

IN THE NATIONAL COMPANY LAW TRIBUNAL
COURT NO. 5, MUMBAI BENCH

C.P. (IB) 2583/MB/2019

Under Section 9 of the IBC, 2016

In the matter of

AMI Tech (India) Private Limited

D-22, 3rd Floor, Dhanraj Mahal, CSM Marg,
Mumbai- 400001

.... Petitioner

v/s.

Tata Consultancy Services Limited

9th Floor, Nirmal Building, Nariman Point,
Mumbai, Maharashtra- 400021

.... Corporate Debtor

Order Delivered on 30.04.2020

Coram: Hon'ble Smt. Suchitra Kanuparthi, Member (Judicial)
Hon'ble Shri V. Nallasenapathy, Member (Technical)

For the Petitioner: Mr Hrushii Narvekar a/w Ms Samrudhi Chothani,
i/b M/s Vashi & Vashi, Advocates

For the Corporate Debtor: Ms Fereshte D. Sethna a/w Ms Divya Hirawat, ib
M/s DMD, Advocates.

ORDER

Per: V. Nallasenapathy, Member (T)

1. The Petition reveals that the Corporate Debtor raised several purchase orders on the Petitioner for supply of Automated Meter Reading (AMRs) devices for various Distribution Companies (DISCOMs) within the states of Gujarat and Andhra Pradesh, who were the customers of the Corporate

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Debtor. Based on the purchase orders the Petitioner supplied the AMRs to the DISCOMS.

2. Petitioner submits that they had supplied 50,297 AMR units and 230 DCUs to the DISCOMS in Gujarat. It is submitted, that 46,509 units were installed and 32,000 units were successfully commissioned. The Petitioner raised invoices for the above said supply from 28.12.2010 to 01.07.2013 to the extent of ₹28,72,95,617/-, out of which the Corporate Debtor made payments to the extent of ₹23,95,67,700/- and a sum of ₹4,77,27,917/- is still due.
3. Petitioner further submits that they have supplied 1,04,000 AMR units to the DISCOMS in Andhra Pradesh, out of which 90,421 units were installed and 81,995 units were successfully commissioned. The Petitioner raised invoices for this supply from 30.06.2011 to 28.03.2014 amounting to ₹36,78,34,937/- out of which a sum of ₹31,08,15,465/- was paid by the Corporate Debtor and still there is an outstanding due of ₹5,70,19,473/-.
4. The Petitioner further submits that in order to ensure efficient and seamless working of the AMRs, tailor-made additional investments to the extent of ₹1,90,00,000/- was made and the same is recoverable from the Corporate Debtor.
5. It is submitted that total of the above said three components works out to ₹12,37,47,390/- and the interest at the rate of 18% from the date of the bill works out of ₹7,70,05,171/- and thus there is a total due of ₹20,07,52,561 recoverable from the Corporate Debtor and accordingly the Petitioner issued demand notice on 04.01.2018 under Section 8 of the Code, demanding the said sum from the Corporate Debtor.
6. The Corporate Debtor by its reply to the demand notice dated 15.01.2018 denied the liability saying that the claim is utterly false, bogus, *ex-facie* misconceived, disingenuous and time-barred. It is also stated that the

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demand notice glosses over the multitude of disputes raised by the Corporate Debtor pertaining to the supply of deficient modems relating to the AMRs supplied to various DISCOMS within the states of Gujarat and Andhra Pradesh, including multiple instances of negligence and incompetence afflicting daily schedules, failures to rectify and/or replace faulty defective modems in timely manner, non-submission of requisite certificates, reports, bank guarantees, apart from raising premature invoices without completion of project milestones. It was further alleged that in respect of Gujarat DISCOMs, the Petitioner failed to commission nearly 23,000 modems, inaction on certain purchase orders and due to multiple defaults, a notification was given on 31.07.2013 pointing out the various deficiencies and inadequacies in performance of obligation under the purchase orders. The reply further notes that the Corporate Debtor suffered losses including penalties imposed by their customer, in the form of liquidated damages for the delays and damages due to negligence of the Petitioner in deploying active SIMs in defective modems resulting in loss of meter data, misuse of capital SIMs, leading to abnormal GPRS billing, etc. It was further stated that in respect of purchase orders relating to Andhra Pradesh DISCOMs, the Corporate Debtor, in fact, entitled to refunds relating to non-delivery and/or defective quality of AMRs, failure to provide delivery proof, bank guarantee etc., together with entitlement to recover liquidated damages.

