

**NATIONAL COMPANY LAW TRIBUNAL
AMARAVATHI BENCH**

PRESENT: HON'BLE JANAB MOHAMMED AJMAL - MEMBER JUDICIAL

ATTENDANCE-CUM-ORDER SHEET OF THE HEARING HELD ON 13.12.2019 AT 10.30 AM

TRANSFER PETITION NO.	TCP (IB) NO. 82/9/AMR/2019
COMPANY PETITION/APPLICATION NO.	CP(IB) NO. 123/9/HDB/2018
NAME OF THE COMPANY	K.P.R Chemicals Ltd
NAME OF THE PETITIONER(S)	Sravanthi Infratech Pvt Ltd
NAME OF THE RESPONDENT(S)	K.P.R Chemicals Ltd
UNDER SECTION	9 OF IBC

Counsel for Petitioner(s):

Name of the Counsel(s)	Designation	E-mail & Telephone No.	Signature

Counsel for Respondent(s):

Name of the Counsel(s)	Designation	E-mail & Telephone No.	Signature

ORDER

No representation for the Petitioner. Counsel for the Respondent present. Order pronounced vide separate sheets. The Company Petition is admitted.


MEMBER JUDICIAL

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**NATIONAL COMPANY LAW TRIBUNAL
AMARAVATI BENCH AT HYDERABAD**

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**TCP No. 82/9/AMR/2019
[CP (IB) No. 123/9/HDB/2018]**

In the matter of K. P. R CHEMICALS LIMITED

&

In the matter of a Petition under Section 9 of Insolvency and Bankruptcy Code, 2016, read with Rule 6 of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016

Between:

Sravanthi Infratech Private Limited
Registered Office: LG Floor, Rider House,
136, Sector-44,
Gurgaon – 122 002
NCR Delhi.

... **Petitioner / Operational Creditor**

and

K.P.R Chemicals Limited
Registered Office: S.No. 22/3 & 31/1,
Biccavolu (Village & Mandal) – 533 343
East Godavari District,
Andhra Pradesh

... **Respondent / Corporate Debtor**

Date of Order: 13.12.2019

C O R A M:

Hon'ble Janab Mohammed Ajmal, Member Judicial

Appearance:

For Applicant (OC) : Mr. N. B. Sudarshan, Advocate
For Respondent (CD) : Mr. Challa Gunaranjan, Advocate

ORDER

In this Petition under section 9 of the Insolvency & Bankruptcy Code, 2016 (the Code for short) an Operational Creditor (OC) seeks Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor (CD).

2. The facts culminating in the petition may thus be stated. The Petitioner is a vertically integrated organization offering end-to-end engineering solutions for in house development of Thermal, Gas, Hydro and Wind Energy based power generation projects in India. It also offers Engineering, Procurement and Construction (EPC) services including Consultancy services on feasibility and design development on turnkey basis to both in-house projects as well as external developers. The Corporate Debtor had invited International Competitive Bids by publishing advertisement in newspapers on 13.12.2010 for setting up a 225 MW gas based combined cycle power station at Bikkavolu, East Godavari District, Andhra Pradesh and had issued a corrigendum thereafter on 05.12.2010. The Petitioner was the lowest bidder. The Respondent awarded the contract for execution of the aforementioned project to the Petitioner and a Letter of Award (LoA) was granted on 24.12.2010 for an amount of Rs. 827 Crores. They comprised of four Engineering Procurement and Construction (EPC) contracts for offshore and onshore Equipment Supply Contract for a value of Rs. 687 Crores; Civil and Construction Works Contract amount to Rs. 80 Crores; Engineering, Custom Clearance, Erection, Testing and Commissioning Service Contract for Rs. 57 Crores and Transportation Services for Offshore Equipment Contract for Rs. 3 Crores. The contracts were signed between the Petitioner and Respondent on 09.02.2011. Several obligations and conditions for payment were enumerated therein. However, the Respondent did not release any of the scheduled payments after 25.02.2011. The Respondent only paid an amount of Rs.50.15 Cores in instalments, which was not even the entire advance of 10% that Respondent was obliged to provide immediately after signing the contract. As result of such breach of contract the Respondent owes an amount of Rs.1292,13,13,000/- to the Petitioner. To complete the project the Petitioner had engaged various vendors and had contracted with them and given them various sub-contracts to meet the strict timeline of the EPC Contract. Due to non-payment by the Respondent, various sub-contracts had raised litigations against the Petitioner, which led the

Petitioner to suffer huge losses and damages. This being an operational debt the Petitioner issued a notice dated 02.07.2018 in Form-3, under section 8 of the Code. The notice was delivered at the registered office of the Respondent Company as well as to its Managing Director respectively on 09.07.2018 and 11.07.2018. The notice was not responded to. The Petitioner accordingly came up with the present petition on 03.12.2018.

