**IN THE NATIONAL COMPANY LAW TRIBUNAL**
**KOLKATA BENCH (Court No. I)**
**KOLKATA**
**C.P (IB) No.05/KB/2021**

*An application under 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**:

**Gupta Power Infrastructure Limited (CIN** U31300WB1961PLC025104)

*... Operational Creditor*

*Versus*

**India Power Corporation Limited (CIN** L40105WB1919PLC003263)

*...Corporate Debtor*

Order Pronounced on: 17 July, 2023

**Coram:**

***Shri Rohit Kapoor, Member (Judicial)***
***Shri Balraj Joshi, Member (Technical)***

**Counsels appeared through Video Conference/Physical hearing**

| | | |
|---|---|---|
| For the Operational Creditor | : | Mr. Shaunak Mitra, Adv. |
| | | Ms. Shruti Swaika, Adv. |
| | | Ms. Iram Hassan, Adv. |
| | | Mr. S. Saraogi, Adv. |
| | | Mr. S. Ghosh, Adv. |
| | | Ms. J. Sabbah, Adv. |
| | | Ms. Y. Agarwal, Adv. |
| For the Corporate Debtor | : | Mr. Joy Saha, Sr. Adv. |
| | | Mr. R. Banerjee, Adv. |
| | | Mr. R. Banerjee, Adv. |
| | | Ms. P. Shana, Adv. |

***O R D E R***

***Per: Rohit Kapoor, Member (Judicial)***

***1.*** The Court is convened *via* hybrid mode.

***2.*** This is a Company Petition filed under section 9 of the Insolvency and Bankruptcy Code, 2016 ***("Code")*** by Mr. Susanta Kumar Sahoo, Regional Project Manager, Gupta Power Infrastructure Limited ***("Operational Creditor"),*** duly authorised *vide* Board Resolution dated 10 February, 2020 seeking to initiate Corporate Insolvency Resolution Operational Creditors ***("CIRP")*** against India Power Corporation Limited ***("Corporate Debtor")***.

***3.*** The present petition was filed on 16 December, 2020 before this Adjudicating Authority on the ground that the Corporate Debtor failed to make a payment of a sum of Rs.5,92,76,817/- (Rupees Five Crore Ninety Two Lakh Seventy Six Thousand Eight Hundred Seventeen only) *[Principal - Rs.4,76,04,630/- & Interest - Rs.1,16,72,186/-]* Interest is calculated as per terms and conditions in the tax invoice i.e., 18% per annum till 31 December, 2019.

***4.*** In part II of the Petition the authorized share capital of the Corporate Debtor is Rs. 17,00,00,00,000/- (Rupees Seventeen Hundred Crore Lakh only) with subscribed share capital of Rs. 97,37,89,640/- (Rupees Ninety Seven Crore Thirty Seven Lakh Eighty Nine Thousand Six Hundred Forty only). Part – IV of the Petition deals with the Particular of the Operational Debt.

***Submission of learned Counsel appearing for the Operational Creditor***

***5.*** The Operational Creditor is engaged in the business of rural electrification, Construction of HT & EHT Line and Substations for Power and Utilities in EPC mode. During the period of 2017-18, the Corporate Debtor approached the Operational Creditor for supply, erection, testing and commissioning of two 220/132KV AIS Substation and 132 KV Indoor Type GIS sub-stations at Burdwan District of West Bengal *[Letter of Award – A]*. The Corporate Debtor also issued work orders from time to time upon such terms and conditions as agreed between the parties.

***6.*** Accordingly, the Operational Creditor supplied the materials and completed the erection work and raised invoices. The Corporate Debtor has also issued a work completion certificate dated 05 August, 2019 *[Annexure – C]*. Further, the Corporate Debtor in discharge of its admitted liability made part payment to the Operational Creditor.

***7.*** Between January, 2018 to August, 2019, materials and services were supplied/ provided from time to time and invoices issued amount to a total sum of Rs. 21,64,21,762/- (Rupees Twenty One Crores Sixty Four Lakhs Twenty One Thousand Seven Hundred and Sixty Two only). The said invoices were duly accepted by the Corporate Debtor without any demur or objection in complete satisfaction of the materials received and utilized, details of which are as follows;

