concern. A copy of the GST Registration details of A Square Engineering is annexed hereto and marked as Exhibit "A".

4.1. The Petitioner also does not dispute the receipt of the letter dated 2nd December 2020 wherein the Respondent cancelled and returned multiple invoices raised by the Petitioner, for being illegal and contrary to GST Norms. The liability to pay GST is not contingent on payments.

4.2. The Petitioner has also not disputed the documents executed by the Petitioner confirming receipt of the payments.

4.3. The cheques were honoured only to avoid criminal liability to the Respondent and its directors. This was a pragmatic decision and does not amount to admission of liability on part of the Respondent. In fact, the matter was settled before the Lok Adalat and while making payments under the cheques, the Respondent has not admitted any liability. Further, payments of Rs. 8 lakh odd each made under 3

cheques cannot amount to admission of liability greater than Rs. 2+ crores as is alleged in the Petition.

- 4.4. In fact, the Respondent had borrowed monies from various financial institutions which liabilities have been paid back by the Respondent. The Respondent is honouring its dues to financial institutions and has repaid multiple loans including to Janata Sahakari Bank Ltd. and to the Encore Asset Reconstruction Company Ltd.

### ***Findings***

5. We have heard the arguments of both the counsel on records

- 5.1. The Learned Counsel for the Corporate Debtor informed that the present petition is liable to be dismissed in terms of Rule 6(2) of IBBI (Application to Adjudicating Authority) Rules, 2016, as the Applicant failed to serve a copy of petition upon IBBI before filing of the petition. The Learned Counsel for the Operational Creditor submitted that u/s 9 (5) of the Code this bench must notify the defect and, allow one-week time to the petitioner to cure the defect. Considering that even if the fresh petition is filed now, the same be within the period of limitation. The Corporate Debtor relied upon decision of the Hon'ble Supreme Court in then Case of State Uttar Pradesh vs. Singhara Singh & Ors., and contest the grant of Opportunity to cure. The Operational Creditor has also submitted that "*Serving copy to the Insolvency and Bankruptcy Board of India is not mandatory for an Operational Creditor i.e. a Petition under section 9 of the Code. That the same is mandatory for Section 7 Application i.e. the Application by the Financial Creditors. That the Hon'ble Supreme Court of India in Macquarie bank v. Shilpi Cable Technologies Limited ( Civil Appeal 15135/2017) has very clearly held that non-compliance of a procedural formality cannot be ground of rejection of Application .*" After considering the contention, this bench considered it appropriate to

allow an opportunity. Accordingly, this bench is of the considered view the defect, being curable and haven being cured by the petitioner, cannot lead to dismissal of the petition.

- 5.2. The allegation of the Corporate Debtor that applicant has suppressed the payment of money amounting to Rs.30,00,000/- acknowledged by Mr. Abaso K Patil. The petitioner has claimed that, the receipt of said money by her husband was in different transaction and was not received by her husband on behalf of the petitioner. This bench finds that the said amount was paid in cash on five different dates and the money is stated to have been received by the husband of the petitioner. Further, the Corporate debtor's allegation in the reply that the letter confirming the payment was signed by the petitioner is incorrect.
- 5.3. The Corporate Debtor has also raised the issue of GST credit, not being available because of non-payment of GST by the petitioner. This bench finds this argument as feeble, as the Corporate Debtor was otherwise also not eligible to the GST credit in the absence of payment of the Invoices in accordance with GST Law.
- 5.4. The Corporate has also raise a defence of diversion of business of the Corporate debtor in collusion with employee of the Corporate Debtor Mr. Abhijeet Lakundre and payment of kick Bags to him to secure payments and contracts from the Corporate Debtor. The Applicant has submitted that, the Respondent has never raised any issue with regards to the goods supplied to them. The respondent has already utilized the goods and further supplied them to the Ultimate purchaser i.e. Siemens Gamesha. The respondent has also been paid wholly by the third party for the goods successfully delivered by the Applicant. It was also submitted that the FIR filed by the Corporate Debtor against Mr. Abhijeet Lakundre for offence of stealing company

equipment's and the petitioner is neither connected nor was named therein. On perusal of Annexure 'D', the bank statement of the petitioner, annexed to the reply of the Corporate Debtor, this bench finds that Operational Creditor had made certain payments during the month of March 2018, November 2017 and April 2017. The petitioner has not refuted the fact of payment made to the wife of Mr. Abhijeet lakundre in the above stated months and has only objected to the manner under which the Corporate Debtor has obtained this document. This bench finds that the petitioner obtained work orders during Nov 2017 and September 2018. This bench feels there may be substance in the contention of the Corporate Debtor that the petitioner was in collusion with its plant head Mr. Abhijeet Lakundre, and such allegation requires detailed examination and investigation, which cannot be taken up in these proceedings. This bench also finds that the Corporate Debtor had made payment of about 12.81 Crores approximately against the Claim of 15.11 Crores. In view of these facts this bench feels that the existence of the debt existence of debt can be said to be under cloud on account of this prima facie fact.

6. In view of the above we find that there appears to be a pre-existing dispute in so far as the obligation to pay the amount claimed is itself in dispute on account of alleged collusion, which appears to be prima facie evident from perusal of Bank Statement of the petitioner placed on record by the Corporate Debtor in view of above the petition deserve to be dismissed.
7. Accordingly, C.P.(IB) 1065/2021 is **dismissed**.

**Sd/-**  
**PRABHAT KUMAR**  
**MEMBER (TECHNICAL)**  
**30.08.2023**

**Sd/-**  
**KISHORE VEMULAPALLI**  
**MEMBER (JUDICIAL)**