

**IN THE NATIONAL COMPANY LAW TRIBUNAL,  
DIVISION BENCH – I, CHENNAI**

**CP/IB/329/CHE/2021**

*(filed under Section 9 Rule 6 of the Insolvency and Bankruptcy  
(Application to adjudicating Authority) Rules, 2016)*

In the matter of **VA Tech Wabag Limited**

**NITYA ELECTROCONTROLS PRIVATE LIMITED**

C-295, 1<sup>st</sup> Floor, KH No.281,  
New Ashok Nagar,  
New Delhi – 110 096

*... Operational Creditor*

- Vs -

**VA TECH WABAG LIMITED**

Wabag House, Plot No.17,  
200 Feet Radial Road, Thoraipakkam,  
Kolathur, Near Velachery, Kamakshi Hospital  
Chennai – 600 117

*... Corporate Debtor*

**CORAM:**

**Justice (Retd) S. RAMATHILAGAM, MEMBER (JUDICIAL)  
SAMEER KAKAR, MEMBER (TECHNICAL)**

*For Applicant : Pallav Palit, Advocate  
For Respondent : Neeraj Kumar, Advocate*

*Order pronounced on 18<sup>th</sup> July 2022*

**ORDER**

**Per: SAMEER KAKAR, MEMBER (TECHNICAL)**

Under Adjudication is an Application that has been filed by  
**Nitya Electrocontrols Private Limited** (hereinafter referred to as  
'Operational Creditor') under Section 9 of the Insolvency &

Bankruptcy Code 2016 (in short, 'IBC 2016') r/w Rule 6 of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 against **VA Tech Wabag Limited** (hereinafter referred to as '*Corporate Debtor*'), to initiate the Corporate Insolvency Resolution Process against the Corporate Debtor, declare a moratorium and appoint Interim Resolution Professional.

2. Part-I of the Application sets out the details of the Applicant from which, it is evident that the Operational Creditor is a Company incorporated under the provisions of the Companies Act, 1956. From Part-II of the Application it is seen that the Corporate Debtor is a Limited Company incorporated under the provisions of the Companies Act, 1956 and the registered office of the Corporate Debtor as per the Application is stated to be situated at Wabag House, Plot No.17, 200 Feet Radial Road, Thoraipakkam, Kolathur, Near Velachery, Kamakshi Hospital Chennai – 600 117. From Part III of the Application, it is seen that the Operational Creditor has not proposed the name of the IRP and left it to the discretion of this Tribunal to appoint the IRP.

3. Part IV of the Application states that the Operational Creditor has claimed a total sum of Rs.3,45,40,099/- including interest at the rate of 18% p.a.

4. The Learned Counsel for the Applicant submitted that the Operational Creditor is an MSME. It was submitted that Andhra Pradesh Power Generation Corporation Limited (APGENCO), presently known as Telegana State Power Generation Corporation Limited (TSGENCO) awarded the contract for completion of plant works of Kakatiya Thermal Power Project Stage – II to the consortium comprising of three members (i) Tecpro Systems Limited; (ii) VA Tech Wabag Limited; and (iii) Gammon India Limited. It was submitted that Tecpro Systems Limited acted as the leader of consortium, issued purchase orders on vendors for procurement of goods and services.

5. It was submitted that Purchase Order No. E10894001355 dated December 6, 2013 was issued by Tecpro to NEC / Operational Creditor herein for purchase of various electrical goods, such as LT Switchboards and mandatory spares, for the said project. It was submitted that in terms of Clause 23 of the said Purchase order, in addition to the supply of the said goods, Operational Creditor was required to provide assistance in commissioning of the goods on free – of costs basis.

6. It was submitted that the Operational Creditor supplied the first lot of specified goods worth Rs.4,49,81,239/- in compliance with the

agreed terms and conditions enshrined in the Purchase Order and raised its tax invoice pursuant to the successful supply of goods and commissioning at the said project site. It was submitted that since Tecpro was undergoing a financial crisis and was unable to issue Letter of Creditor, Tecpro requested TSGENCO to directly release payments to the Operational Creditor and accordingly TSGENCO vide an Amendment Letter dated December 3, 2014 made necessary modifications in its arrangement with the consortium for directly releasing the payments to the Operational Creditor and the Operational Creditor subsequently received the payment of Rs.2,37,97,632/- on January 23, 2014 from APGENCO.