7. The Corporate Debtor filed reply to the Petition, rejoinder was filed by the Petitioner, for which the Corporate Debtor filed its sur-rejoinder and both parties filed their written submissions and both sides argued the matter exhaustively.
8. The following are the contentions of the Petitioner in support of the Petition:

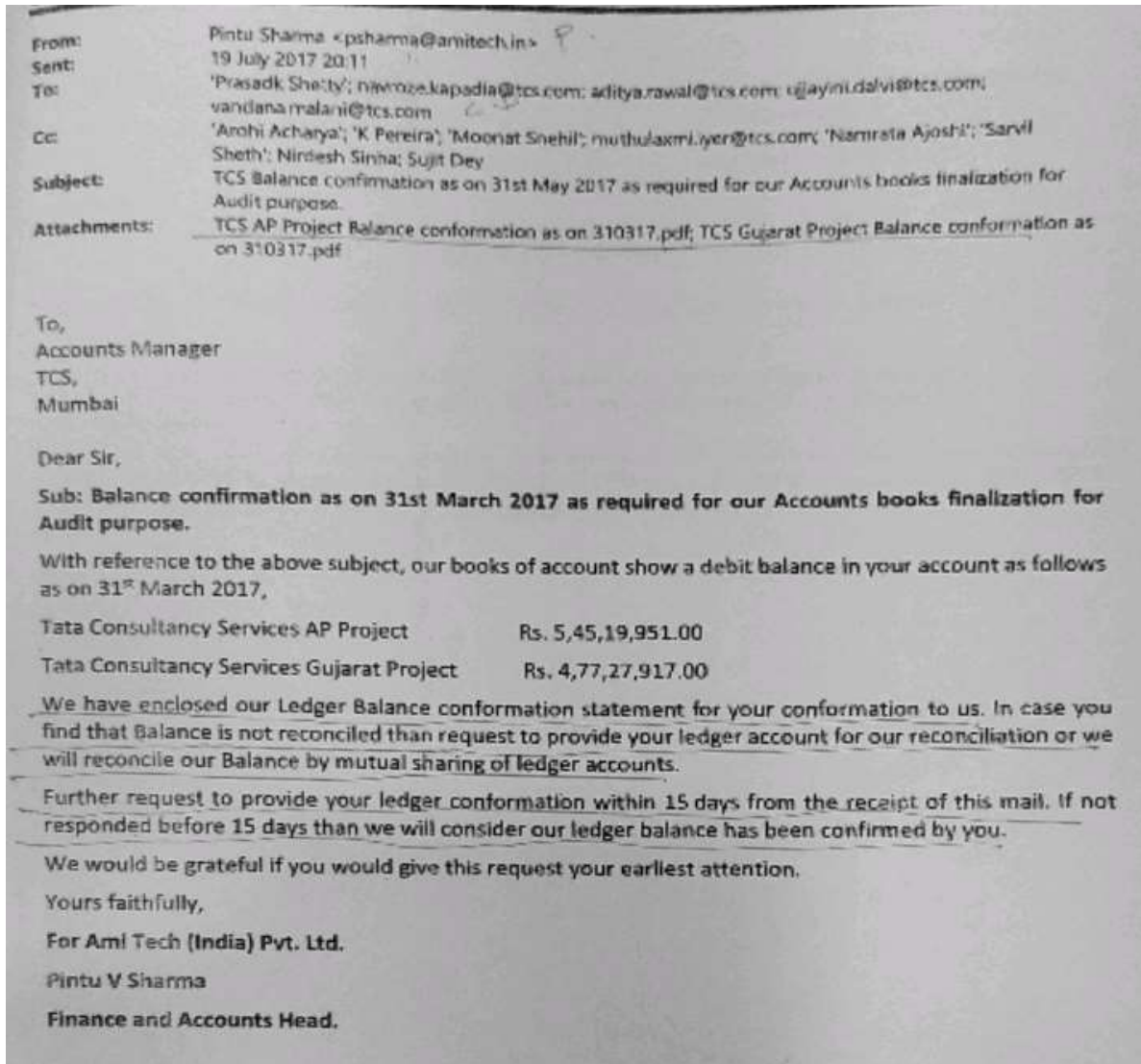
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- a. The Corporate Debtor is liable to pay ₹20,07,52,561 as demanded.
- b. Owing to its long-standing association with the Corporate Debtor, they consistently supported the Corporate Debtor by working in the absence of advance payments, accommodating continual delays in payment, undertaken obligations such as replacement of defective SIMs etc. for the benefit of both the parties.
- c. Admittedly, the parties were not acting in terms of purchase orders raised.
- d. Owing to the unprofessional attitude and the deliberate failure to make payments on the part of the Corporate Debtor, they are constrained to withdraw from the Gujarat and Andhra Pradesh projects during December 2013 and January 2016 respectively.
- e. The last payment received was in March 2015.
- f. On 19.07.2017, the Petitioner had addressed an email to the Corporate Debtor, enclosing its ledger balance statement, for the Corporate Debtor's confirmation, requesting to provide the confirmation within 15 days failing which the Petitioner's ledger statement would be deemed confirmed and the same is extracted below:

