

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH, COURT-I
KOLKATA**

**I.A. (IB) No. 429/KB/2021
and
CP (IB) No. 1903/KB/2019**

In the matter of:

A petition 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:

**Titagarh Wagon Limited¹
[CIN: L28910WB1943PLC168801]**

...Operational Creditor

Versus

**Tenughat Vidyut Nigam Limited
[CIN: U40101JH1987SGC013153]**

...Corporate Debtor

I.A. (IB) No. 429/KB/2021

In the matter of:

An application under section 60(5) of the Insolvency and Bankruptcy Code, 2016.

In the matter of:

Titagarh Wagon Limited

... Applicant

Order pronounced on: 14 September 2023

Coram:

Shri Rohit Kapoor	:	Member (Judicial)
Shri Balraj Joshi	:	Member (Technical)

Appearances (through video conferencing):

For the Operational Creditor	:	Mr. Sabyasachi Chaudhury, Advocate Ms. Madhurima Das, Advocate
For the Corporate Debtor	:	Mr. Anoop Kumar Mehta, Advocate

¹ Erstwhile Cimmco Ltd., amended *vide* order dated 30.08.2021

ORDER

Per Balraj Joshi, Member (Technical)

1. This Court convened through hybrid mode.
2. This is a Company Petition filed under section 9 of the Insolvency and Bankruptcy Code, 2016 (“Code”) by Titagarh Wagons Limited (erstwhile Cimmco Limited and Cimmco Birla Ltd.) (“Operational Creditor”), a company incorporated under the provisions of Companies Act and represented by Mr. Dinesh Arya, by a Board Resolution dated 20 September 2019, seeking to initiate Corporate Insolvency Resolution Process (“CIRP”) against Tenughat Vidyut Nigam Limited (“Corporate Debtor”).
3. The Corporate Debtor is a company limited by shares incorporated on 26 November 1987, having CIN: U40101JH1987SGC013153, incorporated under the Companies Act with the Registrar of Companies, Jharkhand. Therefore, this Adjudicating Authority has jurisdiction to deal with this petition.
4. The present petition was filed on 01 October 2019 before this Adjudicating Authority on the ground that the Corporate Debtor failed to make payment of a sum of Rs.8,77,59,895/84 (Rupees Eight Crore Seventy Seven Lakh Fifty Nine Thousand Eight Hundred and Ninety Five and Eighty Four Paise only) being Principal sum of Rs.4,75,75,679.65 (Rupees Four Crore Seventy Five Lakh Seventy Five Thousand Six Hundred and Seventy Nine and Sixty Five Paise) and interest upto 31 July 2019 being Rs.4,01,84,216.19 (Rupees Four Crore One Lakh Eighty Four Thousand Two Hundred and Sixteen and Nineteen Paise).
5. *Submissions of the learned Counsel appearing on behalf of the Operational Creditor*

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5.1.The learned Counsel submitted that the Corporate Debtor issued purchase orders² to the Operational Creditor on 28 March 1989, for purchasing 34 Bottom Discharge Bogie Hopper Wagons for Tenughat TPS.

5.2.The total price for supply of the wagons F.O.R. (Free on Rail) was Rs.3,38,14,148/- (Rupees Three Crore Thirty-Eight Lakh Fourteen Thousand One Hundred and Forty Eight only) as contained in Clause 4 of the purchase order.

5.3.It is submitted that the purchase order provided for payment in the following manner:

- 5.3.1. 15% of equipment price as interest free advance against bank guarantee for equivalent amount;
- 5.3.2. 15% of equipment price as interest free interim advance upon submission of Wagon drawings and its approval against furnishing of bank guarantee for equivalent amount;
- 5.3.3. 5% of equipment price together with all taxes and duties on discharge upon submission of proof of discharge;
- 5.3.4. 10% of the equipment price and transportation charges on receipt of equipments at site;
- 5.3.5. 5% final payment upon performance guarantee test being completed at site.

5.4.Payment on account of escalation, if any, was to be made on receipt of the wagons/equipments/ spares at site upon separate invoices being raised with documentary proof for applicable indices subject to the condition that escalation would be limited to 20% of the ex-works price

5.5.The wagons were to be dispatched from the factory of the operational creditor within 104 weeks.

² Annexure B @ Pp. 29-55A of the C.P.

