IN THE NATIONAL COMPANY LAW TRIBUNAL

NEW DELHI, COURT-III

C.P. (IB)-618(ND)/2023

Order under Section 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

IN THE MATTER OF:

M/s. NEEV ENERGY LLP

Having its Registered Office at:

B-63 Okhla Industrial Area,

Phase-2, New Delhi-110020.

Through its Director

Mr. Tajesh Chakravarty

..... Operational Creditor

VERSUS

M/s. ENERGY EFFICIENCY SERVICES LIMITED

Having its Registered Office at:

NFL Building, 5th & 6th Floor, Core-III,

Scope Complex, Lodhi Road, New Delhi-110003

......Corporate Debtor

Order Pronounced On: 12.03.2024

CORAM:

SHRI BACHU VENKAT BALARAM DAS, HON'BLE MEMBER (JUDICIAL)

SHRI ATUL CHATURVEDI, HON'BLE MEMBER (TECHNICAL)

APPEARANCES:

For the Applicant	:	Mr. Zorawar Singh, Mr. Varun Tandon, Mr. Hitesh Mankor, Mr. Shubham, Ms. Rajlakshimi Kawshish, Ms. Veni Tandon, Advs.
For the Respondent	:	Mr. Samdarshi Sanjay, Ms. Monika Sharma, Mr. Ashish Kumar Sharma, Advs.

ORDER

PER: ATUL CHATURVEDI, MEMBER (TECHNICAL)

1. This application under Section 9 of the Insolvency and Bankruptcy Code, 2016 has been filed by M/s. Neev Energy LLP, the Operational Creditor herein. The Applicant/Operational Creditor is a limited liability partnership incorporated with the Registrar of Companies. The Applicant is seeking initiation of Corporate Insolvency Resolution Process against the Corporate Debtor i.e. M/s. Energy Efficiency Services Limited which is a Public Company duly incorporated with the Registrar of the Companies.

2. **Brief Background of the Case:**

i. The Applicant/Operational Creditor is carrying on the business of manufacturing, installing and maintaining of LED lights whereas the Corporate Debtor, i.e., Energy Efficiency Services Limited **("EESL")** is a Joint Venture of 4 (Four) Central Public Sector Undertakings of Ministry of Power, Government of India-NTPC Limited, Power Grid Corporation of India Limited, Power Finance Corporation Limited and Rural Electrification Corporation Limited and is the Nodal Agency for implementation of Street Light National Programme **("SLNP")** throughout the country. EESL has been set up with the objective to lead the market related action of the Nation Mission of Enhanced Energy Efficiency (NMEEE), under Prime Ministers' National Action Plan on Climate Change.

ii. The Corporate Debtor issued certain tenders for the State of Uttar Pradesh and Bihar details of which are as under:-

Date of Tender	Details of Tender	Date of Letter of Award	Date of Agreement
25.08.2017	Employer reference no. EESL/06/2017-2018/DIC-P/171808040 for installation, dismantling, testing commissioning, repair and maintenance of LED street lights	12.01.2018 & 05.07.2022	06.03.2018
28.02.2019	Employer reference no. EESL/06/SLNP/DIC/ Bihar for installation, dismantling, testing, commissioning, repair and maintenance of LED street lights	28.03.2019	18.11.2019

As per the agreement, the Corporate Debtor was required to make the payment to the Operational Creditor for Dismantling, Installation and commissioning of LED lights within 30 days from the date of submission of original bill and for maintenance and repair on monthly basis during the contract period.

3. **<u>Submissions made by the Operational Creditor:</u>**

i. It is submitted that the Operational Creditor by fulfilling the obligations under the above said Agreement and Letter of Awards raised invoices against the Corporate Debtor. However, the Corporate Debtor failed to make payments to the Operational Creditor and the acknowledged debt of a sum of Rs. 3,32,23,171/- towards the invoices as recorded in the Minutes of the Meeting held on 10.02.2023, 03.04.2023 and 11.05.2023. The Corporate Debtor made certain payments which were adjusted in the respective invoices. The details of the unpaid invoices have been mentioned in the working sheet.

ii. It is submitted that the defaults have occurred on different dates from October 2019 till June 2023 based on the invoices and is not inclusive of the period falling under Section 10A of the Code.