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- g. The Corporate Debtor, on 21.08.2017, in response to the above email, requested the Petitioner to:
- confirm the period for which the balance is mentioned, and
 - provide invoice wise breakup for the balance outstanding amount.
- h. The Petitioner complied with the above said request of the Corporate Debtor vide email dated 21.08.2017 which is extracted below:

*"Dear Sir/ Madam,
Highly appreciate your reply.*

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We have attached herewith balance details till 31.03.2017 (same balance as on date as no transaction entered during the year).

Detail invoice wise list attached for your reference and reconciliation. Please inform to us if you required further information and detail for reconciliation."

- i. The Corporate Debtor's reply email dated 21.08.2017 is as below:

"Dear Sharma,

Please find the status of invoice which are already booked and paid as per TCS books but still shown outstanding in statement.

There are also few invoices which are partially paid, details of the same mentioned in below attached file.

Payment details of the invoice mentioned in below attached file for reference.

Request you to kindly remove the same and send a revised outstanding statement."

- j. Pertinently, not once was payment of the outstanding amount disputed by the Corporate Debtor. An amount of ₹48,16,839/- was shown as outstanding amount as per TCS books, in the Excel sheets attached to the email sent by the Corporate Debtor.
- k. On 21.08.2017 itself, Petitioner provided the necessary details including invoices list for the Corporate Debtor's reconciliation to the Corporate Debtor.
- l. On 22.08.2017, the Corporate Debtor sent an email attaching a statement which contained details of invoices which were purportedly fully paid by the Corporate Debtor which is as below:
- "Dear Sharma,*
- The below file contains invoice which are fully booked and paid as per TCS books.*

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Request you to kindly remove the paid invoice from statement and provide revised statement so that we can do further reconciliation for the balance invoice shown in outstanding statement.

Details of payment mentioned in below attached file.”

- m. The Corporate Debtor, despite having unequivocally acknowledged its liability by requesting for “revised statement” and “revised outstanding statement”, failed to make the payment, hence this Petition.
9. The Corporate Debtor raised the following contentions while opposing the Petition:
- a. Commencing from 17.08.2010, 15 purchase orders were placed upon the Petitioner primarily for supply of AMRs to facilitate data collection from electricity meters. Each purchase order bore distinctive terms as to credit terms, payment milestones, supply, installation, commissioning, with the purchase orders stipulating the requirement of a performance bank guarantee in favor of the Corporate Debtor.
 - b. Petitioner raised invoices on the Corporate Debtor from 28.12.2010 to 28.03.2014.
 - c. Petition made no reference to any dispute or the terms of purchase orders raised upon the Petitioner, or the fact of abandonment of performance by the Petitioner, much less any waiver of dispute. The Petitioner attempted to mislead the tribunal, premised on the assertions that there is no dispute as regards the debt amount.
 - d. The Corporate Debtor submitted that there are performance lapses on the part of the Petitioner and the Corporate Debtor raised disputes across both the projects and referred to various email communications, the details of which are as below:
 - i. Email dated 14.03.2012 from the Corporate Debtor to the Petitioner, wherein the Corporate Debtor pointed out non-achievement of

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completion of targets in certain places; non-installation of modems due to unavailability of man power; non-initiation of modem installation; modems not communicating the data; non-submission of master data on time; forgetting to collect data appropriately; poor progress of rectification of defective modems and achievement of only 55-60% modem communication, despite the commitment being 90%.

- ii. Email dated 24.10.2012 from the Corporate Debtor to the Petitioner wherein the Corporate Debtor complained regarding poor resource management including unavailability of adequate manpower which was hampering the project execution such as employing only three persons where the requirement is of 12 in the case of towns under Dakshin Gujarat Vij Company Limited, contrary to assurance of 42 teams only two persons were on the field in the pilot town of Dhoraji, master data for modem installation was not submitted for more than 6000 modems where modems installation required to be completed in 6 months prior, faulty PCB and cable issues resulted in the requirement to replace almost 100% of the modems in certain places; failure to respond in respect of issues relating to Elster Meter Conversion and Substation Data Validation.
- iii. Notice dated 31.07.2013 sent by the Corporate Debtor to the Petitioner citing non-performance and non-compliance against certain purchase orders for supply installation and commissioning of modems, wherein it was stated that even after three years of the award of the Contract, the Petitioner failed to even submit the installation report for nearly 20,000 AMR Modems which were recalled by the Petitioner due to manufacturing defects. In the said notice, the Petitioner was required to complete the entire work

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assigned to them as per the purchase order, failing which the remainder of the work will be completed by engaging a third party vendor at the risk and cost of the Petitioner and to recover from the Petitioner the excess payment made by the Corporate Debtor. It was also stated that the Corporate Debtor reserves their right to apply penalty as per purchase order's terms & conditions due to performance failure and non-compliance with delivery timeline.

