

IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI (COURT NO. IV)
Company Petition No. IB- 452/ND/2020

[Under Section 9 of the Insolvency and Bankruptcy Code, 2016 Read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016]

IN THE MATTER OF:

M/S HERO SOLAR ENERGY PRIVATE LIMITED

...APPLICANT/OPERATIONAL CREDITOR

VERSUS

M/S NATIONAL TEXTILE CORPORATION LIMITED

...RESPONDENT/ CORPORATE DEBTOR

ORDER PRONOUNCED ON: 27.05.2022

CORAM:

MR. DHARMINDER SINGH
HON'BLE MEMBER (JUDICIAL)

MS. SUMITA PURKAYASTHA
HON'BLE MEMBER (TECHNICAL)

ORDER

Per-Smt. Sumita Purkayastha, Member (Technical)

This is an application filed by M/s. Hero Solar Energy Pvt. Ltd. the applicant/operational creditor seeking (for brevity Operational Creditor) to initiate CIRP against the Respondent company/Corporate Debtor (for brevity Corporate Debtor) M/s National Textile Corporation Ltd., under Section 9 of IBC 2016 for the alleged default on the part of the Corporate Debtor having an

outstanding balance of Rs. 13,84,254/- during the course of performance of two contracts for solar rooftop power projects entered by it with the corporate debtor. The details of transactions leading to the filing of this petition as averred by the applicant are as follows:-

- a. A Work Order/ Purchase Orders for 423 kWp - Pioneers Spinners Kamuthakudi Project ("Project 1") and Work Orders/Purchase Orders for 357 kWp - Kaleeswarar Mills Project ("Project 2") entered into by it with the Corporate Debtor on 20.05.2016.
- b. Further it is stated that operational creditor was granted Letter of Allocation ("LOA") by the Solar Energy Corporation of India ("SECI") being the successful bidder, for "Design, Engineering, Manufacture, Supply, Erection, Testing and Commissioning including Warranty, Operation & Maintenance of Roof Top Solar PV System" in cities/states in India (Phase IV- Part 2) and vide letter dated 21.08.2015, awarded the contract for "Implementation of Grid Connected Roof Top Solar PV System" for a total allocated capacity of 750 in the State of Tamil Nadu. Further, operational creditor and corporate debtor entered into a "Design, Engineering, Supply, Testing & Commissioning Agreement" ("Agreement") on 07.06.2016 for total 780 kWp Grid

Connected Rooftop Solar PV Power System in terms of the above notification as success bidder.

- c. It is submitted that the said Agreement contained the scope of duty of HSEPL, the technical specifications, payment terms, completion period, expected power generation and warranties, force majeure clause, site access, parties' obligations, etc. However, there was no clause with respect to penalty that corporate debtor may impose on operational creditor in the event of delay in project commissioning.
- d. It is submitted that none of the abovementioned POs/ WOS with respect to Project 1 and Project 2 contained any clause with respect to damages for delay in work/ commissioning. Therefore, the said contracts did not bestow upon NTCL any right to impose penalty in the event of delay beyond the time periods prescribed therein. As per the conditions contained POs/WOs, amount of Rs. 2,21,33,898/- towards Project 1 and Rs.1,86,80,382/- towards Project 2 become due from corporate debtor upon the completion of work on 25.12.2016 and 21.04.2017, respectively.
- e. Further it is submitted that corporate debtor failed to release the complete payment due to HSEPL and

retained an amount of Rs. 13, 84,254/- against the terms of the POs/WOs and Agreement..

- f. Furthermore, the unpaid debts are 7,32,120.60 and Rs.6,52,134.40, respectively, for Project 1 and Project 2, i.e. a total of Rs.13,84,254/- out of which Rs. 2,07,954 is towards C Form and ST difference. Importantly, SECI vide its mail dated 12.05.2017 also clarified to corporate debtor that there was no clause/ provision in the Agreement entered into by corporate debtor and operational creditor enabling corporate debtor to levy penalty.
- g. The applicant sent demand notice under Section 8 of the code on 23.10.2019 calling upon the corporate debtor to pay the total amount of Rs. 13,84,254/-. The applicant submits that the notice has been duly served on the corporate debtor. The Copy of demand notice along with postal receipts and the tracking reports has been annexed.

2. The Corporate Debtor in its reply to the application submits that:
- a. The corporate debtor claimed that there is a dispute between the parties over the pending amount of debt. It is the case of the respondent corporate debtor that

the applicant had committed delay of 117 days in execution of the work order and the corporate debtor had suffered losses and therefore, deducted penalties from the payments due towards applicant.

- b. The respondent has placed reliance on emails dated 04.09.2019, letter dated 02.09.2019, 09.12.2016, 23.09.2016, 17.10.2016 in order to prove the delay committed by applicant in completion of the work order.
 - c. The respondent claimed that time was the essence of contract and applicant had failed to adhere the terms of agreement hence, the claimed amount was withheld by the respondent towards penalty for the delay committed by applicant. The respondent submits that the delay is admitted by the applicant itself.
 - d. The respondent has relied upon inter departmental communication dated 16.12.2019 in showing calculations of losses suffered by the respondent.
3. In this regard, the applicant has denied the allegations made in the reply of the corporate debtor and further submitted in rejoinder that:
- a. The applicant claimed that no notice of dispute was ever given by the corporate debtor to applicant. Infact,

the applicant vide letters dated 17.12.2018, 20.02.2019, 03.04.2019, 17.04.2019, 31.07.2019 and in its Demand Notice dated 23.10.2019, has demanded its pending dues and the corporate debtor has never raised any dispute over the delay in execution of the contract.

