

**NATIONAL COMPANY LAW TRIBUNAL  
HYDERABAD BENCH  
COURT HALL NO: II**

**Hearing Through: VC and Physical (Hybrid) Mode**

**CORAM: SHRI. RAJEEV BHARDWAJ, HON'BLE MEMBER (J)**

**CORAM: SHRI. SANJAY PURI, - HON'BLE MEMBER (T)**

**ATTENDANCE-CUM-ORDER SHEET OF THE HEARING OF NATIONAL COMPANY LAW TRIBUNAL,  
HYDERABAD BENCH, HELD ON 06.06.2024 AT 10:30 AM**

<b>TRANSFER PETITION NO.</b>	
<b>COMPANY PETITION/APPLICATION NO.</b>	<b>CP (IB) No.93/9/HDB/2020</b>
<b>NAME OF THE COMPANY</b>	<b>Hinduja National Power Corporation</b>
<b>NAME OF THE PETITIONER(S)</b>	<b>Bharat Heavy Electrical Ltd</b>
<b>NAME OF THE RESPONDENT(S)</b>	<b>Hinduja National Power Corporation</b>
<b>UNDER SECTION</b>	<b>9 of IBC</b>

**ORDER**

Orders pronounced, recorded vide separate sheets. In the result, this Company Petition is dismissed.

**Sd/-**  
**MEMBER (T)**

**Sd/-**  
**MEMBER (J)**

**NATIONAL COMPANY LAW TRIBUNAL  
HYDERABAD BENCH - II**

**CP (IB) No. 93/9/HDB/2020**

**Between:**

**M/s Bharat Heavy Electricals Limited**

BHEL House, Siri Fort,

Asian Games Village,

New Delhi – 110049

..... Petitioner / Operational Creditor

**AND**

**M/s Hinduja National Power Corporation Limited**

c/o. Gulf Oil Corporation Limited

Post Bag No.1, Kukatpally, Sanathnagar I.E.,

Hyderabad – 500018

Telangana.

.....CD /Corporate Debtor

Date of Order: 06.06.2024

**Coram:**

Sri Rajeev Bhardwaj, Hon'ble Member (Judicial)

Sri Sanjay Puri, Hon'ble Member (Technical)

**Counsels:**

For OC: M/s. M.V. KINI & CO. and Mohd. Ashfuq, Advocates

For CD: Ms.Rubaina S. Khatoon and Mayank Salva, Advocates

[ PER: BENCH ]

**ORDER**

1. The present Petition has been filed by M/s Bharat Heavy Electricals Limited (“**Petitioner/Operational Creditor/OC**”) seeking to initiate Corporate Insolvency Resolution Process (“**CIRP**”) of M/s Hinduja National Power Corporation Limited (“**Respondent/Corporate Debtor/CD**”) under section 9 of IBC.

**2. Case of Petitioner**

- a) In June 2009, CD floated a tender inviting bids for setting up a 1040 MW Coal Based Thermal Power Project at Vizag, Andhra Pradesh consisting of two units each of capacity 520 MW (“**Project**”). The OC participated in the tender by submitting its bid and was declared as a successful bidder.
- b) CD issued a Letter of Award (“**LOA**”) dated 30.03.2010 to the OC for Supply, Erection and Commissioning including Civil Works. The said LOA was amended and a Supplementary LOA was issued on 17.01.2011 (**Annexure B (colly)**).

- c) CD and OC entered into a Contract Coordination Agreement, Onshore Supply Agreement, Erection & Commissioning Services Agreement and Civil Works Services Agreement dated 25.01.2011 ("**Contracts**") for supply, erection and commissioning including civil works (**Annexure C (colly)**).
- d) The Contract specified the nature of the work to be carried out, payment associated thereto and a payment mechanism, whereby the CD agreed to pay the Contract Price to the OC upon achievement of certain fixed milestones by the OC as set out under the Contract. Article 5 of the Contract stipulates the payment terms and the stages at which payments are to be released to the OC by the CD.
- e) The CD issued various works/purchase orders to the OC pertaining to the Contract. The OC has performed its obligation as set out under the Contract from different locations and raised invoices from time to time as per the payment terms set out under the Contract. However, substantial dues of the OC remain due to be paid by the CD. Therefore, the OC requested the CD through its letter dated 03.01.2018 to clear the outstanding dues (**Annexure D**).
- f) Meeting took place between the CD and OC on 15.11.2018, wherein the OC raised the issues regarding outstanding payments including delay due to failure of the CD to provide requisite inputs etc. The CD in the said meeting accepted the outstanding amount to be paid to OC and agreed to settle all the issues including the payment issue at the latest by end of February, 2019.