7. It was submitted that the Operational Creditor on various occasions followed up with Tecpro and TSGENCO for payment of the outstanding balance of Rs.2,11,83,607/- and that TSGENCO and Tecpro while assuring the payment of outstanding debts shall be done shortly, requested the Operational Creditor to supply the balance goods. It was submitted that in view of the assurance made, the Operational Creditor acting on good faith supplied the second lot of goods worth Rs.2,55,95,431/- and accordingly raised various tax invoices in consideration of the balance goods successfully supplied and also commissioned at site.



8. It was submitted that the supply and commissioning of the electrical goods purchased under the Purchase Order dated December 6, 2013 were done in line with the agreed terms and conditions. Further, it was submitted that TSGENCO also issued a certificate dated June 3, 2015 certifying the goods supplied by the Operational Creditor in relation to the Purchase Order dated December 6, 2013 to have been successfully commissioned at site while further certifying the satisfactory performance of the supplied goods.

9. It was submitted that a request was made by the Consortium members collectively to change the leader of consortium and on May 31, 2014 TSGENCO vide its letter had removed Tecpro as the Leader of consortium and appointed the Corporate Debtor herein as the Leader of consortium. It was submitted that upon change in leadership of the consortium, when the Operational Creditor followed up with Tecpro regarding the outstanding payment of Rs.4,67,79,038/-, the Operational Creditor was informed that the pending dues shall be paid by the Corporate Debtor owing to the change in consortium.

10. It was submitted that the issue regarding the pending payment dues of the Operational Creditor from Tecpro was considered in a

meeting held on November 7, 2014 between TSGENCO and the Corporate Debtor and in the said meeting, the agreement and understanding that the dues pending from Tecpro to the Operational Creditor in relation to the first and second lot of goods, shall be paid to the Operational Creditor by the Corporate Debtor was crystallized and the Corporate Debtor categorically had admitted its liability to pay the entire outstanding amounts to the Operational Creditor in lieu of first and second lot of goods supplied against the Purchase Order dated December 6, 2013 issued by Tecpro.

11. It was submitted that on November 18, 2014 another meeting was organized wherein the Managing Director of the Operational Creditor and the authorized officials of TSGENCO and Corporate Debtor met and discussed the issues *inter alia* regarding payment and in the said meeting the Corporate Debtor again acknowledged its liability / obligation to pay the outstanding dues pending to the Operational Creditor against the supplies made in relation to the Purchase Order dated December 6, 2013 issued by Tecpro.

12. It was submitted that pursuant to the meeting dated November 18, 2014 it was decided that new purchase orders for fresh supplies shall be issued by the Corporate Debtor to the Operational Creditor being the new Leader of Consortium. In pursuance of the agreement

and understanding reached between the parties in the meetings dated November 7, 2014 and November 18, 2014 the Corporate Debtor issued 4 cheques to the Operational Creditor and as such as against the total goods supplied by the Operational Creditor worth Rs.7,05,76,670/- a total payment of Rs.5,93,93,061/- stood settled and thereby leaving an outstanding amount of Rs.1,11,83,609/-. Thus, it was submitted that the principal unpaid amount of Rs.1,11,83,609/- remains outstanding and liable to be paid by the Corporate Debtor to the Operational Creditor.

13. It was submitted that after the Corporate Debtor was appointed as the new leader of consortium effective from May 31, 2014, the Corporate Debtor had issued 3 (Three) purchase orders for design, engineering, manufacturing, inspection, testing, painting, packing, forwarding and supply of various electrical goods, such as MCC panels worth Rs.1,54,27,601/- for the said Project. It was submitted that Corporate Debtor raised a separate Work Order dated June 15, 2015 on Operational Creditor for deputation of service engineers for supervision and commissioning of the aforesaid supplied electrical goods for a consideration of Rs.3,99,000/-. Pursuant to the issuance of the Purchase Orders and Work Order, the Operation Creditor successfully supplied the said goods and rendered the said services in adherence with the agreed terms and conditions, and accordingly

raised tax invoices to the Corporate Debtor. It was submitted that as against the supply of goods and service rendered, the Corporate Debtor paid an amount of Rs.1,16,87,161/- and has not paid the remaining balance of Rs.41,40,214/- which remains outstanding till date.

