

**BEFORE THE AJUDICATING AUTHORITY
(NATIONAL COMPANY LAW TRIBUNAL)
AHMEDABAD BENCH
AHMEDABAD**

C.P. (I.B) No. 36/9/NCLT/AHM/2017

Coram:

**Present: Hon'ble Mr. BIKKI RAVEENDRA BABU
MEMBER JUDICIAL**

**ATTENDANCE-CUM-ORDER SHEET OF THE HEARING OF AHMEDABAD
BENCH OF THE NATIONAL COMPANY LAW TRIBUNAL ON 20.07.2017**

Name of the Company: Nagai Power Pvt. Ltd.
V/s.
GEI Industrial Systems Ltd.


Section of the Companies Act: Section 9 of the Insolvency and Bankruptcy Code

<u>S.NO.</u>	<u>NAME (CAPITAL LETTERS)</u>	<u>DESIGNATION</u>	<u>REPRESENTATION</u>	<u>SIGNATURE</u>
1.	NATASHA SUTARIA	ADV.	RESPONDENT	Natasha.
2.	RAJAN SHAH FOR S. U. SHUKLA.	ADV.	PETITIONER	Rajesh.

ORDER

Learned Advocate Mr. Rajan Shah i/b Learned Advocate Mr. S. U Shukla present for Operational Creditor/ Applicant. Learned Advocate Ms. Natasha Sutaria present for Respondent.

Order pronounced in open Court. Vide separate sheet.

 20/7/17
**BIKKI RAVEENDRA BABU
MEMBER JUDICIAL**

Dated this the 20th day of July, 2017.

**BEFORE ADJUDICATING AUTHORITY (NCLT)
AHMEDABAD BENCH**

C.P. No.(I.B) 36/9/NCLT/AHM/2017

In the matter of:

M/s. Nagai Power Private Limited
Registered Office at
6-3-1109/A/1, 3rd Floor,
Navbharath Chambers,
Raj Bhavan Road,
Somajiguda,
Hyderabad-500082
Telengana

: Applicant.
[Operational Creditor]

Versus

M/s. GEI Industrial Systems Limited
Registered Office at
26-A, Industrial Area,
Govindpur,
Bhopal-462023 (M.P.)

: Respondent.
[Corporate Debtor].

Order delivered on 20th July, 2017.

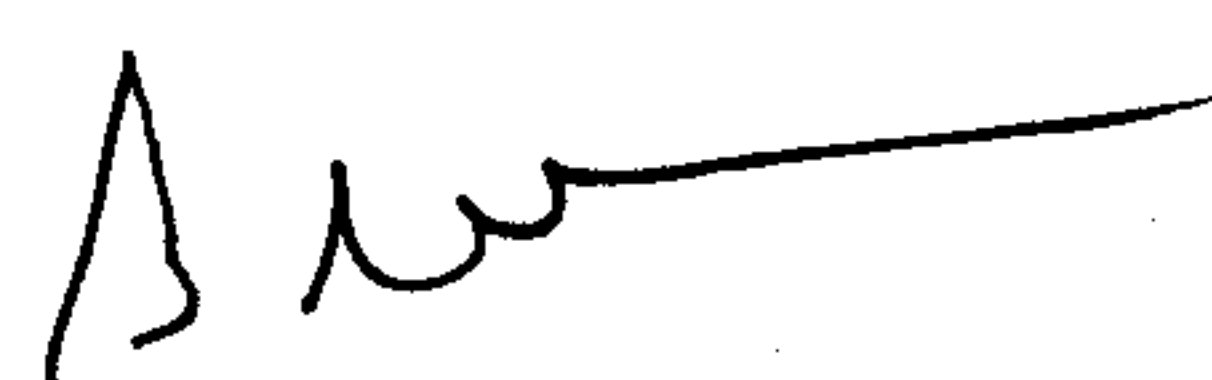
Coram: Hon'ble Sri Bikki Raveendra Babu, Member (J).

Appearance:

Shri Shashvata Shukla learned Advocate for Applicant.
Ms. Natasha Sutaria, learned Advocate for Respondent.

ORDER

1. M/s. Nagai Power Private Limited filed this Application with a prayer to trigger Corporate Insolvency Resolution Process against Respondent/Corporate Debtor under Section 9 of the



Insolvency and Bankruptcy Code, 2016 [hereinafter referred to as "the Code"].

2. The facts in brief, that are germane for disposal of this Application are as follows;

2.1. Applicant entered into an Agreement for supply of power plant equipments with Nagarjuna Construction Company Limited (NCC Ltd) vide Contract No. NPPL/EPC/AGMNT for SUPPLY/001 dated 7.7.2010. Respondent approached NCC Ltd., with a request for a sub-contract in relation to Air Cooled Condenser and agreed to provide Design, Engineering, Manufacture, Inspection, Testing, Packing and forwarding and supply of one Air Cooled Condenser and associated equipment including start-up and Commissioning Spares. NCC Ltd accepted the same and issued a Letter of Award dated 6.2.2012 for a contract value of Rs. 26,90,00,000/- only with the consent of Applicant.

