

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

CP(IB) No. 211/09/HDB/2017

U/s 9 of IBC, 2016 and Rule 6 of I&B
(Application to Adjudicating Authority) Rules, 2016

In the Matter of:

IAC Electricals Private Limited,
701, 2/6, Sarat Bose Road,
Kolkata – 7000 020.

...Operational Creditor

Versus

Aster Private Limited
Plot No. 141/1, Phase-II, IDA
Cherlapally, Hyderabad,
Telangana – 500051.

...Corporate Debtor

Order Pronounced on: 18.01.2018

CORAM

Hon'ble Shri Rajeswara Rao Vittanala, Member (Judicial)

Hon'ble Shri Ravikumar Duraisamy, Member (Technical)

Parties / Counsel present

For the Operational Creditor : Shri K. Pratik Reddy, Adv.
Shri M. Ashwin Reddy, Adv

For the Corporate Debtor : Shri P. Vikram, Adv
Shri Nitish Bhandary, Adv.
Shri P. Bhasker, Legal Officer

Per: Ravikumar Duraisamy, Member (Technical)

ORDER

1. IAC Electricals Private Limited has filed the present application under Section 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 6 of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 as the Corporate Debtor is indebted to Operational Creditor for the amount of Rs 1,30,97,600/- including interest at 18% on default amount of Rs. 82,61,542/-.

Brief facts of the case are as follows:-

2. Corporate Debtor has been awarded with a Contract by Power Grid Corporation of Station – Angul Transmission line, part-I under common transmission system associated with East Coast and NCC power projects in Srikakulam Area- Part A, vide PGCIL LOA number CC-CS/158 – ER2-TW – 1466/3/GI/NOA-I/4350 and NOA-II/4351.
3. The Corporate Debtor has placed a Purchase order bearing No. POTL3OR0026 dated 1st October, 2012 on the Applicant for supply of Hardware Fittings and Accessories for Conductor & Earthwire. The Purchase Order, inter alia, includes the following Conditions:
 - i. In accordance with Corporate Debtor's Contract with PGCIL, Applicant has been instructed by Corporate Debtor to directly consign the material to PGCIL.
 - ii. Total value of Corporate Debtor said Order was Rs. 11,73,18,700/- (Rupees Eleven Crores Seventy Three Lakhs Eighteen Thousand Seven Hundred Only) with applicable PGCIL price Variation Formula over and above the Purchase Order value at extra. The applicable price variation clause is extracted below:



“Price Variation Base Date Nov, 2011. PV Formula, calculation and Billing as per PGCIL Formula, Back to Back.”

- iii. 100% payments through 90 days Letter of Credit(LC)
 - iv. Delivery Schedule as per the Purchase Order was in three lots.
4. After receipt of Technical, Manufacturing & Commercial Clearnece from the Corporate Debtor, the Applicant has manufactured and supplied the first lot of goods to PGCIL by 31.08.2013. The total amount payable against the first lot of supply was Rs. 4,02,55,783/- , and on account of price variation and stamping charges a further amount of Rs. 20,16,441.99/- became due and payable by the Respondent. Thus, the total amount payable by the Corporate Debtor to the Applicant for the First lot was Rs. 4,22,72,224/-. There was no objection raised and the same was accepted by the Corporate Debtor. However, the Operational Creditor has only received the payment of the first lot of goods amounting to Rs. 4,02,55,783/- on 27.02.2014, but the amount against the price variation & stamping charges i.e, Rs 20,16,441.99/- remained due and payable till date.
5. Subsequently for the second lot the Corporate Debtor has changed the Payment terms from LC to Direct payment. The Applicant has agreed to the said change of payment terms and completed supplies under second lot by 31.01.2014. The total amount payable against the second lot of supply was Rs 4,70,11,447/-. On account of price variation a further amount of Rs 42,33,653/- became due and payable. Thus, the total amount payable for the second lot was Rs. 5,12,45,100/-. The Operational Creditor has received part payment against the second lot of goods supplied amounting to Rs. 4,50,00,000/-. An amount of Rs. 62,45,100/- remained outstanding



on account of price variation and part payment of the total supply of goods.

