

**IN THE NATIONAL COMPANY LAW TRIBUNAL**  
**AHMEDABAD**  
**COURT - 2**

ITEM No.302  
CP(IB)/156(AHM)2021

**Order under Section 9 IBC**

**IN THE MATTER OF:**

Ganges Internationale Pvt Ltd  
V/s  
Harsha Abakus Solar Pvt Ltd

.....Applicant

.....Respondent

**Order delivered on: 29/01/2024**

**Coram:**

**Mrs. Chitra Hankare, Hon'ble Member(J)**  
**Dr. Velamur G Venkata Chalapathy, Hon'ble Member(T)**

**PRESENT:**

**ORDER**

The case is fixed for pronouncement of order

The order is pronounced in open Court vide separate sheet.

SD/-

**DR. V. G. VENKATA CHALAPATHY**  
**MEMBER (TECHNICAL)**

SD/-

**CHITRA HANKARE**  
**MEMBER (JUDICIAL)**

**BEFORE THE ADJUDICATING AUTHORITY  
NATIONAL COMPANY LAW TRIBUNAL  
AHMEDABAD BENCH  
Court No. II**

**CP (IB) No. 156(AHM)2021**

(Company Petition under Section 9 of the Insolvency and Bankruptcy Code, 2016)

**In the matter of :**

**Ganges Internationale Private  
Limited**

(CIN: U74110TN1991PTC082714)

Registered Office at:

163/1, K Sons Complex  
3<sup>rd</sup> Floor, Broadway, Chennai,  
Tamilnadu-600108

...Operational Creditor/  
Applicant

**Versus**

**Harsha Abakus Solar Private  
Limited**

(CIN: 29307GJ2010PTC063233)

Registered Office at:

NH- 8A, Sarkhej Bavla Highway,  
Changodar-Ahmedabad

...Corporate Debtor/  
Respondent

**Order pronounced on 29/01/2024**

**CORAM:**

**MRS. CHITRA HANKARE  
MEMBER (JUDICIAL)**

**MR. VELAMUR G VENKATA CHALAPATHY  
MEMBER (TECHNICAL)**

Appearance:

For the Applicant : Ms. Nalini, Adv. a.w. Mr. Arun Saxena,  
Advocate

For the Respondent : Mr. Tushar Hemani, Sr. Counsel a.w.  
Ms. Vaibhavi Parikh, Advocate.

**J U D G M E N T**

1. This company petition is filed on 25.08.2021 by Ganges Internationale Private Limited (Operational Creditor) under Section 9 of the Insolvency and Bankruptcy Code, 2016 (**'IB Code'**) for initiating Corporate Insolvency Resolution Process (**'CIRP'**) against Harsha Abakus Solar Private Limited (Corporate Debtor) on the ground that corporate debtor committed default in paying the operational debt of Rs.3,08,55,708/- (Rs.1,99,00,836/- as principal amount and Rs.1,09,54,827/- towards the interest calculated up to 31/07/2021).
2. The averments made by the Operational Creditor are summarised as under;
  - i. The Operational Creditor is engaged in the business of Steel manufacturing and a service division which deals in manufacturing of Telecom Towers, Transmission Lines and Solar Module Mounting Solutions.
  - ii. The Corporate Debtor is into the business of providing comprehensive complete turnkey solutions to all Solar Photovoltaic requirements. Hence, for the same the Corporate Debtor was in search of a reputed company

having vast experience and expertise in the Solar Industry and issued a letter of Award dated 16.11.2017 for supply of 2x21 Fix Tilt Module Mounting Structure and Hardware for 65MW for their Project in Virudhunagar, Tamilnadu. Purchase order dated 18.11.2017 was issued by Corporate Debtor to Operational Creditor.

- iii. The Operational Creditor had undertaken the entire work as per the Letter of Award and Purchase order. The Operational Creditor issued various invoices to raise its payment which were enclosed as proof. The last invoice issued on 24.07.2018 of Rs. 25,80,877/- .
- iv. Despite various reminders, emails and meetings the Corporate Debtor failed to make payment. Hence, the Operational Creditor had issued notice for payment of dues amounting to Rs.2,06,41,885 dated 14.11.2018, the Corporate debtor as per the applicant neither disputed to the facts of dues nor paid.
- v. The respondent had sent a reply to the notice on 21.11.2018 in which disputes relating to quality and schedule of delivery are mentioned. The Applicant also has attached various Whatsaap communication between the CEO of the respondent and the representative of the applicant. As no further repayments were made, Operational Creditor issued Demand Notice dated 17.01.2020 under Insolvency and Bankruptcy Code, 2016 for an amount of Rs. 2,56,00,364/- . The said notice was replied by the Corporate Debtor on

29.01.2020 through its Advocate.

