

NATIONAL COMPANY LAW TRIBUNAL  
COURT-V, MUMBAI BENCH

225. C.P. (IB)/3142(MB)2019

**IN THE MATTER OF**

M/S. Action Construction Equipment Ltd

Vs

M/S. Capacite Infra Project Ltd

Section 9 of the Insolvency & Bankruptcy Code, 2016

**Order Delivered on 05.04.2024**

CORAM:

MS. REETA KOHLI  
MEMBER (J)

MS. MADHU SINHA  
MEMBER (T)

**Appearance through VC/Physical/Hybrid Mode:**

For the Petitioner:

For the Respondent:

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**ORDER**

Vide order dated 02.07.2020, the company petition is wrongly listed on board.

Sd/-  
MADHU SINHA  
Member (Technical)  
Shubham

Sd/-  
REETA KOHLI  
Member (Judicial)

IN THE NATIONAL COMPANY LAW TRIBUNAL  
COURT NO. 5, MUMBAI BENCH

CP (IB) 3142/MB/2019

Under Section 9 of the Insolvency and Bankruptcy Code, 2016

In the matter of

M/s. Action Construction Equipment Limited  
Dudhola Link Road, Dudhola, Palwal,  
Faridabad-121102 (Haryana)

...Petitioner

v/s.

M/s. Capacit'e Infra Project Limited  
605-607, Shrikant Chambers, Phase-I, 6<sup>th</sup>  
Floor, Adjacent to R. K. Studios, Sion-  
Trombay Road, Mumbai-400071,  
Maharashtra, India

... Corporate Debtor

Order delivered on: 02.07.2020

Coram:

Hon'ble Smt. Suchitra Kanuparthi, Member (Judicial)

Hon'ble Shri. V. Nallasenapathy, Member (Technical)

For the Petitioner: Mr. Kunal Chhada, Advocate.

For the Respondent: Mr. Shyam Kapadia, Advocate, Mr. Dhruva Gandhi,  
Advocate a/w Mr. Vaibhav Warerkar, Advocate and Ms. Maherfrin Mehta,  
Advocate, i/b M. Mulla Associate.

*Per: V. Nallasenapathy, Member (Technical)*

ORDER

1. This Company Petition is filed by Action Construction Equipment Limited (hereinafter called "Petitioner") against Capacit'e Infra Project Limited (hereinafter called "Corporate Debtor") under section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter called "Code") read with rule 6 of the Insolvency and Bankruptcy Board of India (Application to Adjudicating Authority) Rules, 2016 ("Rules") alleging that the Corporate Debtor defaulted in making payment to the extent of Rs. 1,00,22,471/- including interest @ 18%p.a. on the defaulted amount.

2. The Petition reveals that the claim amount consists of two portions, one for the sale of machinery to the extent of Rs. 77,52,435/- and Rs. 18,95,326/- towards interest on the delay in payment of the above said sum, totaling Rs. 96,47,761/-. The followings are the details of calculation for this portion of the claim:

Sr. No.	Bill No.	Invoice Date	Amount Due	Interest	Total outstanding due
1	GP4/1800894	27-Sep-17	16,65,994	4,39,549	21,05,544
2	GP4/1800915	29-Sep-17	44,84,000	<u>1,97,026</u> 10,01,824	<u>8,69,626</u> 48,13,224
3	GP4/1802022	23-Dec-17	1,18,000	29,620	1,47,620
4	GP4/1802533	25-Jan-18	1,18,000	27,699	1,45,699
5	GP4/1900122	17-Apr-18	1,18,000	22,928	1,40,928
6	GP4/1900121	17-Apr-18	1,18,000	22,928	1,40,928
7	GP4/1900487	15-May-18	1,26,260	22,789	1,49,049
8	GP4/1901073	23-Jun-18	2,54,880	41,102	2,95,982
9	GP4/1901915	30-Jul-18	2,41,900	34,595	2,76,495
10	GP4/1901915	17-Aug-18	1,26,260	18,866	1,45,126
11	GP4/1901936	18-Aug-18	1,26,260	18,804	1,45,064
12	GP4/1903890	27-Dec-18	2,54,880	17,597	2,72,477
Total			77,52,434	18,95,326	96,47,761

3. The second portion of the claim relates to the rental payable by the Corporate Debtor for hiring of machinery from the Petitioner and the details are as below:

Sr. No.	Bill No.	Invoice Date	Amount Due	Interest	Total outstanding due
1	SP2/1900009	3-Apr-18	1,98,949	31,101	2,30,051
2	SP2/1900165	16-May-18	1,27,440	17,220	1,44,660
Total			3,26,389	48,322	3,74,711