6. In view of the above, a total amount of Rs. 82,61,542/- for 1st & 2nd lots as on date remains outstanding and payable to the Operational Creditor by the Corporate Debtor.
7. As per the terms of the Purchase order, the Applicant was supposed to receive full payment within the agreed credit period for each supplied lot. On Corporate Debtor's failure to make the said payment, the Applicant has sent two letters dated 15.11.2014 & 21.03.2015 requesting the Corporate Debtor to clear the dues at the earliest.
8. Subsequently, the Applicant has also sent e-mails on 04.04.2014, 29.05.2014, 15.05.2014, 24.06.2014, 09.06.2014 and 21.07.2014.
9. After receipt of the aforesaid e-mails, the Corporate Debtor has sent an e-mail on 29.07.2014 asking the Operational Creditor to send a copy of cancelled cheque immediately. After receiving the said e-mail, the Applicant was under an impression that the Corporate Debtor is taking steps to make the payments due to the Petitioner. However in spite of sending the cancelled cheque, the Corporate Debtor has not made the payments.
10. Since the Corporate Debtor has not made payments the Operational Creditor was constrained to send reminder e-mails to the Corporate Debtor on 29.07.2014, 18.08.2014, 11.08.2014, 04.09.2014, 07.09.2014, 26.09.2014, 10.10.2014, 11.10.2014, 30.10.2014, 12.11.2014, 13.11.2014, 15.11.2014, 12.03.2015, 23.03.2015, 12.06.2015, 24.06.2015, and 15.07.2015. However, the Corporate Debtor has neither replied nor made any payments. This demonstrates that the Corporate Debtor has failed and neglected to fulfil its obligation to make the payments.



11. The Operational Creditor vide its e-mail dated 21.03.2014 and 25.03.2014 has requested the Corporate Debtor to confirm invoice raised pursuant to the Price Variation. In response to the said e-mails, the Corporate Debtor has sent an e-mail on 25.03.2014 stating that "*As per Aster's calculation the invoicing is correct. Please make tax invoice and original document send it to our HO, Hyderabad*" This demonstrates the Corporate Debtor's obligation to pay the balance amount is undisputed and the Corporate Debtor has admitted the liability.

12. In spite of various calls, requests and reminders, correspondence and notices exchanged as mentioned above, the Corporate Debtor has failed to pay the undisputed and admitted dues. The Operational Creditor further States that the aforesaid default on the Respondent's part in not releasing the payments demonstrates Corporate Debtor's inability to pay debt due to the Operational Creditor.

13. Respondent has filed a Counter dated 16.11.2017 stating that:

- a. Respondent is not indebted to the Petitioner much less the amount claimed therein.
- b. The Respondent submits that notice dated 22.08.2017 shall in no case be treated as a notice issued under Section 8 of Insolvency and Bankruptcy Code. It is submitted that the notice dated 22.08.2017 read with Clause (a) of sub rule (1) of rule 5 of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 through Form 3 and Form 4.
- c. The demand notice/invoice demanding payment under I&B Code is required to be issued under Form 3 or Form 4. Through the said formats the Petitioner shall make it abundantly clear that it shall initiate corporate insolvency process in respect of Respondent as apparent from the Point no. 6 of notice contained in Form 3. Further, the alleged notice was issued by the Director



of the Petitioner under his signature without any authorisation by way proper board resolution comprising of all the directors delegating powers to the said director. Lack of authorisation is evident from the fact no copy to the extent of authorisation is enclosed by the Petitioner to the purported demanded notice.

- d. It is submitted that only an aggrieved person is required to issue a notice U/s 8 of Insolvency and Bankruptcy Code, 2016 and it is a pre requisite.
- e. The Petitioner has issued a winding up notice under S. 433 of the Companies Act, 1956 on 09.08.2016 to the Respondent i.e. very much prior to the issuance of notice purported to be under Section 8 of IB Code. On receipt of such notice the Respondent disputed the claim by detailed reply dated 20.09.2016. The disputes were pre-existing even before the petitioner invoked the provisions of the Code, as such the Petitioner have concealed such existing disputes before this Hon'ble Tribunal. A copy of winding up notice issued by the Petitioner on 09.08.2016 and a copy of reply by Respondent dated 20.09.2016 are filed herewith.
- f. It is further submitted that the Respondent has issued a Purchase Order vide PO. No. POTL30R0026 dated 01.10.2012 for value of Rs. 11,73,18,700/- to the Petitioner for supply of Hardware fittings, Conductor and Earthwire accessories for its project works of Tower Package awarded to it by Power Grid Corporation of India Limited (PGCIL) who is a Customer of Respondent.
- g. It is submitted that the goods were meant for consumption of another end user namely Power Grid Corporation of India Limited. Though the PO was released by Respondent directly for its project awarded to it by PGCIL, the nature of the Purchase Order is based on back to back clauses governed by terms and



conditions of PGCIL, being a beneficiary, which the Petitioner is also well aware of. Hence, the Respondent alone cannot be held as alleged defaulter since there exists privity of the Petitioner with the PGCIL.