3. The Respondent being noticed appeared and contested the petition by filing a counter. It is pleaded that, the Petitioner itself stated the alleged debt to have fallen due on 09.02.2011 and the present petition was filed only as an afterthought on 03.12.2018 i.e. more than 7 years after the alleged debt fell due. As such the Petition is hopelessly barred by limitation. Further, the petitioner stated that the last correspondence had taken place on 10.04.2013. Yet the petitioner had not taken any action whatsoever to claim any dues, until filing of the present Petition more than 5 years after the alleged last correspondence. The alleged due as claimed by the Petitioner are under various heads, none of which are an operational debt as defined under Section 5(21) of the Code. Further many conditions were enumerated in the contracts and unless all the conditions were met for a certain milestone, the payment for such milestone, and the subsequent milestones could not arise. The Petitioner was to complete the works including commissioning of the open cycle plant within 12 months and the combined cycle plant within 14 months from the date of issuance of the Notice to Proceed and after the receipt of the advance of 10% of the total contract price. As per Clause 4.2 of the LoA, an interest free advance was to be paid by the Respondent upon acceptance of the LoA and furnishing of the required security by the Petitioner towards performance of the contract. However, the petitioner had never furnished the security for the performance of the contract. As such, there was non-fulfilment of conditions and reciprocal obligations by the Petitioner for the first milestone itself and hence, the question of adherence to subsequent payment milestones would not arise. On 31.07.2011, the Petitioner issued a notice of suspension of the contracts

on the ground that an amount of Rs. 32.55 Crores was pending as part of 10% advance that was to be paid by the Respondent. The same day, all the EPC activities were immediately stopped by the Petitioner and have not been completed till date. Having never furnished any security, which also constitutes a breach of the assurance given by the Petitioner, the petitioner now could not be allowed to take advantage of its own lapses and claim that it was constrained to suspend the EPC Contracts. The Petitioner raised claims on un-quantified, un-crystallised and vague heads such as demobilization expenses, cost of suspension, interest of delayed reimbursement and vendors payment, potential claims and loss of income without any substantiation whatsoever and such claims cannot be quantified unless adjudicated. The Petitioner for a period of over seven years has not taken any steps for initiating such adjudication before any competent forum. The Petitioner submitted Billing Break Up (BBU) to the Respondent on 03.01.2012, and the Petitioner had requested the Respondent's acceptance of the same, by which time the EPC Contracts had already been suspended itself. Having never raised any demand under the BBU and considering the fact that the third payment milestone was to be paid on a pro-rata basis, the Respondent was never under any obligation to pay any amount. The Petition thereafter deserves to be rejected. The Petition was filed before the NCLT, Hyderabad Bench and was transferred to this Tribunal, after its establishment.

4. The rival pleadings raise the following issues for determination.
 - I. Whether the Company Petition is maintainable?
 - II. Whether the Respondent owed an Operational Debt to the Petitioner?
 - III. Whether the Company Petition is barred by limitation?
 - IV. To what relief the Petitioner is entitled?

Issue Nos. I & II:

