

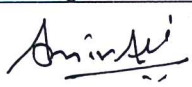
NATIONAL COMPANY LAW TRIBUNAL  
HYDERABAD BENCH

PRESENT: HON'BLE SHRI BIKKI RAVEENDRA BABU – MEMBER JUDICIAL


ATTENDANCE-CUM-ORDER SHEET OF THE HEARING HELD ON 30.08.2018 AT 10.30 AM

TRANSFER PETITION NO.	
COMPANY PETITION/APPLICATION NO.	CP (IB) NO. 50/9/HDB/2018
NAME OF THE COMPANY	Nilgiri Power Pvt Ltd
NAME OF THE PETITIONER(S)	Inox Wind Limited
NAME OF THE RESPONDENT(S)	Nilgiri Power Pvt Ltd
UNDER SECTION	9 OF IBC

Counsel for Petitioner(s):

Name of the Counsel(s)	Designation	E-mail & Telephone No.	Signature
Amir Bavani. [DMR & DMR Associates]	Advocate	9949216962.	

Counsel for Respondent(s):

Name of the Counsel(s)	Designation	E-mail & Telephone No.	Signature
V. Anesh for V. Harish Kumar	Adv	9849463726 litigators hyd @fatvaregal. com	

**ORDER**

Learned counsel Mr.Amir Bavani present for Petitioner.

Learned counsel Mr.V.Anesh present on behalf of  
Mr.V.Harish Kumar present for Respondent.

Order pronounced in open court.

Petition is rejected.

Vide separate order.

  
MEMBER JUDICIAL

**IN THE NATIONAL COMPANY LAW TRIBUNAL  
HYDERABAD BENCH, HYDEABAD**

CP(IB) No.50/09/HDB/2018  
Red with Rule 6 of the Insolvency and Bankruptcy  
(Application to Adjudicating Authority) Rules, 2016.

IN THE MATTER OF:

**M/s INOX WIND LIMITED,**  
Plot No.1, Khasra No.264-267,  
Industrial Area, Village-Basal,  
District: UNA, Himachal Pradesh – 174 303,  
Corporate Office at INOX Towers,  
17, Section 16-A  
Noida, U.P. 201 301

... **Petitioner/  
Operational Creditor**

**Versus**

**M/s NILGIRI POWER PRIVATE LIMITED,**  
NSL ICON, # 8-2-684/2/A,  
Road No.12, Banjara Hills,  
Hyderabad – 500 034.

... **Respondent/  
Corporate Debtor**

**Date of Order:30.08.2018**

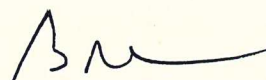
**CORAM:**

Hon'ble Sri Bikki Raveendra Babu, Member Judicial

**Counsels / Parties Present:**

**For Applicant/  
Operational Creditor** : Mr. Y. Suryanarayana  
Sr. Counsel, along with  
Mr. Amir Bavani,  
: Mrs. M.S. Mano Ranjani  
Advocates

**For Respondent/  
Corporate Debtor** : Mr. Harish Kumar  
along with  
Ms. V. Sheila &  
Mr. Prashanth,  
Advocate



**ORDER**

1. **M/s INOX WIND LIMITED** styling it as Operational Creditor filed this Petition, U/s 9 of the Insolvency and Bankruptcy Code 2016, read with Rule-6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 with a request to commence Corporate Insolvency Resolution Process (CIRP) in respect of M/s NILGIRI POWER PRIVATE LIMITED, styling it as Corporate Debtor.
  