- g) The CD vide letter dated 22.11.2018 had invariably assured repayment. The CD vide the said letter further assured that all the pending issues would be resolved amicably in a time bound manner.
- h) Subsequently, as the CD failed to repay the outstanding invoices despite several reminders, the OC was compelled to issue a legal notice dated 24.05.2019 to the CD. On receipt of the legal notice dated 24.05.2019, the CD addressed a letter dated 07.06.2019 to the OC wherein the CD proposed a meeting to resolve the issues amicably between both the parties.
- i) Further, the CD addressed a letter dated 27.06.2019 to OC responding to the said legal notice. In the said letter, the CD requested to grant some time to arrive at an amicable settlement. CD at no point denied the debt due to be paid to the OC in the said letters dated 27.06.2019 (**Annexure F (colly)**).
- j) Meeting took place between CD and OC on 28.06.2019 wherein the OC requested the CD to release the payment/ submit payment plan immediately. Further, again the OC served a letter dated 09.07.2019 requesting the CD to release the payment/ submit payment plan within a week from the date of receipt of this letter.
- k) However, there was no positive response from the CD and therefore the OC was constrained to issue a Demand Notice dated 20.12.2019 (**Annexure H**).

### 3. Case of Corporate Debtor

- a) It is averred that the Petition is misconceived and not maintainable. On the OC's own showing, there are pre-existing disputes between the CD and the OC with respect to the Contracts.
- b) It is claimed that the claim of OC is barred by the law of Limitation. The date of default, if any and if at all, arose on the respective dates the invoices of which are prior to 2017. There have been delays and defaults on the OC part resulting in loss and damage to the CD. The works were not completed solely due to the OC's default.
- c) CD has a substantial counterclaim by way of liquidated damages on account of failure of the OC to complete the works within the stipulated time. Further, it is averred that the present Petition is facile and meritless as the same purports to present a distorted version of the actual facts to mislead this Authority in an attempt to extract monies from the CD towards its illegal claim and deserves to be dismissed in limine for the following amongst other grounds:
  - A. There is a pre-existing dispute between parties;
  - B. The Petition is barred by limitation;
  - G. The OC is not entitled to claim interest;
  - D. The Petition is filed based on a defective authorization;
  - E. There is no proof of default;
- d) The dispute arose between parties on account of defects and deficiencies in the services rendered by the OC entrusted with significant EPC contracts for Erection, Testing & Commissioning of power plant, where the expertise of the OC was relied upon. Such deficiencies in service

were communicated by the CD time and again. However, the same were never rectified by the OC, thereby causing further losses to the CD to be suffered on long term.

- e) Under Article 22 of the Erection & Commissioning Services Agreement, the OC became liable to pay liquidated damages on account of delay and as per clause 22.2 of the said agreement; the OC is also liable to pay liquidated damages on account of defects and deficiencies in Performance Guarantees as specified thereunder for each of the particular guarantees indicated under the said clause. Thus, the CD is entitled in law to receive a sum in excess of the alleged claim of the OC. These claims are required to be adjudicated before any amount can be said to be due and payable by the CD.
- f) The alleged claim is for rendering of goods and services. As recorded in the correspondence, the goods and services supplied were not proper and upto the required quality. Hence the CD is entitled to diminution in price.
- g) The CD mentioned relevant clauses of the said Agreements providing the effective date and implementation schedule to be adhered to by the OC.
- h) The OC had agreed and covenanted to perform all obligations and render all services in terms of completion of the said Project on or before the Cut-off Date. Notwithstanding the aforesaid, the OC had sought multiple extensions for performance of its obligations and completion of services from time to time. At the same time, the OC has also admitted as well as acknowledged its delay in completion of the said Project before the Cut-off date. In that respect, the CD has refused

from accepting any extension requests as the delay caused were solely attributable to the OC, and such delays have severely hindered the performance and output of the said Project (**Exhibit 'A' (colly)**).

- i) On 16<sup>th</sup> May 2017, the OC, while acknowledging delay in completion of the said Project as per contractual schedule, submitted its delay analysis of critical milestones of both units and requested the CD to grant time extension for Unit - 1 till September 2016 and Unit - 2 till March 2017 without levy of liquidated damages (**Exhibit 'B'**). Despite the fact that the OC had explicitly agreed that the said project would be completed before the Cut Off date, the OC miserably failed and neglected to achieve completion of Unit 1 as well as Unit 2 prior to the Cut Off date further, in terms of the agreements entered between the parties, the COD i.e., Commercial Operations Date would be achieved upon the OC being successful in completing all necessary tests in a satisfactory manner. However, in the present case, till date, the CD has not been able to conduct the necessary tests including the Performance Guarantee Test (**PG Test**) which would signify COD being achieved for the Project.
- j) It is claimed that OC has admitted through its Legal Notice dated 24<sup>th</sup> May 2019 that the PG Test is yet to be conducted by the OC for the said Project. Copy of the Legal Notice dated 24 May 2019 issued by the Advocates for the OC is enclosed at Annexure F of the Petition at page 401. As a result, the OC has failed to perform its service obligations under the agreements to fulfil the required conditions of COD on or before the Cut-Off Date. Accordingly, the CD has suffered grave commercial loss every day after the Cut Off since the said Project had not been completed and made available to the CD as per the contract agreed terms.