- vi. In spite of repeated requests and reminders by the Operational Creditor, the Corporate Debtor failed to pay the outstanding amount. Thereafter, the Operational Creditor issued a demand notice dated 14.11.2018 but the Corporate Debtor neither replied to the demand notice nor paid the outstanding amount. The applicant had filed a Writ Petition before the Hon'ble Gujarat High Court, under Arbitration Act, No.156 of 2019 against the respondent which was withdrawn as not pressed by the applicant.
3. The Corporate Debtor filed its affidavit in reply and made the averments which are summarized as under :
    - i. There is no amount due and payable as claimed by the Operational Creditor and denied the default. It is further submitted that inspite of making advance payment to the applicant towards the supply of materials timely, the Operational Creditor gave false assurance that the supply schedule shall be met. The respondent continuously followed-up with the applicant, however, the supply of materials not as per the schedule. Hence, the respondent has stated that it was compelled to purchase material on high rate from other source to complete the installation of the solar plant within time frame. As per the LOA that Applicant shall pay liquidated damages

for delay in delivery of the materials from the fixed delivery schedule. In the present case, as per respondent there is huge delay in the supply of the materials by the Applicant and hence is liable to pay liquidated damages, penalties etc.

- ii. The respondent listed in its submissions the following points:
  - i) Delayed supply;
  - ii) Cost incurred by CD for deputing its own officials for expediting manufacturing at OC's premises;
  - iii) Material not supplied as per specifications viz. Quality issues
  - iv) Less weight material supplied as compared to Purchase Order;
  - v) CD was compelled to short close the order due to delay in delivery resulting into procurement of materials from other Vendors at a higher rate; and
  - vi) Withholding the materials by OC in spite of the same being inspected by the CD.
- iii. It is further submitted that the Applicant issued first Demand notice under the IB Code on 10.12.2018 and not on 14.11.2018 as mentioned and annexed with the application. The said application has never been served to the respondent, which was received on 10.12.2018 which was replied vide notice of dispute dated

21.12.2018. After issuance of first demand notice dated 06.05.2019 to NLC India Limited, the Company requested to withhold the payment due to the Respondent Company which was replied/disputed by the Respondent Company vide reply dated 15.05.2019.

- iv. It is submitted by the respondent that applicant filed a Civil Suit before Small Causes Court at Ahmedabad which was then transferred to Commercial Court at Ahmedabad on 24.05.2019 and the same was objected by the respondent by filing appropriate reply in the said proceedings. The suit before the Commercial Court was pending and the Applicant filed a petition under the Arbitration Act being IAAP No. 156 of 2019 in October, 2019 before the Hon'ble High Court of Gujarat at Ahmedabad which was withdrawn on 13.12.2019.
- v. After withdrawal of the Arbitration petition, the applicant had issued second Demand Notice under the provisions of IB Code, 2016 on 17.01.2020 which was replied by the Respondent Company vide notice of Dispute dated 29.01.2020. After a period of one and half years viz. in August 2021, the Applicant preferred the present Insolvency application before this Tribunal. It is also stated that the amount claimed is disputed and objected. The Applicant

has withdrawn the said suit on 18.10.2021 during the pendency of this application. It is also to state that the present application is barred by limitation and deserves to be dismissed as the claim has been raised by the Applicant for the period April, 2018 to July 2018 which is barred by limitation. Hence, the present petition is filed with malafide intention to extort money and create undue pressure on the Respondent Company which is nothing but abuse of process of law.

- vi. The Respondent Company whose name is stated to have been changed to Harsha Engineering International Pvt. Ltd. Further stated that it is a going concern, with sufficient capital and turnover of more than Rs.64 Crores approx. for the year ended on 31.03.2020 become a listed company in NSE. The Respondent Company is employing more than 100 employees directly as well as indirectly. The Company is regularly paying statutory dues. The present Application has no legal base for seeking resolution of the Company but to pressuring tactics for recovery of money. Hence, requested to dismiss the application.
- vii. The applicant has further stated (by way of an annexed table of cost incurred and to be received) that they had made a payment of

Rs.14,11,48,688/- out of the total invoices received from the applicant and after debit to various shortfalls including non-supply, late receipt and less weight etc., an amount of Rs.1.52 crores (liquidated damages) is to be received from applicant thereby there was a net amount difference of Rs.91,589/- to be received from the applicant.

- viii. Further as per the respondent, the doctrine of election applies to the operational creditor who has initiated various litigations in various forums since 2018-2021 when case was pending. The respondent has submitted his reply in various forums including the Arbitration Process and reiterates that there is a dispute before this Tribunal.
- ix. Respondent has also submitted various judgments in support of his denying the debt due to pre-existing disputes which was raised before issue of stated demand notice.

4. Heard both sides Ld. Advocates.

5. Respondent has placed on record following judgments in support of its arguments:-

- i) Mobilox Vs. Kirusa Software (P) Ltd.  
[2017] 85 taxmann.com 292 (SC)
- ii) Transmission Corporation of Andhra Pradesh Ltd. Vs. Equipment Conductors & Cables Ltd.  
- [2018] 98 taxmann.com 375 (SC)
- iii) Biswa Janani Services Vs. Shree Nokoda Ispat Ltd.