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- 5.6. The Corporate Debtor would provide the site at Track Hopper for commissioning of line site equipment in the 84th week. The timelines mentioned above would commence on and from the date of receipt of the initial advance by the operational creditor.
- 5.7. The Wagons would be dispatched through railways on its wheels as connected load and TVNL would provide railway siding for dispatch of wagons. Insurance charges were to be borne by the Corporate Debtor.
- 5.8. Pursuant to the aforesaid purchase order, a contract was executed by and between Corporate Debtor and the Operational Creditor on 31 March 1989³ incorporating therein the terms and conditions contained in the purchase order as the terms which would govern the contractual relationship between the parties in respect of supply of the said 34 wagons.
- 5.9. The purchase order dated 28 March 1989 and the contract dated 31 March 1989 were amended by an amendment issued by the Corporate Debtor on 27 October 1990⁴, (“1st Amendment”) as a result of unavoidable delay in construction of rail line connecting the nearest rail head to the project site, as a result whereof, the Corporate Debtor was not in a position to receive the wagons.
- 5.10. By the said amendment, Clause-8 of the said agreement and the purchase order were amended to the effect that the wagons were to be dispatched from the Operational Creditor's works by March, 1993, commissioning of wagons and line site equipment to be completed by June, 1993, Corporate Debtor to conduct performance guarantee test within 30 days of intimation by the operational creditor of readiness of the system; and site at track hopper for commissioning of line site equipment to be provided by Corporate Debtor to the Operational Creditor by November, 1992.

³ Annexure C @ Pp. 56-57A of the CP

⁴ Annexure D @ Pp. 58-59A of CP

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5.11. By a further amendment dated 18 February 1993⁵, (“2nd Amendment”), the contract dated 31 March 1989 and the purchase order dated 28 March 1989 was further amended to the following effect:

- a. The contract price was amended to be read as Rs.4,04,29,476/- (Rupees Four Crore Four Lakh Twenty-Nine Thousand Four Hundred and Seventy-Six only) on 31 March 1991 after escalating the price of the original contract as on 31 March 1991 in accordance with the price variation formula contained in the said contract without the same being adopted for payment of initial advance or interim advance;
- b. The stipulation as to delivery as contained in the original contract and the purchase order, as amended by the first amendment, was further amended to the effect that the wagons were now to be dispatched from the operational creditor's works by 31 December 1993; commissioning of wagons and line site equipment were to be completed within a period of four months from completion; the Corporate Debtor would conduct performance guarantee test within 30 days from intimation of readiness of the system and site at track hopper for commissioning of the line site equipment would be provided to suit the amended delivery period as indicated in the second amendment.

5.12. The said contract and the purchase order were further amended (“3rd Amendment”) by Letter No. 567 dated 26 April 1995⁶ issued by the Corporate Debtor, *inter alia*, to the following effect:

- a. The price of the wagons was to be amended in the manner provided in the third amendment dated 26 April 1995;
- b. The delivery period was amended such that the delivery of the wagons would have to be completed by December, 1996;

⁵ Annexure E @ Pp. 60-67A of the CP

⁶ Annexure F @ Pp. 68-71 of CP

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- c. Commissioning of wagons and line site equipment after completion would have to be completed within a period of four months from the intimation of readiness of site;
- d. Corporate Debtor would conduct performance guarantee test within 30 days from intimation by the operational creditor of readiness of the system; and
- e. Site at track hopper for commissioning of line site equipment would be provided to the operational creditor.

5.13. In spite of the amendments, the Corporate Debtor was not in a position to receive delivery of the wagons, although the same were lying ready with the operational creditor.

5.14. In view thereof, a supplementary agreement was executed by and between the Corporate Debtor and the Operational Creditor on 26 March 1998⁷. Such supplementary agreement was executed, inasmuch as the Corporate Debtor was not in a position to take delivery of the wagons and desired to keep the wagons in the Operational Creditor's workshop till such time as they were required to be used at Tenughat TPS. The said supplementary agreement, *inter alia*, provides as follows:

- a. Delivery period for the wagons was extended up to 31 December 1998;
- b. The Corporate Debtor would immediately release payment for ex-works price of 14 wagons with up-to-date price variation and proportionate foreign exchange rate variation against submission of proforma invoice;
- c. The wagons would be kept in the operational creditor's work site so long alternative arrangement is not made by the Corporate Debtor;

