

SL. No.5

**NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH
COURT HALL NO: II**

PHYSICAL HEARING

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

**ATTENDANCE-CUM-ORDER SHEET OF THE HEARING OF NATIONAL COMPANY LAW TRIBUNAL,
HYDERABAD BENCH, HELD ON 07.12.2023, At 10:30 AM**

TRANSFER PETITION NO.	
COMPANY PETITION/APPLICATION NO.	CP (IB) No.148/9/HDB/2020
NAME OF THE COMPANY	Rotodyne Engineering Services Pvt Ltd
NAME OF THE PETITIONER(S)	Vertex Cranes & Hoists India Pvt Ltd
NAME OF THE RESPONDENT(S)	Rotodyne Engineering Services Pvt Ltd
UNDER SECTION	9 of IBC

ORDER

Orders pronounced, recorded vide separate sheets. In the result, this petition is dismissed.

Sd/-
MEMBER (T)

Sd/-
MEMBER (J)

**IN THE NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH – II**

CP No.148/9/HDB/2020

[Section 9 of the Insolvency and Bankruptcy Code, 2016]

In the matter of :

M/s.Vertex Cranes & Hoists India Limited,
Suvey No.103/1, Besides Jain International School,
Kucharam Village, Toopran (M),
Medak District - 502381,
Telangana.

....Operational Creditor/Applicant

AND

M/s.Rotodyne Engineering Services Private Limited,
Plot Nos.8 & 9,
Annapurna Enclave,
Adj Lane to BSNL Office,
Chandanagar,
Hyderabad - 500 050.

.....Corporate Debtor

Counsel/Parties present:

For the Petitioner : Mr.T.Sujan Kumar Reddy, Ms.G,Sumathi,
Advocates

For the Respondent : Mr.Mayur Mundhra

Date of Order: 07.12.2023

Coram:

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

Heard on : 21.11.2023

Per: Rajeev Bhardwaj, Member (Judicial)

ORDER

1. This petition has been filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 by M/s.Vertex Cranes & Hoists India Limited (hereinafter referred as operational creditor) for initiation of Corporate Insolvency Resolution Process (CIRP) against M/s.Rotodyna Engineering Services Private Limited (hereinafter referred as corporate debtor).
2. The operational creditor has averred that it is a private limited company incorporated under the Companies Act, 1957 and is engaged in the business of manufacture and supply of all types of EOT Cranes, Gantry Cranes, JIB Cranes, Electrical Winches, Hoists etc.
 - 2.1 The corporate debtor has placed purchase order dated 22.09.2018 amounting to Rs.26,25,000/- for the supply of 25 tonnes x 6.2 meters span x 30 meters lift x 40 meter long travel and double girder gantry crane with dual speed as per M5 standard and power cable supply alongwith cables.
 - 2.2 As per the terms and conditions of the purchase order, cost of the material supplied by the operational creditor to the corporate debtor was to be adjusted. The operational creditor supplied material of Rs.6,34,247/- vide bill dated 15.10.2018 and of Rs.4,66,234/- vide bill dated 13,10,2018. Thus, the remaining amount left was Rs.15,24,519/-excluding Rs.60,841/- towards erection and commissioning charges and value of tax invoice at Rs.15,85,360/-.
 - 2.3 After the tax invoice was raised by the operational creditor, the corporate debtor paid Rs.12,34,000/- out of the total amount of Rs.18,70,725/-. The remaining amount left was Rs.6,36,725/- including an interest amount of Rs.1,14,610/- @ 18% and the total debt due was Rs.7,51,335/-. The corporate debtor has also issued completion certificate as per the purchase order without raising any dispute on 17.01.2019.

3. The corporate debtor by filing the reply has raised various issues, but admitted that 10% of the total due amount is left to be paid because the operational creditor has not complied with the terms & conditions of the contract.
- 3.1 Against the material worth Rs.26,25,000/-, it is clarified that 80% of the payment has already been made to the operational creditor. The remaining 20% payment was stopped because of certain defects, as detailed hereunder were to be rectified:
 - a) Roller Bearing damaged in main wheel.
 - b) Distance between Rail Locking caps shall be maintained 500 mm, additional locking caps to be erected.
 - c) Gantry cranes cable fixing is not present.
 - d) Any other defects noticed by the erection team.

