

**IN THE NATIONAL COMPANY LAW TRIBUNAL
COURT-V, NEW DELHI**

CP IB NO. 474/(ND)/2021

An Application 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:

RAYS POWER INFRA PRIVATE LIMITED

Through its Managing Director & Authorised signatory

Mr. Ketan Mehta

1st – 21, Evershine Mall,
North Meter Cabin 1, Malad, West Mumbai,
Mumbai-400064, Maharashtra

...Operational Creditor

VERSUS

RGS SOLAR POWER PRIVATE LIMITED

109, 1st Floor, Vardhman Shopping Mart,
LSC No. 4, Derawal Nagar,
North-West Delhi-110009, Delhi

...Corporate Debtor

Order Delivered on: 30.04.2024

CORAM:

SHRI MAHENDRA KHANDELWAL, HON'BLE MEMBER (JUDICIAL)

DR. SANJEEV RANJAN, HON'BLE MEMBER (TECHNICAL)

APPEARANCES:

For the Applicant: Mr. Sushil Daga, Ms. Akshita Koolwal, Advs.

For the Respondent: Mr. Ajay Kumar, Ms. Stuti Vatsa, Advs.

O R D E R

PER: MAHENDRA KHANDELWAL, MEMBER (JUDICIAL)

1. This is a Company Petition filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 (**‘the Code’**) read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 by **M/s. Rays Power Infra Private Limited (‘Operational Creditor’)** through its Managing Director, Mr. Ketan Mehta, duly authorized for initiation of Corporate Insolvency Resolution Process (**‘CIRP’**) against **M/s. RGS Solar Power Private Limited (‘Corporate Debtor’)**.
2. **M/s. Rays Power Infra Private Limited** (Operational Creditor) is a private limited company incorporated under the Companies Act, 1956, having its registered office at 1st – 21, Evershine Mall, North Meter Cabin 1, Malad, West Mumbai, Mumbai-400064, Maharashtra. **M/s. RGS Solar Power Private Limited** (Corporate Debtor) is a company registered under the Companies Act, 2013 [CIN- U74999DL2014PTC274587], having its registered office at 109, 1st Floor, Vardhman Shopping Mart, LSC No. 4, Derawal Nagar, North-West Delhi-110009, Delhi. The Corporate Debtor has Authorized Share Capital of Rs. 10,00,00,000 (Rupees Ten Crores) and Paid-Up Share Capital of Rs. 10,00,00,000 (Rupees Ten Crores).
3. The present Petition was filed on 28.07.2021 before this Adjudicating Authority by M/s. Rays Power Infra Private Limited (Operational Creditor), duly authorized to initiate Corporate Insolvency Resolution Process (**‘CIRP’**) proceedings under Section 9 of the Insolvency and Bankruptcy Code, 2016 (**‘Code’**). The total amount claimed is Rs. 1,19,30,990 (Rupees One Crore Nineteen Lacs Thirty Thousand Nine Hundred and Ninety). The date of default is stated to be 31.03.2021.

4. Submissions by the Ld. Counsel appearing on behalf of the Operational Creditor.

- a) The Operational Creditor is engaged in the business of establishment of renewable energy power projects, especially solar energy power plants, across the country and worldwide.
- b) The Corporate Debtor approached the Operational Creditor for installation and commissioning of 8.26 MW solar project and to carry out subsequent work of operation and maintenance (O&M) of the established solar power project.
- c) To govern the O&M, the parties entered into a comprehensive O&M agreement dated 25.07.2015 for five years.
- d) The Operational Creditor completed the installation and commissioning in 2016 and thereafter started O&M in 2016 itself and accordingly, raised invoices on the Corporate Debtor.
- e) As per clause 4 of the O&M agreement, the Corporate Debtor was required to make payment within seven days of receipt of invoice.
- f) In respect to the services rendered, an amount of Rs.1,19,30,990/- (Rupees One Crore Nineteen Lacs Thirty Thousand Nine Hundred and Ninety) stands due and payable by the Corporate Debtor to the Operational Creditor, however, the Corporate Debtor failed in making payment of the same.
- g) The Operational Creditor sent numerous emails to the Corporate Debtor and in response of the same, the Corporate Debtor assured to make payment vide email dated 30.07.2020 and issued two cheques in the favour of Operational Creditor however, the same got dishonored on the ground "Payment stopped by Drawer".
- h) The Operational Creditor issued a Demand Notice dated 05.07.2021 on the Corporate Debtor under Section 8 of the Code and the Corporate Debtor had replied to the Demand Notice on 15.07.2021.
- i) Hence, the Applicant has filed the present petition.

