

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

CP (IB) No. 369/MB-IV/2021

Under Section 9 of the I&B Code, 2016

In the matter of:

Ami Heavy Engineers Private Limited

[CIN: U28910MH2012PTC235805]

...Operational Creditor/Applicant

V/s

Holtec Asia Private Limited

[CIN: U74999PN2010FTC136732]

...Corporate Debtor/Corporate Debtor

Order Dated: 23.06.2023

Coram:

Mr. Prabhat Kumar

Hon'ble Member (Technical)

Mr. Kishore Vemulapalli

Hon'ble Member (Judicial)

Appearances (via videoconferencing):

For the Applicant(s) : Mr. Rajesh Jain a/w Mr. Rohit Jain,
Advocates.

For the Corporate Debtor(s) : Mr. Sarthak S Diwan, Advocate.

ORDER

Per: Prabhat Kumar, Member Technical

1. This is an Application being C.P. (IB) No. 369/MB/C-IV/2021 filed on 12.03.2020 by Mr. Mahendra Danmal Mutha, Director of Ami Heavy Engineers Private Limited, the Operational Creditor/Applicant, under section 9 of Insolvency & Bankruptcy Code, 2016 (I&B Code) for initiating Corporate Insolvency Resolution Process (CIRP) in the matter of Holtec Asia Private Limited, Corporate Debtor.
 - 1.1 The Operational Creditor has claimed a debt of Rs.19,07,796/- (Rupees Nineteen Lakhs Seven Thousand Seven hundred and Ninety-Six Only) along with interest @18% per annum from due date till the date of actual realization of outstanding sums against the supply of said goods and invoices raised by the Operational Creditor.
 - 1.2 The Operational Creditor has filed Board Resolution dated 22.02.2020 in support of authorization in favour of signatory of this Application authorising him to file the present company application on behalf of the Operational Creditor.
 - 1.3 The date of default as mentioned by the Applicant in part IV of the Petition is 19.03.2019.
2. The Operational Creditor herein is engaged in the business of manufacturing fabricated metal products and supply of ducting items and is a MSME undertaking. The Corporate Debtor is engaged in the business of supplying critical heat transfer equipment and desalination of industries products.
 - 2.1 The Operational Creditor submits that Corporate Debtor had approached the Operational Creditor for purchase of aforesaid products of different specifications and quantity manufactured by

the Operational Creditor as and when required by the Corporate Debtor and supplies were made on the basis of the instruction issued by the Corporate debtor from time to time.

- 2.2 Against the supply of said goods, the Operational Creditor duly raised 21 (Twenty-one) different invoices amounting to Rs.2,29,58,604/- which were duly acknowledged by the Corporate Debtor without any protest or demure.
- 2.3 The Corporate Debtor undertook to clear all its outstanding amounts within due time, but failed to clear the same despite their assurances, except for a part payment of Rs. 4,29,111/- made on 12.07.2019 as duly reflected in ledger account maintained in books of accounts of the Operational Creditor. The total amount thus payable by the Corporate Debtor is Rs.19,07,796/- (Rs. Nineteen Lakhs Seven Thousand Seven Hundred and Ninety Six Only) which is still due and outstanding. The said books of account and balance was duly confirmed by the Corporate Debtor and thereby stood admitted between the parties.
- 2.4 Despite several requests made to the Corporate Debtor they have not paid the said amount to the Operational Creditor. The said debt is still in default which is evident by the ledger account of the Corporate Debtor and the same is undisputed between the parties.
- 2.5 The Operational Creditor raised the last invoice on 19/03/2019 against the supply of said goods which was duly acknowledged by the Corporate Debtor without any protest and demure. On 12.07.2019, the Operational Creditor received the part payment

pertaining to said supply of good and the cause of action is continuous in nature, as the Corporate Debtor till date has not paid the said balance amount to the Operational Creditor.