iii. It is submitted that the Corporate Debtor has categorically acknowledged the debt and the documents acknowledging the debt have been duly stamped and signed by the Corporate Debtor. The Operational Creditor has categorized these documents/invoices into two categories i.e. (i) Unconditional Acknowledged Invoices and (ii) Conditional Acknowledged Invoices. In the unconditional Acknowledged Invoices, the Corporate Debtor has made a noting to the effect that these invoices are being processed for payment to be released to the Operational Creditor or the payment has already been released to the Operational Creditor. With respect to the second category of invoices which includes Conditional Acknowledged Invoices, the Corporate Debtor has made a noting stating that certain documents are pending to be submitted or in case supporting documents are already submitted those invoices are pending approval by the Competent Authority of the Corporate Debtor for processing of the payment. The present application under Section 9 of the IBC, 2016 has been filed only with respect to the Unconditional Acknowledged Invoices.

iv. It is submitted that the Operational Creditor issued a notice in terms of section 8(1) of the Code, demanding a sum of Rs. 3,32,23,171/- on 04.09.2023 which was delivered to the Corporate Debtor on 06.09.2023. The Corporate Debtor through its counsel issued a reply to the demand notice after the expiry of the statutory limit i.e. 10 days which is prescribed under the Code on 21.09.2023 which was received on 22.09.2023 by the Operational Creditor.

4. **Submissions made by the Corporate Debtor:**

i. The Corporate Debtor in response to the averments and contentions raised by the Applicant has submitted that the disputes relating to the payment have to be resolved by way of settlement of disputes i.e. adjudication/arbitration as provided in the Letter of Award/Tender Documents and not under summary procedure by this Tribunal.

ii. It is further submitted that a dispute exists pertaining to the amount claimed under the demand notice. Further the demand notice is in contravention of the terms of Clause 21 of the Letter of Award dated 12.01.2018 & 28.03.2019 and Clause 19 of the Letter of Award dated 05.07.2022 which stipulates that ***"all correspondences, bills and any other documents related to above work shall be addressed to Engineer in Charge for this Contract".*** Since the notice under reply is not in consonance with Clause 21 & 19 of the Letter of Award the same deserves to be withdrawn and any action based on such a notice is *"**void ab initio.**"*

iii. It is submitted by the Corporate Debtor that around 13 agreements were executed between the Corporate Debtor and Urban Local Bodies **("ULB's")** under the LED Street light National Programme in Bihar in the year of 2018 and the Corporate Debtor issued various complaints on account of non-adherence of the safety norms in the process of installation and maintenance of street lights and therefore, issued a show cause notice dated 05.05.2022 to the Operational Creditor in respect of Letter of Award dated 28.03.2019 wherein it was clearly stated that the field teams are working without following the safety norms during installation and maintenance work due to which few accidents were occurred and further accidents may occur at the work sites. Another show cause notice was issued on 06.06.2022 for presenting inaccurate data for installation sheets and certificates to the ULB's without verification /certification of EESL representative.

iv. It is submitted that the Corporate Debtor sought an explanation from the Operational Creditor on the complaint made by Dhaka ULB vide its Letter No. 506 dated 21.05.2022 because of the deviation in the IDC material and submission of completion certificates without proper verification. Further, the ULB, Pakhridyal, East Champaran vide its Letter No. 542 dated 08.09.2022 informed the Corporate Debtor about the unsatisfactory maintenance work. The Corporate Debtor has also sent various show cause notices to the Operational Creditor about the poor maintenance work in most of the ULB’s. The Corporate Debtor also issued a show cause notice on 18.01.2023 w.r.t. ULB's under SLNP, Bihar and again on 25.05.2023.

v. It is submitted by the Corporate Debtor that the Operational Creditor is liable to pay penalty under Clause 8(f) of the Letter of Award which stipulates that Penalties for non-fulfilment of minimum uptime requirement i.e., 95% and delays in restoration of LED streetlights faults shall be Penalty = 2 X [(Wattage of defective Streetlights X (operating hours) x (no. of days of default beyond 48 hours) X tariff)/1000 or Rs. 5O/-per day per light whichever is higher.