- iv. Email dated 22.08.2013 from the Corporate Debtor to the Petitioner wherein the Corporate Debtor complained that there is no work being done in the field and complained that 32,000 modems committed to start communicating by 20.08.2013 were not communicating.
- v. Email dated 22.01.2015 from the Corporate Debtor to the Petitioner wherein the Corporate Debtor complained that there is scarcity of manpower, mismanagement and misplacement of sim cards and also, denied payment to the Petitioner stating that 50% of the modems delivered have not communicated at least once.
- vi. Email dated 14.09.2015 from the Corporate Debtor to the Petitioner wherein the Corporate Debtor complained that the Petitioner has not replaced 6100 defective modems taken from the Corporate Debtor.
- e. The Corporate Debtor also enclosed certain email communications received from their customers regarding the poor project performance.
- f. The Corporate Debtor contended that the claim is barred by limitation. It is submitted that, if limitation is calculated on the basis of work done, based on the documents relied upon by the Petitioner, work done has been recorded in the terms of certificate issued by the Corporate Debtor. According to the Corporate Debtor, the last such certificate was issued on 05.02.2015 and the limitation ended on 06.02.2018 and since this Petition is filed on 26.06.2019, three years after the issue of certificate,

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the claim is time barred. It is further submitted that if the limitation is calculated on the basis of invoices raised by the Petitioner, the last invoice was raised on 10.03.2015 and the limitation comes to an end on 10.03.2018 and this Petition filed on 26.06.2019, after a lapse of three years from the last invoice, this Petition is barred by limitation.

10. The Petitioner in their rejoinder submitted as below:

- a. Despite encountering issues with the Corporate Debtor relating to payment, non-cooperation, the Petitioner performed its task to the satisfaction of the Corporate Debtor and finally constrained to withdraw from both the projects (Gujarat and Andhra Pradesh).
- b. The Corporate Debtor between 2012 and 2014 issued several certificates in the name of the Petitioner.
- c. The DISCOMS to whom the Petitioner supplied AMRs were also certified the performance of the Petitioner.
- d. In view of the above, the stand now taken by the Corporate Debtor is to wriggle out of its liabilities to make payment to the Petitioner.
- e. The disputes raised by the Corporate Debtor are only issues that have arisen between the parties in the normal course of business.
- f. A perusal of the email trail of the August 2017 shows that the default occurred in August 2017 and therefore, the claim is within time.

11. This Bench, on hearing the respective counsel and on analyzing the pleadings, is of the view that there are pre-existing disputes which squarely falls under Section 5(6) of the Code, as revealed from the followings:

- a. The Corporate Debtor enclosed a record of notes of review meeting of Power Finance Corporation with the representative of the Corporate Debtor, at page no. 297 of the Petition, which shows that poor data communication from the modems to the data centre, delay in installing

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new modems and attending the problems and the non-functioning of modems were discussed.

- b. Email communication dated 27.03.2012 from the Petitioner to the Corporate Debtor:

-----Original Message-----
From: Nitinkumar Gaikwad [mailto:nitinkumar.gaikwad@tcs.com]
Sent: Tuesday, March 27, 2012 5:21 PM
To: subbarao.pv@amitech.in
Cc: ajsaju@amitech.in; 'Bhatt Darshan'; 'Dinesh Malani'; 'Dhanamjaya Reddy'; g.raghavan@tcs.com; 'H M SHAH'; nitin.chaudhari@amitech.in; nm.shah@tcs.com; 'Ram Thakur'; 'Suramya Bhatt'; 'S Roy'
Subject: RE: Modem Installation & Rectification
Importance: High

Dear Mr. Subbarao,

We are "shocked" to see your email on not encouraging the Modem installations with blank SIMs, where our per day Modem installation asking rate has already shoot up to 4266 and Modem rectification asking rate is around 700. I have already stated in my email dtd March 21, 2012. Out of 16 727 activated SIMs, we are receiving only 7998 CDF files (which is around 48%). Even after having preactivated SIMs, significant improvement has not reflected in getting the data from the Modems, so request you to please continue with the Modem Installation with blank SIMs to avoid any further delay. We will keep you posted on SIMs activation status.

