


**NATIONAL COMPANY LAW TRIBUNAL
BENGALURU BENCH
COURT NO.1**


ATTENDANCE CUM ORDER SHEET OF THE HEARING OF NATIONAL COMPANY LAW TRIBUNAL,
BENGALURU BENCH, BENGALURU, HELD ON 12.02.2020

PRIORITY CAUSE LIST - 1

PRESENT: 1. Hon'ble Member (J), Shri Rajeswara Rao Vittanala
2. Hon'ble Member (T), Shri Ashutosh Chandra

CP/CA No.	Purpose	Sec	Name of Petitioner	Petitioner Advocate	Name of Respondent	Respondent Advocate
CP(IB)No. 341/BB/2019	For orders	Sec 9 of I&B Code 2016	M/s Abhiyanta Inc	Venkataraman, Advocate	M/s Prism Surface Coatings (P) Ltd	K B S Manian, Advocate

 [VENKATA RAGHAVAN]
 ADVOCATE FOR PETITIONER/s: KAR 1453/2013
 [VEERESH - SANGOLLI]
 9220427169


 ADVOCATE FOR RESPONDENT/s:
 (K.B.S. MANIAN)

ORDER

Heard Shri Venkata Raghavan along with Shri Veeresh Sangolli, learned Counsel for the Petitioner and Shri K.B.S. Manian, learned Counsel for the Respondent.

CP (IB) No.341/BB/2019 is dismissed by separate order.


Member (T)


Member (J)

**IN THE NATIONAL COMPANY LAW TRIBUNAL
BENGALURU BENCH**

C.P. (IB) No.341/BB/2019
U/s 9 of IBC, 2016
R/w Rule 6 of I&B (AAA) Rules, 2016

BETWEEN:

Abhiyanta Inc.
No.290, 2nd Cross, 10th Main,
Opp. Baldwin School,
BEML – Layout 5th Stage,
Rajarajeshwari Nagar,
Bangalore – 560 098. - Petitioner/Operational Creditor

AND

Prism Surface Coatings Pvt. Ltd.
Regd. Off: #89, 3rd Cross Road,
4th Phase, Bommasandra Indl.,
Bangalore – 562 158. - Respondent/Corporate Debtor

Date of Order: 12th February, 2020

Coram: 1. Hon'ble Shri Rajeswara Rao Vittanala, Member (Judicial)
2. Hon'ble Shri Ashutosh Chandra, Member (Technical)

Parties/Counsels Present:

For the Petitioner/Applicant : Mr. Venkata Raghavan with
Mr. Veeresh Sangolli
For the Respondent : Mr. K.B.S. Manian

ORDER

Per: Rajeswara Rao Vittanala, Member (J)

1. C.P. (IB) No.341/BB/2019 is filed by M/s. Abhiyanta Inc. (hereinafter referred to as 'Petitioner/Operational Creditor') under Section 9 of the IBC, 2016 read with Rule 6 of the I&B (AAA) Rules, 2016, by inter alia seeking to initiate Corporate Insolvency Resolution Process (CIRP) in respect of M/s. Prism Surface Coatings Private Limited (hereinafter


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referred to as 'Respondent/Corporate Debtor'), on the ground that it has committed default in respect of four Purchase orders/invoices dated 22.01.2016, 10.11.2016, 10.11.2016 and 10.02.2017 for total amount of Rs.1,57,48,155/- (Rupees One Crore Fifty Seven Lakhs Forty Eight Thousand One Hundred and Fifty only), out of which, the unpaid amount (as per PO and Invoices) is Rs.27,86,731/- along with interest of Rs.3,34,407.72/-.

2. Brief facts of the case, as mentioned in the Company Petition, as well as in Synopsis filed by the Petitioner, are as follows:

(1) M/s. Abhiyanta Inc. (hereinafter referred to as 'Petitioner/Applicant/Operational Creditor') is a Registered Partnership Firm based in Bangalore.

(2) M/s. Prism Surface Coatings Private Limited (hereinafter referred to as 'Respondent/Corporate Debtor') is a Private Limited Company incorporated on 17.03.1999 under the Companies Act, 1956 with CIN: U29299KA1999PTC024911 having its registered office situated at #89, 3rd Cross Road, 4th Phase, Bommasandra Industrial, Bangalore-562158.


(3) It is stated that on 22.01.2016, the Corporate Debtor has contacted the Petitioner/Applicant to provide them with the goods manufactured by it, which is a Motorised Ground Mount Trolley for shot blasting chamber, for paint booth, for paint drying oven.