vi. It is submitted that with regard to the Uttar Pradesh, five agreements were signed with the Urban Local Bodies under the LED Street light National Programme in the Gorakhpur Division and the Operational Creditor was liable to execute the work under the said agreements. The Corporate Debtor has issued various show cause notices on 02.04.2018, 19.02.2020, 08.09.2020 with regard to the poor performance in the installation work.

vii. In the show cause notice dated 08.09.2020, the Corporate Debtor apprised the Operational Creditor about the joint inspection held on 26.08.2020 in the presence of EESL Engineer-in-Charge and M/s RECPDCL Engineer, wherein, various issues were highlighted. Under the joint inspection it was found that LED streetlights amounting to a value of around 1.05 crores + 0.189 Crores @ 18% GST) = Rs 1.24 Crores was submerged in the warehouse and the Operational Creditor was apprised that this loss shall be adjusted towards its running invoices.

viii. It is submitted that since the Operational Creditor failed to comply with the terms of the Letter of Award in respect of the Uttar Pradesh, the same was terminated vide notice for termination dated 10.11.2023. The Operational Creditor in its response dated 18.11.2023 to the termination notice admitted that it has initiated proceedings before the MSEF Council, District South East, Delhi on 23.10.2023 under the Micro, Small and Medium Enterprises Development Act, 2006. Thus, the Operational Creditor has initiated multiple proceedings to recover the amount which is not payable is a case of forum shopping.

ix. It is submitted that a Letter of Award dated 18.09.2018 was issued in favour of the Operational Creditor for the State of Maharashtra and due to default and breach committed by the Operational Creditor in the State of Maharashtra a risk and cost Notice dated 09.02.2023, 11.05.2023, 11.07.2023 & 04.09.2023 were issued and the losses were quantified at Rs. 10,83,56,240/- (Rupees Ten Crores Eighty-Three Lakhs Fifty-Six Thousand and Two Hundred Forty Only) which is liable to be recovered from the Operational Creditor. A criminal complaint was also filed against the Operational Creditor on 17.02.2023 at Latur, Maharashtra. Further, the LOA dated 21.05.2018 and Contract Agreement dated 26.11.2019 have also been terminated on 04.09.2023.

x. It is submitted that since the Operational Creditor failed to submit Contract Performance Guarantee and Contract Agreement within 30 days of the issuance of Letter of Award dated 16.10.2018, a notice dated 06.12.2018 was issued for complying with the same without any further delay.

5. **<u>Analysis and Findings:</u>**

i. We have heard the submissions made by the Ld. Counsel appearing for the parties and perused the records carefully.

ii. It is an admitted position that the Operational Creditor and the Corporate Debtor entered into various agreements for the Installation, Commissioning and Maintenance etc. to be carried out in the state of Uttar Pradesh and in the state of Bihar for a period of 7 years each.

iii. Pursuant to the agreements, the Corporate Debtor issued tenders to the Operational Creditor for carrying out the Installation and Maintenance of LED Lights in the state of Uttar Pradesh and Bihar. The payment terms have been clearly set out in the said Agreement/Letter of Award which reads as follows:

"100% LOA rates for Dismantling, installations and commissioning shall be made to the BIDDER within 30 days from the date of submission of original/invoices…."

iv. The same terms of payment were agreed upon in the subsequent agreements executed between the parties which stipulates that the payment shall be made within 30 days from the date of submissions of the invoices.

v. Ld. Counsel for the Corporate Debtor submits that the Operational Creditor has committed breach in executing the work of maintenance in terms of the Letter of Award and other terms and conditions and therefore, invoices raised are not payable in absence of due certification by Engineer-in-Charge or any person duly authorized on his behalf as prescribed by Terms of Payment at Clause 5.

vi. On the issue of maintainability, it is submitted by the Corporate Debtor that the dispute in question require detailed appreciation of evidence and cannot be decided in a summary proceeding under the IBC, 2016. Further the terms and conditions of the Letter of Award executed between the Operational Creditor and the Corporate Debtor provides for settlement of disputes through adjudication/arbitration. The relevant clauses of Letter of Award are reproduced below:

> ***"Clause 11:*** *Adjudicator: Adjudicator under the Contract shall be appointed by the Appointing Authority i.e., MD (EESL).*
>
> ***Clause 12:*** *Arbitration, Arbitration shall be carried out as per the Arbitration & Conciliation Act, 1996 and its subsequent amendment. The contract shall be governed by and interpreted in accordance with the laws in force in India. The Courts of Delhi shall have exclusive jurisdiction in all matters arising under the Contract."*