⁷ Annexure G @ Pp. 72-76A of the CP

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- d. The Operational Creditor would be entitled to storage charges of Rs.2000/- (Rupees Two Thousand only) per wagon per month;
- e. Payment for the said 14 wagons as aforesaid was to be made immediately upon execution of the supplementary agreement and storage charges would be payable by the Corporate Debtor for the said 14 wagons with effect from 01 January 1997;
- f. The payment of cost of wagons along with price variation, exchange rate variation and storage charges for the remaining 20 wagons would be made only after inspection and acceptance thereof by RITES in two instalments, i.e. for 10 wagons in June, 1998, and for the remaining 10 wagons in September, 1998;
- g. The Operational Creditor would insure the said 14 wagons during the term of their storage in the works maintained by the operational creditor and the cost thereof would be reimbursed by TVNL. Insurance charges for the 2nd and 3rd instalments of wagons would also be borne by TVNL.

5.15. Pursuant thereto, the Operational Creditor submitted invoices for 10 wagons on 01 July 1998⁸ under cover of the Operational Creditor's letter of the same date for a sum of Rs. 1,37,08,357/- (Rupees One Crore Thirty-Seven Lakh Eight Thousand Three Hundred and Fifty-Seven only). The said sum included invoices on account of price of the wagons, proforma invoice for Price Variation, invoice for Foreign Exchange Variation and invoice for storage charges for 14 wagons.

5.16. Under cover of the operational creditor's letter dated August 18, 1998, the operational creditor raised bill for a sum of Rs. 1,59,092/- (Rupees One Lac Fifty-nine Thousand and Ninety-two only) towards insurance charges in respect of the said 34 wagons.

⁸ Annexure H @ Pp. 77-91 of CP

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- 5.17. On 19 August 1998⁹, the Operational Creditor raised invoice for the last batch of 10 wagons for a value of Rs.1,35,96,357/- (Rupees One Crore Thirty-Five Lakh Ninety-Six Thousand Three Hundred and Fifty Seven only). The said sum included invoices on account of price of the wagons, proforma invoice for Price Variation and Invoice for Foreign Exchange Variation.
- 5.18. On 27 October 1998, the Operational Creditor raised invoice for storage charges for the period 01 July 1998 to 30 September 1998. Similarly invoices for storage charges for the period 01 October 1998 to 31 March 2002 were also raised. By letter dated 23 May 2000, the Operational Creditor raised invoices for price variation after accounting for claims on such account made earlier.
- 5.19. In spite of repeated requests, the Corporate Debtor failed to take delivery of the said wagons. The Corporate Debtor has, at all material times, acknowledged its liability to take delivery of the said wagons and promised to make payment in respect thereof as also of the other charges required to be paid by the Corporate Debtor under the contract, by letters dated 11 June 2014 and 13 June 2017. There has been further accrual of storage charges for the period thereafter till date.
- 5.20. By the letter dated 11 June 2014, the Corporate Debtor agreed to make payment to the operational creditor of a sum of Rs.4,12,94,933/- plus taxes as full and final payment to the operational creditor against the said supply. However, in spite of repeated assurances, the Corporate Debtor has failed and neglected to either take delivery of the wagons or to make payment.
- 5.21. The Corporate Debtor having not taken delivery of the wagons as contemplated in their letter dated 11 June 2014 are also liable to make

⁹ Annexure J @ Pp. 96 of the CP

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payment of storage charges at the contractual rate till the Corporate Debtor take delivery.

