

The National Company Law Tribunal
Kolkata Bench
Kolkata

Coram: Shri Jinan K.R.
Hon'ble Member(J)

C.P IB NO: 698/KB/2017

In the matter of:

An application for initiation of corporate insolvency resolution process by the Operational Creditor under Section 8 and 9 of the Insolvency and Bankruptcy Code, 2016.

-And-

In the matter of:

Inspira Martifer Solar limited, a company incorporated under the provisions of the Companies Act, 1956, having its registered office at 21, Satyam, 312, Linking Road, Khar West, Mumbai- 400 052 and address for correspondence is at 6th Floor, Gala Impecca, Andheri Kurla Road, J.B Nagar, Andheri East, Mumbai-400059;

-And-

Alex Green Energy Private Limited, having its Identification No.U74999WB2012PTC173609 and registered office at 40, Rupchand Mukherjee Lane, Kolkata-700025;

Counsels appeared :

1. Mr. Sabyasachi Chowdhury, Advocate]
2. Mr. Rajarshi Dutta, Advocate] For the Operational Creditor
3. Mr. V.V.V Sastry, Advocate]
4. Ms. Deepabali Datta, Advocate]

1. Mr. Jishnu Chowudhury, Advocate]
3. Mr. A.Agarwalla, Advocate] For the Corporate Debtor
4. Ms. Farnaz Nasim, Advocate]
2. Ms. Urmila Chakraborty, Advocate]

Order delivered on 21.02.2018

ORDER

Shri Jinan K.R., Member (J) :

This is a petition filed under Section 9 of the Insolvency & Bankruptcy Code 2016 (IBC in short) read with Rule 6 (1) of the Insolvency and Bankruptcy (application to Adjudicating Authority Rules 2016) by the operational creditor/petitioner Inspira Martifer Solar limited for initiating corporate insolvency resolution process as against the corporate debtor/respondent Alex Green Energy Private Limited.

2. Briefly stated facts emerged from the petition are that the petitioner, who is a contractor executed certain contracts with the respondent referred in the petition filed this application for the project namely 5.5 Mwp at Orissa of the respondent on the basis of six contracts and one purchase order. The petitioner has entered inter-alia into the contracts all dated 23rd July, 2013 with the respondent. The copies of contract produced on the side of the petitioner were produced and marked as **Annexure E**. The petitioner provided the services & supplied the materials to the respondent as per requirement placed by the respondent from time to time and invoices were generated for payment for the goods supplied to the respondent. The petitioner contends that an amount of Rs.7,49,71,165/- (Rupees Seven Crore forty nine lakh seventy one Thousand one Hundred sixty five only) along with interest is due as per invoices **Annexure C** from the respondent and in spite of demand, the respondent did not repay the amount and thereby issued a demand notice under Form 3 of IBC on 22.08.2017 under Rule 5 of the code to the respondent demanding the alleged outstanding payment.

3. The petitioner further contends that the demand notice was delivered to the respondent on 23.08.2017 and respondent in turn sent a

reply on 15.09.2017 contending untenable contentions. The respondent raised disputes to avoid payment of the legitimate dues of the petitioner. The petitioner approached this adjudicating authority with clean hands with supporting documents proving that the debt to the tune of Rs. 7,49,71,165/- is due from the respondent and since the respondent failed to repay the amount, the petition is liable to be admitted under Section 9 of IBC 2016.

4. The Corporate Debtor / respondent objected this application mainly on two grounds. Firstly, it contends that the respondent is not a corporate debtor because no amount is due to the petitioner and the work was delayed.

5. Secondly, it contends that the goods supplied was damaged-defective work and was unable to utilize for the purpose of the respondent's business and a dispute regarding the quality of goods was already raised and it is in existence. In view of the defective supplies the respondent raised a series of complaints with the petitioner and the petitioner is liable to compensate damages to the respondent. The respondent further contends that the petitioner filed the petition on the basis of invoices annexed with the petition of which no amount is due. The amount due as per the invoices have been duly paid and no sum due or payable by the respondent to the petitioner as alleged. The respondent further alleged that a dispute regarding the amount demanded by the petitioner already raised by the respondent and various reply and emails were issued to the petitioner. Upon the above said contentions the respondent prays for rejection of the petition with exemplary cost.