When the operational creditor assured to rectify these defects, 10% of the amount was released, but the remaining 10% was kept pending, until the removing of defects.

- 3.2 It is claimed that the financial creditor has not rectified the defects brought to its notice and therefore, the corporate debtor is not liable to make the payment. Besides, the corporate debtor has also taken objection of suppression of facts and maintainability of the present application.
4. We have heard the Learned Counsels for both the parties and have also gone through the records.
5. Indisputably, the operational creditor supplied 25 tonnes x 6.2 meters span x 30 meters lift x 40 meter long travel and double girder gantry crane with dual speed as per M5 standard and power cable supply along with cables to the corporate debtor vide purchase order dated 22.09.2018. (**Annexure 1 - page No.19 of the application**). The relevant terms and conditions which have an impact on the decision in the present application are reproduced below:

- a) *Payment terms - 10% advance on acceptance of P.O.*
- b) *80% of the revised PO value + 18% GST to be given after visual inspection at M/s.Vertex works.*
- c) *10% of PO value shall be paid after erection, commissioning and load test of the crane*
- d) *Balance 10% shall be paid after 3 months from the load test date.*
- e) *Guarantee of the equipment shall be for 1 year from the load test date.*

6. In the delivery challan, the cost of the machine was reduced to Rs.18,70,725/- (**Annexure3- page No.22-23 of the application**) from the original price.

7. The description of the total debt due from the corporate debtor is given below (**para iv of part IV – page Nos.7-8 of the application**).

S.No	Particulars	Amount (Rs)	Amount (Rs)
1	Purchase Order	Rs.26,25,000/-	
2	Materials supplied by CR (Bill No.22266)	6,34,247	
3	Materials supplied by CR (Bill No.3272)	4,66,234	
4	Supply, Erection and Commissioning charges	15,24,519+ 60,841=15,85,360 (Tax Invoice)	
5	Payment received	12,34,000	
		Net amount due	6,36,725
		Interest @18% (Rs.1,14,610/-) including interest	7,51,335
		TOTAL DEBT DUE AMOUNT	751,335

8. The corporate debtor has admitted about the supply of the machine at Rs.26,25,000/- and claimed that 90% of this amount has already been

paid and only 10% of the total amount was kept pending because of certain defects which were not rectified by the operational creditor. Therefore, there is dispute about the exact amount of the debt.

9. Condition No.(e) of the purchase order (**Annexure 1**) says that 80% of the purchase order plus 18% GST was to be paid after inspection and out of 20%, 10% was to be released as per condition No.(f) after erection, commissioning and load test of the crane. The balance 10% was to be paid by the corporate debtor after three months from the load test date.
10. In Part IV, S.No.xiii (page 14 of the application), it is mentioned that after the tax invoice was raised, the corporate debtor paid Rs.12,34,000/- and in this manner, Rs.6,36,725/- excluding interest is still to be paid by the corporate debtor. This shows that the claim of the financial creditor is not as per the terms and conditions of **Annexure -1**, wherein the schedule of payment has been described. In this context, withholding of some amount of the amount by the corporate debtor is relevant and the reasons for this have been given in e-mails dated 29.02.2019 and 20.02.2019 (**Annexure 9 -11 of the counter**). It has been specifically explained in the e-mail dated 20.02.2019 as to what defects were found in the machine supplied by the operational creditor. The corporate debtor has also pointed out that 10% payment shall be released after rectification of the issues raised in the e-mail dated 19.02.2019.
11. The operational creditor instead of redressing the grievance of the corporate debtor, issued the demand notice dated 19.07.2019 (**page No.30 of the reply**) wherein an amount of Rs.6,36,725/- excluding the interest was claimed to be due from the corporate debtor. In response, the corporate debtor vide letter dated 17.08.2019 again requested the operational creditor for rectification of the issues pointed out in e-mail dated 19.02.2019. The operational creditor has not made reference of this notice in the petition, but relied upon another demand notice dated 20.12.2019 (**Annexure page No. 13 of the application**).