- 5.22. Consequently, the Corporate Debtor is liable to make payment of a sum of Rs. 42,16,000/-towards principal amount on account storage charges for 34 wagons at the rate of Rs. 2,000 per wagon per month from June 2014 to 31 July 2019. The Corporate Debtor is further obliged to pay interest on outstanding storage charges @18% per annum, such rate being the rate at which nationalized banks charge interest on commercial transactions.
- 5.23. Accordingly, the Corporate Debtor is also liable to make payment of a sum of Rs.19,92,060/- on account of interest on storage charges for the period June 2014 to 31st July, 2019.
- 5.24. The Operational Creditor was compelled to issue a demand notice dated 16 September 2019¹⁰ under section 8 of the Insolvency and Bankruptcy Code, 2016 seeking payment of the said sum of Rs. 8,77,59,895.84/- which was duly served upon the Corporate Debtor by way of speed post.
- 5.25. The Corporate Debtor replied to the demand notice by two letters dated 30 August 2019 and 16 September 2019. The said replies do admit the Corporate Debtor's liability, however these do not disclose any plausible contention requiring further investigation and contains assertions of purported facts unsupported by evidence.
- 5.26. The Operational Creditor has filed I.A. (IB) No. 429/KB/2021 seeking permission to bring on record the subsequent events that have taken place after filing the Company Petition.
- 5.27. It is submitted that during the pendency of the Company Petition, the Cimmco Limited has amalgamated with the Titagarh Wagons Limited *vide* order dated 30 September 2020. In order to mitigate its losses, the Operational Creditor scrapped and sold the wagons of which the Corporate

¹⁰ Annexure Q @ Pp. 142-153 of CP

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Debtor had failed to take delivery, as the said wagons were blocking the space of the Operational Creditor's facility at Bharatpur, Rajasthan and reducing the manufacturing capacity.

5.28. The Operational Creditor states that the wagons were sold at a scrap value of Rs.2,10,93,600/- and in view of the aforesaid the claim of the Operational Creditor in the present petition shall stand at Rs.6,66,66,295.84 (Rupees Six Crore Sixty-Six Lakh Sixty-Six Thousand Two Hundred and Ninety-Five and Eighty-Four Paise).

5.29. The Operational Creditor submitted that the Operational Creditor may be permitted to amend the claims made in the Company Petition by deducting the sum realized by sale of wagons as scrap.

6. *Submissions of the learned Counsel appearing on behalf of the Corporate Debtor*

6.1. It is submitted that in the year 1989 a purchase order was placed for procurement of 34 BDH Wagons valued at Rs.3,30,76,640/- which was modified by subsequent amendments. An advance of Rs.2,88,07,884/- was paid.

6.2. By letter dated 11 June 2014, the issue relating to delivery of 34 wagons was informed to the Operational Creditor by the Corporate Debtor wherein it was stated that delivery of 34 wagons shall be taken subject to Final Inspection to be carried out by RITES before dispatch of wagons. After Final Inspection of wagons, the Operational Creditor was to arrange the dispatch of wagons to the nearest depot of Indian Railways from their works at Bharatpur, Rajasthan and on acceptance by the Railways, Rs. 4,12,94,933/- + Taxes would be paid towards full and final settlement against purchase order dated 28 March 1989.

6.3. Subsequently, the Corporate Debtor by letter dated 16 June 2014 informed RITES that Preliminary Survey of 34 Wagons was conducted on 14 May 2013 to 18 May 2013 jointly by RITES but Final Joint Inspection was yet

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to be done by RITES and therefore a Work Order dated 29 August 2014 engaging RITES Ltd. for carrying out Final Inspection was issued.

6.4. By letter dated 18 October 2014, e-mail dated 30 May 2017, 13 June 2017, the Operational Creditor was informed that RITES has requested to provide the latest updates of action taken towards repair/replacement of accessories of the wagons against Preliminary Inspection Report conducted in May 2013 before carrying out Final Inspection. Similar e-mail dated 13 November 2017, letter dated 07 December 2017 and e-mail dated 23 December 2017 and 04 January 2018 were sent to Operational Creditor with a request to intimate about their readiness for Final Inspection by RITES.

6.5. In reply the Operational Creditor, by their letter dated 06 January 2018 replied to the Corporate Debtor that they have already approached RITES for their confirmation for carrying out 3rd Party Inspection/Certification of Wagons and they shall keep them updated of the developments regarding Final Inspection and progress in the matter.

6.6. The Corporate Debtor sent a letter dated 11 April 2018 to the Operational Creditor informing the Operational Creditor that they had assured for 3rd Party Inspection but no progress has been made. They were also reminded that without 3rd Party Final Inspection, it is not possible to take delivery of wagons. Further reminder was given that if 3rd Party Inspection is not carried out soon, the Corporate Debtor would ask for refund of the advance amount for supply of wagons. Accordingly, the Operational Creditor was requested to intimate about 3rd Party Inspection of the Wagons at the earliest.