2.2. As per the terms of the Letter of Award dated 6.2.2012, Respondent was obligated to supply all equipments under the Letter of Award and was bound to supply within 12 months from the date of the Letter of Award and receipt of advance (vide Clause 5.0 of Letter of Award).

2.3. Applicant made advance payments to the tune of Rs. 4,03,50,000/- in three tranches and the said payments were acknowledged by the Respondent on several occasions. Respondent was obligated to supply equipments within 12 months from the date of receipt of advance amount, i.e., from 10.7.2013. However, Respondent failed to adhere to the terms and conditions of Letter of Award and did not supply the material.

2.4. Thereafter, Novation Agreement dated 6.1.2014 was entered into between the Applicant, NCC Ltd., and Respondent wherein NCC Ltd., agreed to short close its Supply Agreement and

requested the Applicant to take over all its rights and obligations under the Letter of Award released to the Respondent.

2.5. In view of the Novation Agreement dated 6.1.2014, Applicant stepped into the shoes of NCC Ltd. The obligation of the Respondent to execute the work and supply the machinery in terms of Letter of Award remained intact and enforceable by Applicant.

2.6. In spite of the repeated reminders given by the Applicant, Respondent failed to return the advance amount paid by the Applicant. Respondent also failed to adhere to the terms and conditions of the Letter of Award. Respondent clearly acknowledged the receipt of the advance amounts totalling Rs. 4,03,50,000/-. It is evidenced in the Minutes of the Meetings held on 20.3.2015 and 5.12.2015 wherein the Respondent requested further time for supply of material. Respondent in the Meeting dated 5.12.2015 agreed to give corporate guarantee admitting the liability to the Applicant. The Deed of Corporate Guarantee was executed by the Respondent on 26.4.2014. It was extended from time to time as evidenced by the Minutes of Meeting dated 5.12.2015. According to the Applicant as on the date of filing of the Application an amount of Rs. 4,03,50,000/- with 24% interest p.a. from 30th March, 2012 is due and payable by the Respondent.

2.7. The last payment was made by the Respondent in November 2014. In spite of repeated reminders Respondent did not pay any amount thereafter. Ultimately Respondent by Mail dated 17.8.2015 enclosed the statement of account and ledger account of the Respondent confirming that the outstanding balance amount was due and payable to the Applicant. Ultimately Applicant was forced to terminate the Letter of Award vide letter dated 27.4.2016. Applicant issued a legal notice dated 9.6.2015 calling upon the Respondent to pay Rs. 4,03,50,000/- with 24% p.a. from 30th March, 2012 within 21 days from the date of receipt of the notice. On 26.10.2016, Applicant sent a notice to the Respondent invoking the

Corporate Guarantee dated 26.4.2014 which was extended vide Deed of Extension dated 5.12.2015. In spite of invocation of the Corporate Guarantee, Respondent failed to make payment either by repaying the outstanding dues under the Letter of Award or under the Corporate Guarantee. Applicant issued a demand notice dated 4.1.2017 under Section 8(1) of the Code. Respondent replied to the demand notice making time-barred, baseless and unsupported claims on 31.1.2017. Applicant issued another notice of demand on 9.5.2017. Respondent gave reply by sending letter dated 22.5.2017 to which the letter dated 31.1.2017 was attached.

3. It is stated by the Applicant that Respondent did not provide details of any suit or arbitral proceedings commenced in relation to the operational debt as required by Section 8(2)(a) of the Code prior to issuance of notice of demand. It is stated that claim is not barred by limitation. It is also stated that the Registered Office of the Respondent in Bhopal, Madhya Pradesh is within the jurisdiction of National Company Law Tribunal, Ahmedabad. Applicant has not proposed the name of Interim resolution Professional but requested the Tribunal to invoke Section 16 of the Insolvency Code.

4. It is the contention of the learned counsel appearing for Applicant that the advance amount paid by the Applicant to the Respondent comes within the meaning of 'operational debt' as defined in Section 5 sub-section (21) of the Code but not a 'financial debt' since it is not against the consideration of time value of money.