- k) The OC reserves its right to seek any other damages as provided in the EPC Contract under as may be permitted under law. The relevant provisions which entitle the CD to levy Liquidated Damages on account of delay in completion of services.
- l) The CD on several occasions raised concerns with respect to deficiencies in performance and delay in completion of works amounting to breach of commitments by the OC under the said Agreements. Despite communicating dissatisfaction and requesting the OC to rectify problems being faced, the OC failed to effectively arrest delays and rectify glitches, thereby placing the CD in major financial distress (**'Exhibit C' (colly)**).
- m) CD held several meetings with the OC with a view to resolve and discuss the issues and disputes between parties. Similarly, a meeting was held on 15<sup>th</sup> November 2018(**Annexure E to the Petition at Volume 2**), when the CD raised several issues with respect to the performance of the OC in completion of the project and also shared its concerns on the pending works to be completed. Furthermore, the CD had raised certain queries with respect to successful Performance Guarantee tests and completion of Unit - 1 which remained unanswered. As regards Unit- 2, the OC requested for deemed acceptance of Unit - 2 Performance Guarantee test which was not acceptable to the CD as it was a marked deviation from the procedures agreed in the said Agreements, and accordingly it was insisted that Performance Guarantee tests be conducted.

- n) The CD issued a letter dated 22<sup>nd</sup> November 2018 whereby pending technical issues and concerns relating to critical spare procurement was delineated. By the said letter, the CD categorically highlighted the existing disputes regarding plant and turbine heat rate VS Load Curve, as well as excess turbine vibration. Additionally, the CD, through its letter dated 14<sup>th</sup> May 2019 explicitly notified the deficiency of services by the OC. By the said letter, the CD underscored the delay caused in completion of the said Project and pointed out financial loss caused on account of inability of the OC to optimise the production capacity of Unit- 1.
- o) The CD further notified the following deficiency of services as well as breach of representations by the OC as under;
- A. Vibration issues in TG-1;
  - B. Inability to utilize full capacity of Unit-1 due to TG-1 vibration resulting in substantial financial loss
  - C. Completion of punch points where 5 critical points are still pending by the OC;
  - D. Withdraw of 'HOLD' on O&M spares and resuming supplies of spares;
  - E. Non-completion of Unit-2 PG Test:
  - F. AHIP and Paddle Feeder demonstration and auto loop test of CH were not achieved during PG Test of CHP;
- p) On 8<sup>th</sup> February 2021, the CD issued a letter notifying that the OC has not completed the PG Test and pending works despite lapse of more than four years. It was specifically communicated that the PG Test issue was not resolved although such issue was discussed by the parties during the meeting held on 15<sup>th</sup> November, 2018. Accordingly, the OC was

called upon to complete and conclude PG test for both units and complete all pending works, including the issue of spares. (**Annexure-A of Additional Reply**)

- q) On 1<sup>st</sup>April 2021, the OC responded to the above letter falsely claiming to have completed PG Test of Unit 1 and having addressed all pending points which were raised by the CD in the meeting held on 15th November 2018. The OC further called upon the CD to take up the issue of spares separately. In response to the above, the CD, vide its letter dated 15th April 2021, placed the correct array of facts on record and clarified that PG Test of Unit 1 had infact not been completed since the OC has merely conducted a demo of the PG Test for Unit 1, and that comprehensive testing of each of the parameters as per stipulations in the commercial agreements inter se parties, is yet to be completed. As regards the issue of spares it was clarified that the terms of tender documents and agreements executed between parties, it was the responsibility of the OC to arrange for supply of spares for all equipment for 25 years. Accordingly, the OC was once again called upon to satisfactorily complete and conclude all pending issues (**Annexure C of the Additional Reply**).
- r) OC has neither responded to the abovementioned letter, nor concluded pending issues till date. It was precisely due to this reason that the Respondent was constrained to avail services of a third party namely SIEMENS LTD for the purposes of attending to a major vibration in turbine generator of Unit-1 of the plant, incurring a cost of Rs 0.49 crores for which several requests were made to the OC.

- s) On 24<sup>th</sup> May 2019, the OC, through its Advocates issued a Legal Notice acknowledging disputes that have arisen between parties and proposing to invoke the dispute resolution mechanism under the said Agreements (**Annexure F of the Petition at page 401**).
- t) On 7<sup>th</sup> June 2019, the CD vide its letter to the OC referred to the meeting held between parties on 15<sup>th</sup> November 2018 at the plant office at Visakhapatnam when it was agreed that all pending issues be amicably resolved through joint discussions. By the said letter, the CD proposed a high-level meeting with its chairman to resolve pending issues to the satisfaction of both parties by mutual consultation. Copy of the letter dated 7<sup>th</sup> June 2019 issued by the CD to the OC.
- u) Thereafter, on 27<sup>th</sup> June 2019, the CD issued a letter to the OC, denying each and every averment, allegation, claim, contention and insinuations made in letter dated 24<sup>th</sup> May 2019 issued by the OC. By the said letter, the CD drew the OC's attention to the confirmation received from the OC for scheduling a meeting on 28<sup>th</sup> June 2019 for amicable settlement outside legal framework and urged the OC to allow time to arrive at a workable solution to avoid expenditure of additional time and resources to litigate (**Annexure F of the Petition at page 407**) further on 1<sup>st</sup> July 2019, the CD issued another letter to the OC referring to the meeting held on 28 June 2019 and while suggesting a meeting to finalize the pending points in a time bound manner.
- v) On 25<sup>th</sup> October 2019, the OC issued a Notice purported to be issued under Section 8 of the Code calling upon the CD to make payment of INR 271 crores (approx.) alleged to be due and payable as on 15 November 2018. Notably, the said Notice was not served at the

Registered office of the CD, but at its Corporate Office situate at Hinduja House, 171, Dr. Annie Besant Road, Worli, Mumbai - 400 018 (**Exhibit H 36**).