6.7. The Managing Director and CEO of the Operational Creditor by their Letter dated 13 June 2019 in paragraph 7 requested the Member (Rolling Stock) Ministry of Railways (Railway Board), New Delhi to intervene in the matter for 3rd Party Final Inspection of 34 Wagons by RITES so that wagons are delivered by the Operational Creditor to the Corporate Debtor. Thus, by letters and e-mails dated 30 May 2015, 13 June 2017, 13 November 2017,

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07 December 2017, 23 December 2017, 04 January 2018, 11 April 2018 requests were made to the Operational Creditor to make the wagons ready for Final Inspection but they never informed about the readiness of the wagons and therefore RITES Ltd. was unable to carry out Final Joint Inspection of 34 wagons.

6.8. Since, the wagons were not made ready for Final Inspection and the wagons were not finally inspected, the Operational Creditor failed to dispatch the wagons to the nearest Railway Siding for acceptance by Indian Railways.

6.9. The Corporate Debtor upon receipt of Demand Notice under section 8 of the Code dated 16 September 2019, submitted its reply disputing the demand by submitting that Operational Creditor, in terms of the delivery schedule was required to get the wagons finally inspected but it continuously failed to convey their readiness for Final Inspection of Wagons and therefore the wagons could not be subjected to Final Joint Inspection for onward dispatch to the Railway Siding and acceptance of Wagons by Railways which were condition precedent for making payment. The Corporate Debtor in its reply to the said notice has clearly stated that there is no operational debt in default and therefore the demand made *vide* Demand Notice dated 16 September 2019 is disputed.

6.10. Nowhere in the application there is any averment that fault was on the part of Corporate Debtor that it has failed to pay to RITES the Final Inspection Charges and therefore Final Inspection was refused by RITES. On the contrary, Work Order dated 29 August 2014 was issued to RITES but the Operational Creditor never confirmed about their readiness for Final Inspection of Wagons. In none of the correspondences of Operational Creditor or in the pleadings before the Adjudicating Authority it has been stated that failure on the part of the Corporate Debtor, 3rd Party Final Joint Inspection could not be carried out.

6.11. During pendency of this proceeding, I.A. (IB) No. 429/KB/2021 has been filed under section 60(5) of the Code stating that the wagons have been

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rendered scrap and sold for a sum of Rs. 2,10,93,600/- without disclosing any particulars including the date of scrapping, the invoice by which scrap was sold, proof showing receipt of money, etc. No information whatsoever was given to the Corporate Debtor prior to the scrapping and as such a serious dispute existed as to whether the goods could be scrapped more particularly when the Corporate Debtor had advanced huge amount of money.

- 6.12. That though a total amount of Rs. 2,88,07,884/- was given as advance for supply of 34 Wagons, nothing has been delivered to the Corporate Debtor. That neither of the 34 Wagons have been finally inspected nor they have been dispatched to the Railway Siding and consequently the Wagons could never be accepted by Indian Railways. Thus, there is no delivery of goods against purchase order.
- 6.13. The Company Petition for initiation of Corporate Insolvency Resolution Process is not maintainable in view of section 9(5)(ji)(d) of the Code as there is a record of dispute. The learned Counsel placed reliance on the judgment of the Hon'ble Supreme Court in the case of *Mobilox Innovations (P) Ltd. v. Kirusa Software (P) Ltd., (2018) 1 SCC 353* (Paras 51, 56 and 57) has held that where dispute exists between the parties, application under Section is not maintainable and in the case of *Raratan Babulal Agarwal v. Solartex India Pvt. Ltd. and others, 2022 SCC OnLine SC 1395* has considered the case of Mobilox Innovations and has explained the scope of dispute under section 9(3)(b) as well as section 9(5) (in)(d) of the Code. Therefore, in view of serious dispute the present application is liable to be dismissed.
- 6.14. No affidavit has been filed by the Operational Creditor along with the application to the effect that no dispute has been raised by the Corporate Debtor in compliance of Section 9(3)(b) of the Code which is a mandatory requirement.