14. It was submitted that the Operational Creditor has on multiple occasions requested for the release of the outstanding dues, however, despite the earnest efforts made, the dues have not been paid till date and that the officials of the Corporate Debtor on numerous occasions have assured the release of the outstanding payments but such assurances have not been honoured by the Corporate Debtor till date.

15. It was submitted that the Operational Creditor has raised a Demand Letter dated May 24, 2018 which was addressed to the Corporate Debtor, TEGENCO, Tecpro and GET Power Limited. In reply to the same, it was submitted that the Corporate Debtor has sent a reply on June 18, 2018 whereby the Corporate Debtor acknowledged the existence of dues and accepting their liability of payment however the CD took a completely false, baseless and unfounded stand to claim that they are liable to pay only when they receive payments from TSGENCO and further upon the clearance of the price variation

claim submitted by them before TSGENCO. It was submitted that the Operational Creditor had replied to the said letter on August 10, 2018.

16. It was submitted that after repeated follow ups and promises of payments given by the Corporate Debtor, on June 17, 2019 the Corporate Debtor through its authorized representative, Mr Sridhar K, sent a formal email communicating their agreement and decision to release the outstanding dues in relation to the supplies against Tecpro Pruchase order and their own Purchase Orders and for the said purchase the Corporate Debtor informed that they required the 'signed' account statements for outstanding dues in relation to Tecpro account as well as Corporate Debtor's account. It was submitted that upon receipt of the aforesaid email, the Operational Creditor immediately vide email dated June 18, 2019 sent the signed account statement for outstanding dues for both Tecpro and Corporate Debtor's account. However, it was submitted that despite the express promise made vide aforesaid June 17, 2019 the Corporate Debtor till date has failed to make the outstanding payments.

17. Hence it was submitted that in view of the continuous non – payment of the dues by the Corporate Debtor, the Operational Creditor was constrained to issue Demand Notice as mandated under

Section 8 of IBC, 2016 on 23.08.2019 demanding payment of Rs.3,45,40,099/-. It was submitted that the Corporate Debtor replied to the said Demand Notice on 11.09.2019 wherein bald, baseless and sham contentions have been raised in a desperate attempt to dispute the legitimate dues, which have never been disputed before the issuance of Demand Notice. Under the said circumstances the learned Counsel for the Operational Creditor prayed for initiation of Corporate Insolvency Resolution Process in respect of the Corporate Debtor.

18. In relation to the Corporate Debtor, it is seen that multiple opportunities were given to the Respondent to file counter and in spite of the same, the Respondent has failed to file its counter, even though represented by its counsel. Thus, with the documents available on record, this Tribunal is constrained to decide the present matter.

19. The present Petition is filed before this Tribunal on 17.03.2021. A perusal of the Purchase Order and Invoices which are raised by the Operational Creditor in respect of the Corporate Debtor all pertains to the year 2013 – 2015 and in the said circumstances, it is imperative upon this Tribunal to examine the issue as to whether the Petition filed by the Operational Creditor under Section 9 of IBC, 2016 is maintainable on the ground of limitation in terms of Section 3 of the Limitation Act, 1963.

20. The Operational Creditor in page 185 - 186 of its typed set of documents has given the working for consolidated computation of operational debt, which is captured hereunder;