- w) The CD vide letter dated 8<sup>th</sup> November 2019 responded to the aforesaid Notice denying its liability and placing on record the pre-existing dispute with respect to the quality of services and goods, as well as commission of several breaches of warranties/representations by the OC under the said Agreements. The CD further pointed out that the said Notice was not served on the Registered office of the CD as mandated under Rule 5(2)(a) of the Insolvency and Bankruptcy (Petition to Adjudicating Authority) Rules, 2016.
- x) CD was served with a copy of Petition filed by the OC under Section 9 of the Code seeking initiation of corporate insolvency resolution process of the CD on 21<sup>st</sup> December 2019 before the National Company Law Tribunal, Mumbai Bench for an alleged claim of INR. 481 crores (Principal of Rs. 271 crores and Interest of Rs. 210 crores) (**Exhibit I**).
- y) The CD was served with another Notice dated 20<sup>th</sup> December 2019 purported to be issued under Section 8 of the Code, at the Registered office of the CD for an alleged claim of INR 271 crores. However, the CD, for reasons beyond its control was unable to respond to the said notice. Accordingly, the OC filed the present Petition on 20<sup>th</sup> January 2020 before this Authority. It is stated that the CD had already intimated the OC of the pre-existing dispute between parties vide its letter dated 8<sup>th</sup> November 2019. Thus, despite of being aware of and being notified of the pre-existing dispute, the OC has filed the present Petition seeking to initiate corporate insolvency resolution process of this CD.

- z) The OC through Part IV of the Petition has indicated that the date of default is 15<sup>th</sup> November 2018. It appears from a perusal of the Petition that the date of default has been identified by the OC basis the meeting held between the OC and CD on 15<sup>th</sup> November 2018. It is claimed that the minutes of the said meeting merely record that the CD agreed that verified invoices of Rs. 250 crores (approx.) are available at the Mumbai office of the CD. However, there are pending punch points (unfinished work related to the Project), PG Test completion and delay analysis for the project to be arrived at mutually by the parties, which is a part of contract closure procedure to facilitate payment. Thus, verification of invoices alone cannot be construed that they are due and payable. Hence, this cannot be considered as the date of default. Further, the OC on its own assertion through Part IV of the Petition has admitted that the debt fell due on completion of 30 days from the date of invoices submitted to the CD.
- aa) The date of default would vary for each invoice such date of default for each invoice will be the date on which such invoice was due and payable but not paid. It is a well settled law that since the Limitation Act is applicable to Petitions filed under sections 7 and 9 of the Code from the inception of the Code, Article 137 of the Limitation Act gets attracted. "The right to sue", therefore, accrues when a default occurs. If the default has occurred over three years prior to the date of filing of the Petition, the Petition would be barred under Article 137 of the Limitation Act. A perusal of all the invoices annexed to the Petition reveals that several invoices annexed to the Petition were raised during the period from 2012 to 2016 are time-barred. (**Exhibit 'J'**).

- bb) Furthermore, as per the Petition and documents annexed therewith, there is no document whereby the CD has acknowledged its liability which would have the effect of extending the period of limitation in terms of Section 18 of the Limitation Act, 1963. The OC has claimed an amount of IN 210 crores towards interest charged @ 18% per annum.
- cc) There is no clause in the said Agreements for payment of interest on unpaid or delayed payment. Since no interest was payable as per terms of the said Agreements executed between the OC and CD and no such claim towards interest had been previously made by the OC either in the Legal Notice dated 24<sup>th</sup> May 2019 or the Demand Notice dated 25<sup>th</sup> October 2019. In absence of any provisions to claim any interest under the Agreements, the OC is pre-empted from raising any superfluous claim of interest.
- dd) As per Rule 6(1) of the Insolvency and Bankruptcy (Petition to Adjudicating Authority) Rules, 2016 read with Form 5 mandates that a Petition filed under Section 9 of the Code be filed by the Operational Creditor or person authorized to act on behalf of the Operational Creditor. Similarly, Rule 23(2) read with Rule 26 of the National Company Law Tribunal Rules, 2016 requires a Petition to be filed and signed verified by an Authorized Representative' of the OC. Such an 'Authorization' would mean a specific authorization by the Board of Directors of the OC.
- ee) The OC has annexed certified true copy of extracts of the "Delegation of Powers" as approved by its Board of Directors in its meeting held on 26 August 1986. The same confers full powers on Executive Directors to institute, conduct, intervene, defend, abandon or compound any suit,

appeal, review, revision, writ petition or other proceedings against the OC or its employees or otherwise concerning the affairs of the OC in any court and or quasi- judicial authorities, etc. The said Delegation of Powers further permits such Executive Directors to execute Power of Attorney, to enforce legal rights.