- 2.6 As per books of account maintained by the Operational Creditor an amount of Rs.19,07,796/- (Rupees Nineteen Lakhs Seven Thousand Seven hundred and Ninety Six Only) along with interest @18% per annum from due date till the date of actual realization of outstanding sums against the supply of said goods and invoices raised by the Operational Creditor which were duly acknowledged by the Corporate Debtor.
- 2.7 The Demand notice dated 24.10.2019 in Form 3 of IBC was issued to the Corporate Debtor claiming the principal amount with interest calculated @ 18% per annum from the date of respective invoices till the date of demand notice. The Corporate Debtor did not reply to the contents of the said demand notice, however, it sought time vide letter dated 11.11.2019 to respond citing pre-occupation arising from the heavy backlog of work on account of extended holidays during Diwali. Hence, no dispute is raised by the Corporate Debtor in respect of principal amount and rate of interest charged/demanded in the said notice.
3. The Corporate Debtor has filed a reply dated 08.12.2021 stating that it is engaged in the business of providing heat transfer solutions to Power Plants with products such as air cooler Condensers, Water Cooled Condensers, Feed Water Heaters and specialized equipment to the Nuclear Power Plants.

- 3.1 On 04.07.2018, the Corporate Debtor issued Purchase Order No. 20 for a total price of Rs. 1,99,53,800/- including the amount of G.S.T. to the Petitioner for fabrication and supply of ducting items as per the fabrication drawings, after engineering and design by Corporate Debtor, and the Purchase Order value was based on the estimated weight of the ducting to be fabricated at a fixed per kg finished weight of ducting to be supplied. The purchase order specifically provides for deduction of liquidated damages @1% per week subject to a maximum of 10% of the PO value for the undelivered portion of order value beyond the contractual delivery date. As per the purchase order, the first lot was to be delivered in the week of August 2018 and delivery of total quantity was to be completed on or before 15.10.2018.
- 3.2 The Corporate Debtor wrote a letter to the Petitioner dated 19.11.2018 and gave the status report wherein it pointed out that the committed dates are lagging and the manpower employed by the Petitioner is not sufficient. The Corporate Debtor wrote another letter dated 20.11.2018 to the Petitioner pointing out the precarious condition about all the developments and also informed that one of its employee will be visiting its shop for physical inspection.
- 3.3 The Corporate Debtor thereafter sent a mail to Petitioner on 28.11.2018 that the Petitioner has to depute a team of minimum 20 more technicians/ skilled workers to expedite fabrication as the delivery schedule is already over and execution is lagging. It is also stated that the Petitioner were informed vide said mail that any

delay in delivering the products will attract the penalty from the date of delivery as mentioned in the purchase order.

- 3.4 The Corporate Debtor vide email dated 29.11.2018, 30.11.2018, 01.12.2018, 10.12.2018, 11.01.2019, 14.01.2019, 15.01.2019, 20.01.2019, 16.02.2019, 11.12.2018 and 16.02.2019 to the petitioner informing the delay in all fronts about dispatching the products.
- 3.5 The Corporate Debtor again sent mails to the Petitioner on 11.12.2018, 12.12.2018 and 10.01.2019 informing about the bad quality of blasting of equipment's and requested to arrange a catch-up plan.
- 3.6 The Corporate Debtor on 17.01.2019 sent a mail to the Petitioner recording that several issues have arisen in the project and meeting will have to be called for of all the officials and specifically asking the petitioner to not to issue any credit notes or debit notes as per whims and asking it to withdraw the said credit notes. The Corporate Debtor on 18.01.2019 sent a mail to the petitioner stating that the basics of the tenets of fabrication are not understood.
- 3.7 The Petitioner, vide email dated 14.03.2019, requested the Corporate Debtor to amend the payments terms and delivery date as mentioned in the purchase orders, and for sending the amended purchase order. It was verbally informed by Petitioner that no dispatch will be made unless extension in contractual delivery is given. The purchase order was since amended only for the items

which were held by the Petitioner and not for the entire contract. It is pertinent to note that contractual extension was granted only for the items which were held by the Petitioner "under ransom" that dispatch will not be made without the contractual delivery extension. Corporate Debtor had no option but to extend the contractual delivery date. An amendment to Purchase Order was issued only for the items held by Petitioner and not for the entire contract.