2. The Corporate Debtor entered into the following Agreements with the Petitioner for a composite project comprising of supply of material as well as Erection and Commissioning of 5 Wind Turbine Generators (WTGs) of 2 MW each totalling to 10 MW for its Vaspite Site, Sangli District, Maharashtra .
  - i) Purchase Order #  
 NSL/PD/IVSP/2014/001 Dt: 26.08.2014  
 ("Supply Agreement") between the Corporate Debtor and the Operational Creditor, whereby the Operational Creditor was required to supply materials inter alia nacelle, hub, rotor blades, tubular tower

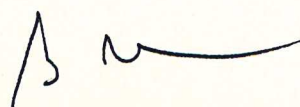


and transformer for commissioning of the Project.

ii) Work Order #  
NSL/PD/IVSP/2014/002 dated 26.08.2014  
("E&C Agreement") between the Corporate Debtor and subsidiary of Operational Creditor ie. Inox Wind Infrastructure Services Limited ("IWISL". A 100% subsidiary company of the Operational Creditor), whereby IWISL was required to inter alia Erect and Commission the Project.

iii) Work Order #  
NSL/PD/IVSP/2014/004 dated 26.08.2014  
("Development Agreement") between the Corporate Debtor and IWISL whereby IWISL was required to inter alia coordinate / facilitate for procurement / lease of land for the Project.

iv) Work Order #  
NSL/PD/IVSP/2014/003 dated 26.08.2014  
("Shared Service Agreement") between the Corporate Debtor and IWISL, whereby IWISL was required to inter alia provide

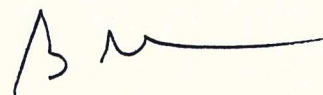


power evacuation and shared infrastructure for the Project.

v) Wrap Agreement dated 26.08.2014 ("Wrap Agreement") between the Corporate Debtor, Operational Creditor and IWISL, combining all aforesaid Agreements whereby Operational Creditor is nominated as the main contractor for the entire Project.

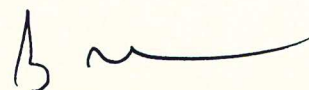
vi. Operation & Maintenance Agreement dated 26.08.2014 ("O&M" Agreement) between the Corporate Debtor and ILWISL, whereby IWISL was required to inter alia operate and maintain the Project. The total Contracts value was quantified as Rs.12,45,00,000.00 per WTG totalling to Rs.62,25,00,000.00 for all 5 WTGs.

3. According to the Petitioner as per the clauses in the contracts all payments were to be released within 7 days of the respective completion of the milestones and delay in payment by 21 days by the Corporate Debtor was to be charged with interest @ 5% p.a. over SBI base rate for the period of delay from the due date. The project was



completed by 31.10.2015. Petitioner raised the following invoices:-

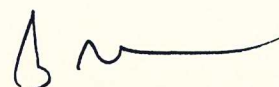
- IWL/MH/TRNS/2014-15/001
- IWL/MH/TRNS/2014-15/002
- IWL/MH/TRNS/2014-15/003-
- IWL/MH/TRNS/2014-15/004 and-
- IWL/MH/TRNS/2014-15/005 all dated  
29.09.2014 along with Invoices Nos.
- IWL/MH/BLD/2014-15/001
- IWL/MH/BLD/2014-15/002
- IWL/MH/BLD/2014-15/003
- IWL/MH/BLD /2014-15/004 and
- IWL/MH/BLD/2014-15/005 all dated  
29.09.2014 along with Invoice Nos.
- IWL/MH/WTG/2014-15/001
- IWL/MH/WTG/2014-15/002
- IWL/MH/WTG/2014-15/003
- IWL/MH/WTG /2014-15/004 and
- IWL/MH/WTG /2014-15/005 all dated  
29.09.2014 along with Invoices Nos.
- IWL/MH/TWR/2014-15/005
- IWL/MH/TWR/2014-15/006
- IWL/MH/TWR/2014-15/007
- IWL/MH/TWR/2014-15/008
- IWL/MH/TWR/2014-15/009 all dated  
29.09.14