- ff) The present Petition is filed by one Mr. G. Murali based on an Authorization Letter dated 3rd January 2020 annexed to the Petition. From a perusal of the said Authorization Letter, it appears that one of the Executive Directors - Mr. G. K. Hedao authorized under the aforesaid Delegation of Powers issued the Authorization Letter in favour of Mr. G. Murali to file the present Petition against the CD.
- gg) It is averred that the Delegation of Powers was approved at the meeting of the Board of Directors of the OC held in the year 1986. It is evident that since this Board Resolution approving Delegation of Powers was given prior to the advent of the Code, hence Mr. G. K. Hedao has no authority to authorize Mr. G. Murali to institute insolvency proceedings under the Code for he himself has no authority to institute proceedings under the Code.
- hh) It is submitted that as per Section 9(3) of the Code it is necessary for the OC to furnish the documents which would establish debt and default. More particularly, the OC has failed to furnish a copy of the certificate from the financial institutions maintaining accounts of the OC which is a sine qua non for proving default. On the contrary, the OC has wrongfully produced and relied upon statement of accounts maintained by Canara Bank, whereas all payments pertaining to the said Project were remitted by the CD to the OC's State Bank of India Delhi account



and not Canara Bank account. In fact, the account maintained with Canara Bank was with respect to the Spread Supply Business Group of the OC wherein payments were being remitted by the CD under an arrangement and transaction which is not related or connected to the said Project.

- ii) OC has suppressed various true and material facts and they have not approached this Authority with clean hands. The OC has purported to present a distorted version of the actual facts by portraying that there exists no dispute between the parties as regards the supply of services and goods by the OC. Further, the Authorized signatory to the Petition has furnished a false/ incorrect verification to the extent that no notice has been served upon the OC by the CD indicating existence of any dispute with respect to the amount outstanding.
  
- jj) The CD has not only raised disputes as regards supply of goods and services by the OC but also issued notice of dispute dated 8<sup>th</sup> November 2019 in response to the first Demand Notice of the OC dated 25<sup>th</sup> October 2019. In fact, the CD had on multiple occasions suggested that parties reconcile their accounts, which is a sine qua non for arriving at the amount payable. It is submitted that the process of account reconciliation has been unilaterally delayed and protracted by the OC, despite several requests by the CD. In fact, the CD had afforded all possible assistance and latitude to the OC for the purpose of reconciliation so that the dues payable to the parties could be ascertained. In this regard, the CD has addressed several emails and reminders calling upon the OC to comply with the agreed norms and standard-operating-procedures for reconciliation of accounts.

kk) It is submitted that on account of the defects, deficiencies and delays committed by the OC, the CD has suffered and incurred huge costs and expenditure which has not only caused revenue loss but has also occasioned in failure/delay in completion of the said Project. In fact, on account of the said defects, deficiencies and delays committed by the OC, the CD reserves its right to set-off sums accumulated towards liquidated damages as specified under the said Agreements. In view of the same, no amounts are due or payable to the OC. In fact, the OC has itself acknowledged existence of disputes between parties vide its notice dated 24<sup>th</sup> May 2019 and proposed to invoke dispute resolution mechanism under the said Agreements. Therefore, the pre-existing dispute between parties with respect to the quality of goods and services warrants rejection of the present Petition in terms of Section 9(5) (ii)(d) of the Code.

4. In the rejoinder, the Petitioner denied all the averments in the reply of Respondent and reiterated the facts stated in the Petition.
5. It is further contended in the rejoinder that OC has consistently pursued the matter of the pending payment for invoices with the CD. The CD has repeatedly assured the OC that the outstanding payment pertaining to milestone billing conducted in December 2016 and March 2017 (Trial Operation Billing) would be released. Furthermore, during a meeting held on 15<sup>th</sup> November 2018, the CD acknowledged that verified invoices amounting to approximately Rs. 250 crores were available at the Corporate Debtor's Mumbai office. The minutes of the meeting (**MoM**) dated 15<sup>th</sup> November 2018, were signed by senior officials of the CD.

6. It is claimed that the OC's claim is well within the period of limitation, as evidenced by the records and annexures submitted with the original application, including the signed MoM dated 15<sup>th</sup> November 2018. Additionally, the claim for interest on the outstanding amount is justified. The Application has been duly filed by the undersigned under authorization from the Competent Authority, in accordance with the Delegation of Powers approved by the OC's Board of Directors.
  
7. It is further averred that the completion of the project depended on the CD providing essential inputs such as water and coal. Due to the CD's failure to provide these inputs in a timely manner, the project was delayed. On 16<sup>th</sup> May 2017, the OC submitted a detailed time extension request for procedural requirements, such as extending the insurance policy, contracts with sub-vendors, and dispatch clearance, explaining the reasons for the delay. However, the CD has consistently refused to discuss the time extension request, despite repeated requests from the OC. As the CD failed to provide the necessary inputs for the timely completion of the project, it is not entitled to claim any damages, particularly liquidated damages, against the Petitioner. Therefore, the CD's claim for liquidated damages should be dismissed in limine.
  