Looking at our current Modem installation and rectification speed, we are left with no choice and should not stop our ongoing Modem installation just for SIMs are not activated at present. We are working on it and will keep you posted with the progress.

As per AMI' Modem installation plan. We would have been completed Porbandar and Thangadh' Modem installation by now and Rajkot by March 30, 2012, but we have not even started the same till date.


- c. Email communication dated 28.03.2012 from a representative of the Corporate Debtor sent to another person on the side of the Corporate Debtor itself with a copy to the Petitioner:

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EXHIBIT-24



From: S Roy/MUMTCS
To: G Raghavan/VP/CHN/TCS@TCS
Cc: saju@amitech.in, "Bhatt Darshan" <bhatt.darshan@tcs.com>, "Dinesh Malani" <dinesh.malani@tcs.com>, "Dhananjaya Reddy" <dreddy@amitech.in>, "H M SHAH" <hshah@amitech.in>, Nitinkumar Gokwad/MUM/TCS@TCS, chandhan@amitech.in, nm.shah@tcs.com, "Ram Thakur" <ram.thakur@tcs.com>, subbarao.pv@amitech.in, "Suramya Bhatt" <suramya.bhatt@tcs.com>, paresh@swan.co.in
Date: 03/28/2012 11:49 AM
Subject: RE: Modem Installation & Rectification

Raghavan / Sajju / Paresh
We are not getting any payments from Discoms - they are citing lack of data consistency for not paying. This is becoming another problem
Regards
Sumanta Roy
Tata Consultancy Services
Akruti Trade Centre
4th flr, MIDC,
Andheri East
Mumbai - 400 096, Maharashtra
India
Ph:- 67797302
Buzz:- 4227302
Mailto: s.roy@tcs.com
Website: <http://www.tcs.com>

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d. Email communications dated 14.03.2012 from the Corporate Debtor to the Petitioner:

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EXHIBIT-26



From: Nitinkumar Gaikwad/MUM/TCS - C.D.
To: subbarao.pv@amitech.in
Cc: ajsaju@amitech.in, "Dinesh Malani" <dinesh.malani@tcs.com>, "O Raghavan" <g.raghavan@tcs.com>, "Nm Shah" <nm.shah@tcs.com>, "Ran Thakur" <ram.thakur@tcs.com>, "Suramya Bhatt" <suramya.bhatt@tcs.com>, "S Roy" <s.roy@tcs.com>, "Dhananjaya Reddy" <dreddy@amitech.in>, Bhatt Darshan/AHD/TCS@TCS

Date: 03/14/2012 09:22 AM
Subject: Guj RAPDRP: AMI Failure against the commitment made - Status as on March 13, 2012.

Dear Mr. Subbarao,

Once again AMI has failed to deliver as per the commitment made on March 11, 2012 (refer the below AMI email)

- DGVCL: Bardoli - 37% and Billimora - 83% - Which was supposed to be 100% completed first on March 10 and then on March 13
- DGVCL: No installation resumed in Surat & Navsari due to the unavailability of rectified Modems
- MGVCL: Modem installation at Godhra has been stopped since March 07, 2012 due to unavailability of Manpower
- PGVCL: Modem installation at Botad has been stopped March 05, 2012 due to unavailability of Manpower
- PGVCL: Modem installation at Rajkot is yet to be initiated as per submitted plan by AMI
- Substation Modems: No data is coming from installed S/S modems
- AMI is not submitting master data on time and even forgot to collect the same appropriately in some towns (Just experienced the same in DGVCL: Bardoli)

in addition to above, AMI Modem rectification progress is very poor due to the limited team on board. You have highlighted during our yesterday call that you are planning to hire additional resources and AMI will train them to cope up the Modem rectification requirement, then from when these resources will be working effectively? and I don't think we will achieve our 30 town Go-live target by March 31, 2012. Even after giving pre-activated SIMs to AMI, your team has managed only 55-60% Modem communication (where it was expected to be up to 90% as per your commitment) from fresh Modem installations. Is it mean that still remaining 40-45% rectified Modems are faulty and AMI is not able to fix the problem?

After experiencing so many problems in Modem rectification/communication, AMI should have done the sufficient resource arrangement in well advance.

Request you to please do the needful and avoid any further delivery/commitment slippages.

