



IN THE NATIONAL COMPANY LAW TRIBUNAL
JAIPUR BENCH

CORAM: SHRI DEEP CHANDRA JOSHI,
HON'BLE JUDICIAL MEMBER
SHRI PRASANTA KUMAR MOHANTY,
HON'BLE TECHNICAL MEMBER

CP No. (IB)- 162/9/JPR/2019

(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:

RAYS POWER EXPERTS PRIVATE LIMITED

...Operational Creditor/Applicant

Versus

NAVKAR WOOLLENS PRIVATE LIMITED

...Corporate Debtor/Respondent

MEMO OF PARTIES

RAYS POWER EXPERTS PRIVATE LIMITED

CIN: U40106RJ2011PTC034452

R/o 4th Floor, Sheel Mohar Plaza,

Yudhisthir Marg, C-Scheme,

Jaipur- 302001

...Applicant

VERSUS

NAVKAR WOOLLENS PRIVATE LIMITED

CIN: U40300RJ2003PTC018789

R/o Office No. 67-A, Industrial Area,

Rani Bazar-Bikaner,

Rajasthan- 334001

...Respondent

For the Applicant : Pawan Sharma, Adv.



For the Respondent : Susshil Daga, Adv.
Akshita Koolwal, PCS

Order Pronounced On: 06.02.2023

ORDER

Per: Shri Deep Chandra Joshi, Judicial Member

1. The present application has been filed by Rays Power Experts Private Limited through its authorised signatory Mr. Rahul Gupta ('Operational Creditor'/ 'Applicant'), seeking to initiate Corporate Insolvency Resolution Process ('CIRP') against Navkar Woollens Private Limited ('Corporate Debtor'/ 'Respondent') under Section 9 of the Insolvency and Bankruptcy Code, 2016 ('IBC' / 'Code') read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 ('Rules').
2. The Applicant, M/s Rays Power Experts Private Limited, is a private limited company provides engineering, procurement, construction, operation and maintenance services. The registered office is at 4th Floor, Sheel Mohar Plaza, Yudhisthir Marg, C-Scheme, Jaipur- 302001. The alleged default by the Corporate Debtor for the non-payment of operational dues amounts to Rs. 1,87,53,696/- (Rupees One Crore Eighty-Seven Lakh Fifty-Three Thousand Six Hundred Ninety-Six Only).
3. The Corporate Debtor, M/s Navkar Woollens Private Limited, is a private company incorporated under the Companies Act, 1956, on 04.12.2003,



having CIN: U40300RJ2003PTC018789. The Respondent has its registered office at – Office No. 67-A, Industrial Area, Rani Bazar-Bikaner, Rajasthan- 334001; and has an Authorised Share Capital of Rs. 1,00,00,000/- (Rupees One Crore Only) and Paid-Up Share Capital of Rs. 91,19,200/- (Rupees Ninety-One Lakh Nineteen Thousand Two Hundred Only).

4. The details of the transactions leading to the filing of this application averred by the Applicant *vide* Diary No. 1131/2019 dated 19.06.2019 are as follows:
 - a. The Corporate Debtor issued a work order in favour of the Applicant on 16.11.2012 and thereafter entered into an Engineering Procurement and Construction Agreement ('Agreement') dated 21.12.2012, wherein the Corporate Debtor engaged the Applicant for providing Engineering, Procurement, Construction ('EPC') services along with commissioning of a project. It is also agreed between the parties that the Applicant will provide Operation & Maintenance Services ('O&M') to the project for 25 years. A copy of the agreement is attached as Annexure-V of the Application.
 - b. The Applicant states that the total cost of the project agreed between the parties is Rs. 7,31,00,000/- (Rupees Seven Crore Thirty-One Lakh Only).



- c. Further the Applicant contended that the O & M services will be free of cost for initial 2 years from the commissioning of the plant thereafter the cost of O & M services shall be 6,00,000/- (Rupees Six Lakh Only) per annum inclusive of all taxes, duties, levies and annual escalation of 6% per annum.
- d. The Applicant successfully commissioned the work of the project on 24.05.2013. Subsequently, the Applicant issued an invoice on 24.05.2013 for Rs. 6,81,00,000/- (Rupees Six Crore Eighty-One Lakh Only). Further, the Applicant issued an invoice on 12.03.2016 for Rs. 32,060/- (Rupees Thirty-Two Thousand Sixty Only).
- e. It is pertinent to note that in lieu of the aforesaid invoices raised the Applicant has received Rs. 5,63,48,461 (Rupees Five Crore Sixty-Three Lakh Forty-Eight Thousand Four Hundred Sixty-One Only).
- f. Further the Applicant has issued three invoices for O&M services against which no payment has been received. The Applicant issued a Demand Notice under Section 8 of the Code on 13.05.2019.
- g. The aforementioned details, as reflected in Part IV of the Application, are as follows:

Part IV

Particulars of Operational Debt



1.	Total Amount of Debt, Details of Transactions on account of which debt fell due, and the Date from which such debt fell due.	1. Claim for commissioning of Solar Power Project being Rs. 1,67,83,599/- (Rupees One Crore Sixty-Seven Lakh Eighty-Three Thousand Five Hundred Ninety-Nine Only). 2. Claim for O & M is Rs. 19,70,098/- (Rs. Nineteen Lakh Seventy Thousand Ninety-Eight Only) Therefore, total amount of debt: Rs. 1,87,53,696/- (Rupees One Crore Eighty-Seven Lakh Fifty-Three Thousand Six Hundred Ninety-Six Only)
2.	Amount claimed to be in default and the date on which the default occurred	Amount Claimed to be in default: Rs. 1,87,53,696/- Date from which Debt fell Due: 31.12.2016

5. Consequent to the notice issued by this Adjudicating Authority, the Respondent filed its reply *vide* Dairy No. 2727/2019 dated 21.11.2019, stating as follows:

- a. The Respondent contended that the Applicant/Operational Creditor has not approached with clean hands and suppressed various material facts. The Respondent submits that there is no Operational Debt and exists a pre-existence of the dispute between the parties as the affidavit under section 9(3)(b) is not filed with the Application.



- b. The Respondent submits that the present Application is defective as it is not supported by a proper affidavit. It is pertinent to note that there is no amount is due on the part of the Respondent rather the Corporate Debtor has made the payment of Rs. 51,00,000/- (Rupees Fifty-One Lakhs Only) to the Applicant. Copy of the account statement is attached as Annexure-2 of the reply.
- c. The Applicant has filed a balance sheet for the last 3 years in compliance of an order dated 09.08.2019 however the Respondent contends that the same has been fabricated and then presented before the tribunal.
- d. As per the terms of the payment clarifies that Applicant was bound to submit a revolving performance Bank Guarantee for average sale value every year and if the generation in any year is less than the guaranteed generation then the same shall be paid by the Applicant at the end of the year.
- e. The Corporate debtor submits that the Applicant till date not submitted the performance bank guarantee. The annual generation and performance of the project is not up to the mark. The Corporate Debtor has written various E-mails to the Applicant prior to the issuance of the Demand Notice.
- f. Further the Corporate Debtor submits that the scheduled commissioning and performance of the project was the essence of the



contractual relations between the parties. As per the terms of the Agreement, the project is required to be commissioned by 15.03.2013 and any delay after that would lead to the imposition of liquidated damages on account of loss of generation and depreciation claim. The Applicant admitted that the project was commissioned on 24.05.2013. The amount of liquidated damages quantified is Rs. 73,10,000/- (Rupees Seventy-Three Lakh Ten Thousand Only).

- g. The Corporate Debtor contends that the installation of a plant is incomplete till date. The Applicant has not performed SCADA monitoring system which enables monitoring of the entire plant, plant boundary, internal roads, road lights, shelters on inverters, and various other works that have not been completed till date.
- h. The Applicant has signed a letter dated 23.06.2016 wherein it was agreed that the Respondent would transfer 15,00,000/- (Rupees Fifteen Lakh Only) and the remaining would be transferred after completion of the above work which was promised to be completed by 30.08.2016. In lieu of the same the Respondent has transferred Rs. 15,00,000/- (Rupees Fifteen Lakhs Only) on 23.06.2016 and the remaining Rs. 15,00,000/- (Rupees Fifteen Lakhs Only) on 29.06.2016 however till date, the work has not been completed. Copy of the letter dated 23.06.2016 is annexed as Annexure-4 of the reply.



- i. The mail conversation between the Applicant and Respondent wherein the Applicant admits the pendency of work. Copy of an Email conversation wherein a pendency of work is admitted is attached as Annexure-5 of the Reply.
- j. The Respondent submitted that minimum guaranteed generation was the essence of the commercial contract between the parties and it is relevant to mention that the generation loss was to be mitigated in the following manner if the generation loss was 10% of the guaranteed amount then the same shall be adjusted by encashing revolving bank guarantee provided by the Applicant for 25 years and if the shortfall exceeds more than 10% the same shall be compensated by Applicant through direct payment to the Respondent.
- k. It is pertinent to note that not even for a single year a guaranteed generation met as undertaken by Applicant hence the Applicant has issued a debit note issued in respect of loss of power generation.
- l. The Corporate Debtor mentions that there exists a pre-existing dispute between the parties as defined under section 5(6) of the Code. Copy of relevant Emails relating to various disputes are attached as Annexure-7 of the Reply.
- m. The Corporate Debtor submits that time is the essence of the project as per the terms of the Agreement however the Applicant failed to honour the timelines and abandoned the project without



accomplishing the same. The plant has not been completed and delivered in its entirety and the Applicant was also bound to furnish a performance bank guarantee to the Respondent.

