

**IN THE NATIONAL COMPANY LAW TRIBUNAL,**  
**MUMBAI BENCH, COURT III**

**I.A. 2070/2022**

**In**

**C.P.(IB)-724(MB)/2022**

(Under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 read with Rule 11 of the National Company Law Tribunals Rules, 2016)

*In the matter of*

**M/s. Bagalkot Cement and Industries Ltd**

*.....Applicant/ Corporate Debtor*

**Vs**

**Vyshali Energy Private Limited (VEPL)**

*.....Respondent/ Operational Creditor*

**C.P.(IB)-724(MB)/2022**

(Under Section 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudication Authority) Rules, 2016)

*In the matter of*

**Vyshali Energy Private Limited (VEPL)**

(CIN: U31100KA2008PTC045946)

Address: Plot No. 13, Sy. No. 64 Part, Hi-Tech City Layout, Madhapur, Hyderabad-500081.

*.....Petitioner/ Operational Creditor*

**Vs**

**M/s. Bagalkot Cement and Industries Ltd**

(CIN: U26940MH2007PLC172697)

Registered office at: Stadium House, Block No. 1, 6<sup>th</sup> floor, Veer Nariman Road, Churchgate, Mumbai-400020.

*.....Respondent/ Corporate Debtor*

Reserved for order on: **29.08.2023**

Order pronounced on: **11.09.2023**

**CORAM:**

**SHRI CHARANJEET SINGH GULATI**  
**HON'BLE MEMBER (T)**

**SMT LAKSHMI GURUNG**  
**HON'BLE MEMBER (J)**

**For the Petitioner:** Ms. Rohini Menon, Advocate

**For the Respondent:** PCS Nithish Bangera

**COMMON ORDER**

***Per: Charanjeet Singh Gulati, Member (Technical)***

1. The above Company Petition is filed by **Vyshali Energy Private Limited (VEPL)** (hereinafter called as 'Operational Creditor') seeking to initiate of Corporate Insolvency Resolution Process (CIRP) against **M/s. Bagalkot Cement and Industries Ltd** (hereinafter called as 'Corporate Debtor') by invoking provisions of Section 9 of Insolvency and Bankruptcy Code, 2016 (hereinafter called as "Code") read with rule 6 of the Insolvency and Bankruptcy (Application to Adjudication Authority) Rules, 2016.

The Corporate Debtor has filed Interlocutory Application/2070 of 2022 under Section 60(5) of the Code, 2016 read with Rule 11 of National Company Law Tribunal Rules, 2016, seeking dismissal of the Company Petition. The said Interlocutory Application was heard along with the Company Petition as the grounds challenging the maintainability of the Company Petition and reply are same.

2. **Brief Facts**

- (i). The Operational Creditor is engaged in the business of generation & sale of renewable energy. The Operational Creditor and Corporate Debtor entered into an 'Energy Purchase Agreement' dated 10.04.2017 ('Agreement') for the sale and supply of energy by the Operational Creditor to the Corporate Debtor. The Operational Creditor has supplied power to the Corporate Debtor from March 2017 to February 2021 as per the Corporate Debtor's requirement which Corporate Debtor has accepted.

- (ii). The Operational Creditor had raised tax invoices for the Supply of Power on the Corporate Debtor from time to time. The amount of Operational Debt in the form of Tax Invoices raised by the Operational Creditor on the Corporate Debtor for the supply of power, for the purpose of section 9 petition are as follows:

<b>S.No.</b>	<b>Invoice Date</b>	<b>Invoice Amount (Rs.)</b>
1.	03.01.2020	68,40,000
2.	02.02.2020	65,55,000
3.	03.03.2021	29,14,684
	<b>Total Balance</b>	<b>1,23,31,500</b>