4. The Petitioner submits that a demand notice was sent by the Petitioner through his advocate to the Corporate Debtor on 03.06.2019 in Form-3 demanding the above said dues receivable from the Corporate Debtor to the extent of Rs. 1,00,22,471/- enclosing the working computation of default with interest wherein invoice details were given (Annexure A/1), copies of purchase/ work orders (Annexure A/2), statement of account for the period from 30.01.2013 to 31.01.2019 and 02.03.2017 to 02.02.2019 for the 1<sup>st</sup> and 2<sup>nd</sup> portion of the claim respectively (Annexure A/3).
5. The Corporate Debtor sent a reply through its advocate on 24.06.2019 raising the following contentions:
- I. There is no outstanding debt of Rs. 1,00,22,470/- as claimed in the Petition and hence there is no operational debt due from the Corporate Debtor to the Petitioner.
  - II. The payment for the invoices claimed in the Petition were already made and there is no outstanding debt as claimed in the Petition.
  - III. Certain disputes in respect of cranes supplied for Malad Project were raised, wherein there was a failure of weld in the crane erected by the Petitioner on 10.02.2014 which led to a loss of 10 working days and the Corporate Debtor suffered financial loss as below:
 

a. dismantling charges and re-erection charges	Rs. 24 Lac
b. consequential damages due to stoppage of work	
c. Idling of other equipment	
i) Placer boom	Rs. 95,000.00
ii) concrete pumps	Rs. 88,333.33
iii) Passenger hoists	Rs. 60,000.00
iv) Air compressor	Rs. 4,666.66
v) Aluminum Formwork	Rs. 20,3,333.33
vi) Staff	Rs. 7 Lacs-Payroll
vii) Support Staff	Rs. 4 Lacs: Bhupati
viii) Workmen	Rs. 18 Lac
ix) Loss of revenue	Rs. 1.50 Crores
x) Loss of profit	Rs. 30 lacs
  - IV. The Petitioner failed to provide certain standard accessories in respect of three cranes supplied for the project-Godrej Central during 2015 and due to that the cranes were idle from 07.03.2016 to 20.06.2019 entailing a total rental charge of Rs. 1,50,000/- (dry lease) per crane for a period of 36 months for two cranes.

V. There are various critical issues developed in wire rope winding at Gurgoan site which was a quality failure that created certain safety concerns etc.

6. The Corporate Debtor in the reply to the Petition submitted that the amount claimed by the Petitioner was completely fake and there is no outstanding due as claimed. The Corporate Debtor given the following invoice wise details of payment:

Invoice Date	Invoice No.	Invoice Amount	Payment date	Payment amount	Cheque/Loan	Cheque releasing date	Remark
19-09-17			19-09-2017	8,96,800	614118	27-09-17	FULL AMOUNT PAID
29-09-17	1800915	4,84,000	01-11-2017	40,35,600	HDFC LOAN		FULL AMOUNT PAID
27-09-17	1800890	44,84,000	03-11-2017	40,35,600	HDFC LOAN		FULL AMOUNT PAID
23-12-17	PA/1802022	1,18,000	18-12-2017	1,18,000	186066	20-12-17	FULL AMOUNT PAID
25-01-18	1802533	1,18,000	18-12-2017	1,18,000	186067	20-12-17	FULL AMOUNT PAID
17-04-18	P4/1900121	1,18,000	21-03-2018	1,18,000	650557	26-03-18	FULL AMOUNT PAID
17-04-18	P4/1900122	1,18,000	21-03-2018	1,18,000	650558	26-03-18	FULL AMOUNT PAID
06-07-18	CP4/1901915	1,26,260	06-07-2018	1,26,260	216738	14-08-18	FULL AMOUNT PAID
06-07-18	GP4/1901936	1,26,260	06-07-2018	1,26,260	216737	14-08-18	FULL AMOUNT PAID
15-05-18	1900487	1,26,260	21-04-2018	1,26,260	5436/250	21-04-18	FULL AMOUNT PAID
23-06-18	P4/1901073	2,54,880	05-05-2018	2,54,880	340881	20-06-18	FULL AMOUNT PAID

30-07-18	P4/1901609	2,41,900	19-07-2018	2,41,900	556830	24-07-18	FULL AMOUNT PAID
27-12-18	P4/1903890	2,54,880	10-12-2018	2,54,880	239589	24-12-18	FULL AMOUNT PAID
		1,05,70,440		1,05,70,440			

7. It is submitted that the entire rental dues were also paid and there is no outstanding due payable in respect of rental claim also. In support of this the Corporate Debtor enclosed the statement of account for the rental transaction at Page No. 55 of the reply.