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6.15. The Operational Creditor was always aware about the existence of dispute and therefore no affidavit has been filed. The learned Counsel relied on *Stonex India (P) Ltd. v. Design Work Constructions India (P) Ltd., 2018 SCC OnLine NCLT 24382, Shree Shyam Inorganic Pvt. Ltd. v. RHD Enterprises Private Limited 2017 SCC OnLine NCLT 15521* and *OPGS Power Gujarat (P) Limited v. RL Steels & Energy Limited, IB-492(ND)/2017*.

Analysis and Findings

7. Heard the learned Counsel appearing on behalf of the Operational Creditor and the Corporate Debtor and perused the records.
8. It is not a matter of dispute that the Corporate Debtor had entered into contract with the Operational Creditor for purchase of 34 wagons. The main contention of the Corporate Debtor is that there is a pre-existing dispute, as the final inspection with respect to the 34 wagons had not taken place.
9. On perusal of the correspondences made between the Operational Creditor and the Corporate Debtor dated 13 June 2017, it is clear that preliminary inspection was carried out in May 2013, wherein it was seen that all major mechanisms were found working in 26 nos. of the wagons whereas some mechanisms were not operative in the remaining 8 wagons and that the Operational Creditor had agreed to rectify the workings of the 8 wagons within 15 days on confirmation of the date of taking delivery of the wagons by the Corporate Debtor. The letter is given hereunder for reference.

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TENUGHAT VIDYUT NIGAM LIMITED

तेनुघाट विद्युत निगम लिमिटेड
(A GOVT. OF JHARKHAND UNDERTAKING)
CIN U40101JH1987SGC013153

HINOO, DORANDA, RANCHI-834002, JHARKHAND

(TEL: 0651-2502325, 2503399, FAX: 2251296, 2501015)

Letter no. 365/2017-18

Dated. 13.06.2017

Sh. Anupam Bajaj
General Manager-Coordination
CIMMCO Ltd
756, Anandapur
EM Bypass, Kolkata-700107.

Sub: Regarding final inspection of 34 nos. of bottom discharge hopper wagons by RITES Ltd in the works of M/s CIMMCO Ltd at Bharatpur, Rajasthan.
Ref: Your letter dated 01.06.2017

Sir,

In continuation to our previous discussions and correspondences in the subject matter, it is requested that all 34 nos. of bottom discharge hopper wagons at the works M/s CIMMCO Ltd be made ready for final inspection by RITES Ltd at the earliest. TVNL shall make all mutually agreed payments at the time of delivery of above wagons.

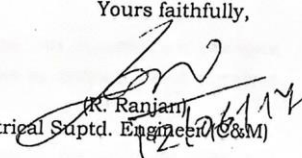
As per last preliminary inspection carried out in May'2013, all major mechanisms were found working in 26 nos. of the wagons whereas some mechanisms were not operative in remaining 08 wagons and M/s CIMMCO Ltd. had agreed to comply with all the short comings within 15 days period on confirmation of the date of taking delivery of the wagons by TVNL.

Regarding final inspection of above wagons, M/s RITES Ltd have asked for details of readiness of the wagons against preliminary inspection report before deciding date of final inspection.

As such, it is requested to provide readiness of above 34 wagons to TVNL at the earliest so that final inspection by RITES Ltd can be carried out soon without further delay.

Thanking you,

Yours faithfully,


(R. Ranjani)
Electrical Suptd. Engineer (E&M)

10. Further, the Corporate Debtor sent an email with respect to the final inspection on 13 November 2017 to intimate the Corporate Debtor about the readiness of the above wagons at the earliest in order to carry out the final inspection. In reply to the said email, the Operational Creditor has only thanked the Corporate Debtor, but has not informed the Corporate Debtor as to the status of the wagons. A scanned copy of the email is given below for reference.

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Annexure - 9

ajesh ranjan <ranjantvnl@gmail.com>

M Gmail

Fwd: Delivery of 34 nos. of Bottom discharge hopper wagons lying at the works of M/s Titagarh wagons Pvt. Ltd. to TVNL.