Thank you,

With Regards,
Nitinkumar Gangadhar Gaikwad
Tata Consultancy Services
Ph:- +91 922 755 1947
Cell:- +91 922 755 1947
Mailto: nitinkumar.gaikwad@tcs.com
Website: http://www.tcs.com

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From: G Raghavan/VP/CHN/TCS
To: subbarao.pv@amitech.in, Suramya Bhatt/AHD/TCS@TCS, Ram Thakur/MUM/TCS@TCS
Cc: S Roy/MUM/TCS@TCS, paresh@swan.co.in
Date: 03/14/2012 09:28 AM
Subject: Re: Guj RAPDRP: AMI' Failure against the commitment made - Status as on March 13, 2012.

Saju & Subbarao

This is not what I was expecting after commitment from you.

We were supposed to complete all towns by 21st March. This is hurting. I am not sure whether you will be able to complete as the commitments are not being kept.

I would like to have a call with you tomorrow to discuss. I have a meeting on 18th with GUVNL MD and we should have closed 50 towns by then.

Pareshji, It is important to do this with quality and come out successful. It is becoming very embarrassing in PFC especially on MDAS.

Regards

Raghavan

G. Srinivasa Raghavan
Tata Consultancy Services
Mailto: g.raghavan@tcs.com
Website: <http://www.tcs.com>

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- e. Email communication dated 27.10.2012 from the Corporate Debtor to the Petitioner:

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EXHIBIT-31

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CD

From: Nitinkumar Gaikwad/MUM/TCS
To: <subhansu.in@amitech.in>
Cc: <subhansu.in@amitech.in>, "Dinesh Malani" <dinesh.malani@tcs.com>, "H M SHAH" <hshah@amitech.in>, <akmal@amitech.in>, <prasad.g@amitech.in>, <rajeshkumar.m@amitech.in>, "Ravi Thakur" <ravi.thakur@tcs.com>, "Shitalkumar Shah Sir" <shital.shah@amitech.in>, <vishwas.murmu@amitech.in>, "Suresh Bhatt" <suresh.bhatt@tcs.com>, "S Roy" <s.roy@tcs.com>

Date: 10/27/2012 12:31 PM
Subject: RE: Guj RAPDRP: AMI Modern Installation and 'Go-live' progress - As on Oct 24, 2012 - REMINDER - 3 !!!

Dear Mr. Subhansu,

Thanks. We would appreciate if you could respond on the following points as well. Below highlighted activities are handled by your back-end team and not by field teams. Most of these activities should have been completed by now, but still pending since more than 6 months.

- Around 89 SS Elster Meter conversion was supposed to be completed on 23.10.12. It is still pending - Mr. NK Mangal' commitment failed once again
- Boundary CDF file shared with your team. DISCOM is ready to provide you the sample meter at Rajkot Meter testing Lab - No updates received from your team
- Latest Firmware delivery - Required coordination between Vadodara & Hyderabad team is still missing and we are still waiting for final closure
- Substation CSV data validation issue - No updates received from your team
- Head end API for new firmware - Received, but there are some issues and AMI' further response is still awaited
- Responsibility/Escalation matrix is yet to be shared by AMI

Please Note: We are just referring your submitted plan and tracking the progress. All DISCOMs are escalating daily against our slow progress. We are still waiting for your confirmation on Mr. Mangal' 2-3 weeks deputation at Vadodara (effective from Monday Oct 29 onwards), who can work closely with the teams and ensure any further delay in resolution of back-end issues, Modern installation & 'Go live' activities etc.

Thank you,

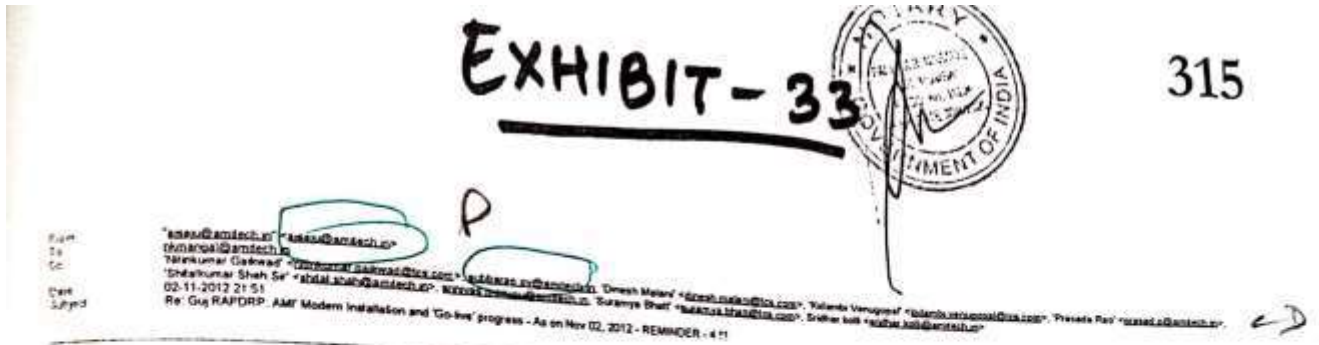
With Regards,
Nitinkumar Gangadhar Gaikwad
Tata Consultancy Services
Ph:- +91 922 755 1947
Cell:- +91 922 755 1947
Mailto: nitinkumar.gaikwad@tcs.com
Website: <http://www.tcs.com>