In respect of purchase orders raised by Tecpro Systems Limited								
Date	Invoice amount (Rs.)	Amount paid (Rs.)	Balance amount (Rs.)	Days	Invoice no.	Invoice date	Amount paid (Rs.)	Balance amount (Rs.)
10-Dec-13	3,559,483	23,797,632	-	18	31-Jul-19	2059	-	-
10-Dec-13	6,499,349	11,500,000	-	18	31-Jul-19	2059	-	-
10-Dec-13	6,100,138	9,043,300	-	18	31-Jul-19	2059	-	-
10-Dec-13	3,895,890	5,252,429	-	18	31-Jul-19	2059	-	-
12-Dec-13	6,785,388	10,000,000	-	18	31-Jul-19	2057	-	-
13-Dec-13	8,094,908	-	-	18	31-Jul-19	2056	-	-
13-Dec-13	5,307,377	-	-	18	31-Jul-19	2056	-	-
13-Dec-13	4,738,706	-	-	18	31-Jul-19	2056	-	-
26-Mar-14	3,725,248	-	-	18	31-Jul-19	1953	-	-
29-Mar-14	6,737,502	-	-	18	31-Jul-19	1950	-	-
31-Mar-14	2,813,551	-	-	18	31-Jul-19	1948	-	-
31-Mar-14	3,325,886	1,990,065	-	18	31-Jul-19	1948	4,813,939	2,823,874
31-Mar-14	2,628,049	2,628,049	-	18	31-Jul-19	1948	6,357,213	3,729,164
31-Mar-14	3,006,824	3,006,824	-	18	31-Jul-19	1948	7,273,464	4,266,640
31-Mar-14	3,358,571	3,358,571	-	18	31-Jul-19	1948	8,124,335	4,765,764
<b>Total</b>	<b>70,576,870</b>	<b>59,593,361</b>	<b>11,267,309</b>				<b>28,568,951</b>	<b>35,565,442</b>

  

In respect of purchase orders raised by VA Tech Wabag Limited								
Date	Invoice amount (Rs.)	Amount paid (Rs.)	Balance amount (Rs.)	Days	Invoice no.	Invoice date	Amount paid (Rs.)	Balance amount (Rs.)
30-Apr-15	2,587,715	11,687,262	-	18	31-Jul-19	1553	-	-
30-Apr-15	328,707	-	-	18	31-Jul-19	1553	-	-
6-Jun-15	199,500	-	-	18	31-Jul-19	1516	-	-
23-Jun-15	16,093	-	-	18	31-Jul-19	1499	-	-
Aug-15	7,261,654	-	-	18	31-Jul-19	1460	-	-
8-Aug-15	4,600,301	3,306,714	-	18	31-Jul-19	1453	6,390,666	3,083,952
8-Aug-15	420,284	420,284	-	18	31-Jul-19	1453	812,255	391,971
1-Sep-15	200,375	200,375	-	18	31-Jul-19	1429	383,060	182,685

31-Dec-15	41,535	41,535	-	18	31-Jul-19	1308	75,164	33,629
31-Dec-15	171,306	171,306	-	18	31-Jul-19	1308	310,003	138,697
<b>Total</b>	<b>15,827,476</b>	<b>4,140,214</b>					<b>7,971,148</b>	<b>3,830,934</b>

<b>Total Operational Debt (Rs.)</b>	<b>34,540,099</b>
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21. A perusal of the aforesaid consolidated working sheet would show that the last payment made by the Corporate Debtor was on 30.04.2015. Hence, if the aforesaid date is taken for the purpose of

limitation, then the Operational Creditor ought to have filed the Petition before this Tribunal on or before 30.04.2018. Admittedly the present Petition was filed before this Tribunal only on 17.03.2021.

22. Be that as it may, the Operational Creditor in his averments has stated that the Corporate Debtor on June 17, 2019 through its authorized representative, Mr Sridhar K, sent a formal email communicating their agreement and decision to release the outstanding dues in relation to the supplies against Tecpro Purchase order and their own Purchase Orders and for the said purchase the Corporate Debtor informed that they required the 'signed' account statements for outstanding dues in relation to Tecpro account as well as Corporate Debtor's account. In this connection it was contended that the Corporate Debtor has made an express promise to pay the outstanding, however has failed to do so.