12. Therefore, it is clear that the operational creditor has not only issued second demand notice, but has not uttered a single word about the first notice and there is also dispute about the exact amount of the debt as the corporate debtor has admitted about the non-payment of 10% of the total amount only because of pre-existing dispute, while the operational creditor claims that the corporate debtor is liable to pay Rs.7,51,335/-.
13. In view of the said factual facts, Learned Counsel for the operational creditor is unable to explain the reasons behind issuing the second notice and he tried to distinguish the same by submitting that after the issue of the first notice, the corporate debtor has made some payment. He has also submitted that the corporate debtor has no locus standi to raise dispute because the contract was not completed.
14. Per contra, Learned Counsel for the corporate debtor submitted that the operational creditor is unable to explain as how the amount of the contract was reduced from Rs.26,25,000/- to Rs.18,70,725/-. He has also taken us through the document (**Annexure 5 – page 25 of the application**) showing as what work was required to be done by the operational creditor. As per the terms and conditions of the works to be done, it was stipulated that despite the completion of work, the operational creditor was to rectify any problem which may arise in future.
15. Section 9 r/w Section 8 of the IBC lays down the procedure and formalities for initiation of CIRP by an operational creditor. These provisions require a strict proof of debt and default. Hon'ble Apex Court in *Mobilox Innovations Private Limited versus Kirusa Software Private Limited 2018(1) SCC 353* explained as what the Adjudicating Authority has to examine in an application under Section 9:-

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)

(ii) Whether the documentary evidence furnished with the application shows that the aforesaid debt is due and payable and has not yet 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.

16. From the perusal of the IBC, it is clear that a demand notice under Section 8 is to be served on the corporate debtor and the latter may do either of the following:

a) Bring to the notice of the operational creditor that there is existence of a dispute or pendency of a suit or an arbitration proceeding already filed before the receipt of such notice; or

b) Bring to the notice of the operational creditor that the claim amount has already been paid either through electronic transfer or by encashment of cheque by the operational creditor.

17. The operational creditor has issued two notices dated 19.07.2019 and 20.12.2019 without explaining properly why need arose to issue fresh notice. Learned Counsel for the operational creditor has tried to say that after issuance of first notice dated 19.07.2019, corporate debtor has paid certain amount, but the amounts claimed in both the notices are the same. Accordingly, first notice dated 19.07.2019 is to be taken as date of default. Reply to this notice was given by the corporate debtor on 17.08.2019, wherein it was pointed out that the amount was withheld because the operational creditor did not rectify the defects brought to its notice vide e-mail dated 19.02.2019. Therefore, it is clear that the shortcomings pointed out by the corporate debtor were in the knowledge of the operational creditor prior to the issuance of the demand notice dated 19.07.2019.

18. The defects noticed relating to the roller bearing, distance between rail locking caps, gantry crane cable fixing and other defects are essential for running the crane. For such type of eventuality, a condition was included

in the contract between the parties that the balance 10% amount shall be paid after three months after the load test date. **(As per Annexure 5 – page No.29 of the application).**

11. When the operational creditor did not fix the problems as per the terms and conditions of the agreement, the corporate debtor was within its right to withhold the payment. Such defects were pre-existing before the receipt of the demand notice by the corporate debtor. The dispute was also genuine one and the standard of determining ought not to be equated with the doctrine of preponderance of probability.
12. Besides the pre-existing disputes bar the filing of the present application, the operational creditor is also unable to prove the exact amount due from the corporate debtor. This Authority exercising summary jurisdiction cannot determine the claim amount and initiate the corporate insolvency resolution process.
13. As a result, Company Petition No. **CP(IB) No.148/9/HDB/2020** is dismissed.

SD/-

**SANJAY PURI
MEMBER (TECHNICAL)**

SD/-

**RAJEEV BHARDWAJ
MEMBER (JUDICIAL)**

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