| ***SI. No.*** | ***Invoice Details*** | ***Date*** | ***Amount*** |
|---|---|---|---|
| 1. | GPIL/17-18/001 | 31.01.18 | 4,50,56,346.00 |
| 2. | GPIL/17-18/004 | 24.02.18 | 39,66,866.00 |
| 3. | GPIL/WB/URCM/001 | 26.02.18 | (41,88,521.00) |
| 4. | GPIL/17-18/005 | 28.02.18 | 6,05,07,450.00 |
| 5. | GPIL/17-18/006 | 14.03.18 | 26,94,438.00 |
| 6. | GPIL/17-18/009 | 31.03.18 | 2,45,82,434 |
| 7. | 9117318110 | 31.03.18 | 7,37,404.00 |
| 8. | GPIL/18-19/001 | 23.04.18 | 250,763.00 |
| 9. | GPIL/18-19/002 | 15.05.18 | 24,64,516.00 |
| 10. | 9118311033 | 11.06.18 | 81,75,994.00 |
| 11. | 9118311034 | 11.06.18 | 15,05,797.00 |
| 12. | GPIL/18-19/003 | 16.06.18 | 55,39,021.00 |
| 13. | GPIL/18-19/004 | 28.06.18 | 18,53,264.00 |
| 14. | GPIL/18-19/006 | 11.09.18 | 1,16,92,981.00 |
| 15. | GPIL/18-19/011 | 29.10.18 | 23,78,434.00 |
| 16. | GPIL/18-19/015 | 28.11.18 | 2,04,66,054.00 |
| 17. | GPIL/19-20/001 | 15.05.19 | 2,26,00,000.00 |
| 18. | GPIL/19-20/002 | 09.08.19 | 19,50,000.00 |
| | | ***Total Value*** | ***21,22,33,241.00*** |

***8.*** However, out of the total invoice, only a sum of Rs. 16,46,28,611/- (Rupees Sixteen Crores Forty Six Lakhs Twenty Eight Thousand Six Hundred and Eleven only) has been paid by the Corporate Debtor and material amounting to Rs. 41,88,521/- (Rupees Forty One Lakhs Eighty Eight Thousand Five

Hundred and Twenty One only) has been returned vide credit Note No. GPIL/WB/URCM/001 dated 26.02.2018 been duly accepted by the Operational Creditor leaving a balance of Rs. 4,76,04,630/- (Rupees Four Crores Seventy Six Lakhs Four Thousand Six Hundred and Thirty only). Thus, a sum of Rs. 4,76,04,630/- on account of principal has admittedly become due and payable to the Operational Creditor.

***9.*** Notice in Form 3 dated 26 August, 2019 was issued by the Operational Creditor on 02 September 2019, wherein the required details were provided and demand for a sum of Rs. 5,49,58,929.47 being the principal amount and the interest thereon till that date was made. In reply to the said notice in Form 3, an email was issued by the Corporate Debtor on 03 September 2019 making baseless and misconceived statement that some jobs were unfinished and they had engaged contractors to complete those unfinished jobs.

***10.*** In reply to the said email dated 03 September, 2019, an email was issued from the Operational Creditor on 10 September, 2019 wherein all the purported issues raised by the Corporate Debtor were dealt with and the Corporate Debtor was once again called upon to release the outstanding payments with interest. Thereafter, *vide* letter dated 13 September, 2019, another reply was made to the Operational Creditor's Demand Notice in Form 3 wherein the Corporate Debtor has completely denied the claims of the Operational Debtor with an ulterior motive and with the mala fide intent of manufacturing and creating an illusion of a dispute though there is no existing dispute regarding the outstanding dues payable to the Operational Creditor.

***11.*** Subsequently, the Corporate Debtor has issued another letter dated 03 December, 2019, wherein it has sought to terminate the various Purchase Orders and Service Orders mentioned therein. It is pertinent to mention here that the Corporate Debtor has also stated that even as per their books, a sum of Rs. 2.563 crores balance remains to the credit of the Operational Creditor which they seek not to pay in view of reasons given in their letter. The said letter been duly replied to by the Operational Creditor vide its letter dated 27 December, 2019 once again dealing with all the baseless allegations being raised by the Corporate Debtor at this stage and stating inter alia, that such purported termination of contract is not accepted and once again calling upon them to make payment of the amounts due. Subsequently, the Corporate Debtor has again issued a letter dated 23 January, 2020 in an attempt to create disputes.

***Reply filed on behalf of the Corporate Debtor***

***12.*** Nothing is due and payable by the Corporate Debtor to the Operational Creditor. On the contrary the Operational Creditor is liable to pay the Corporate Debtor the aforesaid sum of Rs. 8,31,73,530.99 it had demanded vide its own Letter dated 23.01.2020 *[see Pg. No. 221 – 227 of Form 5/Petition (Vol.2)]*, along with interest.

