

IN THE NATIONAL COMPANY LAW TRIBUNAL: NEW DELHI
PRINCIPAL BENCH

Company Petition No. (IB)-810(PB)/2020

Order under Section 9 of Insolvency & Bankruptcy Code,
2016

IN THE MATTER OF:

BKB TRANSPORT PRIVATE LIMITED

2F VATIKA APARTMENT
LINK TANK ROAD,
RANCHI – 834001.

... **Operational Creditor**

Vs.

NTPC LIMITED

NTPC BHAWAN,
CORE 7, SCOPE COMPLEX
7, INSTITUTIONAL AREA,
LODHI ROAD,
NEW DELHI – 110003.

... **Corporate Debtor**

Order Pronounced on: 04.01.2021

CORAM

SHRI. B.S.V. PRAKASH KUMAR
HON'BLE ACTG. PRESIDENT

SHRI. HEMANT KUMAR SARANGI,
HON'BLE MEMBER (TECHNICAL)

PRESENT:

For the Petitioner : Mr. Rishabh Sancheti, Advocate
Mr. Neeraj Lalwani, Advocate

For the Respondent : Mr. Balbir Singh Sr. Advocate along with
Mr. R. Sudhinder, Advocate
Mr. Adarsh Tripathy Advocates

ORDER

PER-SH. B.S.V. PRAKASH KUMAR, HON'BLE ACTG. PRESIDENT

1. It is a Company Petition filed u/s 9 of the Insolvency and Bankruptcy Code by an Operational Creditor, namely BKB Transport Pvt. Ltd. against NTPC Limited (Corporate Debtor) stating that the Corporate Debtor defaulted paying an amount of ₹11,21,44,047.40 as on 29.02.2019 excluding interest @18% per anum, therefore the Operational Creditor sought for initiation of Corporate Insolvency Resolution Process against the Corporate Debtor for the Corporate Debtor defaulted in paying the claim despite after receipt of Section 8 notice served upon the Corporate Debtor.
2. The case of the Operational Creditor is, the Corporate Debtor at the time of setting thermal power plant with a capacity of 330MW invited bids for transportation of Coal from Amrapali Mine to Banadag Railway Siding and loading of Coal into Indian Railways Wagon at Banadag Railway Siding for NTPC Barh II (2x660MW) through RCR mode wherein the Operational Creditor being accepted as the highest bidder, the Corporate Debtor vide **Purchase Order 4000164568 – 064-1028 dated 13.04.2016** awarded the contract to the operational creditor on the terms and conditions contained in the above purchase order.
3. Pursuant to the same, an agreement 30.06.2016 was entered into between the Corporate Debtor and the Operational Creditor with a duration of contract period from 19.03.2016 to 18.03.2017 for a total sum of ₹211,95,00,000, later the contract was extended to the



Operational Creditor up to 26.04.2018. As per the Purchase Order, the Operational Creditor is supposed to submit its bills on despatch of the rake as per the RR receipt. Upon receipt of the same; the Corporate Debtor is bound to release 90% payment within 7 days on receipt of the Bill and the balance 10% upon the receipt of the coal at the plant.

4. On the invoices raised by the Operational Creditor, the payment was done to some of the invoices, as to the invoices payment was not made, the said unpaid invoices have been referred in the calculation of default amount in the application filed by the Operational Creditor.
5. As to the dues payable towards unpaid invoices, the Operational Creditor sent emails dated 18.03.2019 and 18.04.2019 to which the Corporate Debtor vide its email dated 24.01.2020 admitted that as per the books of accounts of the Corporate Debtor, an amount of ₹7,25,91,090.40 is due to the Operational Creditor as on 31.12.2019 with a request to the Operational Creditor to confirm that it is showing in the books of the Operational Creditor.
6. To which the Operational Creditor replied through its email dated 24.01.2020 that the amount shown in the statement sent by the Corporate Debtor does not match with the books of the Corporate Debtor, therefore the Operational Creditor attached the statement as per its books and informed them that an amount of ₹11,21,44,047.40 is outstanding pending but not ₹7,25,91,090.40 as stated by the Corporate Debtor.