- (iii). Each of the aforesaid invoices were payable by the Corporate Debtor to the Operational creditor within the 15 days of receipt of such invoice or within 18 days of dispatch of such invoice whichever is later as per Clause 4(viii)(b) of the agreement. The Corporate Debtor failed to make payments towards the said Invoices despite several oral requests and reminders made by the Operational Creditor to the Corporate Debtor.
- (iv). The Operational Creditor issued a Demand Notice dated 02.03.2022 to the Corporate Debtor vide Speed Post with Acknowledge Due (SPAD) as per Section 8 of the Code, read with Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, demanding the Corporate Debtor to pay a sum of Rs. 7,42,50,734/- (Rupees Seven Crores Forty-Two Lakhs Fifty Thousand Seven Hundred and Thirty-Four Only) to the Operational Creditor.
- (v). The Amount claimed by the Operational Creditor from the Corporate Debtor in the Demand Notice dated 02.03.2022 was 6,09,49,769/- (Rupees Six Crores Nine Lakhs Forty-Nine Thousand Seven Hundred and Sixty-Nine Only). However, a sum of Rs. 4,86,18,269/- (Four

Crores Eighty-Six Lakhs Eighteen Thousand Two Hundred and Sixty-Nine Only) falls under the ambit of Section 10A and the same has therefore been excluded in this Application in comparison to the Demand Notice. The Operational Creditor has mentioned to reserves its right to recover the aforesaid amounts covered under Section 10A from the Corporate Debtor as and when it may deem fit.

- (vi). On receipt of Demand Notice sent by the Operational Creditor, the Corporate Debtor has issued a Reply dated 16.03.2022 to the Demand Notice issued by the Operational Creditor. Through the Reply to Demand Notice, the Corporate Debtor has raised various issues alleging pre-existing dispute. The Corporate Debtor has not made payment towards the Operational debt to the Operational Creditor after receipt of Demand Notice.

**3. Objections raised by the Corporate Debtor in IA/2070/2022, challenging the maintainability of the Main Company Petition along with detailed affidavit in reply:**

- (i). The Corporate debtor has filed its affidavit in reply dated 20.07.2022 stating that Demand Notice dated 02.03.2022 and the present application are contradictory; that there is a pre-existing dispute between the Operational Creditor and the Corporate Debtor, and that on receiving the Demand Notice dated 02.03.2022, the Corporate Debtor replied to the same highlighting the pre-existing dispute pending between the parties. The Corporate Debtor has also submitted table reproduced hereinbelow to emphasise that there are pre-existing disputes between the parties and material facts have been concealed by the Operational Creditor:

<b>Date</b>	<b>Document</b>
21.04.2021	Corporate Debtor's letter vide which alleged dispute was raised with respect to the amount charged by the Operational Creditor
02.03.2022	Demand Notice issued by the Operational Creditor

16.03.2022	Reply to the Demand Notice by the Corporate Debtor
17.03.2022	Arbitration Invocation notice issued by the Corporate Debtor
16.04.2022	Reply to the Arbitration Invocation Notice by the Operational Creditor
20.04.2022	Petition filed by the Corporate Debtor under Section 11(6) of the Arbitration & Conciliation Act, 1996 before the Hon'ble High Court of Karnataka
28.04.2022	Notice issued by the Hon'ble High Court of Karnataka on the Section 11 Arbitration Petition filed by the Corporate Debtor to the Operational Creditor
01.06.2022	Notice of the Section 11 Arbitration Petition received by the Operational Creditor
07.06.2022	Section 9 IBC Petition filed by the Operational Creditor

- (ii). In light of the aforesaid it is submitted that there are pre-existing disputes between the parties and the Corporate Debtor has relied upon the judgment passed by the Hon'ble Supreme Court of India in the matter of *Mobilox Innovations Pvt. Ltd. v/s Kirusa Software Pvt. Ltd*[(2018) 1 SCC 353] and has contended that the present Application filed by the alleged Operational Creditor deserves to be dismissed.
- (iii). The Corporate Debtor further states that, in part IV of the Application filed by the alleged Operational Creditor it has been stated that due date for payment of the Invoices was 30 days from the date of the said invoice. However, in terms of the Agreement at Clause 4 (viii) (b) the invoices were to be paid within 15 days of receipt of such invoice or within 18 days of dispatch of such invoice. This makes it amply clear that the alleged Operational Creditor is not even sure about the date of default and the Application deserves to be dismissed on this ground alone.