(4) By approving the project by the Corporate Debtor, has placed the following Purchase orders and corresponding invoices were raised by the Respondent:

1) Purchase Order No.PSC-L/ATF/058/15-16 dated 22.01.2016, on the Applicant at its Bengaluru Office for total value of Rs.44,87,366/- (Rupees Forty Four Lakh Eighty Seven Thousand Three Hundred and Sixty Six only). Accordingly, Invoices AB-SI-036/15-16, AB-SI-001/16-17,

AB-SI-003/16-17, AB-SI-004/16-17, AB-SI-006/16-17 were raised and the Corporate Debtor had to make payments by 30.04.2016. However, the Corporate Debtor however has not paid full payment by keeping outstanding of Rs.6,11,855/- (Rupees Six Lakh Eleven Thousand Eight Hundred and Fifty Five only).

- 2) Purchase Order No.PSC-L/JA-L/007/16-17 dated 10.11.2016 for total value of Rs.35,77,507/- was placed. Accordingly, Invoices AB-SI-026/16-17, AB-SI-027/16-17, AB-SI-029/16-17, AB-SI-035 /16-17 were raised and the Corporate Debtor had to make payment by 15.05.2017. However, the Corporate Debtor has not made full payment and thus around Rs.2,74,980/-still to be paid.
- 3) Purchase Order No.PSC-L/JA-YN/008/16-17 dated 10.11.2016 for total value of Rs.51,39,235/- was placed and thus corresponding Invoices AB-SI-009/17-18, AB-SI-010/17-18, AB-SI-012/17-18, AB-SI-013/17-18, AB-SI-014/17-18, AB-SI-015/17-18, AB-SI-016/ 16-17 were raised. However, the Corporate Debtor has not made full amount and thus default for Rs.6,54,162/-
- 4) Purchase Order No.PSC-L/JA-L-TC/013/16-17 dated 10.02.2017 for total value of Rs.25,44,047/- (Rupees Twenty Five Lakh Forty Four Thousand and Forty Seven only) was placed and thus corresponding Invoices AB-SI-020/17-18, AB-SI-025/17-18, AB-SI-026/17-18, AB-SI-027/17-18 were raised. The Corporate Debtor, has committed default for Rs.12,45,734/- (Rupees Twelve Lakh Forty Five Thousand Seven Hundred and Thirty Four only)
- (5) The Corporate Debtor did not make full payment as per purchase orders and invoices, despite receiving goods and using them. Further, the Applicant reminded the Corporate Debtor, of their obligation to make payments towards the outstanding



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due and payable to it of amount Rs.27,86,731/- (Rupees Twenty Seven Lakh Eighty Six Thousand Seven Hundred and Thirty One only). However, Corporate Debtor has failed to make payments.

- (6) The total amount due by the Corporate Debtor to the Petitioner is as follows:

Summary	
<i>Description</i>	<i>Value</i>
Purchase order dated 22.01.2016	44,87,366
Purchase order dated 10.11.2016	51,39,235
Purchase order dated 10.11.2016	35,77,507
Purchase order dated 10.02.2017	25,44,047
Payable	
Unpaid (As per PO and Invoices)	27,86,731
Interest	3,34,407.72
Total	31,21,138.72

- (7) It is stated that the insolvency notice was sent to the registered office of the Corporate Debtor and the same was delivered to the Corporate Debtor on 15.05.2019.
3. The Respondent has opposed the Company Petition by filing Statement of Objections dated 21.01.2020 by inter alia contending as follows:

- (1) The instant Company Petition is false, frivolous and they are not liable to pay any sums of monies to the Applicant. On the other hand, the Applicant/Petitioner is liable in damages for breach of contract to the Corporate Debtor. The Corporate Debtor is a leading Company in the provision of advanced painting technologies and projects. The Petitioner had entered into contracts with the Corporate Debtor for the supply of certain conveyor systems, which were required for the execution of



certain projects on behalf of the Corporate Debtors clients' Jamna Auto Ltd. for their plants at Lucknow and Yamunagar and for another client M/s. AT and F.