8. It is averred that the OC completed the 720-hour trial operation of Unit-1 on 5<sup>th</sup> September 2016 and Unit-2 on 16<sup>th</sup> March 2017. Protocols were jointly signed by the OC and CD to this effect. The Commercial operation date ("COD") for both the units was declared on 11<sup>th</sup> January 2016, and 3<sup>rd</sup> July 2016, respectively. Therefore, it is incorrect to claim that there were glitches and failures in the equipment supplied by the OC. The PG Test for Unit-1 has been completed, but the PG Test for Unit-2 could not be completed because of CD's failure to provide necessary inputs.

9. Further, the goods and services supplied by the OC were in accordance with contract conditions and of the specified quality. There were no defects or deficiencies in the services provided during the execution of the contracts by the OC with the CD. Any alleged deficiencies arose due to the improper operation of the power plant by the CD. The OC was willing to address these deficiencies on the commitment of CD's release of outstanding payment. However, the CD did not comply the payments against the submitted invoices.
10. It is averred that the MoM dated 15<sup>th</sup> November 2018 addresses several points regarding the time extension, release of outstanding payments, Clarifications about the PG Test of Unit-1 and reconciliation statements.
11. The CD's letter dated 8<sup>th</sup> November 2019, is an afterthought aimed at creating the impression of a pre-existing dispute which does not exist. The date of default identified as 15<sup>th</sup> November 2018, is significant as the CD accepted on that date the existence of verified bills totaling Rs 250 crore pending for payment at their Mumbai office for over 1.5 years. The completion of verification implies readiness for payment.
12. All invoices covered under the claim are older than 30 days from the claim date, and interest on outstanding invoices has been calculated from the default date of each invoice. The MoM dated 15<sup>th</sup> November 2018, serves as clear evidence of the CD's acknowledgment of liability for the outstanding payment, extending the limitation period even for invoices allegedly subject to limitation. The MoM serves as undeniable proof of the CD's debt and default and allegations in the Reply are misleading and made with intent to deceive.

13. Heard both the learned counsels and perused the records.

### Issues for Consideration

- a) Whether Mr. G. Murali (General Manger) was authorised to file the present Petition on behalf of the OC under section 9 of IBC and Rule 23(2) read with Rule 26 of NCLT Rules, 2016?
  - b) Whether the Petition was filed within the Limitation Period?
  - c) Whether there are any pre-existing disputes?
14. The primary issue to consider is the matter of the authorized signatory. In this case, the Corporate Debtor contends that the present Petition, filed by Mr. G. Murali (General Manger) based on an authorization letter dated January 3, 2020, lacks legal validity. This argument is based on the extracts from the "Delegation of Powers" approved by the Board of Directors on August 26, 1986 in its 150<sup>th</sup> Meeting ("**Board Meeting**"), which confer such powers solely to the Executive Director. "Delegation of Powers" as approved by the Board is extracted below:

CERTIFIED TRUE COPY OF EXTRACTS FROM THE "DELEGATION OF POWERS" AS APPROVED BY THE BOARD OF DIRECTORS IN IT'S 150 MEETING HELD ON 26" AUGUST, 1986.

#### *POWERS OF EXECUTIVE DIRECTORS*

*"Legal: Full powers to institute, conduct, intervene, defend, abandon or compound any suit, appeal, review, revision, writ petition or other proceedings by or against the Company or its employees or otherwise concerning the affairs of the Company in any court and or quasi-judicial authorities, to refer any claims or demands by or against the Company to arbitration and observe and perform the awards, to sign and verify complaints, written statements, execution and other petitions, applications, affidavits, objections, memorandum of appeal or other pleadings to be filed before any judicial or quasi-judicial authorities or arbitrators, to enforce judgement, execute any decree or order of any judicial or quasi-judicial authorities or to satisfy the same and/or to realise or withdraw money from any court, persons or other authorities in execution of such decree or order and to sign vakalatnamas.*

*Full powers to execute contracts, general/special instruments including joint undertaking, service agreements\bond(s) and deeds in respect of or connected with*

*sale/lease/licence mortgage, or hypothecation/pledge or other deed(s) of a legal character of whatever description, **power(s) of Attorney**, to enforce guarantee(s) or any other legal rights, to incur legal expenses and to act as agent of the Company for any purpose whatsoever relating to the Company's business".*

15. Now, the question arises whether the Executive Director who has the power to file the Petition on behalf of the OC can further delegate such power to Mr. Murali vide an Authorisation Letter without any board resolution. On perusal of the extracts from the "delegation of powers" as approved in the Board Meeting it is evident that the Executive Director also has a power to execute a power of attorney but in the instant case the Executive Director has issued an Authorisation Letter instead of a power of attorney.