4. It is stated by the Petitioner that Corporate Debtor continuously defaulted in remittance of dues. Petitioner vide its letter dated 03.12.2016 demanded the Corporate Debtor to clear the outstanding amount of Rs.28,73,87,934.99 along with applicable interest w.e.f. 07.11.2015. Subsequently Petitioner by its letter dated 24.02.2017 again demanded the Corporate Debtor to clear of the above said dues. Corporate Debtor neither made any payment nor to choose give reply to the Demand Notice. Petitioner having no option withdrew the operation and maintenance services provided to the Project of the Corporate Debtor. Thereafter, the representative of the Corporate Debtor visited the office of the Petitioner and agreed to settle the outstanding amount and entered into Memorandum of Understanding (MoM) dated 24.04.2017.
5. As per the said MoM, Corporate Debtor agreed to make payment of Rs.7.34 Crore. Out of the said amount of Rs.7.34 Crore Rs.2.6 Crore was to be paid by the Corporate Debtor to the Petitioner for reinstatement of operation and maintenance services by the Petitioner to the Project.

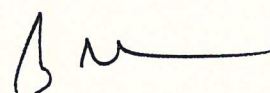


6. The Corporate Debtor was supposed to submit two Post Dated Cheques to the Petitioner as security measure for balance due payment of Rs.4,74,00,000.00/-. But Corporate Debtor failed to submit post-dated cheques of Rs.4.74 Crores as security instrument for balance due to the Operational Creditor. Corporate Debtor also defaulted in fulfilling its obligations and did not make the due payment of Rs.4.74 Crores to the Petitioner. Petitioner issued a demand notice U/s 8 of the Insolvency & Bankruptcy Code 2016 to the Corporate Debtor on 24.08.2017 demanding payment of Rs.4.74 Crores. Corporate Debtor received the Demand Notice at its registered office on 28.08.2017, but Corporate Debtor did not choose to give any reply disputing the amount of Rs.4.74 Crores. According to the Petitioner a sum of Rs.4.74 Crores has become due and payable from the Corporate Debtor and debt is towards provision of goods and services by the petitioner and its 100% subsidiary, IWISL, and therefore it is an operational debt for the purpose of Section 9 of the Insolvency and Bankruptcy Code 2016.
7. Petitioner has not proposed the name of Insolvency Professional as Insolvency Resolution

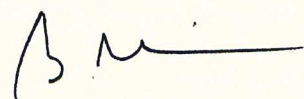


Professional (IRP). Petitioner requested this Authority to refer the matter to IBBI for recommendation of the Insolvency Professional who may act as Insolvency Resolution Professional U/s 16(3) (a) of the Code.

8. Petitioner along with the petition filed copy of computation of amount of operational debt; copy of the ledger account of Corporate Debtor in the Books of Operational Creditor; Copy of purchase orders; copy of Work Agreement dated 28.06.2014; copies of invoices; copy of commissioning certificate, copies of letters dated 03.12.2016 and 24.02.2017; copy of the MoM dtd 24.04.2017; copy of Demand Notice under section 8 of the IB Code dated 24.08.2017, certificate issued by the Financial Institution namely ICICI Bank that maintained the accounts of the petitioner confirming that there is no payment of unpaid operational debt; Copy of the statement of Bank Account of Operational Creditor maintained by ICICI Bank; Copy of the Master Data of the Corporate Debtor and the Petitioner available in the Web Portal of the Ministry of Corporate Affairs.



9. Petitioner also filed copy of the Resolution of the Board dated 31.10.2017 authorising Mr. Kalyan Ghosh, Legal Secretary.
10. Respondent in the Counter raised the following objections:-
- i) Petitioner committed breach of various obligations imposed on it under various orders and Wrap Agreement.
  - ii) The commissioning of the Project completed by 15.11.2014. Even according to the petitioner it was completed only on 31.10.2015 and with the result losses in generation and revenue.
  - iii) Petitioner caused inordinate delay in securing and maintaining required permissions and approvals for the operations of the projects and non-completion of evacuation system curtailed some of the WTG's during the Wind Season resulting in huge losses in generation.
  - iv) The performance of WTG's is much lower than the expected levels. The expected Plant Load Factor of 22.5% and even after 2 ½ years of operations is at 5.9%., during the Financial Year 2017 and a marginally improved PLF of about 13%, during Financial Year 2018. Losses of about



