SL. No.1

NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH
COURT HALL NO: II

Hearing Through: VC and Physical (Hybrid) Mode

CORAM: SHRI. RAJEEV BHARDWAJ – HON'BLE MEMBER (J)
CORAM: SHRI. SANJAY PURI - HON'BLE MEMBER (T)

ATTENDANCE-CUM-ORDER SHEET OF THE HEARING OF NATIONAL COMPANY LAW TRIBUNAL, HYDERABAD BENCH, HELD ON 08.01.2025 at 10:30 AM

TRANSFER PETITION NO.	
COMPANY PETITION/APPLICATION NO.	**CP (IB) No. 34/9/HDB/2024**
NAME OF THE COMPANY	**Zytech Solar India Pvt Ltd**
NAME OF THE PETITIONER(S)	**German Solar Asia Pvt Ltd**
NAME OF THE RESPONDENT(S)	**Zytech Solar India Pvt Ltd**
UNDER SECTION	9 of IBC

ORDER

Orders pronounced, recorded vide separate sheets. In the result, the CP(IB) No. 34/9/HDB/2024 is dismissed.

Sd/-
MEMBER (T)

Sd/-
MEMBER (J)

Vamsi

IN THE NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH - II, HYDERABAD

C.P.(IB) No.34/9/HDB/2024

Under Section 9 of the Insolvency and Bankruptcy Code, 2016

In the matter of:

M/s. GERMAN SOLAR ASIA PTE LTD,
18 Boon Lay Way, #06-107,
Tradehub 21, Singapore – 609966,
Represented by its SPA Holder Mr.Krishna Thimmaiah

…Applicant/Operational Creditor

A n d

M/s.ZYTECH SOLAR INDIA PRIVATE LIMITED,
P.41, Chandragiri Colony, Tirumalagiri,
Secunderabad, Telangana, India – 500016
CIN-U74930TG2014PTC096987
Represented by its Managing Director
Mr.Aadesh Gautam Kothari

…Respondent/Corporate Debtor

Date of Order: 08.01.2025

Coram:

Sri Rajeev Bhardwaj, Hon'ble Member (Judicial)
Sri Sanjay Puri, Hon'ble Member (Technical)

Counsel/Parties present:

For the Applicant	:	Mr. Harshitha Datla O/o. Mr.Chandrasen, Advocate
For the Respondent	:	Mr. Shireen Sethan Baria, Advocate

P e r: Rajeev Bhardwaj, Member (Judicial)

O R D E R

1. This Petition under Section 9 of the Insolvency and Bankruptcy Code, 2016, is filed by M/s. German Solar Asia Pte Ltd (**Applicant/ Operational Creditor**) for initiating Corporate Insolvency Resolution Process (**CIRP**) against M/s. Zytech Solar India Private Limited (**Respondent/Corporate Debtor**) for not paying the operational debt amounting to INR 2,79,15,771.47/- (Rupees Two Crore Seventy-Nine Lakh Fifteen Thousand Seven Hundred Seventy-One Rupees and Forty-Seven Paise Only) as of 21.06.2023.

2. The Operational Creditor, a private company incorporated on 18.05.2015 in Singapore (with Identification No. 201523429H), is engaged in the wholesale supply of PV Solar Products and Systems.

3. The Corporate Debtor, a private company incorporated on 24.12.2014 under the Companies Act, 2013 (with CIN No. U74930TG2014-PTC096987), is engaged in the manufacture, export, import, sale, and installation of solar products, components, and related equipment such as solar panels, cells, batteries, and inverters.

Applicant's Case :

4. The Corporate Debtor had approached the Operational Creditor in 2017 with an oral request for the supply of solar cells and the Operational Creditor agreed for the same. Since then, the two parties have maintained a running account for the supplies made, wherein payment terms were agreed to be either in advance or on the invoice date.

5. The Operational Creditor supplied solar cells as per the orders placed by the Corporate Debtor and raised invoices accordingly. However, the Corporate Debtor has failed to make payments for the supplies made since the year of 2019.