***13.*** Operational Creditor had defaulted in submitting Performance Bank Guarantees required under pertinent payment terms of LOA dated 08.12.2017. Further, the Operational Creditor also defaulted in submitting both the Advance Bank Guarantees required under the pertinent payment terms of the 2nd LOA dated 31.03.2018.

***14.*** The Operational Creditor admits that PBG could not be submitted at pg no.218 (Operational Creditor's Reply dt. 27.12.2019 [Pg no. 217-220] to Corporate Debtor's termination Notice dt. 03.12.2019 (Pg no. 215-216) of Application/Petition. The Operational Creditor had abandoned the contract; had not started erection work/scope under second LOA.

***15.*** The Corporate Debtor relies on paragraph 29 of the judgment of the Supreme Court of India in ***Innoventive Industries Limited vs. ICICI Bank & Anr. reported in (2018) 1 SCC 407*** and paragraph 33 of the judgment of the Supreme Court of India in ***Mobilox Innovations Private Limited vs. Kirusa Software Private Limited reported in (2018) 1 SCC 353*** to state and submit that the existence of multiple pre-existing disputes duly notified by it to the Operational Creditor via written correspondence much prior to receipt of the statutory demand notice under section 8 of the IBC sent by the Operational Creditor renders this petition/application filed by the Operational Creditor under section 9 of the IBC eminently fit for rejection.

***16.*** Reliance is placed on Paragraphs 18 – 21, 22 - 24 of the judgment of the Hon'ble National Company Law Appellate Tribunal in ***Umesh Saraf, suspended Director of Triumph Realty Pvt. Ltd. v. Tech India Engineers Pvt. Ltd. (C.A.(AT)(Insolv.) No. 548 of 2020)*** delivered on 19th October, 2020, to submit that the entire exchange of a multitude of e-mails/letters between Operational Creditor and Corporate Debtor prior to receipt of the said statutory demand notice under section 8 of the IBC corroborates the fact there was concrete existence of disputes prior to issuance of demand notice. Duly notified pre-existing dispute(s) between the parties regarding the non-completion of work and/or deficiency in product/ services and delay does exist and is (are) not spurious, hypothetical or illusory.

***17.*** Furthermore, paragraph 26 of the said judgment of the Hon'ble Appellate Tribunal in *Umesh Saraf* holds that the Code is a beneficial legislation intended to put the Corporate Debtor on its feet and it is not a mere money recovery legislation for the Creditors.

***18.*** The issues raised by the Operational Creditor itself in course of its aforesaid correspondence exchanged with the Corporate Debtor highlights the fact that the instant dispute consists of triable issues where evidence has to be led and pursed and cannot be adjudicated under the summary proceeding.

***19.*** The Operational Creditor itself has admitted in Pg. No. 5 of the instant Company Petition/Form 5 filed by it under section 9 of the Code that it had received a sum of Rs. 16,46,28,611 /- till date, amounting to 87.72 % of the contract price (Rs. 18, 76, 83, 240/-) under the LOA dated 08.12.2017. The Corporate Debtor has never issued the purported Work Completion Certificate dated 05.08.2019 [ see Page No. 154 of Petition/Form 5] that the Operational Creditor has annexed to the instant Company Petition/Application and puts the Operational Creditor to strict proof thereof.

***20.*** Furthermore, the name and designation of the purported "Authorized Signatory" who has purportedly issued the aforesaid purported "Work Completion Certificate" is not stated therein which only reinforces the fraudulent nature. The Corporate Debtor has initiated action under criminal law for the purported Work Completion Certificate dt. 05.08.2019 pg nos. 183 – 189 of Reply Affidavit for complaint dt. 26.07.2021 to jurisdictional police station, Pg nos. 190 – 196 of Reply Affidavit for complaint dt. 03.08.2021 to jurisdictional Police Commissioner, and, Pg. nos. 197 – 229 of Reply Affidavit for certified copy of, inter alia, petition filed by Corporate Debtor against Operational Creditor in terms of section 156(3) of the CrPC,1973, around 22.10.2021 (see pg. no. 206 of Reply Affidavit for filing date).

***21.*** In any event, the Corporate Debtor has raised pre-existing\ disputes between 02.08.2019 *[Page No.142, 148 of the Reply Affidavit]* & 03 September, 2021 *[Page No.160, 148 of the Reply Affidavit]* i.e. after issuance of work completion certificate & even Operational Creditor has admitted to pending / defective works during that period and also thereafter.