- 3.8 The Corporate Debtor sent a mail on 15.03.2019 to the Petitioner asking for the delivery of products to which the Petitioner replied vide letter dated 17.03.2019 stating that except final touch-up and marking the products are ready for delivery.
- 3.9 Between end March and July 2019, Corporate Debtor released payments for supplies made by Petitioner in tranches based on the cash flow and withheld certain sum towards Liquidated Damages due to delay in dispatch of items not covered under the extension of contractual delivery as per Amendment to Purchase Order.
- 3.10 The Corporate Debtor on 09.08.2019 sent a mail to the Petitioner recording that the as per reconciliation statement and after deducting the amount of liquidated damages, the outstanding is zero. The said mail specifically records that even though the Corporate Debtor had to perform additional work at site due to the mismatches, ovality in duct ends, improper work edge preparation, bad quality of painting and so on, the cost of rectification and/or extra money spent by Corporate Debtor has not been recovered

from Petitioner. It is also recorded that due to the poor performance by Petitioner an additional cost of almost Rs. 7.5/- Lakhs was required to be spent by the Corporate Debtor.

3.11 The Petitioner disputed the aforesaid mail of Corporate Debtor on the same day stating that the ovality/mismatches/shed were not reported to the Petitioner within one year and denied having received any debit note from the Corporate Debtor as claimed by them.

3.12 The Corporate Debtor states that the aforesaid mails demonstrate that the Petitioner was unable to fulfil its end of contract within the stipulated period and the products though delivered, were not as per the quality which was expected in the work order. The Corporate Debtor had to incur additional cost of Rs. 7.5 Lakhs on the said products in order to utilize them to its fullest, for an example, there were several mismatches in the products, ovality in the ducting ends, the quality of the surface finish was also bad. The Corporate Debtor has admittedly incurred the cost and the Petitioner was informed about the same. The Petitioner was also informed that no recovery for the said work is done and the entire project is delayed by the period of four months. The Petitioner has not disputed the aforesaid mails about the additional cost spent by the Corporate Debtor and despite receipt of the said mails there is no reply whatsoever to the same. Since the products were not up-to the mark and the delivery the same was also delayed by four month the Corporate Debtor has correctly deducted only the

amount towards Liquidated Damages due beyond contractual delivery as provided in the purchase order.

3.13 The Corporate Debtor states that it was entitled to deduct the amount towards liquidated damages in view of the specific clause provided in the purchase order. The purchase order specifically provides for deduction of liquidated damages @1% per week subject to a maximum of 10% of the PO value for the undelivered portion of order value beyond the contractual delivery date.

3.14 Even though the Petitioner was informed to correct the aforesaid mistakes and to deliver the products within the stipulated period, the same was not done. The Petitioner has failed to deliver the products within the contractual delivery period as was expected under the purchase order.

3.15 The Corporate Debtor has also sent several mails to the Petitioner on various occasions such as 23.10.2018, 24.10.2018, 25.10.2018, 29.10.2018, 30.10.2018, 31.10.2018, 01.11.2018, 04.11.2018, 26.11.2018, 14.01.2019, 18.01.2019, 20.01.2019, 30.01.2019, 01.02.2019, 05.02.2019, 21.02.2019 by which it has repeatedly pointed out the bad quality of painting, welding, defects in the work done, about the several damages found during the inspection, about the quality of the dispatched products, non-availability of components on time, very low skilled manpower deployed for fabrication.

3.16 After the products were delivered the Corporate Debtor has informed the Petitioner about the losses occurred on account of the

defective services and has sent the reconciliation statement after deducting the amount towards the liquidated damages. In this regard the clause 2.1.5 is required to be appreciated, which specifically recognizes the power of the Corporate Debtor to deduct the amount in case of delay beyond the contractual delivery period. The clause 4.8.0 is also crucial, which very specifically state that the final invoicing/billing will be done as per the actual quantity and quality of the product. Since the contract clearly stated that invoicing/ billing shall be as per the finished weight of the product, additional invoices/ bills raised by the Petitioner have been disallowed and not paid.