6. Heard both sides. Perused the records.

7. Upon hearing the arguments of Ld. Counsel on both sides and on perusal of the records the point that arise for consideration is whether there

exists any dispute as alleged by the respondent prior to service of demand notice?

The Point

8. The petitioner filed this petition claiming that an amount of Rs.7,49,71,165/- (Rupees Seven Crore Forty Nine Lakh Seventy One Thousand One Hundred Sixty Five only) is due from the respondent. According to the petitioner, the respondent failed to repay the outstanding amounts even after the receipt of the demand notice and hence filed this petition. The Ld. Counsel for the petitioner submits that the respondent has always made payment on bill to bill basis and not ad-hoc basis as contended by the respondent. The invoices produced along with the petition are few, specimen invoices of certain services rendered by the petitioner and regarding few supply of goods to the respondent. The above said invoices and one debit note were produced and marked as Annexure-C. Ld. Counsel for the petitioner further submits that there was no payment after 29.07.2015 and a termination Notice Annexure-D dated 29.07.2015 was issued to the respondent and lastly on 11.08.2017 the demand notice Annexure-F was issued to the respondent. Since there is no repayment and dispute raised is not bona fide, Operational Creditor filed this application for initiating corporate insolvency resolution process in respect of the respondent company.

9. The respondent's first contention is that the amount demanded as per the invoices referred as Annexure-C has been paid. The reply to the demand notice issued by the respondent is produced by the petitioner and marked as Annexure-F1.

10. Annexure-G is the Bank Statement produced by the petitioner for the years 01.04.2014 to 30.03.2015 evidencing transactions between the petitioner and the respondent. The petitioner also produced Annexure H

certificate purported to be issued under section 9(3) (c) by its bank showing the credit amount paid by the respondent. None of the invoices numbers referred in the invoices referred in the petition as well as in the demand notice seen not mentioned in Annexure H. Therefore, Annexure H is not a certificate issued by the bank showing the unpaid operational debt by the respondent. It refers 6 invoices for which certain amounts were credited by the respondent and as per the certificate a total of Rs.30,30,22980/- seen credited in the bank account by the respondent. The certificate is dated 31.10.2017.

11. All together how many invoices were raised by the petitioner no data seen furnished in the petition. **Annexure A** is the account statement for proving the transactions on account of which debt fell due. It refers 29 invoices. And total credit as per the said statement received from the respondent is Rs. 55,569,502 /- as on 29.07.2015. *It does not tallies with Annexure H. The petitioner claimed unpaid amount on the basis of 10 invoices. The number of invoices referred in the petition are the following. IMSLALEX_OR/INV/15-16/001, 15-16/002, 14-15/021, 15-16/006, 14-15/023, 14-15/026, 14-15/025, 14-15/027, 14-15/024A, 14-15/024B.* However, as per the statement **Annexure A**, several other invoices of which payment was received and payment not received other than the above invoices are seen mentioned. For example invoices numbers ending 14-15/018, 14-15/019 and 14-15/020 of which no credit seen received from the respondent also mentioned in it. No explanation forthcoming whether those invoice amount is still due or not. A screening of the above said statement of accounts and the invoices not at all strengthen the contention on the side of the petitioner that the payment was on bills to bills basis .

12. Ld. Counsel for the respondent submitted that the entire account of the petitioner was settled and there is no amount due and thereafter no business transaction. However, the contention that the amount demanded as per the invoices referred in the petition also was paid no proof produced. Along with reply Annexure A to Annexure M produced on the side of the respondent. None of the documents in support of the plea that the amount due as per the invoices referred in the demand notice was paid. On the other hand respondent contended in the reply that invoices presented by the applicant to the respondent were not in terms of the contract and were not accompanied by the work completion certification issued by the owners, engineer and the petitioner failed to obtain such work completion certificate inasmuch as its work was faulty. (It seems there are certain mistake regarding reference of the applicant and respondent in the reply. Instead for respondent it refers applicant). It is an indication that the amount due as per the invoices not at all paid by the respondent as contended. However what would be the amount if any found liable to pay by the respondent is uncertain upon considering the documents and statement of the account produced in the case in hand. Production of all invoices and a consolidated statement of account in respect of payment received and details of unpaid invoices are necessary for having a right conclusion that the amount as claimed by the petitioner is the outstanding amount liable to be paid by the respondent.