Hence, as per the Clause 11 and 12 of the Letter of Award all disputes have to be referred to adjudication/arbitration. However, there is no embargo for the Operational Creditor to have initiated the present proceedings even if there is an Arbitration Clause. The Hon'ble NCLAT in Judgment titled **Shahi Md. Karim vs Kabamy India LLP and Another**, reported in 2023 SCC OnLine NCLAT 180, it was held that there is no embargo on the 'Operational Creditor' to file a Section 9 Petition, under I&B Code, 2016, even if there is an

'Arbitration Clause' in the 'Agreement'. The Scope and objective of the Code is 'Resolution' and not a 'Recovery Mode/Forum'. Therefore, we are of a considered view that the Application under Section 9 is maintainable and cannot be dismissed on this ground alone.

vii. On the merits of the case, the Ld. Counsel for the Corporate Debtor submitted that the dues in respect of Maharashtra Letter of Award, can be recovered from the dues of UP & Bihar Letter of Award in terms of Clause 8(b) which is reproduced as follows:-

> *"b. Alternatively, EESL reserves the right to avail from elsewhere/other contractor at the sole risk and cost of the successful bidder/contractor and recover all such extra cost incurred by the EESL in avail the services from resources available including EMD/bid security/Encashment of bank guarantee or any other sources etc."*

A huge sum of money to the tune of Rs. 13,38,22,916/- (Rupees Thirteen Crores Thirty-Eight Lakhs Twenty-Two Thousand Nine Hundred Sisteen Only) (approx.) owed by the Operational Creditor to the Corporate Debtor, which may further increase post reconciliation.

viii. The Corporate Debtor raised objections regarding submission of fake documents supporting documents for verifying the maintenance work for state of Bihar and non-submission of supporting documents as agreed in the MoM dated 13.04.2023 and through various emails dated 14.11.2019, 17.02.2019, 18.02.2019, 19.02.2019, 02.03.2019 and 15.03.2019 raised objections regarding the improper installation, work stoppage, slow installation, and non-performance as per the conditions in the Letter of Award. Hence, it is clear and evident that there is a pre-existing dispute between the parties prior to issue of Demand Notice under Section 8 of the Code.

ix. The Ld. Counsel for the Corporate Debtor relied on the judgments of ***Mobilox Innovations Pvt. Ltd. Vs Kirusa Software Private Limited,*** reported in (2018) 1 SCC 353 and ***Transmission Corporation of Andhra Pradesh Limited VS Equipment Conductors and Cables Limited*** reported in (2019) 12 SCC 697 wherein it was categorically laid down that "IBC" was not intended to be a substitute to a recovery forum and that whenever there was existence of a real dispute, IBC provisions could not be invoked.

x. As per the law laid down by Hon'ble Supreme Court, if the Corporate Debtor raises a plausible contention about a pre-existing dispute, which is not just a moonshine or feeble legal argument it would suffice for the Adjudicating Authority to reject the application filed under Section 9 of the Code, the Adjudicating Authority being precluded from determining as to whether the Corporate Debtor would be successful or not, with regard to the said dispute, at the time of decision making.

xi. In the facts and circumstances of the instant case, we are of the view that the Corporate Debtor has been able to raise a plausible contention regarding the pre-existence of "dispute" between the parties. Hence, the present application under Section 9 of the IBC, 2016 ought to be **dismissed**.

6. **<u>Order</u>**

In view of the above facts and circumstances and the foregoing discussion, we are satisfied that the present petition fails to fulfill the criteria laid down under Section 9 of the Code. It is accordingly, hereby ordered as follows: -

i. The Application bearing **IB-618/ND/2023** filed by the Applicant under Section 9 of the Code r/w Rule 6 of the Adjudicating Authority Rules for initiating CIRP against the Respondent is hereby **dismissed.**

ii. The Registry is further directed to send a copy of this order to the Insolvency and Bankruptcy Board of India ("IBBI") for their record.

iii. A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

No order as to costs.

-Sd-

(ATUL CHATURVEDI)
MEMBER (TECHNICAL)

-Sd-

(BACHU VENKAT BALARAM DAS)
MEMBER (JUDICIAL)