5. Both the issues being interlinked are taken up together for the sake of brevity and convenience. Admittedly the parties on 09.02.2011 entered into an EPC contract for equipments supplied in civil and construction works, transportation services as well as erection, testing and commissioning service contract. As per the terms of schedule of payment the Respondent was to pay 82.7 crores upon execution of the contract. The Respondent admittedly has paid 50.15 crores by 25.02.2011 i.e. within two weeks of signing of the contract. Subsequent to that no payment has been made. The contract was for EPC as well as civil and construction works including commissioning and civil contract. The Respondent was to make periodical payments to the Petitioner for execution of the contract as the work progressed. An operational debt is defined under section 5(21) of the Code. It *inter alia* means a claim in respect of provision of goods and services. The payments to be made by the Respondent were in respect of the goods procured and service rendered by the Petitioner. The payment therefore would constitute an operational debt. As against the initial payment of 82.7 crores, the Respondent paid an amount of Rs. 50.15 crores. There has been a default in payment of 32.12 crores for the first milestone. The payment for the first milestone was in the nature of an interest free advance. Unless the full payment was made, the Petitioner could not have been expected to commence the work. Despite that the Petitioner had contacted outside agencies for supply of materials and machinery for execution of the contract and eventual completion of the project. The fact that the Respondent did not fulfil the payment for the first milestone, itself indicates that it defaulted in payment of an operational debt. The Petitioner issued a letter on 30.07.2011 to the following effect.

Dear Sir,

This is in reference to the our letter dated 15.02.11 regarding initial advance payment, even after five months of continuous follow up with you, the balance payment of Rs. 32.55 Crores have not been received against initial advance.

Thus the 100% advance has not been received by SIPL and the contractual obligation as per clause 5.1 of the contract has not fulfilled by M/s KPR Chemicals Limited.

Therefore Sravanthi Infratech Private Limited hereby notifies to you that all the EPC activities for the KPR Chemicals Limited (225 MW Combined Cycle Power Project Project) will be under suspension till the all the contractual obligation are fulfilled by you.

Kindly acknowledge the receipt of this notice.

Thanking you.

Yours Sincerely,

For Sravanthi Infratech Private Limited

Authorized Signatory

6. The Respondent has not issued any reply to the suspension notice nor made any payment. The notice dated 30.07.2011 was issued in terms of para15.2 of the agreement, which is to the following effect.

“Termination upon Non-Payment by owner. If owner fails to pay to Contractor any payment as required hereunder and such failure continues for 30 days after written notice thereof has been given to Owner by Contractor, then Contractor shall give ten days’ prior written notice thereof to Owner and the Financing Parties, and thereafter may stop all works until the Contractor receives payment of all amounts then due plus reasonable suspension and resumption expenses. Owner shall be responsible for reimbursement of all costs incurred by Contractor as a result of the stoppage of works. If performance of the works is suspended by Contractor pursuant to this Article 15.2, Owner will shall authorize a scope Change Order making an equitable adjustment to the Scheduled Unit(s) Completion Date, scheduled facility Completion Date and the Contract Schedule and required reasonable adjustments to one or more of the Contract Price, the Terms of Payment and any relevant terms and conditions of this Agreement, as applicable. If such suspension continues uninterrupted for at least four months, or if two or more suspensions exist for an aggregate of at least six months, contractor may terminate this Agreement; provided that contractor shall give the Financing Parties a further 60 days prior written notice, and opportunity to cure, before terminating this Agreement. In the event of such a termination by Contractor. Owner shall pay to contractor (or contractor may retain) such amounts as are required pursuant to Article 4.3 hereof.”

7. The Petitioner i.e., the contractor did not choose to terminate the contract as provided under para 15.2 or 15.4 of the agreement. The owner i.e., the Respondent could also terminate the contract under the termination clause 15.1 or 15.3.

“15.1 **Termination for Owner’s Convenience.** Owner may for its convenience terminate any part of the works or all remaining works hereunder at any time upon at least 30 days prior written notice to contractor specifying the part of the works to be terminated and the effective date of termination. Upon receipt of such notice, contractor shall promptly initiate steps to stop performance of the terminated works. In the event of a partial termination, contractor shall continue to execute that part of the works not terminated. In case of a termination of part of the works. Owner will shall authorize a scope change order making reasonable adjustments to one or more of the Scheduled Unit(s) competition date, scheduled facility completion dates, the contract price, the contract schedule and any other affected provision of this Agreement, as applicable. In the event of termination by owner under this Article 15.1, owner shall pay to contractor (or contractor may retain) such amounts as are required pursuant to Article 4.3 hereof.