- [2023] 154 taxmann.com 551 (SC)
- iv) S.S. Engineers Vs. Hindustan Petroleum CorporatiLtd.  
[2022] 40 taxmann.com 524 (SC)
- v) Zillion Infraprojects (P) Ltd. Vs. Indure (P) Ltd.  
[2022] 136 taxmann.com 31 (NCLAT-New Delhi)  
Affirmed by Supreme Court reported in -  
[2022] 136 taxmann.com 8 (SC)
- vi) Oyster Steel and Iron (P.) Ltd. Vs. Laxmi Foils (P.) Ltd. -  
[2022] 142 taxmann.com 536 (NCLAT-New Delhi)
- vii) Tricolite Electrical Industries Ltd. Vs. Wipro Ltd.  
[2023] 154 taxmann.com 242 (NCLAT - Chennai)
- viii) ABC India Ltd. Vs. Oriental EPC (P.) Ltd -  
[2022] 137 taxmann.com 322 (NCLAT-New Delhi)
- ix) Nike India (P.) Ltd. Vs. Enkay Brand Distribution (P.)  
Ltd. -  
[2023] 148 taxmann.com 230 (NCLAT-New Delhi)
- x) Raunaq EPC International Ltd. Vs. Hiranmaye Energy  
Ltd.  
- [2022] 137 taxmann.com 28 (NCLAT-New Delhi)

### **Reasons**

6. *“Section 9(5) of the IBC states that the Adjudicating Authority shall, within 14 days of the receipt of the application under sub-section (2), by an order-*
- (i) admit the application and communicate such decision to the operational creditor and the corporate debtor if,—*
- (a) the application made under sub-section (2) is complete;*
- (b) there is no [payment] of the unpaid operational*

- debt;*
- (c) the invoice or notice for payment to the corporate debtor has been delivered by the operational creditor;*
  - (d) no notice of dispute has been received by the operational creditor or there is no record of dispute in the information utility; and*
  - (e) there is no disciplinary proceeding pending against any resolution professional proposed under sub-section (4), if any.*
- (ii) reject the application and communicate such decision to the operational creditor and the corporate debtor, if—*
- (a) the application made under sub-section (2) is incomplete;*
  - (b) there has been [payment] of the unpaid operational debt;*
  - (c) the creditor has not delivered the invoice or notice for payment to the corporate debtor;*
  - (d) notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility.*
  - (e) any disciplinary proceeding is pending against any proposed resolution professional. (Rest provisions are not required)*

7. Section 5(6) of IBC provides for definition of 'Dispute' as under:-

**“Dispute”** includes a suit or arbitration proceedings relating to-

- (a) the existence of the amount of debt;
- (b) the quality of goods or services; or

(c) the breach of a representation or warranty;

8. The Hon'ble Supreme Court explained the scope of provisions under Section 9(5)(ii)(d) and the definitions of dispute in case of ***Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software Pvt. Ltd., 2017*** (AIJEL-SC 60798), in the following words:

*Once the operational creditor has filed an application, which is otherwise complete, the adjudicating authority must reject the application under Section 9(5)(2)(d) if notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility. It is clear that such notice must bring to the notice of the operational creditor the "existence" of a dispute or the fact that a suit or arbitration proceeding relating to a dispute is pending between the parties. 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."*

**It has further held that:**

*Going by the aforesaid test of "existence of a dispute", it is clear that without going into the merits of the dispute, the appellant has raised a plausible contention requiring further investigation*

*which is not a patently feeble legal argument or an assertion of facts unsupported by evidence. The defense is not spurious, mere bluster, plainly frivolous or vexatious. A dispute does truly exist in fact between the parties, which may or may not ultimately succeed, and the Appellate Tribunal was wholly incorrect in characterizing the defense as vague, got-up and motivated to evade liability.”*

9. The applicant has not placed any bank statement to substantiate its claim before this Tribunal. The applicant has raised various invoices and states that last invoice was on 24.7.2018. These invoices are raised on the respondent and the goods are supplied to NLC. The messages seem to have raised certain disputes. The applicant has vide email dated 23 May 2018 spelt out in detail the invoice due and the net payment to be made of Rs.1,90,93,072. Applicant has also attached the relevant invoices (between 4.1.2018 to 10.5.2018) in demand notice dated 17.1.2020 which reflects various amounts due as per the invoice. The debt is stated to be due as on 22 Sept 2018.
  
10. The dispute/s raised by the respondent does not address these invoices, but raises various other reasons of short supply, delay etc., and is not specific to the debt. However, the applicant has not addressed the concern/disputes raised which could have been adjusted in bills or compensated accordingly to ensure continuance of contract, nor has given a bank certificate that specific invoices were not paid. Also, the NeSL certificate of default even though proposed to be filed has not been filed.

11. In view of the above, there is pre-existing dispute in between the operational creditor and the corporate debtor. Hence, this petition is not maintainable. Accordingly, we pass the following order:-

**ORDER**

Company Petition, i.e. CP(IB) 156 of 2021, is rejected.

SD/-

**DR. V. G. VENKATA CHALAPATHY**  
**MEMBER (TECHNICAL)**

SD/-

**CHITRA HANKARE**  
**MEMBER (JUDICIAL)**

Vaishali/PS