3.17 After deduction of the amounts as aforesaid amount the same was communicated to the Petitioner, and the Corporate Debtor has also issued debit notes worth Rs. 19,80,700/- for the said purpose. The Corporate Debtor has also made entries in its books of account accordingly and has closed the accounts of the Petitioner.

3.18 The Corporate Debtor states that the petition is not maintainable and there is no claim and/or debt due or payable by the Corporate Debtor to the Petitioner and that the alleged claim is ex-facie time barred and cannot be granted in light of the provisions of the Limitation Act read with Section 238A of the Insolvency & Bankruptcy Code, 2016 ("Code").

4. We have carefully gone through the documents and pleadings available on record and considered the arguments of both the sides.

- 4.1 We find that the Operational Creditor issued Demand notice on 24.10.2019 in Form 3 of IBC claiming the principal amount with interest calculated @ 18% per annum from the date of respective invoices till the date of demand notice i.e. after the Corporate Debtor had already raised dispute relating to the time and quality of goods.
- 4.2 This Bench finds that there are a series of email communication from the Corporate Debtor seeking timely delivery, and also informing the deficiency in services from time to time. Further, the clause 4.8.0 of the said P.O. states that the final invoicing/billing will be done as per the actual quantity and quality of the product.
- 4.3 This Bench further finds that the Corporate Debtor has communicated the losses occurred on account of the defective services and has sent the reconciliation statement, after deducting the amount towards the liquidated damages, in terms of clause 2.1.5 of the Purchase order dated 04.07.2018, which provides for deduction of the amount in case of delay beyond the contractual delivery period. The said reconciliation statement was shared with the Applicant on 09.08.2019 and shows nil amount as payable to the Applicant. It is also noticed that the Applicant has replied on the same day that the deduction for LD is totally not acceptable. We further find that the Corporate Debtor has issued debit notes worth Rs. 19,80,700/- for the said purpose and said debit note is duly accounted for in its books of accounts much prior to issuance of demand notice.
- 4.4 Therefore, this Bench is of considered view that the Corporate Debtor had, from the very beginning, been communicating the

defects in quality of the goods as well as constant reminders pertaining to the delay in delivery. Further, if the amount of debit note, which is not agreed to by the Applicant vide email dated 09.08.2019, is adjusted from the outstanding claimed in the petition, no amount remains as payable. This shows that there existed a dispute in relation to this amount.

4.5 It is trite law that an Application under Section 9 of the Code cannot be admitted in relation to disputed debt as held by the Hon'ble Supreme Court in *Mobilox Innovations Private Limited vs. Kirusa Software Private Limited*. Further, the Hon'ble Supreme Court in the case of *S.S. Engineers vs. Hindustan Petroleum Corporation Limited and Ors.* 2022 SCC Online SC 1385, held that, “It is not for the court to adjudicate the disputes between the parties and determine whether, in fact, any amount was due from the Appellant to the HPCL or vice-versa.”

4.6 In view of the above, we find that the present case is fit for dismissal under Section 9(5)(ii)(d) read with Section 8(2)(a) of the Insolvency and Bankruptcy Code, 2016 in view of pre-existing dispute between the parties with respect to the purported claims and counter-claims of both the parties, which requires adjudication which is beyond the powers vested in this Bench in proceedings arising from an application filed under sec. 9 of the code and deserves to be **Dismissed**.

ORDER

5. This Application being C.P. (IB) No. 369/NCLT/MB/C-IV/2021 filed under Section 9 of I&B Code, 2016, filed by Ami Heavy Engineers

Private Limited, Operational Creditor/ Applicant against Holtec Asia Private Limited, Corporate Debtor for initiating Corporate Insolvency Resolution Process is **Dismissed**.

6. We make it clear that any observations made in this order should not be construed as expressing opinion on merits. The right of the Applicant before any other judicial forum shall not be prejudiced on the grounds of dismissal of the present petition.

Sd/-

Prabhat Kumar
Member (Technical)
/LRA Akshata/

Sd/-

Kishore Vemulapalli
Member (Judicial)