5. It is the contention of the learned counsel appearing for the Respondent that Applicant is not an 'Operational Creditor' and the amount allegedly due to the Applicant is not an 'operational debt'. Apart from the above said contention, Respondent also raised a plea that a notice of dispute has already been raised by the Respondent in reply to the first demand notice itself. She further contended that Applicant unilaterally terminated the Letter of Award dated 6.2.2012



and invoked the Deed of Corporate Guarantee dated 26.4.2014. Learned Counsel for the Respondent also contended that initially NCC Ltd., ordered for two Air Cooled Condenser machines and basing upon the said order Respondent made preparations for manufacture of 2 Air Cooled Condenser machines but it was reduced to one machine and therefore loss has incurred to the Respondent and the said amount has to be paid by the Applicant to the Respondent.

6. The crucial question that involves in this Application is whether the advance amount paid by the Applicant to the Respondent for supply of Air Cooled Condenser machinery in terms of Letter of Award is 'operational debt' or not within the meaning of sub-section (21) of Section 5 of the Code. On this aspect, there is a decision of the **National Company Law Tribunal, Chennai Bench dated 7th July, 2017 rendered in TCP/3(IB)/2017** between **M/s. Nupower Renewables Private Ltd. Vs. M/s. Cape Infrastructure Private Ltd.** In that decision, Petitioner engaged Respondent for rendering services in respect of setting of and development of 300 MW Windpower Project in the State of Gujarat under a Frame Work Agreement dated 19.4.2011. Petitioner paid advance of Rs.5,25,00,000/- to the Respondent, but Respondent did not perform the services as agreed. Petitioner claimed refund of amount from the Respondent. When Respondent failed to repay the amount, Petitioner invoked Section 9 of the Code after issuing demand notice as required by Section 8 of the Code. In that Judgment, the Hon'ble NCLT, Chennai Bench held that the advance amount paid by the Petitioner to the Respondent is in respect of rendering services and therefore it is an operational debt. In that view of the matter, the Chennai Bench of the NCLT admitted the Application and insolvency resolution process commenced.

7. Learned Counsel appearing for the Respondent, relying upon following decisions of the Principal Division Bench of Delhi, NCLT, contended that the advance amount said to have been paid by the Petitioner to the Respondent, as per the Letter of Award dated

6.2.2012 or the claim under the Deed of Corporate Guarantee dated 26.4.2014, is not at all operational debt;

1. *Sajve Kanwar Vs. AMR Infrastructure*
in C.P No. 06/2017 decided on 16.2.2017.
2. *Col.Vind Awasthy Vs. AMR Infrastructures Ltd.,*
in C.P No.(IB)-10(PB)/2017 decided on 20.2.2017.
3. *Mukesh Kumar & Anr. Vs. AMR Infrastructures Ltd.,*
In C.P No.(IB)-30(PB)/2017 decided on 31.3.2017.

In all the above said decisions, the Hon'ble Principal Bench held that the definition of 'debt', as laid down in Section 3(5) of the Code, cannot be transported while considering the Applications filed under Part II of the Code mainly with reference to the definition of 'operational debt' in sub-section (21) of Section 5 of the Code. In all the above said three decisions, it is held by the Hon'ble Principal Bench of the NCLT that the advance amount paid did not come within the meaning of 'operational debt' as defined in sub-section (21) of Section 5 of the Code.

8. In view of the above said decisions rendered by the Hon'ble NCLT, Chennai Bench and Hon'ble NCLT Principal Bench, it appears that there are two different views by two Benches of equal strength on the above said aspects.

9. The result of this Application depends upon the decision on the following two controversies that emerged in this case.

- (a) The first controversy is whether the advance amount paid by the Applicant to the Respondent under the Letter of Award dated 6.2.2012 is an 'operational debt' or not.
- (b) The second controversy is whether the dispute raised by the Respondent in the Reply to the Demand Notice amounts to existence of disputes as required by Section

8(2)(a) of the Code, and, if so, such dispute is a bona fide dispute on substantial grounds or a Moonshine defence.

10. In order to resolve the first controversy stated above, this Adjudicating Authority has to give a finding in respect of the amount paid by Applicant to the Respondent towards advance for supply of Air Cooled Condenser machines under Letter of Award dated 6.2.2012 is "operational debt" or not.

11. In view of the fact that two Division Benches of equal strength rendered two different decisions in respect of advance amount paid towards services rendered or in respect of goods supplied, this Adjudicating Authority is of the considered view that the matter has to be referred to a Larger Bench or it has to be resolved in any other manner provided by law.

12. Therefore, this Adjudicating Authority is of the view that this matter may be placed before the Honourable President of the National Company Law Tribunal for referring the matter to a Larger Bench or to do the needful as required by law on the issue whether advance amount is an 'operational debt' or not.

13. The Registry is directed to send the record along with a copy of this order to the Registrar, National Company Law Tribunal, New Delhi for placing the same before the Hon'ble President, National Company Law Tribunal, New Delhi.

Signature:  20/7/12

Sri Bikki Raveendra Babu, Member (J).
Adjudicating Authority.