4 messages

uday singh <udks.tvnl@gmail.com>
To: rajesh ranjan <ranjantvnl@gmail.com>

Mon, Nov 13, 2017 at 7:25 PM


----- Forwarded message -----
From: uday singh <udks.tvnl@gmail.com>
Date: Mon, Nov 13, 2017 at 7:24 PM
Subject: Delivery of 34 nos. of Bottom discharge hopper wagons lying at the works of M/s Titagarh wagons Pvt. Ltd. to TVNL.
To: anupam.bazaz@titagarh.in

D/Sir,
In reference to our continued discussion on the subject, it is informed that TVNL has requested M/s RITES Ltd for final inspection of the 34 nos. of Bottom discharge hopper wagons lying at your works at Bharatpur, Rajasthan. Before the final inspection, M/s RITES Ltd has desired informations from TVNL about latest updates of above wagons and the corrective actions taken by M/s Titagarh wagons Ltd towards repair/replacement of accessories of the wagons against the preliminary inspection report of TVNL & M/s RITES Ltd carried out in May'2013. M/s RITES Ltd will communicate to TVNL about final inspection schedules for above wagons in the works on basis of your latest updates.
The final inspection of the wagons by M/s RITES Ltd is necessary before taking the delivery by TVNL.
In view of the above, it is requested to intimate TVNL about readiness of the above wagons at the earliest so that the final inspection of the wagons can be got carried out through M/s RITES Ltd.
Thanking you,
U.K.Singh
EEE(C&M-III)
TVNL, Ranchi

Anupam Bazaz <anupam.bazaz@titagarh.in> Tue, Nov 14, 2017 at 8:50 PM
To: uday singh <udks.tvnl@gmail.com>
Cc: "ramawatar.s@rediffmail.com" <ramawatar.s@rediffmail.com>, "ranjantvnl@gmail.com" <ranjantvnl@gmail.com>, "ranjanrajeshranjan@yahoo.co.in" <ranjanrajeshranjan@yahoo.co.in>, Anil Agarwal <anil.agarwal@titagarh.in>, Dipankar Ganguly <dipankar.ganguly@titagarh.in>

Dear Mr. Singh,

We thank you for the below mail and place on record our appreciation to the efforts being put in by TVNL for resolving this long pending issue.



11. Thereafter, on perusal of emails dated 23 December 2017 and letter dated 11 April 2018, it looks that the Corporate Debtor had taken steps for third party inspection but the Operational Creditor did not intimate the date of third party inspection to the Corporate Debtor. Scanned copies of the letters are given below for reference.

IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH, COURT-I

Titagarh Wagon Ltd. v. Tenughat Vidyut Nigam Ltd.
I.A. (IB) No. 429/KB/2021 and CP (IB) No. 1903/KB/2019



TENUGHAT VIDYUT NIGAM LIMITED
तेनुघाट विद्युत निगम लिमिटेड
(A GOVT. OF JHARKHAND UNDERTAKING)
CIN U40101JH1987SGC013153

HINOO, DORANDA, RANCHI-834002, JHARKHAND

(TEL: 0651-2502325, 2503399, FAX: 2251296, 2501015)

Letter No...../2018-19

Dated.....

Sh. Anupam Bajaj
General Manager- Co-ordination
Titagarh Wagons Ltd,
Titagarh Towers, 756, Anandpur,
Kolkata-700107.

Sub: Final inspection of 34 nos. of bottom discharge hopper wagons at works of M/s Titagarh Wagons Ltd, Bharatpur, Rajasthan.

**Ref: i. TVNL Letter No. 1652/17-18, dt. 07.12.2017
ii. TVNL Letter No. 1909/17-18, dt. 08.01.2018
iii. TVNL Letter No. 1996/17-18, dt. 22.01.2018**

Dear Sir,

With reference to the subject, final inspection of 34 nos. of bottom discharge hopper wagons at works of M/s Titagarh Wagons Ltd, Bharatpur, Rajasthan is still pending despite continuous persuasion of TVNL with M/s RITES Ltd and M/s RDSO.

You have been apprised about all the communications and you assured us about taking all efforts required for the third party inspection of above wagons; however no progress in the direction made so far. Without final third party inspection of the wagons, it isn't possible to take delivery of the wagons by TVNL.

TVNL management has taken this matter seriously. If third party inspection of the wagons isn't carried out soon, the Nigam may get forced to ask refund of the advance amount already given to you for supply of the wagons

As such, kindly take up the matter seriously and intimate TVNL about date of third party inspection of above wagons at the earliest by pursuing the matter with M/s RDSO or M/s RITES Ltd.