- (iv). It is also submitted that the Operational Creditor fails to meet the threshold of Rs. 1 Crore to file the present Application under Section 9 of the IBC and that the invoice dated 03.03.2021 raised by the Applicant for a sum of Rs. 29,14,684/- falls under the ambit of Section 10A of the Code, as the same was raised during the operation of Section 10A of the Code.
- (v). Accordingly, for the Invoice dated 03.03.2021 the alleged Operational Creditor is not eligible to file present Application and if the amount of Rs. 29,14,684/- is deducted from purported/alleged amount of debt of Rs. 1,23,31,500/- then the same would amount to Rs.94,16,816/-. Therefore, the alleged Operational Creditor fails to meet the threshold of Rs. 1 crore and the Application deserves to be dismissed on this ground alone.
- (vi). Further, it is submitted that the alleged Operational Creditor has mischievously not disclosed before this Adjudicating Authority that in terms of the letter dated 07.04.2017 annexed as 'Annexure-2' of IA No. 2070/2022, the Corporate debtor had made it explicitly clear that the Corporate Debtor will be liable to pay the contracted rate for the contracted quantity of energy i.e. Three Million units per year and the supply of energy over and above this quantity, the Corporate Debtor will be liable to pay the average rate of energy as per the open access scheme. The Operational Creditor has charged an excess amount of Rs. 77,53,450/- from the Corporate Debtor, and even if the amount of Rs. 77,53,450/- is deducted from purported/alleged amount of debt of Rs. 1,23,31,500/- then the same would amount to Rs. 45,78,050/-. Therefore, the application of the Operational Creditor on this ground also fails to meet the threshold of Rs. 1 Crore and the Application deserves to be dismissed on this ground alone.
- (vii). Further, it is submitted that, the Corporate Debtor vide its letter addressed to the alleged Operational Creditor raised a dispute and

stated that without any prior intimation the alleged Operational Creditor had arbitrarily discontinued the supply of energy from 01.04.2021 onwards, causing grave hardship and heavy financial losses to the Corporate Debtor. Further the alleged Operational Creditor had not issued the credit notes for the excess charges levied towards the energy in the invoices raised for the period from 01.04.2018 to 31.03.2021. The Corporate Debtor also requested the alleged Operational creditor to issue credit notes for an amount of Rs. 4,46,12,934/- being excess charged levied by the alleged Operational Creditor in terms of the Agreement, which the alleged Operational Creditor has failed to do till date. Therefore, the Corporate Debtor raised a dispute in April, 2021 itself, however, the alleged Operational Creditor failed to address the same and has filed the present frivolous Section 9, IBC Application.

- (viii). The Corporate Debtor further submitted that the representatives of the Corporate Debtor into discussions with Greenko wind Project Pvt. Ltd./GWPPPL and the Operational Creditor, wherein it was agreed that Corporate Debtor will purchase Wind Power from GWPPPL and the Operational Creditor under the Group Captive Scheme. The GWPPPL and the Operational Creditor stated that in order to consume energy under the Group Captive scheme, the Corporate Debtor will have to subscribe to the shares of GWPPPL. Accordingly, it was agreed that the Corporate Debtor will enter into a subscription and Shareholders Agreement with the Operational creditor and subscribe to 12,123 shares at the rate of Rs. 10/- per share for a total value of Rs. 1,21,230.
- (ix). Further submitted that from a mere perusal of the Agreement annexed with the Application, it appears that all the pages of the said Agreement bears the signature of one Mr. Mariappan T (employee of the Corporate Debtor) on behalf of the Corporate Debtor, except the last executing page wherein the said Agreement has been executed by

Mr. R.C. Sodani on behalf of the Corporate Debtor. In this regard as stated aforesaid the Corporate Debtor had only authorized Mr. R.C. Sodani to execute the said Agreement and not any other person much less Mr. Mariappan T. who has also signed the Agreement as a witness on behalf of the Corporate Debtor. The Corporate Debtor has further submitted that the agreement is dated 10.04.2017 and the Stamp Paper on which the Agreement is executed is dated 02.05.2017.