- b. The applicant further states that the respondent has relied upon the correspondences related to the year 2016-17 and there is no correspondence or any document pertaining to the year 2018-19 raising any dispute regarding claim of the applicant.
- c. It is stated that after issuance of demand notice dated 31.07.2019 the corporate debtor vide its letter dated 19.10.2019 has demanded relevant documents to consider the claim of the applicant, this clearly shows that the claim of dispute is an afterthought. The applicant further pointed out that during meeting between the parties on 07.01.2019, reconciliation statements were drawn up and signed by both the parties and no dispute was raised by respondent during meeting also.
- d. The applicant further stated that there was no provision of penalty in the agreement signed between

the parties, hence, such action of the respondent is against the agreed terms of the work agreement.

- e. The applicant further pointed out that SECI tender contained a specific clause for deduction of penalty and SECI has already deducted penalty of Rs. 14 lakhs from the applicant. Infact the SECI clarified vide letter dated 12.05.2017 to corporate debtor that there was no penalty clause in the agreement between the applicant and corporate debtor which enabled the corporate debtor to impose penalty on the Applicant for delay in execution of project. SECI further advised the corporate debtor that it is not prudent to impose double penalty on applicant.
- f. It is submitted that as per the Tender agreement when the power generated from the instant projects is primarily for the Corporate Debtor's captive consumption only, it cannot be said that the Corporate Debtor suffered any revenue loss on account of any purported delay by the Applicant. The applicant further pointed out that the entire scheme of the project does not envisage the corporate debtor earning any revenue from power generated from the projects, therefore no loss can be cause to the corporate debtor.

4. The corporate debtor has filed its written submissions and reiterated its submissions as filed in the reply.
5. Heard the parties and perused the case records. Considering the documents on record admittedly the respondent has never raise any dispute over quantum of claim or delay of applicant. The corporate debtor has failed to place any document on record to show that said imposition of penalty was ever communicated to the applicant before issuance of demand notice. No debit note in this regard was ever issued by respondent. The communications relied upon by respondent are related to period 2016-17, only in respect of delay in completion of project. No penalty or liquidated damages were levied by corporate debtor.
6. Admittedly, in terms of agreement the corporate debtor is not entitle to impose any penalty to the applicant. The respondent even reconciled the accounts of applicant and failed to raise any dispute over claim of applicant during reconciliation.
7. Section 55 (3) of the Indian Contract Act provided that in case of the promisor failed to perform the contract at time agreed and the promisee still accepts the performance of such promise any time other than agreed, the promisee cannot claim compensation for any loss. It is not the case of respondent that work order was never completed by applicant. The respondent has already made payments to applicant which shows that there is no defect in performance of contract other than delay in completion, that too a penalty of Rs. 14 lakhs was already levied by SCEI on applicant. This leaves no doubt that the default has

occurred for the payment of the operational debt to the applicant and the so called dispute raised by the corporate debtor is merely a moonshine dispute as laid down by Hon'ble Supreme Court in the matter of "**Mobilox Innovative Private Limited vs. Kirusa Software Private Limited**".

8. Therefore, in the given facts and circumstances, it can be concluded that the applicant has established its claim which is due and payable by the corporate debtor and the corporate debtor has failed to prove existence of any pre-existing dispute in respect of amount claimed by applicant. The present application is admitted.
9. The applicant has not proposed the name of IRP, therefore, this bench appoints Mr. Amit Talwar as the Insolvency Resolution Professional of the corporate debtor. The registration number of the IRP being IBBI/IPA-002/IP-N01178/2020-21/13887 and email id. amittalwarcs@gmail.com. IRP above named is appointed subject to the condition that no disciplinary proceedings are pending against him. The specific consent is required to be filed in Form 2 of Insolvency and Bankruptcy Board of India (Application to Adjudicating Authority) Rule, 2016 and made disclosures as required under IBBI (insolvency Resolution Process for Corporate Persons) Regulations, 2016.
10. We direct the applicant to deposit a sum of Rs. 2 lacs with the Interim Resolution Professional, namely Mr. Amit Talwar to meet out the expense to perform the functions assigned to him in accordance with regulation 6 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Person) Regulations, 2016. The needful shall be done within one

week from the date of receipt of this order by the Operational Creditor. The amount however be subject to adjustment by the Committee of Creditors, as accounted for by Interim Resolution Professional, and shall be paid back to the Operational Creditor.

11. As a consequence of the application being admitted in terms of Section 9(5) of IBC, 2016, moratorium as envisaged under the provisions of Section 14(1), shall follow in relation to the corporate debtor, prohibiting as per proviso (a) to (d) of the Code. However, during the pendency of the moratorium period, terms of Section 14(2) to 14(4) of the Code shall come in force.
12. A copy of the order shall be communicated to the applicant, Corporate Debtor and IRP above named, by the Registry. In addition, a copy of the order shall also be forwarded to IBBI for its records. Applicant is also directed to provide a copy of the complete paper book to the IRP. A copy of this order is also sent to the ROC for updating the Master Data. ROC shall send compliance report to the Registrar, NCLT.

-Sd-

SUMITA PURKAYSATHA
MEMBER (T)

-Sd-

DHARMINDER SINGH
MEMBER (J)