5. Submission by the Learned Counsel appearing on behalf of the Corporate Debtor

- a) That there exists a pre-existing dispute both with regard to the quality of services and amount of debt and the issues pertaining to deficiency in services were raised in minutes of the meeting dated 16.03.2019, 10.09.2020, 06.10.2020 and email dated 19.09.2020.
- b) The Operational Creditor also failed to provide tilting of the solar panels that was pivotal to maintain the generation levels/performance ratio, as per the O&M Agreements.
- c) The Corporate Debtor vide email dated 19.09.2020 requested the Operational Creditor to rectify the deficiencies and assured to make the payment upon curing of pending issues. Henceforth, the Operational Creditor vide email dated 03.10.2020 accepted the fact that generational loss was caused to the Corporate Debtor as tilting was not done.
- d) Ledger of the Operational Creditor (as on March 31, 2021) shared vide email dated 15.06.2021 reflected only Rs. 52,80,590.66/- as due and payable keeping in consideration all the 5 invoices (Performa invoices) on the basis of which unpaid operational debt is claimed. Hence, the Corporate Debtor vide email dated 15.06.2021 raised a dispute regarding the dues claimed by the Operational Creditor further stating that a sum of Rs. 2,03,693/- is payable by the Operational Creditor to the Corporate Debtor.
- e) The Corporate Debtor is entitled to receive Rs.1,55,26,193/- from the Operational Creditor on account of illegal occupation of land of the Corporate Debtor. Legal Notice dated 18.06.2021 was issued for eviction and recovery of dues.
- f) Total amount claimed by the Operational Creditor is Rs. 1,19,30,990/-, out of which an amount of Rs. 64,62,728/- pertains to April 2020 to March 2021.

Analysis & Findings

6. We have heard the Learned Counsels for the Operational Creditor and the Corporate Debtor, and further perused the averments made in the petition, reply filed by the Corporate Debtor, rejoinder filed by the Operational Creditor and written submissions presented by both the Operational Creditor and the Corporate Debtor. Since the registered office of the respondent Corporate Debtor is in Delhi, this Tribunal is having territorial jurisdiction as the Adjudicating Authority in relation to prayer for initiation of Corporate Insolvency Resolution Process (CIRP) under Section 9 of The Insolvency and Bankruptcy Code, 2016, against the Corporate Debtor.
7. It is observed that the present case involves 5 invoices out of which 4 invoices are dated 16.06.2021 and one invoice is dated 01.07.2021. The date of default is stated to be 31.03.2021 i.e., the date on which last payment was made by the Corporate Debtor. The present petition was filed on 28.07.2021. Therefore, the present petition is filed within the period of limitation.
8. It is to be noted that the 'Operational Creditor' had sent a demand notice dated 05.07.2021 to the 'Corporate Debtor' under Section 8 of The Insolvency and Bankruptcy Code, 2016 for payment of outstanding dues worth Rs. 1,19,30,990 (Rupees One Crore Nineteen Lacs Thirty Thousand Nine Hundred and Ninety).
9. In order to determine the admissibility of petition for initiating CIRP under Section 9 of the Code, the judgment of the Hon'ble Supreme Court in **Mobilox Innovations (P) Ltd. v. Kirusa Software (P) Ltd., (2018) 1 SCC 353** is to be taken into consideration. The said judgment makes it clear that in order to initiate CIRP proceedings under Section 9 of the Code, the Adjudicating Authority has to determine:

- a) Whether there is an 'Operational Debt' exceeding Rs. 1 Lakh (1 Crore, in case the petition is filed after 24.03.2020) as defined under Section 4 of the IBC?
- b) Whether the documentary evidence furnished with the application shows that the aforesaid debt is due and payable and has not yet been paid?
- c) Whether there is existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before the receipt of the demand notice of the unpaid operational debt in relation to such dispute?

10. In the first instance, to determine as to whether the said amount claimed by the Operational Creditor would fall under the ambit of 'Operational Debt', it is pertinent to analyze the definition of 'Operational Debt' as stipulated under Section 5(21) of The Insolvency and Bankruptcy Code, 2016. Under the said Section, the 'Operational Debt' is defined as: *"A claim in respect of the provision of goods or services including employment or a debt in respect of the payment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority"*.

While analyzing the present facts in the light of said definition under Section 5(21), it is observed that the Operational Creditor is engaged in the business of establishment of renewable energy power projects, especially solar energy power plants, across the country and worldwide. The Corporate Debtor approached the Operational Creditor for carrying out the work of installation and commissioning of 8.26MW solar project and further to carry out subsequent work of Operation and Maintenance (O&M) of the established solar power project. To govern the O&M, the Operational Creditor and the Corporate Debtor entered into a comprehensive O&M Contract dated 25.07.2015. It is observed that the Operational Creditor completed the installation and commissioning of the solar power project on 30.11.2016 and thereafter, started O&M work in 2016 itself which was to be carried out for a term of 5 years and