6. The Corporate Debtor did not settle the dues for the solar cells that have been supplied, which prompted the Operational Creditor to send an email on 16.12.2021, attaching a table of outstanding dues and requesting payment. On the same day, i.e., 16.12.2021, the Corporate Debtor acknowledged the debt and proposed settling the account of debt for an amount of USD 50,000, which has been rejected by the Operational Creditor.

7. Subsequently, the Operational Creditor issued a formal Demand Notice under Section 8 of the Insolvency and Bankruptcy Code, 2016, on 21.08.2023, which was duly served on the Corporate Debtor at its registered address. An email dated 21.08.2023 was also sent to the Corporate Debtor in this regard.

8. Despite the statutory period of 10 days having expired, the Corporate Debtor failed to repay the dues and instead issued a reply dated 21.09.2023 raising a dispute. In the said reply, the Corporate Debtor denied any pending dues with the Applicant, but the delivery of solar cells has not been disputed. Moreover, in the last but one paragraph of their reply notice, the Corporate Debtor admitted that complete payment for invoice no.PIGSA20190925002V1 is yet to be made. Therefore, there is no pre-existing dispute, as claimed by the Corporate Debtor in their reply notice.

9. The account of the Corporate Debtor with the Operational Creditor is a single account for all supplies of solar cells from 2017. The debt for the three invoices fell due on the respective dates mentioned therein. The last payment received from the Corporate Debtor was on 10.09.2020, and the last date of acknowledgment of debt was on 16.12.2021.

10. The total principal debt as of 21.06.2023 amounts to USD 340,388.50 (INR 2,79,15,771.47), along with interest calculated at 18% per annum till May 31, 2023, from the respective dates of the invoices (22.08.2019, 27.08.2019 and 14.11.2019).

11. The details of the transactions, including the outstanding amounts and interest are as follows:

    1. **Proforma Invoice No. PIGSA20190822001** dated 22.08.2019 for USD 23,212.80 (for the sale of 44,640 pieces of JA Solar Cells) – Part payment of USD 15,446.19 was received. The unpaid amount, along with interest, is USD 14,570.96 (INR 11,94,725.47 as of 21.06.2023).
    2. **Proforma Invoice No. PIGSA20190807001V1** dated 27.08.2019 for USD 156,759.75 (for the sale of 300,750 pieces of CSI Solar Cells) – Part payment of USD 77,558.18 was received. The unpaid amount, along with interest, is USD 132,800.00 (INR 1,08,24,613.80 as of 21.06.2023).
    3. **Proforma Invoice No. PIGSA20190925002V1** dated 14.11.2019 for USD 119,515.50 (for the sale of 1,974 pieces of Talesun Solar panels) – The unpaid amount, along with

interest, is USD 193,017.53 (INR 1,58,26,202.15 as of 21.06.2023).

Respondent's case :

12. The Corporate Debtor has denied about any outstanding due payable to the Operational Creditor. It is submitted that USD 25,444.80 was paid on 25.02.2020 against Proforma Invoice No. PIGSA20190822001, which was initially issued for USD 23,212.80. The copy of proof of payment is the receipt **Annexure-2**.

13. The payment of USD 50,000 on 05.12.2019 was against the Proforma Invoice No.PIGSA20190610001 vide bank receipt **Annexure-4**.

14. Furthermore, the Operational Creditor issued Credit Note No. CNGSA20191206001 **Annexure-5** dated 06.12.2019 for an amount of USD 105,305.50 concerning Proforma Invoice No. PIGSA2019-0610001. As the amount due under Proforma Invoice No. PIGSA20190610001 has been partially paid and subsequently adjusted through the issuance of the credit note; the Corporate Debtor asserts that the entire liability under this invoice has been settled. Therefore, no further amounts are outstanding or payable.

15. The Corporate Debtor has also made an advance payment of USD 45,000 towards Proforma Invoice No. PIGSA20190925002/Commercial Invoice No. CI-ZLTH201910005 dated 04.11.2019, which amounted to USD 119,515.50. This payment was made via a transaction **Annexure-7** on 27.09.2019.