8. The Corporate Debtor in its additional affidavit of reply brought on record the certified ledger of the Petitioner in the books of the Corporate Debtor and submitted that the final invoices which were booked against the purchase orders placed upon the Petitioner were duly paid. It is submitted that several invoices were raised against the purchase orders placed by the Corporate Debtor from time to time as per the requirements of site of the Corporate Debtor and was duly paid either in advance or after the delivery of the cranes and spare parts.

9. The Corporate Debtor enclosed the following emails to say that there were pre-existing disputes:

a. Email dated 04.05.2015 from the Corporate Debtor to the Petitioner.

*"Subject: ACE crane*

*Rajiv,*

*Picture sent by Bangalore officer, matter serious and extremely disturbing.*

*Take up the matter with ACE now.*

*I want them in office tomorrow"*

b. Email dated 10.10.2015 sent by the Corporate Debtor to the Petitioner

*"Subject: FW: Nearmiss Incident*

*Dear Mahesh,*

*Please look into this. In Gurgaon Godrej site, it is the second time the crane hoist brake has failed and the hook has fallen from a height. As his doing peacemeal correction. They are not planning the preventive action so that this type of failure should not occur at all. Considering the number*

*of cranes of ACE with us, and repeated similar failure it is time we see this failure seriously.”*

- c. Email dated 08.10.2015 sent by the Corporate Debtor to the Petitioner:

*“Subject: Near Miss incident.*

*Dear Sir,*

*This is to inform you that, today tower crane brake failure at A tower when the crane hock take to positioning the load that time suddenly the hock come down and fall on the 7th floor from 3 metres height, no one is injured due this incident but its second time within a week last week 30.09.2015 tower K same case happen and one worker injured due this accident, so request to you take necessary action about this matter.*

*Thanks and regards*

*Rajan Kumar Bishwas*

*Asst. Manager Safety*

*CapaciteInfraproject Ltd.”*

- d. Email dated 16.11.2017 sent by the Petitioner to the Corporate Debtor:

*“Subject: AC tower crane.*

*Dear Mr. Katyal,*

*This has reference to your trail email.*

*Yes, there have been a couple of problems with the wire rope but please note that these problems are not of critical nature and we are using Usha Martin wire ropes which is the largest and the most proven quality and also the most expensive in the country.*

*Usha Martin senior team was at our plant to analyse the problem which were unfortunately faced at your sites and they are going to come back with their detailed report.*

*In the meanwhile, we have already organized to change the wire rope to ensure site functioning and proper safety at the site.*

*Please be rest assured that we will leave no stone unturned to ensure proper safety and good working of our machines. Regards*

*Sorabh Agarwal | Executive Director.”*

- e. Email dated 16.11.2017 sent by the Corporate Debtor to the Petitioner:

*“Subject: Failure of Trolley rollers of ACE5040 crane at Kalpataru.*

*Dear Sir,*

*We are facing many failure/ quality issues in the recently supplied tower crane to capacite infra. We have already raised this issue with Mumbai*

*team but now escalating it to you as quality failure has occurred in two more recently supplied tower crane.*

*Three ACE5034 cranes has developed the issue in hoisting wire ropes. Failure of wire ropes is clear case of quality failure. We cannot work with damaged wire rope as it is a safety concern and compromising to safety is not at all permissible.*

*We need your immediate attention/ intervention on the issue and provide a solution at the earliest."*

*f. Email dated 16.11.2017 sent by the Corporate Debtor to the Petitioner:*

*"Subject: Failure of Trolley rollers of ACE5040 crane at Kalpataru.*

*Imp- Sourabh ji, kindly go through the trail email.*

*Will appreciate your immediate action and intervention as direction.*

*It is said that the issue is discussed persist even now and in fact our productivity.*

*Regards*

*Rohit Katyal | Director."*

*g. Email dated 12.10.2017 sent by the Corporate Debtor to the Petitioner:*

*"Subject: Failure of Trolley rollers of ACE5040 crane at Kalpataru.*

*Dear Sir*

*Pls refer the discussion we had on the subject, such failure is clear case of manufacturing defect.*

*We are lucky to survive without any damage to man and material. This has happened twice and we have taken it very seriously on the product.*