- (x). Further submitted that the Corporate Debtor subscribed to the shares of the alleged Operational Creditor, however, the corporate Debtor has till date not received the shares certificates from the alleged Operational creditor qua the said shares. Further, from time to time the shareholding of the Corporate Debtor in the alleged Operational Creditor was changed by the operational creditor and the other shareholders by obtaining the signatures on the share transfer deeds from Mr. mariappan T., who was not authorised in any manner to execute the said share transfer deeds on behalf of the Corporate Debtor at any point of time. Thus, time and again acts of fraud and forgery have been committed by the alleged Operational Creditor in connivance with Mr. Mariappan T.

### **FINDING**

4. After heard the Parties and on perusal of the main petition IA/2070/2022 along with the annexures, we are of the considered view that no dispute existed qua the liability of Corporate Debtor on the date of issue of Demand Notice dated 02.03.2022, as there are numerous emails dated 30.04.2021, 12.05.2021, 27.05.2021 wherein Corporate Debtor has accepted liability, promised to make part payments of old dues along with current energy bills. The email dated 27.05.2021 is reproduced hereunder for ready reference:



From: BCIL-Works-Bagalkot [works@bagalkotcement.com](mailto:works@bagalkotcement.com)  
Sent: Thursday, May 27, 2021 2:38 PM  
To: Seshagiri Rao N [seshagirirao.n@greenkogroup.com](mailto:seshagirirao.n@greenkogroup.com); Sri Hari Bhagavan K [srhari.k@greenkogroup.com](mailto:srhari.k@greenkogroup.com)  
Cc: Sayed Zameer Bhaisarkar [sayedzameer.b@greenkogroup.com](mailto:sayedzameer.b@greenkogroup.com); Kapil Sharma [kapil.s@greenkogroup.com](mailto:kapil.s@greenkogroup.com); [tm@bagalkotcement.com](mailto:tm@bagalkotcement.com) [tm@bagalkotcement.com](mailto:tm@bagalkotcement.com)  
Subject: FW: Request for Captive power supply-

*Dear Sir,*

*In response to your email of 26<sup>th</sup> May 2021, we would like to draw your kind attention to our email dtd 12<sup>th</sup> may, 2021, wherein we have expressed the circumstances during this COVID-19 period and still we have committed that we would release the payment of Rs. 25 lakhs against your outstanding dues in addition to your bill for power supply for the month of May 2021 under Captive mode. But we have not been given the power during the month of may 2021 by you.*

*However, in view of the telephonic discussions with the undersigned, we confirm that we will release an additional amount of Rs. 30 lakhs against your outstanding dues along with your bill for the month of June 2021. Apart from this, we will be releasing additional amount of Rs. 5.00 lakh per month against the outstanding dues along with monthly bill.*

*Kindly confirm if you will be releasing the power under the captive mode for the month of June, 2021 as per our above commitment.*

*In line with our telecon on the above subject and as per discussions with our Management, we will arrange to make payment of Rs. 25 lakhs against your dues along with regular supply bill.*

*Kindly restore the power supply from May 2021 onwards under captive mode keeping in view of the long term business relationship, please support us under this Covid pandemic situation*

*Kind Regards  
Mariappan  
GM(Electrical)*

In light of the above correspondence from Corporate Debtor it is clear that Corporate Debtor has acknowledged to pay old dues. Further, It is noticed that Arbitration Proceeding were initiated on 17.03.2022 by way of issue of Arbitration Invocation Notice by the Corporate Debtor whereas the Demand Notice under Section 8 of the Code was issued by the Operational Creditor on 02.03.2022. Therefore, the Corporate Debtor only invoked the

arbitration clause or raised dispute between the parties after the date of issuance of Demand Notice dated 02.03.2022 under Section 8 of the Code. Therefore, the Arbitration proceeding so initiated or pending cannot be termed as pre-existing dispute in terms of ‘clause d’ of subsection 5 of Section 9 read with ‘clause a’ of subsection 2 of Section 8 of the Code.