16. It is submitted that there has been no further acknowledgment or payment from the Corporate Debtor towards the remaining balance stated in Invoice No. PIGSA20190925002. The amount claimed by the Operational Creditor under this invoice is barred by limitation and is also below the threshold limit of Rs.1 crore. The CD denies the liability for further payment towards Proforma Invoice No. PIGSA20190925002**,** as the amount claimed is not only time-barred but also fails to meet the requisite threshold.

17. We have heard the Learned Counsels for the Operational Creditor and the Corporate Debtor, and further perused the averments made in the petition, reply filed by the Corporate Debtor and rejoinder filed by the Operational Creditor.

<u>Findings</u> :

18. The supply of solar cells against the bills shown in the table below have not been denied by the Corporate Debtor.

Bill No.	Proforma Invoice No.	Date	Product Details	Bill No	Bill Amount (in USD)	Paid Amount (in USD)	Balance amount (in USD with interest	Balance amount (INR)
1	PIGSA2019-0822001	22.08.2019	44640 Pcs JA Solar Cells	MP/RGNNSA-SE0017105	23.212.80	15.446.19 (last date of payment is 10.09.2020	14570.96	11,94,725.47
2	PIGSA2019-0807001VI	27.08.2019	300750 Pcs CSI Solar Cells	19SEB365926	156.759.75	77.558.18 (last date of payment is 10.09.2020	132.800	1,08,24,613.80
3	PIGSA2019-925002VI	14.11.2019	1974 Pcs Talesun Solar Panels	19SEBKK42452H	119.515.50	-	193.017.53	1,58,26,202.15

19. However, the Corporate Debtor claims that the entire payment against Bill Nos. 1 to 3 have already been made. This payment is also reflected in the Ledger Account **Annexure-1** of the counter, but the stand of the Operational Creditor is that such payment is relating to some other bills.

20. In view of the nature of dispute, the terms and conditions of the contract between both the parties become material. There is no written agreement between the parties. However, the contract can be either oral or written. When the contract is oral, its enforceability will come into question if there is dispute. The terms and conditions of an oral contract are determined by the offer and acceptance of the terms.

21. The Operational Creditor was supplying the solar products on receiving oral requests from the Corporate Debtor. The disputed goods were supplied through bills of lading, **Annexure 3** dated 21.08.2019, **Annexure 5** dated 31.08.2019 and **Annexure 7** dated 07.11.2019 against proforma invoices, **Annexure 2** dated 27.08.2019, **Annexure 4** dated 22.08.2019 and **Annexure 6** dated 04.11.2019, respectively.

22. When there is oral agreement between the parties, it is to be proved by the Operational Creditor that the payments were being made by maintaining running account and not on bill to bill basis. In case of running account, the account is settled when the work is finished. However, there is nothing on record to determine that both the parties agreed that final clearance of the account will be made after finishing of the work. The Operational Creditor has also not relied upon the invoices to show that this was the understanding between them because proforma

bill is only a preliminary estimate and it is the invoice which is the request for payment and it is sent only after confirmation of the sale.

23. Thus, it is to be proved that amount is due qua Bill Nos.1 to 3 and not against other bills. Many transactions on different dates took place between both the parties regarding supply of solar cells. However, it is not proved that amount was due against any particular bill. Moreover, the Operational Creditor has not relied upon other bills to prove that Corporate Debtor has not made payment only against the impugned bills.

24. When the Corporate Debtor has admitted to making some payments, it is the responsibility of the Operational Creditor to prove that no payments were made against Bill Nos. 1 to 3. However, no such evidence has been provided.

25. Besides, the Respondent has already raised the issue of pre-existing dispute between the parties, even before issuance of demand notice under Section 9 of IBC by the Applicant. In response to the e-mail **Annexure 10** dated 16.12.2021 about the non-payment of Bill Nos.1 to 3, the Corporate Debtor has stated that they will be able to pay only USD 50,000 for settling the account after excluding interest part. Therefore, it is evident that the Corporate Debtor was interested to settle the controversy by paying USD 50,000. Additionally, the Corporate Debtor has denied payment of the interest and this is also correct as interest was not part of the contract between the parties. Mere readiness of the Respondent to settle the dispute in no way amounts to admission that the amount raised vide Bills Nos.1 to 3 are genuine.

