

**IN THE NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH – 1**

ATTENDANCE CUM ORDER SHEET OF THE HEARING HELD ON
07-02-2022 AT 10:30 A.M. THROUGH VIDEO CONFERENCE.

IA (IBC) 116/2022
CP(IB) 277/9/HDB/2020
U/s 9 of IBC, 2016

IN THE MATTER OF:

Ansaldoaldaie Boilers India Pvt Ltd

...Operational Creditor

Vs

Nagai Power Pvt Ltd

...Corporate Debtor

CORAM:-

DR. VENKATA RAMAKRISHNA BADARINATH NANDULA, HON'BLE MEMBER (JUDICIAL)
SH. VEERA BRAHMA RAO AREKAPUDI, HON'BLE MEMBER (TECHNICAL)

ORDER

IA(IBC) 116/2022:- Learned Counsel Shri P. Vikram for Applicant and Learned Counsel P.G. Sabnis for Respondent appeared via video conference. This application which was filed on 03-02-2022 by Corporate Debtor for reopening of the matter is listed today, the day on which the main Company Petition 277/9/HDB/2020 stands posted for final orders. The record reveals that sufficient opportunity has been given to Corporate Debtor to raise all the pleas and file documents, if any. That apart, when the Tribunal is ready to pronounce the final order, we do not see any bonafides in the petition. Therefore, this petition is dismissed.

Orders in CP (IB) No.277/9/HDB/2020 is pronounced vide separate sheets.

In the result, this Company Petition (IB) No.277/9/HDB/2020 is allowed and Corporate Debtor is admitted into Corporate Insolvency Resolution Process (CIRP).


M (T)


MEMBER (J)

**IN THE NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH, HYDERABAD**

CP (IB) No.277/9/ HDB/ 2020

Application under section 9 of IBC, 2016
read with Rule 6 of I&B (AAA) Rules, 2016

In the matter of

Ansaldoaldaie Boilers India Private Limited
Ceebros Complex, Manjula Tower
3rd Floor, Office No.3, Old No.45
New No.39, Mondiech Road
Egmore, Chennai – 600008.

.. **Petitioner/
Operational Creditor**

Versus

Nagai Power Pvt Ltd
6-3-1109/A/1, IIIrd Floor
Navbharat Chambers
Hyderabad – 5000082.

.. **Respondent
Corporate Debtor**

SD/-

SD/-

Date of order : 07.02.2022

Coram:

**HON'BLE DR. VENKATA RAMAKRISHNA
BADARINATH NANDULA, MEMBER (JUDICIAL)**

and

**HON'BLE SHRI VEERA BRAHMA RAO AREKAPUDI
MEMBER (TECHNICAL)**

Parties / counsels present:

For the Petitioner .. Shri Pradnyesh G. Sabnis, Advocate

For the Respondent: .. Shri P. Vikram, Advocate.

PER COURT

ORDER

This petition is filed by Ansaldoaldaie Boilers India Private Limited/
Operational Creditor, stating that an amount of **Rs.11,50,00,000/-** along with
an amount of **Rs.2,07,00,000/-** towards interest at the rate of 12% per annum
for the delay of 18 months as on 31.10.2019, is due and payable to the
Operational Creditor by the corporate debtor. Hence this petition is filed
under section 9 of Insolvency and Bankruptcy Code, 2016, read with Rule 6
of Insolvency & Bankruptcy (Application to the Adjudicating Authority)
Rules, 2016, seeking admission of the petition, initiation of Corporate



Insolvency Resolution Process, granting moratorium and appointment of Interim Resolution Professional as prescribed under the Code and Rules thereon.

2. The averments made in the petition are as follows:

- (i) The Corporate Debtor has placed an order with the Consortium of Gammon India Ltd and the Operational Creditor for supply of boiler, turbine and generator for a power plant to be commissioned by the Corporate Debtor, by virtue of Agreement dated 31.07.2010, Supplementary Agreement No.1 dated 20.04.2012 and Supplementary Agreement No.2 dated 27.01.2014 (Annexure-A2 COLLY.), with the Operational Creditor, also called as Old Contract.
- (ii) Having availed a part of such supplies, on 07.11.2015, the Corporate Debtor wrongfully cancelled the said order and encashed the contract Performance Bank Guarantee (PBG) of Rs.30.60 crores furnished by the said Consortium. As a result thereof the Operational Creditor being a member of the Consortium sustained loss of Rs.17.13 crores towards its proportional contribution.
- (iii) Subsequently, the Corporate Debtor again approached the Operational Creditor for supply of balance consignments. Agreement dated 29.07.2016 (Annexure 'A3', page 101), as called as New Contract, had been executed based on which the Corporate Debtor placed a fresh order with the Operational Creditor for supply



of balance boiler parts. However, arbitration proceedings were instituted for the loss sustained by the above wrongful termination of the order.