- (2) In pursuant to the Purchase Orders, the Petitioner supplied the requisite goods and it was alleged that the conveyor system supplied was defective, as the chains frequently gave way by breaking. On account of the defective supply of material by the Applicant, the clients of Corporate Debtors have withheld payments due to the Corporate Debtor to the tune of 10% of the claim amount made herein from the invoices. Therefore, the Corporate Debtor has suffered losses directly on account of the defective goods supplied by the Petitioner. They have also taken steps to initiate arbitral proceedings against the Petitioner for breach of contract and damages suffered by it to the tune of Rs.78,00,000/-.
- (3) They have given a reply dated 08.07.2019 to the Demand Notice dated 14.05.2019 issued by the Petitioner by raising the dispute. It is therefore contended that the Petitioner is not only admittedly entitled for the full payment of the invoices raised but only after due certification that the equipment in question meet the requisite quality standards and is functioning properly. However, the requisite certification was not certified by the concerned authorities of the Respondent, as the equipment supplied was defective.
- (4) The Corporate Debtor produced several emails dated 02.03.2017 (Email from Respondent to Applicant regarding malfunctioning of the Turn Over Device (TOD)), 12.09.2017 (Email from customer to Respondent calling immediate action in replacement of chain conveyors supplied by the Applicant), 27.09.2017 (Email from Respondent to Applicant reporting that the systems supplied by the Applicant is not working), 28.09.2017 (Email from Customer to Respondent complaining



that the basic design of the chain and the sections used in the conveyor system is too weak and recommending replacement and offering to get the new chain installed at their cost, which shall be debited to payments due to the Respondent), 06.11.2017 (Email from Respondent to Applicant regarding rectifying defects), 17.11.2017 (Email from Respondent to Applicant regarding the problems with the Turn Over Device supplied by the Applicant), 17.01.2018 (Email from Respondent to Applicant regarding continuous conveyor breakdown and calling for action plan immediately) and 20.03.2018 (Email to Applicant regarding malfunctioning of conveyor) to establish that the equipment supplied by the Applicant is defective and that the Corporate Debtors clients have raised disputes and have withheld the Corporate Debtor payment on account thereof.

4. Heard Mr. Venkata Raghavan, learned Counsel for the Petitioner, and Mr. K.B.S. Manian, learned Counsel for the Respondent. We have carefully perused the pleadings of both the parties along with extant provisions of the Code, and the Rules made thereunder and the Law on the issue.
5. Mr. Venkata Raghavan, learned Counsel for the Petitioner, while reiterating various averments made in the Company Petition, and also in the synopsis, as briefly stated supra, has further asserted that the outstanding amount in question is not deemed to be in dispute as the defense raised by them is not at all tenable and the allegations and contentions made about the defective services are not at all correct. They have not raised any pre-existing dispute with reference to the Demand Notice dated 14.05.2019. Since the Company Petition is filed in accordance with law and the debt and default is not seriously disputed, thus it is a fit case to initiate CIRP, appoint IRP and impose moratorium.



6. Mr. K.B.S. Manian, learned Counsel for the Respondent, on the other hand, while seriously opposing even maintaining the instant Company Petition, as briefly stated supra in the reply, has further submitted that the Respondent has not only in correspondence with several emails as mentioned in the reply, and also they have suffered huge losses, and thus in fact they are entitled to claim damages to the tune of Rs.78,00,000/- on them, and have also given the same in their reply dated 08.07.2019. Therefore, they are in the process of initiating arbitral proceedings as well as proceedings for damages. Therefore, he submits that the Petition is liable to be dismissed.
7. As stated supra, the instant Company Petition is filed U/s 9 of the Insolvency and Bankruptcy Code, 2016, wherein the main requisite condition to file Company Petition is statutory Demand Notice. However, the Petitioner has not enclosed statutory Demand Notice, though he has mentioned in the Affidavit that he has sent the statutory Demand Notice dated 14.05.2019. Both the parties have not placed the statutory Demand Notice on record till date, except reply given by the Respondent dated 08.07.2019. In the instant case, as stated supra, basing on the four Purchase Orders dated 22.01.2016, 10.11.2016, 10.11.2016 and 10.02.2017, the Petitioner claimed total amount of Rs.1,57,48,155/-, out of which, admittedly 90% of the amount has been paid, and only the remaining 10% is required to be paid by the Respondent. It is not in dispute that the Respondent has time and again brought to the notice of the Petitioner about defective services, which ought to be rectified by the Petitioner.
8. It is relevant to refer general Commercial Terms and Conditions as mentioned in purchase orders, which reads as under:

“Payment Terms:

- *20% advance on Basic Value against receipt of Official Order Acceptance (duly signed and sealed in all the pages of our PO), Advance Bank Guarantee and Proforma Invoice.*



- 40% within 3 Working Days including Tax & Duties against 100% receipt of material at PRISM Works.
- 20% within 30 Days from the date of receipt of material at PRISM Works.
- 10% within 45 Days from the date of receipt of material at PRISM Works.
- 10% against PBG for 12 month from the date of successful Erection and Commissioning.