7. Thereafter, the Operational Creditor on 12.04.2020 sent a detailed demand notice u/s 8 of IBC to the Corporate Debtor demanding payment of ₹11,21,44,047.40 to which, the Corporate Debtor replied on 21.04.2020 raising dispute stating that the Operational Creditor is liable to pay penalty for short supplies of coal, therefore unless penalty is settled, final bill could not be prepared, while admitting from one side that the amount i.e. outstanding is more than ₹1Crore i.e. the threshold for filing company petition u/s 9 of IBC.
8. For the payment has not been made after section 8 notice was served upon the Corporate Debtor, the Operational Creditor has filed this Company Petition for initiation for CIRP against the Corporate Debtor.
9. Invoices and date of default raised by the Operational Creditor is as follows:

INVOICE No. & DATE	AMOUNT (IN Rs.)
2016-17 / 10-13 22.12.2016	1,37,059.00
2016-17 / 17 23.01.2017	1,57,863.00
2016-17 / 23 11.03.2017	1,327.40
BKB/17-18/004 28.08.2017	2,30,16,357.00
BKB/17-18/010 31.10.2017	7,79,976.00
BKB/17-18/018 15.02.2018	57,90,302.00
BKB/17-18/019 15.02.2018	1,87,164.00
BKB/17-18/019 15.02.2018	44,84,253.00
BKB/17-18/019 15.02.2018	1,58,00,873.00
BKB/17-18/020 12.03.2018	37,07,504.00

BKB/17-18/023	31.03.2018	42,83,873.00
BKB/17-18/023	31.03.2018	1,05,33,915.00
BKB/17-18/024	31.03.2018	37,10,624.00
BKB/18-19/002	18.04.2018	2,78,33,508.00
BKB/18-19/003	24.04.2018	1,17,19,449.00
TOTAL		11,21,44,047.40

10. As against this Petition, the Corporate Debtor submits that this Petition shall be dismissed in limine for suppression of documents seminal to decide the penalty and correspondence exchanged long prior to issuing section 8 notice reflecting that the corporate debtor from time to time reminding the operational creditor that it was continuously failing to supply the requisite coal to the siding as per minimum loading per day mentioned in the purchase order and also reminding that the corporate debtor would impose penalty for short supplies as mentioned in the Purchase Order based on which the operational creditor supplying coal and raising invoices, therefore the corporate debtor submits that the Operational Creditor should not have assumed that the corporate debtor defaulted making payment looking at the auto generated Retention Statement supplied by the Finance Department of the Corporate Debtor disclosing the running bills till 31.12.2019, which is retained by the Corporate Debtor for adjustments during reconciliation against the short supplies and the penalties thereof.

11. In the email dated 24.01.2020, the Corporate Debtor has mentioned that the Operational Creditor cannot, simply upon receipt of Retention Statement, assume the amount in the Running Bills retained as an admission of default of making payment of ₹7,25,91,090.40 by the Corporate Debtor.
12. The Corporate Debtor counsel further submits that through the Purchase Order aforementioned, the contract was awarded to the Operational Creditor for supply of 30lac MT of coal, by which, the Petitioner was bound to supply 2.2 rakes per day in terms of the Contract, failing to perform the same, permits the Corporate Debtor to impose a penalty on the Operational Creditor at double the applicable rate of the shortfall quantity, to be applied with respect to 90% of the schedule quantity.
13. In addition to the aforesaid NTPC Barh Contract, another contract was awarded to the Corporate Debtor for supply of Coal to Bongaigaon which is entirely different from the contract awarded for NTPC Barh.
14. As the Operational Creditor failed to make timely supplies to Barh from Jan'2018 to Apr'2018, it has led to acute shortage of coal and also led to power generation loss at Barh, as to this issue, the Corporate Debtor shared its concerns through letters dated 22.01.2018, 26.02.2018, 24.03.2018 and 19.04.2018 with the Operational Creditor, not only that, the Corporate Debtor has also made it clear to the Operational Creditor that coal transportation to Barh should be the first priority.