5. Further, in relation to the contention made by the Corporate Debtor that *the Operational Creditor fails to meet the threshold of Rs. 1 Crore to file the present Application under Section 9 of the IBC as the invoice dated 03.03.2021 raised by the Applicant for a sum of Rs. 29,14,684/- falls under the ambit of Section 10A of the Code*, it is seen that the Operational Creditor has raised three invoices on the Corporate Debtor for the supply of power between 03.01.2020 and 03.03.2021 which is in the following manner:

S.No.	Date Invoice	Invoice amount (Rs.)	Amount received (Rs.)	Balance due (Rs.)	Interest (SE MCLR +2% up to date receipt)	Total amount due (Rs.) C + D
1.	03.01.2020	68,40,000	39,78,184	28,61,816	549644	3411460
2.	02.02.2020	65,55,000		65,55,000	1117628	7672628
3.	03.03.2021	29,14,684		29,14,684	217583	31,32,267
	Total	17,00,38,500		1,23,31,500	18,84,855	1,42,16,355

As per these invoices the Corporate Debtor was liable to pay Rs.1,42,16,355/-, which includes the interest amounting to Rs. 18,84,855/-. There is no doubt that the invoice dated 03.03.2021 raised by the Applicant for a sum of Rs.29,14,684/- falls under the ambit of Section 10A of the Code but then too, if the said amount along with its interest of Rs.2,17,583/- is reduced, the amount in default will still be Rs.1,10,84,088/-. Therefore, such contention cannot sustain. For inclusion of interest to arrive at the Operational Debt, reference is made to the Energy Purchase Agreement between the parties which clearly mentions the interest clause and which states that:

**“4(viii)(d) Penalty for late Payment:**

*If the Invoices are not paid on or before the Payment Due Date, the Purchaser shall pay at a rate equal to 2% over State Bank of India medium term lending rate calculated for the period from the Payment Due Date and date of actual payment of the Invoices.”*

Moreover, the Corporate Debtor has not raised any dispute over the agreement, prior to reply to the demand notice nor against the interest claimed over the sum.

6. Further, it has been submitted that, “the alleged Operational Creditor has charged an excess amount of Rs.77,53,450/- from the Corporate Debtor”, and reference and reliance was made to their letter dated 07.04.2017. The Operational Creditor in its submission has vehemently denied the letter dated 07.04.2017, being a false and fabricated document created by the Corporate Debtor. It is also noted that said letter dated 07.04.2017 annexed as Annexure 2, Page 27 of the IA/2070/2022, is with reference to proposed use of execution of ‘Energy Purchase Agreement’ to be entered into between the parties, and therefore, it sets out some proposition of the Corporate Debtor to the Operational Creditor, prior to the ‘Energy Purchase Agreement’. It is also clearly seen that the ‘Energy Purchase Agreement’ has been made on the 10<sup>th</sup> Day of April 2017, which clearly after the questioned letter dated 07.04.2017. Further, the Corporate Debtor prior to its Reply to the Demand Notice has never raised any allegation/objection regarding any excess amount being charged over and above the terms of Energy Purchase Agreement. Accordingly, this contention of the Corporate Debtor cannot be sustained.

7. Further, with respect to the letter dated 21.04.2021 of the Corporate Debtor, the Operational Creditor has submitted that the letter dated 21.04.2021 is a false and fabricated document created by the Corporate Debtor as an afterthought to create an illusion of a pre-existing dispute between the parties. The Operational Creditor further submits that, the

said letter dated 21.04.2021 was never delivered by the Corporate Debtor to the Operational Creditor and the same was brought into picture by the Corporate Debtor for the first time only vide its reply to the Demand Notice. Moreover, the Corporate Debtor has failed to attach the ***proof of delivery*** of the above said letter dated 21.04.2021. It is also noted that, the Corporate Debtor has admitted the liability to the Operational Creditor vide email dated 27.05.2021 (same has been referred at Para 4 of this order). Therefore, the Corporate Debtor cannot rely on the dispute raised vide letter dated 21.01.2021 after admitting the liability. Accordingly, this contention of the Corporate Debtor cannot be sustained.