26. The Corporate Debtor can present evidence of a pre-existing dispute to the adjudicating authority. Mere fact that a reply to notice under Section 8(1) having not been given within 10 days or no reply to demand notice having been filed by the Corporate Debtor does not preclude the latter to bring relevant materials before the adjudicating authority to establish that there is preexisting dispute which may lead to the rejection of Section 9 application**.** Here reference can be made to the decisions in ***Brandy Realty Services Limited. v. Sir John Bakeries India Private Limited2022) SCC Online NCLAT 290 and Greymatter Entertainment Private Limited v. Pro Sportify Private Limited Company Appeal (At) (Insolvency) No. 1043 Of 2021***. Section 9 (5)(ii)(d) of the Insolvency and Bankruptcy Code, 2016 mandates that the adjudicating authority should reject the application if there is a pre-existing dispute with regard to an operational debt.

27. However, the pre-existing dispute must be genuine, implying that it should have existed prior to the receipt of the demand notice under Section 8 (1) of the Code ***[*Deepak Modi Vs. Shalfeyo Industries Private Limited *(2023) SCC Online NCLAT 169].*** The dispute should truly exists in fact and is not spurious, hypothetical or illusory as held by the Hon'ble NCLAT in ***Soham Polymers Private Limited Vs. Flocksur India Private Limited*** **Company Appeal (AT) (Insolvency) No. 924/2021.**

28. About the nature of dispute and evidence required to prove for successful raising of genuine dispute, the Hon'ble Supreme Court in the celebrated case of ***Mobilox Innovations Private Limited versus Kirusa Software Private Limited (2018)1 SCC 35*** has held:

51….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.

(Own emphasis)

In ***M/s.Kay Bouvet Engineering Ltd. versus Overseas Infrastructure Alliance (India) Pvt. Ltd. (2021)10 SCC 483,*** it was held:

It is thus clear that once the "Operational Creditor" has filed an application which is otherwise complete, the adjudicating authority has to reject the application under Section 9(5)(ii)(d) of IBC, if a notice has been received by "Operational Creditor" or if there is a record of dispute in the information utility. What is required is that the notice by the "Corporate Debtor" must bring to the notice of "Operational Creditor" the existence of a dispute or the fact that a suit or arbitration proceedings relating to a dispute is pending between the parties. All that the adjudicating authority is required 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 a mere bluster. It has been held that however, at this stage, the Court is not required to be satisfied as to whether the defence is likely to succeed or not. The Court also cannot go into the merits of the dispute except to the extent indicated hereinabove. It has been held that so long as a dispute truly exists in fact and is not spurious, hypothetical or illusory the adjudicating authority has no other option but to reject the application.

29. These principles have been reiterated in ***Rajratan Babulal Agarwal vs. Solartex India Pvt. Ltd. and Ors. (2023)1 SCC 115*** by holding that pre-existing dispute employed under the IBC cannot be equated with even the principle of preponderance of probability which guides a civil court at the stage of finally decreeing a suit. There is no need to find out that the case of defence of the Corporate Debtor is likely to succeed and the examination of the merits need not transcend the limited extent to find that the case of the Respondent is not to be brushed aside as spurious, hypothetical or illusory.

30. The Hon'ble NCLAT in ***Sanjay Kumar, Designated Partner of Kapasi Infracon LLP vs. Gannon Dunkerley and Co. Ltd. and Ors. Company Appeal (AT) (Insolvency) No. 1210 of 2023, decided on 30.05.2024,*** after relying upon the decision of the Apex Court in ***Mobilox Innovations Private Limited versus Kirusa Software Private Limited (2018)1 SCC 35*** came to conclusion that pre-existing dispute qualifies a pre-existing dispute to be a defence which is not spurious, mere bluster, plainly frivolous or vexatious. For arriving at this conclusion, the adjudicating authority is not required to sift the evidence like in a civil case, but the yardstick would be:

> 5. …Thus it enjoins an obligation upon the Adjudicating Authority to arrive at a prima facie satisfaction that a dispute indeed exists with regards to quality or price, which in common parlance and in matters of civil jurisdiction, would be regarded as a triable issue of fact. However, it does not call upon the Adjudicating Authority to venture into the appreciation of the merit of pre-existing dispute and embank upon the adjudication of rival contentions of parties. If the dispute is raised by the CD and if the CD shows the disputed issues of facts which require adjudication by a competent court of law, then

> Section 9 of IBC would not empower the Adjudicating Authority to take upon itself the task of sifting through the rival contentions raised and to gave a judgement upon it. However, it has to determine whether there truly exist a dispute which may or may not ultimately succeed, but at the stage of consideration of an application under Section 9 IBC the jurisdiction is limited to consideration of existence of a dispute.