- n. Further the Corporate Debtor handed over a cheque of Rs. 15,00,000/- (Rupees Fifteen Lakhs Only) in respect of O&M services in 2016. Despite the payment, the O&M services were deliberately stopped by the Applicant in the years 2017 and 2018.
 - o. The Corporate Debtor has time and again pointed out the deficiencies in the services of the Applicant. The Applicant was never inclined to resolve the dispute and kept on changing stands. The claim of the Applicant is not sustainable due to the non-completion of the project and generation loss owing to the deficiency in the services.
6. The Applicant filed its rejoinder *vide* Diary No. 502/2020 dated 12.03.2020 and has submitted that:
- a. The Applicant states that the claim is complete which comprehensively demonstrates the factual account statement which is further corroborated by the ledger accounts filed *vide* Diary No. 2019/2019 dated 20.09.2019.
 - b. The Applicant submits that providing a revolving performance guarantee becomes imperative only when the full and final payment is made within 12 months of the commission of the plant.



- c. The Applicant contends that there is no debit note has issued to the Corporate Debtor. Further, the Corporate Debtor not only defaulted the payment towards the supply and erection of the plant but also remains a defaulter towards the O&M.
7. The Applicant filed its written submission *vide* Diary No. 3289/2022 dated 09.11.2022 reiterating the same as mentioned in its Petition.
8. In the instant case, the Applicant sent a Demand Notice *via* a registered post on 13.05.2019 to the Respondent in Form 3 under Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules 2016, wherein the aggregate amount of Rs. 1,87,53,696/- (Rupees One Crore Eighty-Seven Lakh Fifty-Three Thousand Six Hundred Ninety-Six Only) has been claimed.
9. The Corporate Debtor has filed the reply to the Demand Notice dated 25.05.2019 stating that no debt is due on the Corporate Debtor and disputing the demand on the ground of delay and deficiencies in the services provided by the Applicant.
10. We have heard the Ld. Counsels for the parties and perused the averments made in the Application, Reply, Written Submissions, and all the documents enclosed with the Application.
11. This Adjudicating Authority having perused all the relevant papers and finding them in the order notes that the Registered Office of the Respondent is situated in the state of Rajasthan, and therefore Adjudicating



Authority has jurisdiction to entertain and try this Application. Further, this matter is within the purview of Laws of Limitation, as the last payment has been made by Corporate Debtor on 29.06.2016 and the Application has been filed before this Adjudicating Authority on 19.06.2019, hence the period of three years after the default occurred not been exhausted at the time of filing of this Application. Therefore, the present Application has been filed within the prescribed period of limitation.

12. Before we come to the facts of the present case, the statutory scheme with regard to the Application under Section 9 needs to be recapitulated. Section 8 of the Code requires the Operational Creditor on the occurrence of default to deliver a Demand Notice on unpaid Operational Debt. Section 8(2) provides that Corporate Debtor within a period of 10 days of the receipt of the Demand Notice bring to the notice of the Operational Creditor existence of dispute if any. Section 8 of the Code is as follows:

“Section 8: Insolvency resolution by operational creditor. - (1) An operational creditor may, on the occurrence of a default, deliver a demand notice of unpaid operational debt or copy of an invoice demanding payment of the amount involved in the default to the corporate debtor in such form and manner as may be prescribed.

(2) The corporate debtor shall, within a period of ten days of the receipt of the demand notice or copy of the invoice mentioned in subsection (1) bring to the notice of the operational creditor—



(a) *existence of a dispute, [if any, or] record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoice in relation to such dispute;*

(b) *the [payment] of unpaid operational debt—*

(i) *by sending an attested copy of the record of electronic transfer of the unpaid amount from the bank account of the corporate debtor; or*

(ii) *by sending an attested copy of record that the operational creditor has encashed a cheque issued by the corporate debtor.*

Explanation.—For the purposes of this section, a “demand notice” means a notice served by an operational creditor to the corporate debtor demanding 2[payment] of the operational debt in respect of which the default has occurred.”