- (iv) Total consideration as per Article 4 (Annexure 'A3', page 117) of the new contract was Rs.108,64,58,708/-. Break-up of individual transaction is furnished by the Operational Creditor as clauses (a) to (e) at pages B and C of the petition.
- (v) The Corporate Debtor has received all the parts as per the agreement, assembled, installed and commissioned the same at the site of the Corporate Debtor. Nevertheless the Corporate Debtor has paid only Rs.97.14 crores out of the new contract amount of Rs. 108,64,58,708/-, leaving a deficit of Rs.11.50 crores.
- (vi) For the said outstanding amount of Rs.11.50 crores the Corporate Debtor has issued Guarantee dated 28.08.2018 (Annexure 'A6', paged 541) in favour of the Operational Creditor, which was renewed from time to time.
- (vii) The Operational Creditor invoked the said guarantee on 12.09.2019 and demanded the outstanding amount. However, the Corporate Debtor failed to pay the same. The Operational Creditor issued Demand Notice dated 15.11.2019 (Annexure 'A7', page 545) under section 8 of the I&B Code.

3. The respondent/ Corporate Debtor has filed Counter dated 16.12.2020 contending that:



- (i) Arbitration proceeding are pending between the parties and the petition is filed by suppressing material facts.

Prior to issuance of Demand Notice dated 15.11.2019, the Operational Creditor had initiated Arbitration Proceeding before the Indian Council of Arbitration in April 2018 against the Corporate Debtor. Copy of the claim is at Annexure-I to the Counter. The above fact is not disclosed before this Tribunal. There is suppression of facts. Thus, the claim submitted by the Operational Creditor is not maintainable.

- (ii) The Operational Creditor did not supply material in terms of the contract and there is a pre-existing dispute.

(iii). The Operational Creditor neither supplied material as per contract dated 29.07.2016 nor conducted Performance Guarantee Test. Without resolving issues the Operational Creditor has filed this petition. Copies of various emails exchanged between the Operational Creditor and Corporate Debtor are at Annexure-2.

4. The Operational Creditor has filed Rejoinder dated 11.03.2021 contending that:

- (i) The Corporate Debtor had never denied its liability to pay prior to initiation of the present proceedings. On the contrary the Corporate




Debtor has issued Corporate Guarantee and renewed it. As such the Corporate Debtor cannot afford to deny at this stage.

- (ii) The Arbitration proceedings as referred to by the Corporate Debtor relate to wrongful termination of 2011-Agreement and the said fact is stated in the petition. Whereas, the present petition arises from Agreement dated 29.07.2016. Subject matter of each proceeding is different from another. Hence each proceeding has no bearing on another.
- (iii) As regards pre-existing dispute the Corporate Debtor did not refer to such pre-existing dispute in their reply to Demand Notice. Even when the Operational Creditor invoked Corporate Guarantees (Annexures P4 and P5) and demanded payment, the Corporate Debtor did not send any reply raising any dispute.
- (iv) As regards payment of outstanding amount of Rs.11.5 crores, the Corporate Debtor assured that the matter will be taken up with the management and would be intimated shortly. Non-supply of boiler parts is altogether a new allegation levelled by the Corporate Debtor.

5. In the light of the contest as mentioned above, the following points are framed for consideration by this Adjudicating Authority:

- (1) Whether the documentary evidence furnished with application shows that the aforesaid debt is due and payable and has not yet been paid?
- (2) Whether there is existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before



the receipt of demand notice of the unpaid operational debt in relation to such dispute?

6. We have heard Shri. Shri Pradnyesh G. Sabnis, Advocate for the Petitioner and Shri P. Vikram, Advocate the respondent, perused the record, written submissions and the case law.

7. At the very outset, we may state herein that in order to arrive at a just and proper finding on the points involved in the subject lis, we feel it apt to rely on the following illuminating rulings of Hon'ble Supreme Court of India, on the legal aspects of sections 7 & 9 of I&B Code 2016;

- (i) M/s Innoventive Industries Vs. ICICI Bank & another in Civil Appeal Nos.8337-8338 of 2017.
- (ii) Mobilox Innovations Private Limited Vs. Kirusa Software Private Limited,

(i) In re, M/s Innoventive Industries, supra, *Hon'ble Supreme Court of India*, held that;

“The scheme of Section 7 stands in contrast with the scheme under Section 8 where an operational creditor is, on the occurrence of a default, to first deliver a demand notice of the unpaid debt to the operational debtor in the manner provided in Section 8(1) of the Code. Under 71 Section 8(2), the corporate debtor can, within a period of 10

days of receipt of the demand notice or copy of the invoice mentioned in sub-section (1), bring to the notice of the operational creditor the existence of a dispute or the record of the pendency of a suit or arbitration proceedings, which is pre-existing – i.e., before such notice or invoice was received by the corporate debtor. The moment there is existence of such a dispute, the operational creditor gets out of the clutches of the Code.”