h. It is submitted that the alleged demand of Petitioner towards Price Variation (PV) is vehemently disputed and denied as incorrect, baseless and not as per the terms and conditions of the Purchase Order as the PV Clause is expressly mentioned on the front page of the Purchase Order stating that PV formula, calculation and billing shall be as per PGCIL formula on back to back. Hence, whenever PGCIL releases amount towards PV, and if Petitioner qualifies to it, it will be released to it. In view of this, the petitioner demand for money towards PV has no relevance and ultra vires.

i. It is therefore submitted that the alleged claim/demand raised in the present petition by the Petitioner is completely denied as false, incorrect and baseless. Further, Respondent states that no amount much less the amount of Rs. 1,30,97,600 (principle Rs. 82, 61,542/-) has been pending due and remained outstanding from Respondent to the Petitioner pertaining to the transactions made in pursuance of the Purchase Order.

j. It is further submitted that the Respondent has already brought to notice of Petitioner through its letter ref no. APL/Tax/16-17/001 dated 06-Jun-16 that in fact that Petitioner is liable to pay the Respondent a total amount of Rs. 1,95,85,749.80/- towards the non-submission of E-1 Forms as mandated by Clause 8 of Purchase Order. In discharge of its obligation set out under Clause 8 of Purchase Order, Respondent has submitted C-Forms to the Petitioner. Despite submission of C-Forms as shown in table below, Petitioner in gross violation of Clause 8 of Purchase Order has not submitted E-1 Forms till date.



Sl.No	STATE	FY	FORM NO	AMOUNT (Rs)
1	Orissa	11-12	21-C- 15024800231	4,69,65,739
2	Andhra Pradesh	13-14	4612680	3,92,57,885
3	Andhra Pradesh	13-14	4612681	5,20,89,529
	TOTAL			13,83,13,153



- k. It is submitted that the Petitioner is required to submit E-1 Forms for value of Rs. 13,83,13,153/- as shown in the above table for all transaction made with Petitioner pertaining to the transactions made in pursuance of Purchase Order, the Petitioner shall be under statutory obligation to submit E-1 Forms. It is submitted that despite repeated requests by Respondent verbally and through emails dated 04.11.2015, 21.12.2015, 25.12.2015 and 25.04.2016, Petitioner has failed to submit E-1 Forms to the respondent till date.
- l. It is further submitted that through the detailed reply dated 20.09.2016, the Respondent has demanded the Petitioner to pay Rs. 1,95,85,749.80/- (Rupees One Crore Ninety Five Lakhs Eighty Five Thousand Seven Hundred Forty Nine and eighty paise only) along with penalty plus 18% interest as applicable to Respondent. However, the Petitioner has neither responded to the said notice nor paid the said amount till date.
- m. It is submitted that the Petitioner is well aware of the consequences statutorily owing towards non submission of E-1 Form to the Respondent. Further, the Petitioner has given an undertaking on 31.10.2015 to submit E-1 Form to Respondent within 15 to 20 days after submission of C-Form. The

Respondent has submitted C-Forms for an amount of Rs.13,83,13,153/- (as shown in above table) on 04.11.2015 itself to the Petitioner. Since then the Respondent has been requesting the Petitioner to submit E-1 Forms to avoid statutory liability of payment of differential tax along with penalty to the Sales Tax Department. It is respectfully submitted that the conduct of the Petitioner in non-submission of E-1 Form vividly shows malafide intention only to cause pecuniary loss to Respondent and to get unjust enrichment.

- n. It is submitted that the Respondent is financially sound and having total income of Rs. 935.47 crores for the year ended 31.03.2015 against paid up capital of Rs. 82.47 crores and reserves and surplus of Rs. 277.66 Crores. Therefore, it cannot be said that the Respondent is commercially insolvent. Further, the Respondent is having more than 500 employees directly working in various units and projects and equal numbers of persons are working indirectly across various states.



14. The case was first listed on 16.10.2017, heard Shri K. Pratik Reddy, on request of the Ld. Counsel for the Petitioner, the case was posted on various dates i.e. on 23.10.2017 and 06.11.2017. During the hearing held on 06.11.2017, heard Shri K. Pratik Reddy along with Shri K. Vivek Reddy the Ld. Counsels for the Petitioner and were directed to take personal notice to the Respondent. The case was posted to 15.11.2017.
15. On 06.11.2017, the Ld. Counsel for the Respondent has filed an affidavit along with document regarding the certificate received from the Bank on 20.10.2017 and email dated 25.03.2014 from the Corporate Debtor wherein the Corporate Debtor has admitted the liability by stating that the invoicing of the Applicant is correct.