13. Under Section 9(1), Operational Creditor if does not receive payment from the Corporate Debtor or notice of the dispute under Sub-section (2) of Section 8, may file an Application under Section 9(1) of the Code. Section 9(1) is as follows:

“Section 9: Application for initiation of corporate insolvency resolution process by operational creditor.- (1) After the expiry of the period of ten days from the date of delivery of the notice or invoice demanding payment under sub-section (1) of section 8, if the operational creditor does not receive payment from the corporate debtor or notice of the dispute under sub-section (2) of section 8, the operational creditor may file an application before the Adjudicating Authority for initiating a corporate insolvency resolution process.”

14. Section 9(5)(ii) is as follows:

“(5) The Adjudicating Authority shall, within fourteen days of the receipt of the application under subsection (2), by an order—



- (i).....
- (ii) *reject the application and communicate such decision to the operational creditor and the corporate debtor, if—*
- (a) *the application made under sub-section (2) is incomplete;*
 - (b) *there has been [payment] of the unpaid operational debt;*
 - (c) *the creditor has not delivered the invoice or notice for payment to the corporate debtor;*
 - (d) *notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility; or*
 - (e) *any disciplinary proceeding is pending against any proposed resolution professional:*
- Provided that Adjudicating Authority, shall before rejecting an application under sub-clause (a) of clause (ii) give a notice to the applicant to rectify the defect in his application within seven days(i) of the date of receipt of such notice from the adjudicating Authority.”*

15. With regard to an Operational Creditor, the existence of a dispute and its communication to the Operational Creditor is statutorily provided for. Section 9(1) entitles the Operational Creditor to file an Application when it does not receive the payment or notice of the dispute under Sub-Section (2) of Section 8.
16. Now coming to the facts of the present case, after the Demand Notice sent by the Operational Creditor on 13.05.2019, a Reply dated 25.05.2019 was sent by the Corporate Debtor disputing the demand and categorically mentioning that no debt is due on the Corporate Debtor.



17. As noted above, Section 9(5)(ii) contemplates that Adjudicating Authority shall reject the Application if notice of dispute has been received by the Operational Creditor or there is a record of dispute in the Information Utility. The object and purpose of IBC is to reorganize and revive the Corporate Debtor. Section 9 Application is not contemplated to decide the dispute between the parties regarding the operational dues. The law on the subject has been categorically laid down by the *Hon'ble Supreme Court in [2018] 1 SCC 353 "Mobilox Innovations Private Limited Vs. Kirusa Software Private Limited"*. In Paragraph 33 of the Judgement, the following has been laid down:

"...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. In case the unpaid operational debt has been repaid, the corporate debtor shall within a period of the self-same 10 days send an attested copy of the record of the electronic transfer of the unpaid amount from the bank account of the corporate debtor or send an attested copy of the record that the operational creditor has encashed a cheque or otherwise received payment from the corporate debtor [Section 8(2)(b)]. It is only if, after the expiry of the period of the said 10 days, the operational creditor does not either receive payment from the corporate debtor or notice of dispute, that the operational creditor may trigger the insolvency process by filing an application before the adjudicating authority under Sections 9(1) and 9(2)...."



18. From the data produced before us, it is pertinent to mention these documents along with a description to understand the correspondence between the parties to the case:
- a. E-mail dated 24.07.2013 was preferred by the Respondent to the Applicant to improve the generation of the plant and take necessary action to get the plant in working condition.
 - b. E-mail dated 14.11.2013 was preferred by the Respondent to the Applicant stating the problems in power generation such as:
 - i. Around 20 inverters are not working properly since the inception of the plant;
 - ii. Used wrong DC cables for inverters;
 - iii. From the start there is a huge difference between electricity generation by the plant (as per daily generation report);
 - iv. Office work is still pending;
 - v. Scada system has not been installed yet;
 - vi. Modules are not being cleaned on the regular basis etc.
 - c. E-mail dated 21.01.2014 was preferred by the Respondent to the Applicant stating the issues in the plant such as huge losses of electricity between an inverter and main meter which is ultimately causing huge losses of generation.