16. At this juncture, it is pertinent to refer to the decision of the Hon'ble National Company Law Appellate Tribunal (NCLAT) in the case of ***Palogix Infrastructure Private Limited Vs ICICI Bank Limited [Company Appeal (AT) (Insol.) No. 30 of 2017]***, wherein, the Hon'ble NCLAT has held as under:

*36. In so far as, the present case is concerned, the 'Financial Creditor'-Bank has pleaded that by Board's Resolutions dated 30th May, 2002 and 30th October, 2009, the Bank authorised its officers to do needful in the legal proceedings by and against the Bank. If general authorisation is made by any 'Financial Creditor' or 'Operational Creditor' or 'Corporate Applicant' in favour of its officers to do needful in legal proceedings by and against the 'Financial Creditor'/'Operational Creditor'/'Corporate Applicant', mere use of word 'Power of Attorney' while delegating such power will not take away the authority of such officer and 'for all purposes it is to be treated as an 'authorization' by the 'Financial Creditor'/'Operational Creditor'/'Corporate Applicant' in favour of its officer, which can be delegated even by designation. In such case, officer delegated with power can claim to be the 'Authorized Representative' for the purpose of filing any application under section 7 or Section 9 or Section 10 of 'I&B Code'.*

17. Based on the aforementioned judgment, it is clear that an officer delegated with power can claim to be the 'Authorized Representative' for the purpose of filing any application under Section 7, Section 9, or Section 10 of IBC. In the present case, the Executive Director was given the authority to act

as the Authorized Representative of the Corporate Debtor (CD) vide the Board Meeting. However, the Executive Director does not have the authority to issue an authorization letter and delegate this power to another officer without any valid delegation or a Board Resolution for the purpose of filing a petition under the IBC.

18. Hon'ble NCLAT has recently in the case of *Tulip Hotels Private Limited Vs JC Flowers Asset Reconstruction Private Limited and Anr., Company Appeal (AT) (Insol.) No. 1146 of 2023* allowed an application filed by the Power of Attorney Holder under Section 7 of the Code on general authorization being granted vide Board Resolution to file necessary applications for commencement of legal proceedings.
19. In the present case neither a new board resolution was passed nor the Executive Director has issued a Power of Attorney in favour of Mr. Murali to file the present Petition under section 9 of IBC. Mere issuance of letter of authorisation cannot be equated to power of attorney.
20. The OC relied on the judgment of the Hon'ble Apex Court in *United Bank of India v. Naresh Kumar and Others; AIR 1997 SC 3*. In this case, it was held that an individual may be expressly authorized to sign pleadings on behalf of a company, either through a resolution passed by the Board of Directors or by the execution of a power of attorney in favour of the individual. Furthermore, in the absence of such authorization, the action can be ratified by the board, either expressly or impliedly. However, there is no evidence on record indicating that the delegation of powers by the Executive Director to the General Manager was ratified by the Board. Consequently, the General Manager lacks the authority to act as the Authorized Person in accordance with Rule 23(2) read with Rule 26 of the

NCLT Rules, 2016. Therefore, the delegation of power by the Executive Director by a mere letter of Authorisation without a Power of Attorney or a board resolution is invalid and not maintainable.

### **Limitation**

21. Regarding the issue of limitation, the present petition was filed on January 20, 2020. The date of default, as mentioned in the Petition, is November 15, 2018, which corresponds to the date of the Minutes of Meeting (MoM). In support of the default, the OC has submitted numerous unpaid invoices for the period between 2013 and 2018. Invoices dated prior to January 20, 2017, are not within the limitation period. The OC's argument of considering the MoM as an acknowledgment of debt by the CD cannot be entertained, as there is no clear acknowledgment of either full or even a part of the debt, and also the contents of the MoM are ambiguous. The MoM merely states that verified invoices amounting to approximately Rs 250 Crores are available at the CD's Mumbai office. However, it does not explicitly acknowledge the debt.
22. Coming to the alleged unpaid invoices for the period after January 20, 2017, as detailed in Annexure J (colly) on page 442 of the Petition, there is a mismatch between the dates on the invoices raised and the dates listed in the Annexure-J (colly). No explanation was provided in this regard by the OC, nor is there any indication of the default dates for these invoices. Each invoice contains a clause stating that if payments are not made within 30 days from the date of the invoice, interest at the rate of 15% per annum shall be charged. In the absence of an explicit default date, it is appropriate to consider 30 days from the date of the invoice as the default date.



23. Upon reviewing the invoices, we find that only invoice numbers **HR160904929, HR160904930, HR160904931, HR160907237, HR160905230, HR160905231,** and **HSAT1800713** fall within the limitation period. The total amount of the invoices falling within the limitation period is only **Rs.3,54,867.**

S. No	Invoice No	Date of submission of Invoice to CD	Actual date of Invoice as mentioned in the Invoice	Bill Amount (INR)
1.	HR140910105(B)	10.02.2017	24.03.2015	14,40,867
2.	HR140910105(C)	30.01.2018	24.03.2015	11,27,607
3.	HR140910107	10.02.2017	24.03.2015	80,47,752
4.	HR150906539	10.02.2018	24.02.2016	5,37,619
5.	HR150906540	10.02.2019	24.02.2016	1,05,690
6.	HR150906542	02.01.2018	24.02.2016	1,91,462
7.	HR160903473	16.10.2016	30.11.2016	4,66,249
<b>8.</b>	<b>HR160904929</b>	<b>20.02.2017</b>	<b>11.02.2017</b>	<b>93,722</b>
<b>9.</b>	<b>HR160904930</b>	<b>20.02.2017</b>	<b>11.02.2017</b>	<b>8,852</b>
<b>10.</b>	<b>HR160904931</b>	<b>20.02.2017</b>	<b>11.02.2017</b>	<b>505</b>
<b>11.</b>	<b>HR160907237</b>	<b>02.09.2019</b>	<b>31.03.2017</b>	<b>1,53,437</b>
12.	HR150907874	26.03.2016	26.03.2016	44,232
13.	HR150907876	26.03.2016	26.03.2016	6,10,844
<b>14.</b>	<b>HR160905230</b>	<b>02.03.2017</b>	<b>24.02.2017</b>	<b>931</b>
<b>15.</b>	<b>H8160905231</b>	<b>02.03.2017</b>	<b>24.02.2017</b>	<b>53</b>
<b>16.</b>	<b>HSAT1800713</b>	<b>30.06.2018</b>	<b>30.06.2018</b>	<b>97,367</b>