15. Owing to short supply of coal aforementioned, the Corporate Debtor imposed penalty on the Operational Creditor for the short supply to Barh for the period in which the operational creditor failed to commitment of supply of 2.2 rakes of coal per day.
16. The Corporate Debtor revealed the the methodology for calculating the penalty in the Purchase Order dated 13.04.2016 and informed the Operational Creditor vide its letters dated 16.04.2019 and 30.04.2019 for deputation of an authorized representative from the operational creditor side to visit the Corporate Debtor office on 03.05.2019. Despite there being a call upon the Operational Creditor for deputation of authorised representative to complete the formalities for preparation of final bill so that the balance payment, if any payable could be processed, however, the Operational Creditor has not deputed any of its authorised representatives to complete the formalities with respect to preparation of the final bill.
17. The Corporate Debtor counsel submits that from the perusal of exchange of letters and the submissions thereupon, it is quite clear that the amount retained by the Corporate Debtor is largely on account of penalty against the short supplies, therefore the said amount cannot be released to the Operational Creditor. In view thereof, the counsel made it clear that the dispute is pre-existing between the parties since 2018 i.e., well in advance before issuance of the demand notice by the Petitioner.

18. On perusal of the submissions aforementioned, now the point for consideration is as follows:

Whether or not dispute is pre-existing between the parties before issual of Section 8 notice dated 12.04.2020?

To ascertain any dispute is in existence or not, we have to go through the various documents including exchange of letters between the parties.

19. Upon looking at the general conditions of the contract, it is categorically mentioned if the contractor has failed to maintain the required progress in completing the work assigned to it, the Contractor shall pay compensation amount calculated as stipulated in Schedule A of the general terms and the said compensation may be adjusted or set off against any sum payable to the Contractor under this or any other contract with the Corporation (Corporate Debtor i.e., NTPC).

20. The contract that has come into existence between the Operational Creditor and the Corporate Debtor on issual of the Purchase Order dated 13.04.2016, which the Operational Creditor relied upon for all purposes, for supply of coal and raising invoices against the Corporate Debtor, therefore penalty clause present in the Purchase Order is also binding upon the Operational Creditor, of course it is not the case of the Operational Creditor that Penalty Clause is not binding upon it.

21. The Corporate Debtor has annexed a letter dated 26.02.2018 written to the Operational Creditor, wherein the



Corporate Debtor has observed that the Operational Creditor failed to maintain a stock of around 10000MT of Coal at the Siding so as to enable the Corporate Debtor to take up strongly with the Railways and to meet the obligation in terms of the contract. It has been noted that the Corporate Debtor reiterated that fulfilling requirement of Barh from Banadag Railway Siding under the contract should be the first priority of the Operational Creditor.

22. Subsequently, the Corporate Debtor on 22.01.2018 wrote another letter to the Operational Creditor stating that the coal transportation to Barh STPP from Amrapali Mine of CCL under the subject contract (Contract dated 13.04.2016) has been well below the schedule. To prove the same, month wise schedule vs. actual supply is enclosed as Annexure 1 to this letter. They have also quoted Clause 3.2 of the subject contract provides for penalty for under performance from the Operational Creditor side, which is as follows:

“The agency shall supply the coal rakes as per the Schedule of Supply given by NTPC Barh from Banadag siding and ensure around 2.2 rakes per day on an average basis so as to meet the coal supply requirement of NTPC Barh on monthly basis. There will be a penal clause applicable if quantity execution is less than 90% of the monthly schedule given by NTPC @ double the applicable rate of short supplied quantity”.

23. The Corporate Debtor has mentioned in its letters that it had been repeatedly conveying its concerns on less transportation in various discussions and also through many correspondences, therefore it is felt that sufficient

efforts have not been put in from the Operational Creditor side to effect augmentation in coal transportation.

24. In this backdrop, the Operational Creditor was asked to explain as to why penalty in terms of Clause 3.2 of the subject Purchase Order should not be imposed on the Operational Creditor.