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f. Email communication dated 02.11.2012 from the Corporate Debtor to the Petitioner:

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From: "amesh@amtech.in" <amesh@amtech.in>
To: "amesh@amtech.in" <amesh@amtech.in>
Cc: "Tilakraj Kumar Gokhale" <tilakraj.kumar@amtech.in>, "Pravin Kumar" <pravin.kumar@amtech.in>, "Sudhakar" <sudhakar@amtech.in>, "Dinesh Meher" <dinesh.meher@amtech.in>, "Vidya Venugopal" <vidya.venugopal@amtech.in>, "Praveen Rao" <praveen.rao@amtech.in>
Date: 02-11-2012 21:51
Subject: Re: Guj RAFOPP: AMF Modern Installation and 'Go-live' progress - As on Nov 02, 2012 - REMINDER - 4 !!

Dear Mr. Mangal,

- 1) What are you trying to convey, I am unable to appreciate your reply. The queries from TCSL are simple and straight forward, while our answers are quite complicated with absolutely no clarity.
- 2) You need to specify if the said activity is complete or not. In case the task is not completed and you require more time, then please state that. There has to be consistency and progress in the status. Please give clear dates and we have to adhere to it. TCSL have always complained that we at AMI do not stand by our commitment and its high time we change this feeling.
- 3) I have seen the status mail of the progress as on 25th of Oct 2012 and it is certainly not encouraging. Could you please illustrate on how we are going to complete the project by December with 12,000 odd installation pending and 9000 odd modems not sending data (go-live). How many teams do we have?
- 4) Are there problems in conversion of RAW data to CDF? and if so are we attending to it.
- 5) I am told that we are revisiting towns to replace the SIMs. Why are we doing that? Any specific reason attributed to us.
- 6) Are we also revisiting the towns due to modem issues and if so why?
- 7) The earlier firmware was tested and cleared for programming in field modems by TCSL and it was decided at that time, no more changes or new features would be taken-up. why have we come out with a new version? What are the new features of the new version. Is Mr. Sridhar Rao aware of the new version? Have we given the new version to TCSL for clearance before roll-out?
- 8) I was told that Elster meter reading and conversion was completed and we only need to roll-out the same. Am I correct or wrong.

The above questions are the understanding and queries I have after going through few of the previous mails from TCSL.

Dear Mr. Subbarao,
I feel sad and annoyed the way we communicate the status and answer to queries. Why are we not in a position to give more clarity in whatever we do to TCSL. Please appreciate their concerns and please request the concerned in our team to re-send point wise actual status with dates and also provide answers to why we are unable to show progress and how we intend to complete the project by December. No use of just sending and replying to mails if we cannot show progress. Whatever, may be the issues between AMI and TCSL (regarding PO's, AMC, etc) . end of day we at AMI have always credited our growth to TCSL and the only way we can reciprocate is by completing the project ASAP. So please appreciate the fact that we should not tolerate anymore delays moving forward. Let us review the project tomorrow and please share with me the actual status as on-date for all towns ASAP.

Thanks and Regards
Arashari John Saju
Scanned with CamScanner

- g. Email communication dated 27.10.2012 from the Corporate Debtor to the Petitioner:

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Kidambi Venugopal <kidambi.venugopal@tcs.com> wrote: ✓

Dear Ketul,

Please focus on delivery and lets not get into payment related matters as per directives from management directives.

There were various commitments extended to complete the project within 30 working days which have not been achieved and your attention should be focused on addressing those issues and getting them resolved.

Regards
Venu

- h. Email communication dated 17.06.2013 from the Corporate Debtor to the Petitioner:

From: Ram Thakur/MUM/TCS
To: Kidambi Venugopal/PNE/TCS@TCS
Cc: ajsaju@amitech.in, hmsah@amitech.in, indrajeet.kumar@amitech.in, Ketul Patel <ketul.patel@amitech.in>, "Nkmangal@amitech.in" <nkmangal@amitech.in>, s.roy@tcs.com
Date: 17-06-2013 16:05
Subject: Re: Outstanding statement

Mr. Mangal

The language and tone is not only bad, it is threatening.