***22.*** The Corporate Debtor denies that it has acknowledged any debt whatsoever; Corporate Debtor has refuted any admission in letter dt. 03.12.2019 (see pg. no. 215-216 of Vol. 2 of s.9 Petition by Operational Creditor). Operational Creditor has written on 03.12.2019 *"an amount of only Rs. 2.563 crs is balance(subject to certification of the invoices), but the same is not payable to you in view of your fundamental breach of the contract, non-completion of the project, non-performance and resultant continuing damages."*( Emphasis supplied)

***23.*** The Corporate Debtor had to extend the contract twice (Pg. No. 107, Pg. No. 144 of Petition) due to the grave delay in the completion of its work under the aforesaid project contract which is entirely attributable to the defaults in compliance with the terms of the Project Contract on the part of the Operational Creditor and has already claimed from the Operational Creditor [ LD demand – see pages 221-227 , AT Pg. no. 226 , of Petition/Form 5 ]

***Analysis and Findings***

***24.*** We have heard the Ld. Counsel appearing on behalf of the Operational Creditor and the Ld. Sr. Counsel appearing on behalf of the Corporate Debtor and have perused the records.

***25.*** There exists a multitude of duly notified pre-existing disputes notified by the Corporate Debtor via Email to the Operational Creditor much prior to receipt of demand notice on 02.09.2019. The Operational Creditor has admitted to various defects and/or pending works while attempting to qualify them.

***26.*** List of pre-existing dispute raised by the Corporate Debtor bfroe the issuance of statuary demand notice dated 26 August, 2019;

| ***SI. No.*** | ***Date of communication of e-mails of disputes in services.*** | ***Disputes/Defects*** |
|---|---|---|
| 1. | March 18, 2019 *(Page 135 of the Reply Affidavit)* | - Absence of EPC representative Contractor's from work site at J.K. Nagar |
| 2. | August 02, 2019 & August 24, 2014 *(Page 142 of the Reply Affidavit)* | - Failure to resolve multiple critical punch points issue.<br>- Failure by the Operational Creditor to submit as built drawings to the Corporate Debtor, which was mutually agreed for submission by 15 August, 2019.<br>- Failure of the Operational Creditor to replace damaged isolation insulation stack<br>- Failure to submit fire fighting clearance to the Corporate Debtor (email dated 13 March, 2019) |
| 3. | August 10, 2019 (Page 149 of the Reply) | Corporate Debtor intimated the Operational Creditor that 132 kV GIS outgoing bay E05 Circuit Breaker Semaphore |

| | | |
|---|---|---|
| | | indicator on LCC Panel was defective. |

***27.*** Coming to the plea of pre-existing dispute, we seek to rely on ***Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software (P) Limited***[1] where the Hon'ble Apex Court held that;

*"33. The scheme under Sections 8 and 9 of the Code, appears to be that an operational creditor, as defined, may, on the occurrence of a default (i.e., on nonpayment of a debt, any part whereof has become due and payable and has not been repaid), deliver a demand notice of such unpaid operational debt or deliver the copy of an invoice demanding payment of such amount to the corporate debtor in the form set out in Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 read with Form 3 or 4, as the case may be (Section 8(1)). Within a period of 10 days of the receipt of such demand notice or copy of invoice, the corporate debtor must bring to the notice of the operational creditor the existence of a dispute and/or the record of the pendency of a suit or arbitration proceeding filed before the receipt of such notice or invoice in relation to such dispute (Section 8(2) (a)).* ***What is important is that the existence of the dispute and/or the suit or arbitration proceeding must be pre-existing – i.e. it must exist before the receipt of the demand notice or invoice, as the case may be. ……..***"

The Hon'ble Supreme Court in ***Mobilox*** (**Supra**) has observed that all that the Adjudicating Authority has to see at 'the stage of Admission' 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 or a moonshine defence unsupported by tangible materials/evidence***.

***28.*** The facts and documents referred herein above, when seen on the basis of law laid down by the Hon'ble Supreme Court on pre-existing dispute, is not feeble

[1] 2017 (1) SCC onLine SC 353

or merely an assertions. The same is based on the documents referred above and the dispute existed prior to the demand notice issued by the Operational Creditor.

***29.*** In view of the above, C.P **(IB) No. 05/KB/2021** is ***rejected.*** Needless to say that the Operational Creditor is at liberty to resort to other remedies that may be available to it under any other law.

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

**Balraj Joshi**
**Member (Technical)**

**Rohit Kapoor**
**Member (Judicial)**

The order is pronounced on 17th day of July, 2023