Rs.9,45,00,00/- Million in Financial Year 2017  
and Rs.5,41,00,000/- .

v) Improper handling of Sub-contractors/Vendors by IWISL resulting in Right of Way issues and unable to attend regular operations and maintenance of WTG's which inturn caused huge loss of generation and revenue to the Corporate Debtor.

vi) Petitioner has consistently giving preference to other customers over the Corporate Debtor. Petitioner is not restoring the WTG's as per the terms of the contract and inordinate delays in restoring the WTG's by IWISL

vii) Petitioner is not calculating the machine availabilities as per the formula agreed upon between IWISL and the Corporate Debtor and as a result the machine availabilities is shown as higher than actual machine availabilities and thereby IWISL is escaping penalties.

viii) IWISL is considering the non-fore majeure events under Force Majeure Events and blackmailing the Corporate Debtor for money for restoring WTG's moneys stopped due to non-force majeure events.

ix) Lapses and breaches on the part of the petitioner led to loss of confidence among the investors of the Project, thereby severe financial



threat to the viability of the Project. It is also stated that Clause 2 of Article-7 of the Wrap Agreement provides for reference to the Arbitration on the failure to resolve disputes through negotiations.

x) The claim of Rs.28,73,87,934.99 made in the letter dated 03.12.2016 by the Petitioner has been rectified in the meeting convened on 24.04.2017 figure was arrived at Rs.7.34 Crores.. Respondent pleaded that out of Rs.7.34 Crores Rs.2.60 Crores have already been paid. According to the Respondent the following conditions provided in the MoM dated 24.04.2017 govern realisation of amounts against PDC's .

“Payment Schedule 2 = PDCs of Rs.2.89 Crore (“PDC1”) and Rs.1.85 Crore (“PDC2”) totalling to Rs.4.74 Crores shall be submitted by NSL to Inox. The PDC-1 and PDC-2 shall be realised as per following Schedule”

- PDC1 shall be realised post completion of following activities
  - o Wind Zone Certificate of Nilgiri
  - o 2 location land transfer Nilgiri
  - o Resolution of 2 WTG's under ROW in Nilgiri



- o S/S Transformer commissioning along with associated works
- PDC 2 shall be realised post completion of following activity:

Signing of PPA for Nilgiri Project”

- Post realization of both PDC1 and PDC2, Inox shall submit following to NSL.

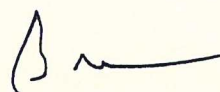
PBG for Jath

PBG for Nilgiri

It is pleaded by the Respondent / Corporate Debtor that the submission of two post-dated cheques to the petitioner is conditional and subject to fulfilment of stipulated conditions by the Petitioner.

It is elaborated by the Respondent in the Counter the following activities shall be completed in order to meet the conditions mentioned in Memorandum of Understanding (MoM):

- a) Installation of another Power Transformer (beyond the existing 2 Nos. of 100 MVA, 33/220 kV Power Transformers) at 33.220 KV Shedyal Pooling Sub-Station.
- b) Construction and Commissioning of another Bay (Beyond the existing 8 Nos. Bays) at 33/220 KV Shedyal Pooling Sub-station.

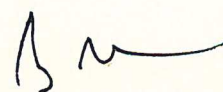


c) Completing signing of PPA with MSEDCL for the remaining 2 MW.

d) Obtaining Wind Zone Classification from MEDA for the remaining 2 MW capacity.

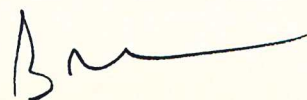
e) Transfer of balance lands for each of the 5 WTGs to meet the agreed total extent of 3 to 3.5 Acres / WTG.