I suppose excuses are only for missing delivery dates. In this case, 15 June 2013 was the last committed date by AMI, for completion of all installation and rectification. Not even Surat is completed, which was to be done by end April.

Best regards
Ram L Thakur
Tata Consultancy Services
Mailto: ram.thakur@tcs.com
Website: <http://www.tcs.com>

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- i. The contention of the Petitioner that the above issues between the parties are in the normal course of business which were given go-by the Corporate Debtor by the email of August 2017

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is devoid of any merit. The emails of July-August 2017 between the parties only shows that reconciliation of accounts is sought but that does not mean that the disputes raised by the Corporate Debtor were wiped out. It also reveals that some of the invoices were only partly paid.

j. In view of the above stated position, the reliance of the Petitioner on the judgment of *Mobilox Innovations Private Ltd v Kirusa Software Private Ltd AIR 2017 SC 4532* is wholly misplaced and the said judgment is in fact is against the Petitioner.

k. Hence the Petition is hit by Section 5(6) of the Code which provides as below:

*"dispute" includes a suit or arbitration proceedings relating to—
(a) the existence of the amount of debt; (b) the quality of goods or service; or (c) the breach of a representation or warranty;"*

12. The next issue raised by the Corporate Debtor is relating to limitation and let us examine that also, despite a finding that the Petition is hit by Section 5(6) of the Code.

a. The Counsel for the Petitioner relies on the following reply email communication dated 21.08.2017, sent by the Corporate Debtor in response to email dated 19.07.2017 and submits that it is an acknowledgement of liability and hence they are well within the limitation:

"Dear Sharma,

Request you to kindly confirm balance confirmation is for period "31.03.2017 or 31.05.2017", as period mentioned in below mail trail is different from the period mentioned in subject line.

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Also request you to kindly provide invoice wise breakup for the balance outstanding amount mentioned in below mail trail for reconciliations."

- b. Per contra the Counsel for the Corporate Debtor submits that in the above email dated 21.08.2017, the Corporate Debtor only seeks clarification as to the subject line of the email and an invoice wise breakup of the attachment received and in response the petitioner sends an email attaching the invoice wise details of the purported balance.
- c. Ongoing through the above email, this bench is of the view that there is no acknowledgement of the liability on the part of the Corporate Debtor. The above emails only seek certain clarifications regarding the accounts and this cannot be an acknowledgement of liability as contemplated under Section 18 of the Limitation Act, 1963.
- d. The Petitioner contended that the default occurred in August, 2017 when the Corporate Debtor for the first time denied the Petitioner's entitlement under the purchase orders and since the Petition was filed in June, 2019, the same is within limitation. It is to be seen that the last invoice was raised on 28.03.2014 and the purchase order issued by the Corporate Debtor shows that 100% payment is to be made within 15 days of receipt of invoice for the quantity of modems that are commissioned in that month. In view of this, the limitation period starts 15 days after 28.03.2014, i.e., on 12.04.2014, and ended on 11.04.2017 and since the last payment was made on 10.03.2015, the limitation gets extended upto 09.03.2018. Since, this Petition was filed in June, 2019, the Petition is barred by limitation. The contention of the Petitioner that the default will start when the Corporate Debtor denied the liability is totally misconceived. The default starts on the date of invoice itself unless otherwise some time period is given for making the payment either in the purchase order or invoice. In this case, the

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purchase order is very clear that the payment is to be made within 15 days of receipt of invoice.

- e. The reliance of the Petitioner on the judgements of *Shango Technologies Pvt. Ltd. Vs. Chemplast Sanmar Ltd. (MANU/TN/1715/2018)* and *Manjit Kaur Sran vs. Tricolite Electrical Industries Ltd. (Company Appeal (AT) (Insolvency) No. 894 of 2019)* is not of avail to the Petitioner in view of the judgement of the Hon'ble Supreme Court in the case of *B. K. Educational Services Pvt. Ltd. Vs. Parag Gupta and Associates (2018 SCC OnLine SC 1921)* wherein at para no. 48 held as below:

"It is thus clear that since the Limitation Act is applicable to applications filed Under Sections 7 and 9 of the Code from the inception of the Code, Article 137 of the Limitation Act gets attracted. "The right to sue", therefore, accrues when a default occurs. If the default has occurred over three years prior to the date of filing of the application, the application would be barred under Article 137 of the Limitation Act, save and except in those cases where, in the facts of the case, Section 5 of the Limitation Act may be applied to condone the delay in filing such application."

13. In view of the above discussion, the Petition is dismissed. No cost.

Sd/-

V. Nallasenapathy
Member (Technical)

Sd/-

Suchitra Kanuparthi
Member (Judicial)