*Request your immediate attention towards the same."*

10. The Petitioner in their rejoinder submitted that the Corporate Debtor has purchased machineries and also taken machineries for rent from the Petitioner during the period 31.01.2013 to 31.01.2019 and invoices were raised to the extent of Rs. 22,82,66,925/- against which the Corporate Debtor paid only Rs. 22,05,14,490/- leaving an outstanding balance of Rs. 77,52,435/-. It is also contended that payments were made on account basis and accordingly it was credited in the ledger account of the Corporate Debtor in the books of the Petitioner. The complaint regarding the quality of equipment supplied to the Corporate Debtor are only an afterthought in order to stay away from the



liabilities. Whenever there were complaints from the Corporate Debtor regarding the minor technical issues they were solved. In fact the Corporate Debtor has not made any complaint other than minor technical issues which were solved by the representative of the Petitioner then and there and hence the issue regarding the quality of equipment does not arise at all. In view of this the Corporate Debtor cannot take shield of the quality of equipment to deny the liability. It is further submitted that the Corporate Debtor used the machinery exhaustively and abused the machinery to the core and despite the rough handling of the machine they have performed up to the expectation of the Corporate Debtor. The Petitioner also denied that there were frequent breakdowns and an employee has lost his leg due to machine. In one instance, the Cunningham Lindsey International Insurance Surveyors and Loss Assessors Pvt. Ltd., an insurance agent of the Corporate Debtor has mentioned in the claim request of the Corporate Debtor that an accident happened due to overturn from the lifting ladder. Hence the Petitioner cannot be punished for the negligence of the Corporate Debtor. The emails referred by the Corporate Debtor do not reflect any dispute.

11. This Bench has gone through the details of payment with the statement of account of the Corporate Debtor maintained with the Corporation Bank. It is found that the payment was made from the bank account of the Corporate Debtor except for two transactions i.e. Invoice No. 1800915 and Invoice No. 1800890 wherein the Corporate Debtor have submitted that they have availed loan from HDFC Bank and the payment was made in full. This Invoice wise payment made by Corporate Debtor was not denied by the Petitioner but it is submitted that the statement of account (Ledger account) maintained by the Petitioner shows that there is balance due payable by the Corporate Debtor. It is also submitted that the payment was on account. However, such submission cannot be accepted in view of the fact that each invoice is based on separate purchase order and payment has been made towards individual invoices. In fact, for some of the invoices advance payments were made by the Corporate Debtor and balance was paid subsequently and the same is evident from the first two purchase orders annexed to the Petitioner (Page 19 and 20). Hence, the contention of the Corporate Debtor that all the payments were made in respect of the invoices claimed in the demand notice is true. Hence, this Bench is of the view that there is no

debt as claimed by the Petitioner, in respect of the first portion of the claim.

12. Coming to the second portion of the claim where some rental dues were claimed, the statement of account produced by the Corporate Debtor (Page No. 55 of the reply) reveals that there is no outstanding payable by the Corporate Debtor. When we go through the ledger account of the Corporate Debtor in the books of the Petitioner, it shows a balance of Rs. 3,26,389/- as receivable from the Corporate Debtor but the Invoice No. SP2/1900009 dated 03.04.2018 for Rs. 1,98,949/-, as claimed in the petition is not even reflecting in the statement of account, hence, the claim under this invoice cannot be accepted. As far as the other invoice no SP2/1900165 dated 16.04.2018 for Rs. 1,27,440/- is reflecting in the statement of account produced by the Petitioner (Page No. 50 of the Petition) but the same is not reflected in the statement of account of the Corporate Debtor (Page No. 55 of reply). In view of this, this claim also fails.

13. When the contention of the petitioner that statement of account of the corporate debtor in the books of the petitioner shows debit balance of ₹ 77,52,435 is taken into consideration, the corporate debtor raised serious disputes, before the issue of demand notice, regarding the quality of wire ropes supplied by the petitioner as evident from the emails extracted above, which squarely falls under the ambit of section 5 (6) of the Code which provides as below:

*'dispute' includes a suit or arbitration proceedings relating to-*

- a. *The existence of the amount of debt;*
- b. *The quality of goods or services; or*
- c. *The breach of a representation or warranty;*

14. It is beneficial to refer the judgement of the Hon'ble Supreme Court in the case of *Mobilox Innovations Pvt. Ltd. v/s. Kirusa Software (P) Limited- 2017 (SCC Online SC 1154)* wherein in para no. 40, it was held as below:

*"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."*

15. When the law laid down by the Hon'ble Supreme Court in the above case is applied to the facts of the present case it is established that there is a clear dispute relating to the quality of goods as provided u/s 5(6)(b) of the Code.

16. Resultantly the Petition is dismissed. No cost.

-Sd-

V. Nallasenapathy  
Member (T)

-Sd-

Suchitra Kanuparthi  
Member (J)