the same is evidenced from clause 3 of the Agreement dated 25.07.2015. The Operational Creditor, accordingly, raised invoices upon the Corporate Debtor for every six months of the O&M work carried out by the Operational Creditor. Furthermore, on the consideration of the transactional invoices, as annexed by the Operational Creditor, and placed before us, we are of the view that there had been a transaction between the Operational Creditor and the Corporate Debtor and that the Operational Creditor has rendered services to the Corporate Debtor and therefore, is claiming the payment in respect of the invoices so raised. Further, the Corporate Debtor has not disputed the fact that services had been rendered by the Operational Creditor to the Corporate Debtor. Hence, this Adjudicating Authority is inclined towards believing that the debt claimed by the petitioner for providing services in respect of O&M of solar power project comes under the purview of 'Operational Debt' within the meaning of Section 5(21) of the Code.

11. It is observed that as per the requirement of Section 8(2)(a) of the Code, the Corporate Debtor is required to bring into notice of the Operational Creditor, existence of any dispute within 10 days of the receipt of the statutory demand notice issued and delivered by the Operational Creditor u/s 8(1) of the Code. In the present case, the Corporate Debtor has filed reply dated 15.07.2021 to the demand notice dated 05.07.2021 sent by the Operational creditor to the Corporate Debtor. Therefore, the Corporate Debtor has fulfilled the requirement of sending reply to demand notice within the stipulated period of 10 days of the receipt of demand notice as laid down under said Section 8(2)(a) of the Code.

12. It is further observed that the Corporate Debtor in its reply of Section 8 notice dated 15.07.2021 has attempted to show that there is a 'Pre-existing dispute' between the parties which has arisen before the receipt of demand notice sent by the Operational Creditor to the Corporate Debtor. The Corporate Debtor disputes both on the 'quality of services' as well as 'quantum of debt' claimed. In **Mobilox Innovations Private Limited v. Kirusa Software Private**

Limited, (2018) 1 SCC 353, the Hon'ble Supreme Court has held that "*an application under Section 9 of the Code is not maintainable and ought to be rejected on there being a "pre-existing dispute"*". The Hon'ble Supreme Court had held that "*so long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the Adjudicating Authority has to reject the application*". Therefore, to admit or reject this application, it is pertinent to adjudicate upon the issue as to whether there exists any 'Pre-Existing Dispute' as claimed by the Corporate Debtor.

13. The Corporate Debtor claims that there were two Operations and Maintenance Agreement, one was dated 25.07.2015 and another was dated 23.03.2016 which refers to some other Agreement dated 20.05.2015 and the same was concealed by the Operational Creditor. On the perusal of the O&M Agreement dated 25.07.2015 and the alleged Agreement dated 23.03.2016, it is observed that the Agreement dated 25.07.2015 is formally executed between the Operational Creditor and the Corporate Debtor having the effective date and complete signatures of the Operational Creditor. However, the alleged Agreement dated 23.03.2016 neither discloses the effective date nor contains the complete signature of the Operational Creditor as in the Agreement dated 25.07.2015 to ensure the genuineness of the alleged Agreement dated 23.03.2016. Further, it is observed that until 16.10.2020 neither the Operational Creditor nor the Corporate Debtor has referred to the alleged Agreement dated 23.03.2016. Additionally, the abovementioned Agreement dated 20.05.2015 has never been referred to by the Operational Creditor and the Corporate Debtor in any of the email exchanges between the parties to the Agreement. Hence, the genuineness of the alleged Agreement dated 23.03.2016 is in question and therefore, cannot be relied upon.

14. Further, the Corporate Debtor in its reply to Section 8 notice dated 15.07.2021 raises a dispute as to the 'quality of services' rendered by the Operational Creditor. The Corporate Debtor contends that there was deficiency in services

such as non-tilting of the solar panels, oil leakage in transformers, LT Panels, transformer yards, broken modules, etc. The Corporate Debtor further contends that generational loss was caused to the Corporate Debtor on the account of non-tilting of the solar panels by the Operational Creditor. To substantiate the contentions raised by the Corporate Debtor, the Corporate Debtor has annexed certain documents such as minutes of meeting dated 16.03.2019 and 06.10.2020. The Corporate Debtor has also annexed email communications dated 10.09.2020, 19.09.2020, 03.10.2020, etc. pointing out the deficiency in services.