25. Again on 24.03.2018, the Corporate Debtor wrote another letter to the Operational Creditor, which is as follows:

Ref. No.400/Barh/RCR/2018
24.03.2018

Date:

*The BKB Transport (P) Ltd.
2F, Vatika Apartment
Line Tank Road
Ranchi – 834 001*

Sub: Coal transportation for NTPC Barh from Amrapali, CCL through Banadag siding (PO no.4000164568-064-1028 Version-4 dtd 28.03.2017).

Dear Sir,

The coal transportation to Banadag siding under the subject contract has been very low during last few days. The details of trips received at Banadag since 16th March is as under:

Date	No. of trips recd.	Rakes loaded
16.03.2018	261	1
17.03.2018	186	0
18.03.2018	196	1
19.03.2018	136	0
20.03.2018	9	1
21.03.2018	17	0
22.03.2018	55	0
23.03.2018	19	1

It is observed that there has been no effort to augment the trips to the tune of requirement. The trips have been also affected by the coal transportation for Bongaigaon which has been increasing of late. It is once again requested that transportation to Banadag may be increased so as to meet the requirement of two rakes a day.

Thanking you,

Yours faithfully,

(N. Shekhar)
AGM (FM-FT)

26. Likewise on 19.04.2018, the Corporate Debtor wrote another letter to the Operational Creditor, which is as follows:

Ref. No.400/Barh/RCR/2018
19.04.2018

Date :

The BKB Transport (P) Ltd.
2F, Vatika Apartment
Line Tank Road
Ranchi – 834 001

Sub: Coal transportation for NTPC Barh from Amrapali, CCL through Banadag siding (PO no.4000164568-064-1028 Version-4 dtd 28.03.2017).

Dear Sir,

The coal transportation to Banadag siding under the subject contract has been very low during last few days. Against a requirement of 2.2 rakes a day, you have been averaging at about 0.6 rakes a day only. The details of trips received and rakes loaded at Banadag during last 10 days is as under:

Date	No. of trips recd.	Rakes loaded
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09/04/18	73	0
10/04/18	192	1
11/04/18	44	0
12/04/18	220	1
13/04/18	291	0
14/04/18	180	1
15/04/18	257	2
16/04/18	223	0
17/04/18	223	0
18/04/18	288	1

It is observed that there has been no effort to augment the trips to the tune of requirement. The trips have been also affected by the coal transportation for Bongaigaon. It is again requested that coal transportation to Banadag may be increased to the tune of requirement.

Thanking you,

Yours faithfully,

*(N. Shekhar)
AGM (FM-FT)*

27. In this correspondence, the Corporate Debtor wrote another letter dated 16.04.2019 to the Operational Creditor with respect to processing of final bill mentioning that in the discussions held between the parties, deductions have been proposed for days when rake has been loaded for Bongaigaon but less than 2 rakes have been loaded for Barh. In the same letter, the Corporate Debtor called upon the Operational Creditor for deputation of representative to sign acceptance for final payment under the subject purchase order.

28. Again on 30.04.2019, the Corporate Debtor wrote another letter reiterating the earlier request to depute the

representative of the Operational Creditor for acceptance of the final bill payment so that it would enable closure of the contract and release of Performance Bank Guarantee submitted under the contract at the earliest.

29. All these correspondences clearly indicate that the Operational Creditor failed to supply the requisite coal to the Siding as mentioned in the Purchase Order, therefore according to Clause 3.2 of the Purchase Order, the penalty shall be paid towards the short supplies of the coal as required under the Purchase Order.
30. It is an admitted fact that from the Operational Creditor side that the Corporate Debtor replied to its Section 8 notice dated 12.04.2020, on 21.04.2020 i.e. within 10 days from the date of receipt of notice, in the reply, the Corporate Debtor has again disputed that the Operational Creditor is liable to pay penalty, therefore it could not be decided who is liable to pay whom, because if the penalty is more than the unpaid invoice amount retained by the Corporate Debtor, the Operational Creditor would be liable to pay the penalty remained due and payable by the Operational Creditor.
31. In all the three Volumes filed by the Operational Creditor, it has not included the **Purchase Order** which is binding upon the Operational Creditor. In the Reply notice dated 21.04.2020, the Corporate Debtor sated that *as per the corporate debtor records, the amount payable to the operational creditor is ₹51,09,867, whereas the amount retained as penalty for short supply is ₹8,95,38,277 (penalty*



for 17rakes (January 18-2 rakes, Feb 18-3 rakes, March 18 and April 18-6 rakes each. Penalty @ double the rate of transportation).