31. The Hon'ble NCLAT in ***Aalborg CSP A/S versus Solar Atria Cleantech Private Limited [2020]*** ibclaw.in 96 NCLAT after relying upon the decisions in ***Mobilox Innovations Private Limited*** supra has held:

> It is clear from the Judgement of the Hon'ble Supreme Court that it is duty of the Adjudicating Authority to see whether there is 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. We are not required to be satisfied that the defence would succeed or examine the merits of the dispute. If the dispute truly exists and is not spurious, hypothetical or illusionary, the Application under Section 9 would require to be rejected. Thus, it is necessary to see if the dispute truly exists in fact. On this basis, it would be appropriate to now see if the Respondent is able to show that dispute truly exists.

32. Within the parameters of the principles explained above, the present dispute in fact is a pre-existing dispute and is not spurious, hypothetical or illusory. The Corporate Debtor is able to show prima facie that payments have been made which the Applicant has failed to prove that these are not against the Bill Nos. 1 to 3.

33. Apart from the pre-existing dispute between both the parties, the present Application is also hit by Limitation Act. The Bill Nos.1 to 3, **Annexure 2, Annexure 4** and **Annexure 6** are dated 27.08.2018, 22.08.2019 and 04.11.2019 respectively. For filing the Application under Section 9, there is a limitation of three years from the date of default under Article 137 of the Limitation Act. Once limitation starts under Article 137, it can be extended only under the Limitation Act. Here, we want to refer to the decision of the Hon'ble Supreme Court in ***Jignesh Shah and Anr vs Union of India and Anr (2019) 10 SCC 750***. Therefore, the limitation can be extended only under Section 18 of the Limitation Act or Section 25 of the Contracts Act, if the debt is time barred. The Applicant has relied upon the e-mail dated 16.12.2021, **Annexure 10**, to show that there is acknowledgement of debt within the limitation period and therefore the limitation is extended under Article 18 of the Limitation Act. The email is reproduced below:

> "***kindly remove the interest and we shall be able to pay USD 50,000 for settling the Account***".

34. The said e-mail was sent within limitation from the date of issuance of the Bills Nos.1 to 3 and therefore the e-mail can be treated as an acknowledgement of debt if it meets the requirements of Section 18 of the Limitation Act. The e-mail acknowledging a debt is as good as written communication signed by the party. However, there is no clear cut admission of the liability of Bill Nos.1 to 3 and the Respondent has only conveyed that he is ready to settle the accounts by paying USD 50,000 excluding interest. But the Applicant has failed to prove that the payment against Bill Nos.1-3 have not been made. Hence, we are of the

opinion that there is no acknowledgement of debt, and the offer to settle the account does not fall in the category of acknowledgement. Accordingly, this Application is hit by limitation.

35. The Applicant has also filed the present Application as a substitute for the recovery forum. Here, we would refer to the decisions of the Hon'ble Supreme Court of India in ***K.Kishan versus M/s.Vijay Nirman Company Private Limited (2018), ibclaw.in01SC and Transmission Corporation of Andhra Pradesh Limited versus M/s. Equipment Conductors and Cables Limited (2018), ibclaw.in 33SC.*** The IBC is not intended to be a substitute for a recovery forum. This Authority cannot be misused as an alternative for alleged debt enforcement.

36. For the reasons given above, we come to this conclusion that the present Petition is without merit. Accordingly, **CP (IB) No.34/9/HDB/2024 is dismissed.**

Sd/-
(SANJAY PURI)
MEMBER (TECHNICAL)

Sd/-
(RAJEEV BHARDWAJ)
MEMBER (JUDICIAL)

Vinod