“On the other hand, as we have seen, in the case of a corporate debtor who commits a default of a financial debt, the adjudicating authority has merely to see the records of the information utility or other evidence produced by the financial creditor to satisfy itself that a default has occurred. It is of no matter that the debt is disputed so long as the debt is “due” i.e. payable unless interdicted by some law or has not yet become due in the sense that it is payable at some future date. It is only when this is proved to the satisfaction of the adjudicating authority that the adjudicating authority may reject an application and not otherwise.”

(ii) Inre, Mobilox Innovations Private Limited (supra), Hon’ble Supreme Court of India, has held that;

“It is, thus, clear that so far as an operational creditor is concerned, a demand notice of an unpaid operational debt or copy of an invoice demanding payment of the amount involved must be delivered in the prescribed form. The corporate debtor is then given a period of 10 days from the receipt of the demand notice or copy of the invoice to bring to the notice of the operational creditor the existence of a dispute, if any. We have also seen the notes on clauses annexed to the Insolvency and Bankruptcy Bill of 2015, in which “the existence of a dispute” alone is mentioned. Even otherwise, the word “and” occurring in Section 8(2)(a) must be read as “or” keeping in mind the legislative intent and the fact that an anomalous situation would arise if it is not read as “or”. If read as “and”, disputes would only stave off the bankruptcy process if they are already pending in a suit or arbitration proceedings and not otherwise.”



“It is clear, therefore, that 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”

In in the same ruling, it has been also that,

“Therefore, the adjudicating authority, when examining an application under Section 9 of the Act will have to determine: (i) Whether there is an “operational debt” as defined exceeding Rs.1 lakh? (See Section 4 of the Act) (ii) Whether the documentary evidence furnished with the application shows that the aforesaid debt is due and payable and has not yet been paid? and (iii) Whether there is existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before the receipt of the demand notice of the unpaid operational debt in relation to such dispute?”

“If any one of the aforesaid conditions is lacking, the application would have to be rejected.” (Emphasis is ours).



8. Shri P. Vikram Ld. Counsel for the corporate debtor would contend vehemently, that that a pre-existing dispute as to supply of material by the operational creditor has been raised by the corporate debtor, besides arbitration proceeding filed before the receipt of the demand notice of the unpaid operational debt in relation to such dispute is pending, as such the present petition is liable to be dismissed.
9. Shri Pradnyesh G. Sabnis, Ld. Counsel for the operational creditor, firstly, would contend that neither a pre-existing dispute as to the supply of material exists nor the pleas such as pre-existence of dispute or pendency of Arbitration proceedings in relation to the operational debt were not even raised by the corporate debtor in its reply to the demand notice of the operational creditor and nextly, that pendency of arbitration proceedings in respect of the old contract, *supra*, has been as mentioned in the Petition, and that the same has nothing to do with the subject dispute, hence both the pleas being baseless are liable to be rejected.
10. In the light of the submissions as above, we have carefully perused the demand notice dated 16/11/2019, its reply dated 30/11/2019 and also the reply of the operational creditor to the reply of the corporate debtor dated 09/12/2019, and did not find either of the pleas now raised by the Ld. Counsel for the corporate debtor, and the only plea we found raised was that there is



no liability to pay the sum of Rs.13,57,00,000 and the alleged liability cannot be considered as operational debt. We therefore find no force in the submission of the Ld. Counsel for the corporate debtor that it had raised a pre-existing dispute as to supply of material by the operational creditor besides arbitration proceeding filed before the receipt of the demand notice of the unpaid operational debt in relation to such dispute.

11. Here we refer to section 8 (2) of I&B Code, which is as below.

“(1) An operational creditor may, on the occurrence of a default, deliver a demand notice of unpaid operational debt or copy of an invoice demanding payment of the amount involved in the default to the corporate debtor in such form and manner as may be prescribed.

(2) The corporate debtor shall, within a period of ten days of the receipt of the demand notice or copy of the invoice mentioned in sub-section (1) bring to the notice of the operational creditor— A bare reading of the above provision states that, the corporate debtor shall, within a period of ten days of the receipt of the demand notice or copy of the invoice mentioned in sub-section (1) bring to the notice of the operational creditor—

(a) existence of a dispute, ¹[if any, or] record of the pendency of the suit or **arbitration proceedings filed before the receipt of such notice or invoice in relation to such dispute;**

12. The corporate debtor herein since failed to satisfy the requirement of bringing to the notice of the operational creditor of existence of a dispute, ¹[if

any, or] record of the pendency of arbitration proceedings filed before the receipt of such notice, is not entitled to raise the said pleas in its counter.