15. On the perusal of the documents placed on record, it is observed that the issues pertaining to deficiency in services were raised by the Corporate Debtor on several occasions. Firstly, during the regular meeting held on 16.03.2019 between the Operational Creditor and the Corporate Debtor, the Corporate Debtor under Item 8 of the punch points of the meeting dated 16.03.2019 raised issue about the damaged modules. Secondly, in the meeting dated 10.09.2020, the Corporate Debtor again raised issue pertaining to services under Items 1,2 and 8 of punch points of the meeting dated 10.09.2020. Thirdly, the Corporate Debtor vide mail dated 19.09.2020 requested the Operational Creditor to rectify the deficiency in services and further assured to make the payment on the rectification of the deficient services. Fourthly, the email dated 03.10.2020 sent by the Operational Creditor to the Corporate Debtor demonstrates acknowledgment on the part of the operational Creditor that generational loss was caused to the Corporate Debtor on the account of non-tilting of the solar panel by the Operational Creditor. Further, as per clause 6 of the Agreement dated 25.07.2015, *“the Contractor shall compensate the client for loss of generation resulted due to under achievement of guaranteed PR ratio...”* The Operational Creditor in reply to the same has stated that the deficiencies will be rectified only on the payment of funds. However, it is observed that payment of funds is not a pre-requisite to provide proper services to the party to the agreement. Subsequently, in the meeting convened on

06.10.2020, the Corporate Debtor again raised dispute as to the deficient services such as generational loss, incorrect calculation of amount, etc. under Items 1,5,8,9 and 10 of the punch points discussed in the meeting dated 06.10.2020. It is pertinent to mention that all the above stated issues were raised by the Corporate Debtor much prior to the issuance of Demand Notice dated 05.07.2021 by the Operational Creditor. It is observed that the Corporate Debtor has time and again raised dispute as to the deficient services on the part of the Operational Creditor. The Operational Creditor in its defence has stated that there has been resolution of some issues raised by the Corporate Debtor, however, the Operational Creditor has failed to annex any document or email exchange that proves that the Operational Creditor has resolved the issues raised by the Corporate Debtor during meetings and via email communications.

16. The Corporate Debtor further raised a dispute as to the 'quantum of debt' claimed by the Operational Creditor. It is observed that on the perusal of the Ledger Account of the Operational Creditor as on 31.03.2021, an amount worth Rs. 52,80,590.66 only is reflected as due and payable by the Corporate Debtor which is below the pecuniary threshold of Rs. 1 Crore. Further, the amount claimed by the Operational Creditor in the Part IV of the Application does not match the Ledger Account of the Operational Creditor. Hence, it raises a reasonable suspicion on the claim of the Operational Creditor.

17. It is pertinent here to refer to the decision of Hon'ble Supreme Court in **Re. Mobilox Innovations Private Ltd vs Kirusa Software Private Ltd (2018) 1 SCC 353**, wherein, the Hon'ble Supreme Court was pleased to hold, inter alia, as follows:

"24. The scheme under Sections 8 and 9 of the Code, appears to be that an operational creditor, as defined, may, on the occurrence of a default (i.e., on non-payment of a debt, any part whereof has become due and payable and has not been repaid), deliver a demand notice of such unpaid operational debt or

*deliver the copy of an invoice demanding payment of such amount to the corporate debtor in the form set out in Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 read with Form 3 or 4, as the case may be (Section 8(1)). Within a period of 10 days of the receipt of such demand notice or copy of invoice, **the corporate debtor must bring to the notice of the operational creditor the existence of a dispute and/or the record of the pendency of a suit or arbitration proceeding filed before the receipt of such notice or invoice in relation to such dispute (Section 8(2)(a)). What is important is that the existence of the dispute and/or the suit or arbitration proceeding must be pre-existing – i.e. it must exist before the receipt of the demand notice or invoice, as the case may be.....***

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.”**

In the present case, the Corporate Debtor has raised dispute as to the deficient services vide meetings dated 16.03.2019, 10.09.2020 and 06.10.2020 and through email communications dated 19.09.2020 and 03.10.2020 between the Operational Creditor and the Corporate Debtor. It is observed that all these disputes were raised by the Corporate Debtor much prior to the issuance of Demand Notice under Section 8 of the Code and subsequently, raised the

dispute in reply dated 15.07.2021 to the Demand Notice dated 05.07.2021 issued by the Operational Creditor. On the basis of the above observations, it is observed that the dispute raised by the Corporate Debtor exists in fact and is not moonshine. Therefore, we are of the view that there exists pre-existing dispute between the Operational Creditor and the Corporate Debtor. Hence, the present Section 9 application is not admissible on the ground of existence of pre-existing dispute between the parties. Consequently, there exists 'no default' on the part of the Corporate Debtor.

18. In the light of the above, the instant application bearing **CP (IB) No. 474/ND/2021** filed by, **M/s Rays Power Infra Private Limited.**, (Operational Creditor), under section 9 of the Code read with rule 6(1) of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating CIRP against **M/s RGS Solar Power Private Limited** (Corporate Debtor) is liable to be dismissed and is, accordingly **dismissed**.

A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

Sd/-
(DR. SANJEEV RANJAN)
MEMBER (TECHNICAL)

Sd/-
(MAHENDRA KHANDELWAL)
MEMBER (JUDICIAL)