- d. E-mail dated 07.02.2014 was preferred by the Applicant to the Respondent regarding requesting to make the payment for 1.2 MW project and asking for a performance bank guarantee.
- e. E-mail dated 10.02.2014 was preferred by the Respondent to the Applicant stating that work which is commissioned on the plant is incomplete. Some of the major incomplete works are:
- i. Leveling, Proper Trenches, Internal Roads, Boundary Wall, Control Room, SCADA and other misc. incomplete and defective work;
 - ii. The plant is not stable due to technical defects and improper O&Ms;
- f. E-mail dated 10.02.2014 was preferred by the Applicant to the Respondent for requesting the payment of Rs. 40,00,000/- (Rupees Forty Lakhs Only) and no further guarantees will be provided until the books are closed properly to the mutual satisfaction.
- g. E-mail dated 24.02.2014 was preferred by the Respondent to the Applicant in order to discuss the status of pending urgent work as followed:

<i>S. N.</i>	<i>PENDING WORK</i>	<i>CURRENT STATUS</i>
<i>1.</i>	<i>Module Tightening</i>	<i>Only 3 Tables Completed</i>
<i>2.</i>	<i>MCB replacement</i>	<i>Partial completed</i>
<i>3.</i>	<i>Control room work</i>	<i>Not done</i>
<i>4.</i>	<i>Inverters</i>	<i>Not done</i>



5.	<i>Identification of causes of Generation loss in AC side and corrective action of the same</i>	<i>Not done</i>
6.	<i>SCADA</i>	<i>No change in old status</i>

- h. E-mail dated 16.06.2014 was preferred by the Respondent to the Applicant regarding various problems in the plant such as poor generation, poor operation & maintenance of the plant, non-standard cables, and non-working inverters in the plant. Generation of the plant is comparatively lower than the generation of other plants. The main reasons of the heavy losses of generation of the plant are as

<i>S.N.</i>	<i>Problem</i>	<i>Loss of Units Per Day</i>	<i>% of Loss</i>
1.	<i>12 Inverters not working and low generations in 2 inverters</i>	<i>450</i>	<i>9%</i>
2.	<i>Losses due to DC cables</i>	<i>250</i>	<i>5%</i>
3.	<i>Line losses from Inverters to Electric Meter</i>	<i>450</i>	<i>9%</i>
4.	<i>Electricity connection from our plant to your office and plant</i>	<i>200</i>	<i>4%</i>
	<i>Total Losses</i>	<i>1350</i>	<i>27%</i>

- i. E-mail dated 26.08.2014 was preferred by the Respondent to the Applicant as reminder mail stating the same as in the above mail.



Copy of the above mail correspondences between the Operational Creditor and the Corporate Debtor is annexed as Annexure-7 of the Reply.

19. The word ‘dispute’ as defined under Code includes a suit or arbitration proceedings relating to the existence of the amount of debt; the quality of goods or services; or the breach of a representation or warranty. It is true that the definition must fit under the parameters as defined under the code but at the same time, it must stand on a test as laid down in the recent judgment of the Hon’ble Supreme Court in *M/S S.S. Engineers Vs Hindustan Petroleum Corporation Ltd. & Ors. in Supreme Court in Civil Appeal NO. 4583 OF 2022* whereby the following has been held:

“31. The NCLT, exercising powers under Section 7 or Section 9 of IBC, is not a debt collection forum. The IBC tackles and/or deals with insolvency and bankruptcy. It is not the object of the IBC that CIRP should be initiated to penalize solvent companies for non-payment of disputed dues claimed by an operational creditor.

32. There are noticeable differences in the IBC between the procedure of initiation of CIRP by a financial creditor and initiation of CIRP by an operational creditor. On a reading of Sections 8 and 9 of the IBC, it is patently clear that Operational Creditor can only trigger the CIRP process, when there is an undisputed debt and a default in payment thereof. If the claim of an operational creditor is undisputed and the operational debt remains unpaid, CIRP must commence, for IBC does not countenance dishonesty or deliberate failure to repay the dues of an Operational



Creditor. However, if the debt is disputed, the application of the Operational Creditor for initiation of CIRP must be dismissed.”

20. Furthermore, the Hon’ble Supreme Court of India, in the matter of *‘Mobilox Innovative Private Limited v. Kirusa Software Private Limited, (Supra)’*, held as follows:

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



21. In view of the foregoing, *inter-alia* pre-existing disputes between the parties, we have no option but to reject the prayer of the Operational Creditor to initiate proceedings under Section 9 of IBC.
22. Hence, the Application is Dismissed. The Order in the present matter is made in terms of Section 9 (5) (ii) of IBC, 2016 and based on the facts and pleadings submitted by the parties in the instant case and shall not prejudice any matter or proceedings between the parties, if any, before any other Court, Tribunal or any judicial or other authority.
23. Let the copy of the Order be served to the parties and IBBI.

DEEP
CHANDRA
JOSHI

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DEEP CHANDRA JOSHI
Date: 2023.02.06
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**DEEP CHANDRA JOSHI,
JUDICIAL MEMBER**

PRASANTA
KUMAR
MOHANTY

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**PRASANTA KUMAR MOHANTY,
TECHNICAL MEMBER**