11. It is stated by the Respondent that Petitioner miserably failed to fulfil the conditions imposed upon it and therefore Respondent could not make payment of Rs.4.74,00,000/- Respondent also stated that as the Demand Notice was misplaced in the Offices of the Respondent, Respondent could not give reply to the Demand Notice.
12. It is stated in the Counter that in view of the failure on the part of the Petitioner, no obligation is incurred by the Respondent to make the payment of Rs.4.74 lakhs as alleged by the Petitioner. Respondent was constrained in providing the PDCs to the Petitioner as the requisite time lines for completion of the above mentioned conditions were not provided by the petitioner.
13. Respondent sent e-mail dated 02.10.2017 wherein requested Petitioner to provide milestones for fulfilment of the conditions against which PDCs

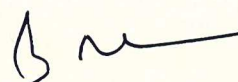


can be issued. It is also stated that Petitioner has filed application with a mala fide intention to cause harm to the Respondent by indulging in vexatious litigations.

14. Respondent pleaded that it has demonstrated the existence of a bona fide dispute that vitiates the maintainability of the Petitioner. Respondent also pleaded that petitioner suppressed the material facts and made an attempt to mislead this Adjudicating Authority.
15. Learned Counsel appearing for the petitioner contended that non-issuance of PDCs as contemplated in MoM dated 24.04.2017 amounts to occurrence of default. It is further contended that Respondent did not choose to give any notice of dispute as a reply to Demand notice. He contended that the dispute raised by the Respondent in the Counter is illusory dispute raised for the first time in the Counter, and therefore it cannot be taken into consideration in view of the Judgement of the Hon'ble Supreme Court reported in AIR2017SC4532 in Mobilox Innovations Private Limited Vs Kirusa Software Private Limited in Civil Appeal No.9405 of 2017 decided on 21.09.2017



16. On the other hand learned Counsel appearing for the Respondents contended that Petitioner must establish that Operational Debt is due and payable to the Petitioner from Respondent Corporate Debtor. He further contended that due to non-compliance of certain conditions Respondent did not furnish PDC-1 and PDC-2 as contemplated in MoM dated 24.04.2017 and it reflects in the e-Mail dated 02.10.2017, which is referred to as Exhibit-D in the Counter. A Perusal of the Exhibit-D shows the mails dated 11.08.2017 given by M/s INOX to NSL, e-mail dated 02.10.2017 issued by NSL to INOX and e-mail dated. 10.02.2018 by NSL to INOX. He further contended that due to the non-compliance of the conditions mentioned in payment Schedule-II that contained in MoM dated 24.04.2017 only PDC-1 & PdC-2 have not been given to the Petitioner by the Respondent and therefore there is no operational debt due and payable by the Respondent to the Petitioner
17. The point that needs determination in this Petition is whether there is Operational Debt which became due and payable by the Respondent to the Operational Creditor /Petitioner.



18. In this context, it is necessary to refer to the Judgement of the Hon'ble Supreme Court in Mobilox Innovations Private Limited Vs Kirusa Software Private Limited, AIR 2017SC4532 in Para 25 of the said judgement it is held as follows:

**"Para-25:** 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 debit 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 arbitral proceeding filed before the receipt of the demand notice of the unpaid operational debt in relation to such dispute?

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

19. Therefore, the Adjudicating Authority when examining the Application under Section 9 of the



code will have to determine whether there is operational debt due and payable.

20. Operational Debt is defined in Section:5 (21)

**“Operational debt”** means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred.

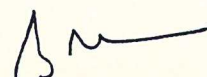
21. In the case on hand the claim made by the Petitioner is in respect of the services rendered by him in connection with Corporate Debtors power project. Therefore, the claim can be treated as Operational Debt.

22. The word ‘claim’ is defined in Section 3(6) which reads as under:

**‘Claim means’ –**

(a) a right to payment, whether or not such right is reduced to judgement, fixed, disputed, undisputed, legal, equitable, secured or unsecured;

(b) right to remedy for breach of contract under any law for the time being in fore, if such breach gives rise to payment , whether or not such right is reduced to judgement, fixed, matured, unmatured, disputed, undisputed, secured or unsecured.



23. **Debt is defined in Section 3(11):**

“Debt” means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt.