Delivery:

- Material should be ready for dispatch from M/s. Abhiyanta Inc. on or before 20th February 2017 without delay.

Freight:

- Freight will be arranged by PRSIM. Vehicle requirement should be informed by M/s. Abhiyanta Inc. to M/s. PRISM three day in advance to arrange the Vehicle.

Material Inspection:

- PRISM engineer will do the material inspection at M/s. Abhiyanta Inc. prior to dispatch. Inspection call letter should be sent to PRISM before 7 days.

Insurance if any:

- To be arranged by you and same will be included in your bill.

Packing:

- Good quality Wooden Carte packing cover with Plastic Packing Cover to be done to avoid the damages during transit, Tran's shipment, Loading & Unloading. Only for Motor and Chain Wooden Cratz Packing other Mechanical parts had to be covered with Plastic Packing Cover.

Note:

1. M/s. Abhiyanta Inc. should provide Test certificates for all the machinery components of the conveyor, Conveyor and Conveyor Structure GA drawings in AutoCAD format, Operation & Maintenance manual, Guarantee Certificate & Spare parts list along with the material.



2. GA Drawing to be submitted to us for our approval within 5 days from the date of PO.

STANDARD TERMS AND CONDITIONS

1. Conveyor and Conveyor Structures GA Drawing to be submitted within 5 Days on receipt of Purchase Order for our approval.
2. Test & Guarantee certificates to be submitted along with the supply of the materials.
3. Operation and Maintenance manual (3 sets) should be submitted to PRISM along with the supply of materials.
4. Spare parts list with prices to be submitted within 3 days from the date of receipt of purchase order.
5. Final inspection will be carried out by PRSIM Engineer at your works before dispatch of the materials call letter to be sent to us 5 days in advance.
6. Guarantee to be provided for a period of 18 months from the date of supply or 12 months from the date of commissioning in case of design fault or defective workmanship found during warranty period the same has to be rectified/replaced within 3 days by M/s. Abhiyanta Inc. at free of cost (including the expenses of your site Engineer) without fail.
7. At the time of commissioning if any items to be replaced or changed, you should replace the defective parts within reasonable time (2 days). Spare parts to be replaced by you during guarantee period except wear and tear items. (Free of charge).
8. For commissioning of Conveyor M/s. Abhiyanta Inc. person should be sent to site at no charges for 5 Days. Boarding, Lodging & Transportation for these 5 days will be in M/s. Abhiyanta Inc. scope. Above 5 Days will be in chargeable Basis.
9. Service to be extended by you in warranty period by deputing your service engineer within 3 days of our receipt of complaint. If not done so, we shall depute our service engineer and debit your account towards such charges.
10. PRISM has certain contractual obligations towards their customer. You are expected to discuss, correspond all technical and commercial matter with PRISM only.
11. You should avoid direct discussion, correspondence, spare parts supply; service calls etc. with PRISM customer till PRISM gives you written clearance to do so.



12. All differences or disputes arising out of this contract shall be settled amicably by mutual discussions and negotiations. If this fails such dispute shall be settled by arbitration.

13. For any transit damages we shall issue an open delivery report which shall be sent to you within 10 days of receipt of materials for your corrective action. Insurance to be arranged by you and it will be paid by us.

14. The jurisdiction of such arbitration shall be Bangalore city. Order conditions are subject to force majeure conditions and applicable to both the sides.”

9. By perusal of the general terms and conditions of the Purchase Orders in question, there are several conditions to be fulfilled in order to make claim and there is an Arbitration clause available in the terms by inter alia stating that the differences or disputes arising out of the contract shall be settled amicably by discussions and negotiations, and failing of such dispute shall be settled by arbitration. The Petitioner has not resorted to arbitration if it is entitled for the remaining balance. As stated supra, the Respondent in their reply dated 08.07.2019 has inter alia states “that in respect of the execution of the project in question, their customers M/s.Jamuna Auto Lucknow and Yamunanagar suffered heavily due to gross delays caused by the Petitioners, which has seriously affected timely execution of the project. Several works were not completed. The Turn Over Device supplied against both the orders has malfunctioned and was not rectified despite several reminders and follow up from the Respondent. One Turn Over Device was removed from the customer site and handed over to the Petitioner by the Respondent representatives so that the Petitioner could analyse and rectify the defects. There has been gross delays and non-performance on several fronts, which has directly affect the Respondents’ obligations to its customers. Further, Mr.Suresh Babu, one of the Partners of Petitioner had met with the Respondent’s Managing Director and accepted that there were manufacturing defects in the conveyor system leading to