xxx xxx xxx

- 15.3 **Termination upon Contractor’s Material Breach.** In the event contract is adjudged bankrupt or insolvent, or if contractor makes a general assignment for the benefit of its creditors, or if a trustee or receiver is appointed for contractor or for any of its property, or if a proceeding is commenced to reorganize under the bankruptcy or similar laws, or if contractor fails to supply sufficient skilled workers or suitable materials or equipment to meet the standards for the works set forth in this agreement, or if contractor fails to make payments to suppliers and material subcontractors, or if contractor is not proceeding with all due diligence to achieve facility completion by the facility completion deadline, or if contractor disregards any material provision of any applicable law, or if contractor otherwise commits a material breach of any of the terms of this agreement, owner may, without prejudice to any other right or remedy owner may have hereunder or at law or in equity, at any time terminate this agreement if contractor fails to remedy, or commence to remedy, any such failure or breach within 30 days after written notice to contractor of such failure or breach, stating the reasons for such failure or breach, or if such failure or breach cannot be remedied within such 30 days, thereafter fails to continue diligently to pursue such remedy.”

8. It is not in dispute that neither of the parties have terminated the contract. The EPC contract is a continuous contract which could only be terminated by the termination clause or upon fulfilling of the contract. Efflux of time has no application in such a contract and the contract doesn't stipulate that lapse of time would have any bearing on its validity. In the instant case as already indicated, the Respondent defaulted in payment for the first milestone. The Petitioner was precluded from fulfilling and executing the contract. The Respondent did not terminate the contract as per the clauses of termination. Therefore the contracts between the parties still subsist and the Respondent owes an operational debt to the Petitioner under the contractual terms. The Petition therefore is maintainable. The Respondent did not reply to the notice dated 02.07.2018 issued by the Petitioner under section 8 of the Code. Therefore its pleadings that the Petitioner did not adhere to its part of the contract would not constitute a pre-existing dispute as contemplated under section 8(2)(a) of the Code. Rather the initial default by the Respondent had the cascading effect of derailing the commencement and execution of the contract. Both the issues are accordingly answered in the affirmative.

ISSUE No. III:

9. It is contended by the Respondent that the claim was barred by limitation. As already held in the foregoing issues, the contract between the parties subsist and the Respondent is bound under the contracts to make payment. It has already been held that the Respondent had defaulted in payment of an operational debt. Since the contracts subsist and the Respondent has not chosen to terminate it, the claim under the contract would also subsist and would not get barred by efflux of time. The claim accordingly would not be barred by limitation and is due and payable. This issue is answered in the negative.

ISSUE No. IV:

10. In view of the foregoing findings the Company Petition observes to be admitted. The petitioner has proposed Mr. Devvart Rana, as Insolvency Resolution Professional (IRP). Hence ordered.

ORDER

The Company Petition be and the same is admitted on contest.

- i. The Corporate Insolvency Resolution Process of the respondent shall commence from this date and shall be completed within 180 days hence, as provided under Section 12(1) of the Code.
- ii. Mr. Devvart Rana, [Registration No. IBBI/IPA-002/IP-PN00680/2018-2019/12025], having office at Apartment No. 4 and 5, Swastik Apartments, 1056, Ward No. 8, Mehrauli, New Delhi-110 030, e-mail ID: devvartrana@gmail.com is appointed as the Interim Resolution Professional. No disciplinary proceeding is pending/proposed against him as per the information available in the IBBI website.
- iii. He is requested to furnish his consent in Form No.2.
- iv. He is directed to take charge of the Respondent/Corporate Debtor's management forthwith and take necessary steps in furtherance of the CIRP in terms of Sections 13(2), 15, 17, 18 and 20 of Code and Rules made thereunder.
- v. Moratorium under Section 14 of the Code in respect of the Respondent is hereby declared.
- vi. The Directors, Promoters or any other person(s) associated with the management of Respondent/Corporate Debtor shall extend all assistance and cooperation to the IRP as stipulated under section 19 of the Code for effective discharge of his functions thereunder.
- vii. The Registry shall to communicate the order to the Petitioner/Financial Creditor and the Respondent/Corporate Debtor forthwith.

- viii. The Registry shall also send a copy of this order to the Registrar of Companies, Andhra Pradesh for effecting necessary alterations in the status of the Respondent/Corporate Debtor in relevant records for general information.
- ix. The petitioner/OC and the Registry are also directed to send the copy of this order to IRP for necessary compliance.
- x. There would however be no order as to costs.

Sd/-

MOHAMMED AJMAL
MEMBER JUDICIAL