13. The respondent main contention is that there was delay in completion of work, the goods supplied was damaged-defective ~~work~~ and was unable to utilise for the purpose of the respondents business which constituted breach of contract. To strengthen the said contention produced proof proving several exchange of emails and conversation. Those documents are sufficient enough to proves that notice of dispute in regards

the debt claimed by the petitioner was already issued to the petitioner prior to the demand notice issued in this case.

14. Ld. Counsel for the respondent succeeds in convincing me that a dispute is in existence regarding damaged supply of goods, defective work and quality of work and goods. The corporate debtor by sending reply to the demand notice raised so many disputes challenging defective supply of goods, delayed completion of work, and defective completion of work. The contentions regarding the dispute in respect of the work undertaken by the petitioner from the inception of the execution of work till it complete the work with out the satisfaction of the respondent and its beneficiary is established on the side of the respondent with supporting proof. In the reply notice ~~dated~~ dated 15th September, 2017 the respondent admittedly raises ~~existence of~~ dispute which according to the petitioner are false and taken for evading payment.

15. The notice dated 15th September, 2017 incorporates the contents of an earlier notice issued by the corporate debtor's Advocate dated 21st August, 2015. This notice contains the entire disputes between the parties. Admittedly vide termination notice dated 29.07.2015 the petitioner terminated the contract (**Annexure J** in the reply) and handed over the keys to the securities agencies of the respondent. To that notice respondent sent a reply on 21.08.2015 (**Annexure K**). In the said notice respondent seen taken all the contentions in the reply objections filed in this case and produced supporting proof to prove the existence of dispute prior to the issuance of the demand notice. Truly no arbitration or legal proceedings not initiated by the respondent as against the petitioner. That doesn't mean that the disputes already raised is not genuine as contended on the side of the petitioner. To the said reply notice the petitioner caused reply denying the contentions raised by the respondent on 09.011.2015 (Page 409 of the reply).

16. The rejoinder filed on the side of the petitioner also indicates that from the inception of the work undertaken by the petitioner there were disputes. The petitioner raised counter allegation against the defect noticed by the respondent during the operation of the work undergone by the petitioner. One among the serious allegation raised on the side of the respondent that petitioner did not sign operation and maintenance agreement subsequent to the delayed completion of the work is also admitted by the petitioner. According to the petitioner it was not executed because of the failure on the side of respondent in not issuing performance bank guarantee and non-issuance of letter of credit. Though there is an allegation on the side of the petitioner that there was no fault in design, either serious or recurrent as alleged the documents produced on the side of the respondent proves otherwise.

17. There is serious allegation of breach of contract on either side. According to the respondent the operational creditor is in breach of the contracts between the parties. **[contract at pages 28 and 276 of Reply]** The contracts require supply, erection, installation, commissioning, operation and maintenance. Up to the stage of commissioning, the operational creditor has allegedly done defective work. The operational creditor has not even signed the document for operation and maintenance and has done no operation and maintenance work allegedly by the Corporate Debtor. **[page 276 and 277, clause (c) – the operation and maintenance contract was required to be signed within one month].**

18. The next contention on the side of the respondent is that operational creditor has failed to perform the contract within time. In accordance with the terms of contract the contract was required to be performed within 23rd November 23, 2013. Time was of the essence of the contract. However, the commissioning is at much later date on August 18, 2014. For reason of delay

in performing the contract, the operational creditor is liable to pay damages to the corporate debtor as per the contract. The contract would permit the claimant for such damages. Emails and documents recording the delay on the part of the operational creditor would appear at **pages 284 to 327 of the Reply.**

19. The next contention is that the work which has been done by the operational creditor is defective. A summary of defect has been pleaded at **paragraph 26, page 9 of the Reply.** The contents of this paragraph would be proved by emails and letters **Annexure G** appearing at **pages 376 to 408 of the Reply.** These are only some of the letters which record the disputes.