16. The said Bank Certificate dated 20.10.2017 stated that bank have not received any payment from Aster Private Limited since 25.08.2017 in respect of the Petitioner Company's Current Account.
17. During the hearing held on 15.11.2017, heard Shri K, Pratik Reddy the Ld. Counsel for the Petitioner and Shri P. Bhasker, Legal Officer for the Respondent. The Ld. Counsel for the Petitioner argued the case at length and submitted that he would name the IRP, thus requested time. The case was posted on 22.11.2017 and again case was posted on various dates i.e. on 28.11.2017, 29.11.2017 and finally on 29.11.2017 at the request of counsels.
18. The Ld. Counsel for the Petitioner filed a memo dated 29.11.2017 across the Bench suggesting Mr. Chandra Sekhar Arasada resident of Flat No. 201, Karan Residency, 1-8-131 to 143, Pender Ghast Road, Secunderabad – 500003 as IRP.
19. Upon perusal of the Counter of the Corporate Debtor dated 16.11.2017, the Bench made the following observations:
- i) In response to the winding up notice dated 09.08.2016 issued under Section 433 of the Companies Act, 1956 by the Operational creditor, the legal counsel for the respondent replied vide reply dated 20.09.2016. Upon perusal of the letter it is noted that in para No.3 of the advocates reply it was clearly stated that it was already brought to the notice of the operational creditor through the letter of the Corporate Debtor i.e. Aster that due to non-submission of "E1 Forms" by IAC Electricals Pvt., Ltd., the respondent has to pay an amount of Rs.1,95,85,749.80/-towards differential tax liability accrued due to non-submission of "E1 Forms" by IAC. It further stated that despite submission of "C Forms" to your client, IAC has not submitted E1 Forms which is a statutory obligation. This clearly shows that there was a pre-existing dispute between the Operational Creditor and Corporate Debtor before issue of notice U/s 8 of IBC, 2016.



- ii) As per Section 9(5) of IBC Code the Adjudicating Authority can admit the Application and communicate the decision to Operational Creditor. In the Instant case as discussed above, there is an existing dispute between the Operational Creditor and Corporate Debtor towards the claim amount. Therefore, the application filed under Section 9 of IBC Code is not eligible to be admitted.
- iii) At this juncture it is also important to quote the judgement of Hon'ble Supreme Court in the matter of:

Civil Appeal No. 9405 of 2017, Mobilox Innovations Private Limited (V/s) Kirusa Software Private Limited.

Hon'ble Supreme Court in this case held, while allowing the appeal:

Once the operational creditor has filed an application, which was 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 was a record of dispute in the information utility. It was 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 was pending between the parties. Therefore, all that the adjudicating Authority was to see at this stage was whether there was a plausible contention which requires further investigation and that the dispute was not a patently feeble legal argument or an assertion of fact unsupported by evidence. It was important to separate the grain from the chaff and to reject a spurious defence which was mere bluster. However, in doing so, the Court did not need to be satisfied that the defence was likely to succeed. The Court did not at this stage examine the merits of the dispute. So long as a dispute truly exists in fact and was not



spurious, hypothetical or illusory, the Adjudicating Authority has to reject the application.

- iv) In view of the above Judgement, there is a pre-existing dispute of debt amount claimed by the Petitioner/ Operational Creditor. Therefore petition filed under Section 9 of IBC Code is not eligible to be admitted/ liable to be rejected.
- v) Therefore, in our considered view, the Petition filed under Section 9 of IBC is not a fit case for admission as prayed for. Therefore, having considered the entire material, records, and Judgement of Hon'ble Supreme Court as discussed supra and having satisfied that a pre-existing dispute over the claim amount, the adjudicating authority is not inclined to admit the C.P No. 211/09/HDB/2017 and thus rejected.
- vi) No order as to costs.



Sd/-
RAVIKUMAR DURAISAMY
MEMBER (TECHNICAL)

Sd/-
RAJESWARA RAO VITTANALA
MEMBER (JUDICIAL)

प्रमाणित प्रति
CERTIFIED TRUE COPY

केस संख्या
CASE NUMBER.. CP (IB) No. 211/9/HDB/2017
निर्णय का तारीख
DATE OF JUDGEMENT.. 18.1.2018
प्रति हेतुपर किया गया तारीख
COPY MADE READY ON.. 22.1.2018

G. Anantha Kumar
For Dy. Regr./Asst. Regr./Court Officer/
National Company Law Tribunal, Hyderabad Bench