8. Further, in respect to the contention raised in para 3(viii) *that it was agreed that the Corporate Debtor will enter into a subscription and Shareholders Agreement with the Operational creditor and subscribe to 12,123 shares at the rate of Rs. 10/- per share for a total value of Rs. 1,21,230* and in Para 3(x) *that the Corporate Debtor subscribed to the shares of the alleged Operational Creditor, however, the corporate Debtor has till date not received the shares certificates from the alleged Operational creditor qua the said shares*, we are of the view that it has nothing to do with Section 9 application and such contention cannot be sustained.
9. Further in relation to the objection, that all the pages of the said Agreement bears the signature of one Mr. Mariappan T (employee of the Corporate Debtor) on behalf of the Corporate Debtor, except the last executing page wherein the said Agreement has been executed by Mr. R.C. Sodani on behalf of the Corporate Debtor and the stamp paper on which agreement was executed is dated 02.05.2017 but the agreement is dated 10.04.2017, we are of the view that the parties have acted on the said agreement and the Corporate Debtor has not placed on record any other agreement entered into by the Operational and Corporate Debtor. It is also noticed that Operational Creditor has been raising the invoices from 2017 onwards and has been receiving the regular payments against invoices for last 3 years without any dispute. Moreover, the Corporate Debtor has

never raised any dispute, prior to reply to the demand notice. Therefore, at this stage the contention cannot be sustained.

10. In view of the above, we are of the considered view that this Operational Creditor has proved debt beyond the threshold limit as mentioned in Section 4 of IBC, valid issue and service of demand notice and default by the Corporate Debtor. Therefore, it is a fit case to be admitted under CIRP. Under the said circumstances, since the debt and default on the part of the Corporate Debtor being proved, we hereby **dismiss the IA/2070/2020** and admit this petition bearing number C.P.(IB)-724(MB)/2022. Accordingly this **petition is admitted** with the direction as follows:-

**ORDER**

- a. The above Company Petition No. (IB) -724(MB)/2022 is hereby allowed and initiation of Corporate Insolvency Resolution Process (CIRP) is ordered against **M/s Bagalkot Cement and Industries Ltd.**
- b. Since the Operational Creditor has not suggested the name of any person to perform the duties of the Interim Resolution Professional (IRP) in the petition, this Bench is appointing the IRP from the list furnished by the Insolvency and Bankruptcy Board of India (IBBI). This Bench hereby appoints **Mr. Atul Gala** ([atulgala.cirp@gmail.com](mailto:atulgala.cirp@gmail.com)); 9833148504, IP Registration No: IBBI/IPA-001/IP-P-01974/2020-2021/13130 as the interim resolution professional to carry out the functions as mentioned under the Insolvency & Bankruptcy Code, 2016.
- c. The Operational Creditor shall deposit an amount of Rs.5 Lakh towards the initial CIRP costs by way of a Demand Draft drawn in favour of the Interim Resolution Professional appointed herein, immediately upon communication of this Order. The IRP shall spend the above amount towards expenses only and not towards fee till his fees is decided by COC.

- d. That this Bench hereby prohibits the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority; transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein; any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002; the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the Corporate Debtor.
- e. That the supply of essential goods or services to the Corporate Debtor, if continuing, shall not be terminated or suspended or interrupted during moratorium period.
- f. That the provisions of sub-section (1) of Section 14 shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.
- g. That the order of moratorium shall have effect from the date of pronouncement of this order till the completion of the corporate insolvency resolution process or until this Bench approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, as the case may be.
- h. That the public announcement of the corporate insolvency resolution process shall be made immediately as specified under section 13 of the Code.
- i. During the CIRP period, the management of the corporate debtor will vest in the IRP/RP. The suspended directors and employees of the corporate debtor shall provide all documents in their possession and furnish every information in their knowledge to the IRP/RP.

j. Registry shall send a copy of this order to the Registrar of Companies, Mumbai, for updating the Master Data of the Corporate Debtor.

11. Accordingly, this Petition is admitted.

12. The Registry is hereby directed to communicate this order to both the parties and to IRP immediately.

Sd/-

Sd/-

**CHARANJEET SINGH GULATI**  
**(MEMBER TECHNICAL)**

**LAKSHMI GURUNG**  
**(MEMBER JUDICIAL)**

Arpan, LRA