20. There is also a lot of pending work which is required to be completed as per the contention of the respondent. A list of the pending work is mentioned at **page 21, paragraph 33 of the Reply.** This has been brought to the notice of the operational creditor as would appear from the email dated 29th June, 2015, **Annexure L at Page 449 of Reply**

21. The respondent also contends that the petitioner is guilty of not making a full capacity plant ready and is guilty of numerous operational defects. These are recorded by the Orissa Government in its reports dated 18th June, 2014, and 25th May, 2015 **Annexure F at page 368 & 372 of Reply.**

22. The entire factual matrix is contained in three letters, all of the year 2015. All these letters predate the notice under IBC 2016. The letters are dated 29th July, 2015 [operational creditor's Advocate], 21st August, 2015 [reply notice of corporate debtor's Advocate and 9th November, 2015 [reply by operational creditor's Advocate].

23. What is meant by existence of a dispute to be established on the side of the respondent in a case of this nature is dealt with in **Mobilox Innovations**

Private Limited Vs. Kirusa Software Private Limited (C A. No. 9405 of 2017 SC) by the Hon'ble Supreme Court. It is significant to read Para 40 of the said judgement. It read 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.”

24. In view of the judgement delivered by the Hon'ble Supreme Court in the case of **Mobilox vs Kirusa** reported in AIR 2017 SC 4532, the petition for insolvency should be rejected, if the disputes are of a period of time prior to the notice issued under the Insolvency and Bankruptcy Code, 2016 [hereinafter referred to as the “said Code”].

25. So, if the respondent succeeds in establishing with supporting proof that the disputes are of a period of time prior to the demand notice issued under section 8(1) of the I & B Code, a petition of this nature is liable to be rejected. The disputes existing between the parties are genuine and there is a genuine claim which the corporate debtor has against operational creditor. By no means, can it be said that above-referred disputes are baseless and frivolous or that the claims raised by the corporate debtor is not genuine?

26. At this juncture Ld. Counsel for the petitioner submits that all the disputes raised are prior to the date of commission of the project and that all the defects pointed out were rectified before issuing commission report. Copy of commission report issued by the respondent (**Annexure C at page 283**) is dated 19.08.2014. According to the Ld. Counsel for the respondent it is not a completion certificate and that the commission of the project was not successful as per the terms in contract and letters issued by the government agency referred above. Evidence led in the instant case satisfactorily establishes that an investigation regarding the allegation and counter allegation is necessary for reconciliation of the disputes evidently raised by the respondent in the case in hand.

27. Therefore, in line with Mobilox's case, the corporate debtor has brought to the notice of the operational creditor disputes between the parties prior to the date of the operational creditor issuing the notice i.e. 22nd August, 2017.

28. The Ld. Counsel for the petitioner lastly submits that since the respondent issued Form C in respect of unpaid invoices referred in the petition and the demand notice thereby admitted contractual obligations to make payment and therefore this petition is liable to be allowed at least for the admitted amount. It appears to me that this argument has no legal force at all. The corporate debtor has furnished the "C" forms, as required under law. To the extent supply has been received, the corporate debtor is obliged

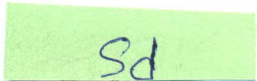
to make payment of government dues and it has done. However, the corporate debtor has withheld payments to the operational creditor and shall not make such payment, in view of the fact that it is not obliged to do so.

29. The evidence available in this case leads to a legitimate conclusion that the defence taken by the respondent that the dispute it raised is bona fide and its claim being protected under the terms of contract and its contentions in that regards are "not spurious, hypothetical or illusion/" as held in the above refereed citation and bearing in mind the principle laid down in the case of *Mobilox Innovations Private Limited Vs. Kirusa Software Private Limited* the existence of genuine dispute prior to the demand notice issued in the instant case stand established in this case . The respondent succeeded in proving that there is pre-existing dispute as defined under Section 5(6) (b) of the IBC.

30. The above said discussion leads to a conclusion that Corporate Debtor succeeds in proving a pre-existing dispute and notice of dispute received by the Operational Creditor is a genuine dispute as defined under section 5(6) (b) of I & B Code. In view of the above, I am of the opinion that this petition is liable to be rejected under Section 9 (5) (ii) (d) of the Insolvency and Bankruptcy Code 2016.

31. In the result, this petition is rejected. However, considering the peculiar nature and circumstances of the case in hand, parties are directed to bear their respective costs.

32. The copies of the order is to be communicated to both parties and certified copy of this order may be issued, if applied for, upon compliance of all the legal formalities.


(Jinān, K.R)
Member (J)

Signed on 21st day of February, 2018.