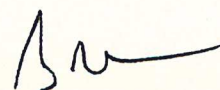
24. **Default is defined in Section 3(12):**

“default” means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not repaid by the debtor or the corporate debtor, as the case may be;

25. In this context, it is necessary to refer to the payment schedule - 2 in MoM dated 24.04.2017. The MoM states that the Final outstanding amount is accrued 7.34 crores. Out of it as per payment Schedule-I, Rs.2.6 crores has already paid by NSL to INOX.

26. The Payment Schedule-II states that NSL should give PDC-1 for Rs.2.8 Crores and PDC-2 for 1.8 crores totalling to Rs.4.74 crores. Payment schedule also state that PDC-1 and PDC-2 shall be realised post completion of certain activities.

27. Further a reading of payment Schedule-2 disclose that PDC-1 shall be realised on completion of certain activities mentioned therein. Similarly,



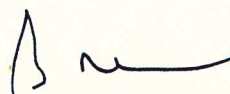
PDC-2 shall be realised on post-completion of signing of PPA for Nilgiri Project. A perusal of payment schedule in MoM dated 24.04.2017 clinchingly establish that even if Corporate Debtor submit PDC-1 and PDC-2 to the Operational Creditor they are due and payable only on post completion of activities mentioned in the Payment Schedule-II, but not otherwise.

28. In Form-5, Para-4, Point-F, it is stated as follows:-

“It was only thereafter that the representative of Corporate Debtor visited the office of the Operational Creditor and agreed to settle the outstanding amount and signed a Minutes of Meeting (MoM) dated 24.04.2017, as per which, towards full and final settlement, Corporate Debtor agreed to make payment of a total amount of Rs.7.34 Crore. It was further agreed that out of the said sum of Rs.7.34 crore, Rs.2.6 Crore was to be paid by the corporate debtor to the Operational Creditor for reinstatement of operation and maintenance services by the Operational Creditor to the Project. Further, Corporate Debtor was also supposed to submit 2 Post Dated Cheques (“PDC”) to Operational Creditor as a security measure of

balance due payment totalling to the tune of Rs.4,74,00,000.00”

29. Therefore, even according to the Petitioner PDC-1 & PDC-2 has to be submitted by the Corporate Debtor to the Operational Creditor as Security measure of balance due payment totalling to a tune of Rs.4.74 crores.
30. In the case on hand Respondent did not submit even the PDCs. Even before the submission of PDCs there was correspondence between the petitioner and respondent in the form of e-mail which is referred to in page No. 39 and 40 of the Counter. There appears to be disputes between the Petitioner and Respondent for non-submission of PDCs as per MoM dated 24.04.2017. Above all whether non-submission of PDCs which are treated as securities creates any liability or obligation in respect of claim which is due from the Corporate Debtor to the Petitioner/Operational Creditor.
31. The non-submission of PDCs by the Respondent to the Petitioner may at best amount to breach of terms of MoM but it cannot be equated with debt due and payable.

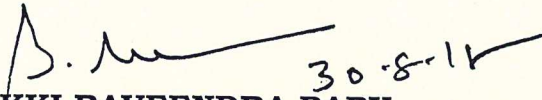


32. Pausing for a movement even if PDCs were submitted by the Corporate Debtor to the Operational Creditor, Operational Creditor is not automatically entitled to realise those PDCs unless and until the activities mentioned in payment schedule-2 in respect of PDC-1 and PDC-2 respectively have been completed.
33. Therefore, the non-submission of PDCs as securities or even otherwise do not amount to debt due and payable. When the debt is not due and payable Petitioner cannot treat it as a claim and cannot call it 'as operational debt'. In view of the findings there is no debt due and payable, the question of payment of the same do not arise. Therefore, there exists no operational debt which has become due and payable.
34. When once this authority comes to the conclusion that there is no Operational Debt due and payable there is no need to dwell on the aspect whether there exist a dispute in respect of Operational debt prior to the issuance of the Demand Notice.

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35. In view of the above discussion there are no grounds to admit this petition.

Hence, this Petition is rejected.

  
**BIKKI RAVEENDRA BABU**  
Member Judicial