13. That apart, a perusal of the claim statement filed before the Arbitration Tribunal, reveals that the said arbitration proceedings which the corporate debtor is referring to relate to Agreement dated 31.07.2010, the Supplementary Agreement No.1 dated 20.04.2012 and the Supplementary Agreement No.2 dated 27.01.2014 with the Operational Creditor, which are also called as Old Contracts, and the subsequent contract namely, the Agreement dated 29.07.2016 also called as the new contract, which is the subject matter of the demand notice dated 16/11/2019, in not the subject matter of the said Arbitration Proceedings. Hence we hold that no arbitration proceeds in respect of the subject dispute has been pending by the time of receipt of the demand notice by the corporate debtor.

14. It is needless to state that baring the pleas stated, *supra*, which can be considered in a petition filed under section 9 of I&B Code, have neither raised nor involved. .

15. Therefore, following the ruling in Mobilox (*supra*), as no materiel has been placed before us as to existence of a pre-existing dispute between the parties or the record of the pendency of arbitration proceeding filed before

the receipt of the demand notice of the unpaid operational debt , the company petition is liable to be ordered,.

16. Hence, we admit this Petition under Section 9 of I&B Code, 2016, declaring moratorium for the purposes referred to in Section 14 of the Code, with following directions: -

- (A) Corporate Debtor, M/s Nagai Power Private Limited is admitted in Corporate Insolvency Resolution Process under section 9 of the Insolvency & Bankruptcy Code, 2016,
- (B) The Bench hereby prohibits the institution of suits or continuation of pending suits or proceedings against the Corporate Debtor including execution of any judgment, decree or order in any court of law, Tribunal, arbitration panel or other authority; transferring , encumbering, alienating or disposing of by the Corporate Debtor any of its assets or any legal right or beneficial interest therein; any action to foreclose, recover or enforce any security interest created by the Corporate Debtor in respect of its property including any action under Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002); the recovery



of any property by an owner or lessor where such property is occupied by or in possession of the corporate Debtor;

- (C) That the supply of essential goods or services to the Corporate Debtor, if continuing, shall not be terminated or suspended or interrupted during moratorium period.
- (D) Notwithstanding anything contained in any other law for the time being in force, a license, permit, registration, quota, concession, clearances or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license, permit, registration, quota, concessions, clearances or a similar grant or right during the moratorium period.
- (E) That the provisions of sub-section (1) of Section 14 shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.



- (F) That the order of moratorium shall have effect from the date of this order till the completion of the Corporate Insolvency Resolution Process or until this Bench approves the Resolution Plan under Sub-Section (1) of Section 31 or passes an order for liquidation of Corporate Debtor under Section 33, whichever is earlier.
- (G) That the public announcement of the initiation of Corporate Insolvency Resolution Process shall be made immediately as prescribed under section 13 of Insolvency and Bankruptcy Code, 2016.
- (H) The Operational Creditor failed to name any one as IRP and has requested the Tribunal to appoint one for the CIRP. The IBBI has recommended a panel of IRPs for appointment as IRP. In compliance with section 16(3)(a) of the Code in order to avoid delay, this Tribunal appoints Shri **Purnachandra Rao Kethe** having registration No.IBBI/ IPA- 002/ IP- N00404/ 2017-2018/ 11176, having address at Flat No.503, SS Residency, Shantinagar, Masab Tank, West Marredpally, Telangana – 500028; email : kpcrao.india@gmail.com as IRP. Proposed IRP shall file Form-B issued by the IBBI within three days hereafter. Thus, there is compliance of Regulation 7A of IBBI (Insolvency Professionals) Regulations, 2016, as amended. Therefore,



the proposed IRP is fit to be appointed as IRP since the relevant provision is complied with.

The petitioner is directed to pay a sum of Rs.1,00,000/- (Rupees one lac only) to the Interim Resolution Professional to meet out the expenses to perform the functions assigned to him in accordance with Regulation 6 of IBBI (Insolvency Resolution Process for Corporate Person) Regulations, 2016. This shall, however, be subject to adjustment by the Committee of Creditors as accounted for by Interim Resolution Professional and shall be paid back to the petitioner.

Accordingly, this Petition is admitted.

17. Registry to send a copy of this order to the Registrar of Companies, Hyderabad for appropriately changing the status of Corporate Debtor herein on the MCA-21 site of Ministry of Corporate Affairs.


VEERA BRAHMA RAO AREKAPUDI
MEMBER (TECHNICAL)


DR. N.V. RAMAKRISHNA BADARINATH
MEMBER (JUDICIAL)

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