23. Further, it could also be seen that the Registry of this Tribunal has also raised a defect while scrutinizing the Petition as to how the Present Application falls within limitation, to which the Operational Creditor has replied as follows;

"In respect to the first defect stating that "Please clarify as to how the present Application falls within limitation"; it is submitted that the Corporate Debtor vide an email dated 15th May, 2018 has acknowledged the debt and in writing provided an assurance to make the payment to the Corporate Debtor. The said email appearing on Page No. 162 -165 of the Petition qualifies to be a 'promise to pay' under Section 25(3) of the Contract Act, 1872

and therefore creates a fresh cause of action where from the limitation period is required to be calculated. In view thereof, the present petition is within the limitation period of 3 years. Reliance is placed on SE Roadways vs. SP Agro Industrial Corporation AIR 1993 Bom 300; Adiraja Ariga vs. K Beeranna Rai AIR 1957 Mad 14. The said view was taken by the National Company Law Appellate Tribunal (NCLAT), New Delhi in "MM Ramachandran vs. South Indian Bank & Ors." Company Appeal (AT) (Insolvency) No. 1509 of 2019 and the same view of the NCLAT was affirmed by the Hon'ble Supreme Court of India in the appeal filed by the said Petitioner against the order by the NCLAT in CIVIL APPEAL NO. 2951 OF 2020.

Without prejudice to the aforesaid, the Hon'ble Delhi High Court in "Skillstech Services Private Limited vs. Registrar, NCLT New Delhi & Anr." W.P.(C) 474/2021 & CM APPL. 1227/2021 has held that the question of maintainability of a petition under IBC in respect of the jurisdiction of such NCLT to decide upon the matter cannot be decided by the Registrar in an administrative capacity and an appropriate bench of NCLT can only decide upon the maintainability of a petition under IBC on grounds of whether it has the jurisdiction to decide upon the issue. In view thereof, the petition may be listed before the Adjudicating Authority."

24. Thus, it could be seen that the Operational Creditor was relying upon Section 25(3) of the Contract Act, 1872 to show that the Corporate Debtor has made an express promise to pay the amount which gave rise to a fresh cause of action. In this light of the same, it is required to examine whether the email sent by the Corporate Debtor would amount to 'express promise to pay' under Section 25(3) of the Contract Act, 1872 in and by which the Operational Creditor gets a fresh cause of action. The email dated June 17, 2019 which is found at page no. 158 of the typed set is extracted hereunder;

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**From:** Sridhar K [mailto:k\_sridhar@wabag.in]  
**Sent:** Monday, June 17, 2019 1:50 PM  
**To:** SOMA DUBEY  
**Cc:** accounts@nityaelectricals.com; enquiry@nityaelectricals.com; manju@nityaelectricals.com  
**Subject:** OUTSTANDING STATEMENT KTHP

Dear Sir

This refers to the works carried out from your end for KTHP.

We need a signed statement from your end for the total outstanding to enable us to proceed further.

The outstanding statement from Tecpro and WABAG may be sent separately.

Please treat the matter on PRIORITY and organize the send same by today.

With kind regards,

**Sridhar K**  
Project Management

25. A perusal of the aforesaid email would manifest the fact that the Corporate Debtor has requested for a signed statement from the Operational Creditor to proceed further. No where in the aforesaid email, the Corporate Debtor has acknowledged, nor promised to pay the amount which is due and payable to the Corporate Debtor. Further, the aforesaid email would not even qualify to be an acknowledged of debt under Section 18 of the Limitation Act, 1963 much less than a 'express promise' under Section 25(3) of the Contract Act, 1872.

26. Further, it could also be seen that the Corporate Debtor in its reply to the Demand Notice dated 11.09.2019 has also stated that the claim of the Operational Creditor is time barred and cannot be raised under the provisions of the Limitation Act, 1963.

27. Thus, in view of the discussion made supra, *prima-facie* it is seen that the debt which is being claimed to be in default from the Corporate Debtor is barred by limitation also by taking into consideration the decision of the Hon'ble Supreme Court in **B.K. Educational Services Private Limited -Vs- Parag Gupta; 2018 SCC Online 1921** and others similar decisions rendered by the Hon'ble NCLAT we are constrained to **dismiss** the petition, however without costs.

-sd-

**SAMEER KAKAR**  
MEMBER (TECHNICAL)

-sd-

**Justice (Retd) S. RAMATHILAGAM**  
MEMBER (JUDICIAL)

*Raymond*