32. The Operational Creditor counsel has filed rejoinder setting up a new case that since the Performance Bank Guarantee has not been retained, it is to be construed that no dues are outstanding against the Operational Creditor, therefore whatever defence taken up by the Corporate Debtor, the operational creditor says, could not be considered as dispute is in existence before receipt of Section 8 notice by the Corporate Debtor.
33. Here the point for consideration at the time of admission of Section 9 Petition is, it is to be seen whether any debt is in existence, whether default is in existence, if default is in existence, it is to be seen that if any dispute is pre-existing before receipt of Section 8 notice by the Corporate Debtor.
34. In the backdrop of the factual scenario of this case, it is not the case of the Operational Creditor that it has not short supplied the coal and it is not also the case of it that penalty need not be paid in the event the Operational Creditor failed to supply coal to the Siding as mentioned in the Purchase Order 13.04.2016.
35. There are several letters from the Corporate Debtor that the Operational Creditor failed to supply 2.2 rakes of Coal per day and that the Corporate Debtor in the year 2018 itself wrote letter after letter that the Operational Creditor is liable to pay penalty for short supply, and the



Corporate Debtor indeed called upon the Operational Creditor stating that the final bill would be reconciled provided the Operational Creditor authorized representative come to the Corporate Debtor for finalization of the bill because the Penalty liable to be paid by the Operational Creditor would be discounted from the unpaid invoice amount retained with the Corporate Debtor.

36. The Operational Creditor, for the reasons best known to it, did not send its authorized representative to make the bill final, unless bill is made final, in case anything is to be paid, the Corporate Debtor cannot be called as defaulted in paying the bill of the Operational Creditor.
37. In a sense, it could be said, that the default is not in existence because final bill has not been prepared. In fact the Corporate Debtor itself called upon the Operational Creditor to clear this issue to discount the penalties from the unpaid invoice amount retained with the Corporate Debtor.
38. In any event, apart from raising dispute over penalties from the year 2018 itself, the Corporate Debtor timely replied i.e. within 10 days from the date of receipt of Section 8 notice that the Operational Creditor is liable to pay penalty, therefore it cannot be called dispute is not in existence as on the date of receipt of Section 8 notice.
39. On record it is evident that final bill has not been prepared, penalties not discounted, the operational creditor has not deputed its authorized representative for finalization of final bill, therefore due itself cannot be assumed unless



final bill is prepared, therefore question of default will not arise, in any event, dispute is preexisting between the parties as on the date section 8 notice the corporate debtor received, therefore it is a clear case hit by pre-existing dispute.

40. In this case, both the parties relied upon ***Mobilox Innovations Pvt. Ltd. v. Kirusa Software Pvt. Ltd., Civil Appeal no. 9405 of 2017***, wherein the Honorable Supreme Court of India held that in the cases where dispute of fact arises, the same truly require further investigation and cannot be decided under the **Insolvency and Bankruptcy Code**.

41. From the Operational Creditor side contention is dispute is frivolous, from the Corporate Debtor side contention is dispute is pre-existing.

42. Nevertheless the sum and substance of the aforesaid judgment is, whenever any dispute is pre-existing, notwithstanding the merit of the dispute raised, the Petition shall be dismissed on the ground that Petition is hit by pre-existing dispute.

43. In view thereof, (IB)-810(PB)/2020 is hereby **dismissed as misconceived**.

-sd-

(B.S.V. PRAKASH KUMAR)

ACTNG. PRESIDENT

-sd-

(HEMANT KUMAR SARANGI)
MEMBER (TECHNICAL)