### **Pre – Existing Dispute**

24. In the present case, the Petitioner issued two Form 3 demand notices dated October 25, 2019, and December 20, 2019, without explaining the necessity for issuing a fresh notice. The CD responded to the first demand notice with a letter dated November 8, 2019 (**Exhibit-I of the Reply**), explaining that there are pre-existing disputes. Notably, this reply,

indicating a pre-existing dispute, was issued on November 8, 2019, which antedates the latest Form 3 demand notice issued on December 20, 2019.

25. The CD also sent various emails and letters to the OC regarding the incomplete works, deficiencies in work and pre-existing disputes. One such letter dated 22.11.2018 also indicates that there are pre-existing disputes between CD and OC prior to the issuance of section 8 demand notice.
  
26. Moreover, the OC did not attach any documents with the Form-3 to prove the existence of debt and the amount in default. The OC merely attached the MoM dated 15.11.2018 and copies of legal notices dated 24.05.2019. Neither the MoM nor the Legal notices can be taken into consideration as documents to prove the existence of debt and to the show the amount of default. The legal notice is only an assertion made by the OC and the MoM as discussed earlier does not stand as a good proof to show debt and default in the present case. Regarding the argument of the OC that it is not mandatory to enclose invoices with the Form 3 demand notice, while this is valid that invoices are not mandatory in form 3, it does not mean that a Form 3 demand notice can be served without any proper documentary proof to establish the existence of the operational debt and the amount in default. It is clear that for establishing the default of the Operational Debt obviously there shall be invoices which are recognized under Column 7 (*List of documents attached to this application in order to prove the existence of operational debt and the amount in default*) of the Form 3.

27. The Hon'ble NCLAT in the case of *Neeraj Jain V Cloud Walker Streaming technologies Pvt. Ltd Company Appeal (AT) (Insolvency) No. 1354 of 2019* held that when a demand notice is issued in form 3 the OC has to submit the documents to prove the existence of operational debt and the amount in default and also that demand notice in form 3 cannot be used as an escape route to not attach the invoices in the demand notice. In the instant case the documents submitted by the OC does not prove the existence of operational debt and the amount of default. Thus, the demand notice issued under section 8 of IBC is defective and not in order. The relevant part of the judgement is extracted below:

*“37 Thus if the demand notice is sent in Form 3, then the Operational Creditor has to submit the document to prove the existence of operational debt and the amount in default along with the notice. The said document may either be invoice or any other document to prove the existence of the operational debt and the amount in default. This situation may arise when the operational debt, is of such nature where no invoice is generated. For example, if an operational debt is relating to the salary dues of an employee, then, in that case, the operational creditor will not have any invoice.”*

*“45 It is important to mention that legislative provisions are made with a larger perspective to deal with all the eventualities that may arise in the implementation of the said provisions. Therefore, the use of the word “OR” in Section 8 cannot be interpreted as such, that the Insolvency and Bankruptcy Code has provided a choice or a discretion to an Operational Creditor, to provide an escape route from submission of the invoice, which can be treated as the most relevant document to prove the debt and amount in default.”*

28. Here, we would like to refer the decision of the Hon'ble Supreme Court in the case of *Mobilox Innovations Private Limited vs. Kirusa Software Private Limited in Civil Appeal No. 9405 o 2017* wherein, the Hon'ble Supreme Court has held in relation to Section 9 proceedings that;

"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." (emphasis supplied)

29. This view has been reiterated by the Hon'ble Supreme Court in the cases of *Sabarmati Gas Ltd Vs Shah Alloys Ltd (2023) 3 SCC 229 [p.256]* and *Rajratan Babulal Agarwal Vs Solartex India Pt Ltd (2023) 1 SCC 115 [p.150]* also, where again it has been unequivocally held that any "plausible contention requiring investigation" will constitute a dispute and if raised prior to the issue of section 8 notice, will result in rejection of Application under section 9 of the IBC.
30. This sequence of events, based on the facts and correspondences between the CD and the OC, reveals pre-existing disputes concerning the quality of services and goods, reconciliation of accounts, and various other disputes arising from the agreements. This creates a plausible contention warranting further investigation. It is important to note that all these disputes were raised prior to the issuance of the Section 8 notice.
31. Besides the pre-existing disputes, improper demand notice and invalid authorised signatory, the OC is also unable to prove the exact amount due from the CD. For these reasons, we are not inclined to admit the present application.

Sd/-

**SANJAY PURI**  
**MEMBER (TECHNICAL)**

Sd/-

**RAJEEV BHARDWAJ**  
**MEMBER (JUDICIAL)**