the breaking of the chains. A visit to the site of the project by Petitioners' aforesaid partner along with Respondents' General Manager Mr. ET Dhanasekaran was also made an effort to resolve the issue. At the site Mr. Suresh Babu has undertaken to Respondents' customer through their plant-head Yamunanagar; Mr. Bhupinder Singh, to replace the defective chains. No action whatsoever has been taken by the Petitioner. The Respondent has not received the chain test certificate till date. Therefore, dispute raised by the Respondent is substantial in nature and it cannot be called a mere dispute which is covered by the judgement of Hon'ble Apex Court.

10. The above facts and circumstances clearly established that there is a pre-existing dispute, wherein the Respondent could not pay the remaining outstanding amount in question and the Petitioner could not take effective steps at the relevant point of time to rectify the defects and avoid delays. Admittedly, 90% of the invoices amount is paid and only 10% is to be paid, and whether Petitioner is entitled or not for remaining balance amount cannot be decided in the instant proceedings. The Petitioner is also failed to invoke alternative mechanism provided in the Purchase Orders as mentioned supra, in case, the Petitioner is entitled for the remaining balance. There are several conditions contained in Purchase Orders with regard to payment, as extracted supra, to be fulfilled before claiming the invoice amount in full. Admittedly, the instant Petition is filed with an intention to recover alleged 10% of the remaining balance amount under the provisions of the Code. It is a settled position of law that the provisions of the Code cannot be invoked to recover the alleged outstanding amount, and more so when there is dispute. The Hon'ble Supreme Court in the case of *Mobilox Innovations Private Limited Vs. Kirusa Software Private Limited*¹, has *inter alia* held that IBC, 2016 is not intended to be substitute to a recovery forum. In another latest

¹(2018) 1 SCC 353



judgement rendered in *Transmission Corporation of A.P. Ltd. Vs. Equipment Conductors and Cables Ltd.*,² Hon'ble Supreme Court of India, has *inter alia* held that existence of undisputed debt is sine qua non of initiating CIRP. As per para 34 of judgement, it is stated that Adjudicating Authority, while examining an application filed under Section 9 of Code, will have to determine:

- i. Whether there is an 'operational debt' as defined exceeding Rs.1 Lakh?
- ii. Whether documentary evidence furnished with the application shows that the aforesaid debt is due and payable and has not yet been paid?
- iii. Whether there is existence of dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before receipt of demand notice of the unpaid operational debt in relation to such dispute?

If any one of aforesaid conditions is lacking, the application would have to be rejected.

11. It is also to be noted here that the Respondent also failed to take necessary action by initiating steps to claim damages or to forfeit the remaining balance for the defective service. Moreover, it is not the case of Petitioner that the Respondent is an insolvent Company. In the absence of any averment with regard to issue of insolvency of Corporate Debtor, the instant Petition can be deemed to have filed only for recovery of outstanding amount rather than to initiate CIRP on justified reasons.

12. For the aforesaid reasons and circumstances, and the law on the issue, we are of the considered opinion that the instant Company Petition is filed with an intention to recover alleged 10% outstanding

²(CA No.9597 of 2018) dated 23rd October, 2018, (2018) 147 CLA 112 (SC)

amount for which there is pre-existing dispute, and the Company is solvent Company. Therefore, the Company Petition is liable to be dismissed. However, it is the responsibility of the Respondent to suitably address the grievance of Petitioner so as to settle the issue as per law.

13. In the result, CP (IB) No.341/BB/2019 is hereby dismissed. However, the Respondent is directed to re-examine the issue, in a dispassionate way, so as to settle the issue in question rather than to drag on the issue. And this Order also will not come in the way of Petitioner to invoke any other remedy available under any other law, to resolve the issue in question. With no order as to costs.

**ASHUTOSH CHANDRA
MEMBER, TECHNICAL**

**RAJESWARA RAO VITTANALA
MEMBER, JUDICIAL**

Krishna