Thanking you,

Yours faithfully,

Sd/-

(U.K. Singh)

Electrical Ex. Engineer (C&M-III)

Memo No. 48 /2018-19

Copy to: ESE (C&M-I), TVNL, Ranchi for information.

Date. 11.04.18

(U.K. Singh)
Electrical Ex. Engineer (C&M-III)

CC: MD, TVNL, Ranchi for kind information.



IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH, COURT-I

Titagarh Wagon Ltd. v. Tenughat Vidyut Nigam Ltd.
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ANNEXURE 14

TENUGHAT VIDYUT NIGAM LIMITED

तेनुघाट विद्युत निगम लिमिटेड

(A GOVT. OF JHARKHAND UNDERTAKING)

CIN U40101JH1987SGC013153



HINOO, DORANDA, RANCHI-834002, JHARKHAND (TEL: 0651-2502325, 2503399, FAX: 2251296, 2501015)

Date 30/08/19

Letter No. 881/2019-20

Sh. Anil Kumar Agarwal
MD & CEO, M/s CIIMCO Ltd.
756 Anandpur
EM Bypass
Kolkata-700107

Subj:- Delivery of 34 nos. of Bottom Discharge Hopper Wagons.

- Ref: i. Your letter no...CL/TVNL/BOBR/2019-20/01, dt. 06.07.2019
ii. TVNL letter no. 48/2018-19, dt. 11.04.18
iii. TVNL Letter no. 1996/17-18, dt.22.01.18

Sir,
With reference to the subject, it is already intimated by TVNL that Nigam will take delivery of 34 Bottom Discharge Hopper wagons after final Inspection by Third Party. The Nigam has regularly pursued the matter and asked for early readiness of the wagons so that their final inspection can be conducted through RDSO/RITES.

Unfortunately, M/s CIIMCO haven't communicated to the Nigam about readiness of the wagons for the final joint inspection and despite our best efforts, the matter is pending. It seems that you are trying to cover up your lapses in the matter. Instead of asking for release of payment, it is requested to carry out the joint inspection by TVNL & RITES Ltd/RDSO first. Based on the report after final inspection, TVNL will consider for delivery of the above wagons and release payments.

For kind information and further necessary action.

Yours faithfully

U. K. Singh
30/08/19

(U. K. Singh)
HOD(F&A/Civil)

CC: MD, TVNL for kind information.

Company Secretary
Tenughat Vidyut Nigam Limited
Hinoo, Ranchi-834002

IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH, COURT-I

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12. In the present matter, although the Operational Creditor had manufactured the wagons and the Corporate Debtor was willing to take delivery of the same, the delivery of the wagons could not take place in the absence of completion of final inspection. There are correspondences as indicated above wherein parties have blamed each other for non-fulfilment of the contractual obligations. Hence, we are of the view that there is a pre-existing dispute with respect to the final inspection and this dispute existed prior to the issuance of demand notices dated 16 September 2019 and the end result is non-crystallization of the operational debt.
13. When the above position is seen on the basis of the judgment of the Hon'ble Supreme Court of India in *Mobilox Innovations Private Limited v. Kirusa Software Private Limited [(2018) 1 SCC 353 : (2018) 1 SCC (Civ) 311]*, wherein the Hon'ble Apex Court has succinctly propounded as under:-

“ 34. 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) [(2018) SCC 353

(ii) Whether the documentary evidence furnished with the application shows that the aforesaid debt is due and payable and has not 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. A part from the above, the adjudicating authority must follow the mandate of Section 9, as outlined above, and in particular the mandate of section 9(5) of the Act, and admit or reject the application, as the case may be, depending upon the

IN THE NATIONAL COMPANY LAW TRIBUNAL
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factors mentioned in Section 9(5) of the Act”

xxx

xxx

xxx

“ 51. 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 dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application.”

[Extracted with supplied emphasis for clarity].

14. We are of the view that the pre-existing dispute is not merely feeble, in view of the above circumstances **CP (IB) No. 1903/KB/2019** is hereby rejected. Under the above circumstances, **I.A.(IB) No. 42/KB/2021** becomes infructuous and hence is disposed of. Needless to say, the Operational Creditor is at liberty to resort to other remedies that may be available to it under any other law.

**IN THE NATIONAL COMPANY LAW TRIBUNAL
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15. 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)

This order is pronounced on the 14th day of September 2023.

GGRB_LRA