

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Comp. App. (AT) (Ins) No. 1185 of 2022
& I.A. No. 4477 of 2022 & 1780, 2830, 4382, 4384, 4541 of 2023

(Arising out of the Order dated 19.09.2022 passed by the National Company Law Tribunal, New Delhi Bench- IV in C.P. (IB) No. 2561/(ND)/2019 2019)

IN THE MATTER OF:

JEEVAGAN NARAYANA SWAMI NADAR

(SUSPENDED DIRECTOR OF SINNAR
THERMAL POWER LTD.)

S/O NARANA SWAMI PALANIAPPAN NADAR,
RESIDING AT N 135 FF, MAYFIELD GARDENS,
N BLOCK, SECTOR 51, GURUGRAM,
HARYANA

EMAIL : jeevagan1950@gmail.com

[In Place of Chandan Mishra, Original Appellant
herein (Since Deceased)].

...Appellant

Versus

1. SHAPOORJI PALLONJI & CO. PVT. LTD.

HAVING ITS REGISTERED OFFICE AT: 70
NAGINDAS MASTER ROAD, FORT,
MUMBAI, MAHARASHTRA 400023
THROUGH ITS AUTHORISED SIGNATORY

...Respondent No. 1

**2. ADARSH SHARMA (INTERIM
RESOLUTION PROFESSIONAL OF SINNAR
THERMAL POWER LTD.)**

J-6A, KAILASH COLONY, NEW DELHI
110048

EMAIL: adarsh@adarshca.com

...Respondent No. 2

Present

For Appellant:

Mr. Palash Singhai, Mr. Karant Batura &
Mr. Jayant Chawla, Advocates.

For Respondents: Mr. Abhijeet Sinha, Mr. Mayank Mishra, Mr. Chirag sharma, Mr. Sudiksha Saini, Mr. Shikhar Misra, Advocates.
Mr. Mr. S. Niranjan Reddy, Sr. Advocate along with Ms. Shally Bhasin, Mr. Prateek Gupta, Mr. Udbhav Nanda, Mr. Aayush Kapoor, Mr. Utkarsh Singh, Mr. Abhishek Anand, Mr. Karan Kohli & Mr. Sajal Jain, for IRP. Mr. Ramakant Rai, Mr. Varun Tikmani, Mr. Saptarshi Chatterjee, Mr. Aditya Pandey & Ms. Drishti Kaushik, for Intervenor (REC Ltd.)

J U D G E M E N T

(19 .01.2024)

NARESH SALECHA, MEMBER (TECHNICAL)

1. The present Appeal i.e., Company Appeal (AT) (Insolvency) No. 1185 of 2022 was filed by Mr. Chandan Mishra, Suspended Director of Sinnar Thermal Power Ltd. (in short '**Corporate Debtor**') under Section 61 of the Insolvency & Bankruptcy Code, 2016 (in short '**Code**') being aggrieved by the Impugned Order dated 19.09.2022 in C.P. (IB) No. 2561/(ND)/ 2019 passed by the National Company Law Tribunal, New Delhi Bench- IV (in short '**Adjudicating Authority**') whereby the Adjudicating Authority admitted the Corporate Insolvency Resolution Process (in short '**CIRP**') filed under Section 9 of the Code by M/s Shapoorji Pallonji & Co. Private Limited who is the Operational Creditor and Respondent No. 1 herein.

2. Mr. Chandan Mishra expired on 22.11.2022 and Mr. Jeevagan Narayana Swami Nadar moved an application for change name as the Appellant which was allowed by this Appellate Tribunal.

3. Mr. Adarsh Sharma is the Respondent No. 2 herein, was appointed as Interim Resolution Professional (in short '**IRP**') of the Corporate Debtor.

4. Heard, the Counsel for the Parties and perused the record made available including the cited judgements.

5. The Corporate Debtor is the company incorporated on 03.01.2007 for the purpose of setting up of 1350 (5×270) MW Nasik Thermal Power Project located at Sinnar SEZ Nashik, whereas the Respondent No. 1 is the Operational Creditor to the Corporate Debtor to whom the Corporate Debtor awarded contract Civil & Structural Box on 28.05.2010 for setting boiler and generator (in short '**BTG**') for an amount of Rs.180 Crores.

6. It has been brought out that the total contract was enhanced from time to time and was increased to Rs. 224.13 Crores.

7. The Corporate Debtor also issued another work order to the Respondent No. 1 dated 22.11.2012 for amount of Rs. 12.56 Crores for various items under OBTG and both the combined contracts/ work orders i.e., OBG and OBTG will be referred hereinafter as "**contracts**".

8. It has been submitted that the Respondent No. 1 issued 77 running accounts bill (in short '**RABs**') along with Final bill for BTG and issued

19 RABs along with final bill for OBTG. The total combined work done by Respondent No. 1 is stated to be of Rs. 208.33 Crores against which the Corporate Debtor made the payment of Rs. 146.14 Crores leaving Rs. 62.19 Crores as outstanding balance.

9. For seeking payment of outstanding dues from the Corporate Debtor amounting to Rs. 62.19 Crores, the Respondent No. 1 issued demand notice under Section 8 of the Code on 16.08.2019 which was replied by the Corporate Debtor on 29.08.2019 denying the averments made in the demand notice.

10. It has been brought out that in meanwhile, the Respondent No. 1 filed a petition under Section 9 of the Arbitration and Conciliation Act, 1996 (in short '**Arbitration Act**') bearing number O.M.P. (Comm.) No. 262 of 2019 on 16.08.2019 before Hon'ble High Court of Delhi, who gave a stay on revocation of bank guarantee by the Corporate Debtor in favour of Respondent No. 1 on 20.08.2019.

11. It has been submitted that the Respondent No. 1 filed an application under Section 9 of the Code before the Adjudicating Authority which was admitted on 19.09.2022. The Appellant submitted that he filed detailed counter affidavit on 13.12.2019, disputing the Respondent No. 1 and bringing out the pre-existing disputes between the Corporate Debtors and the Respondent No. 1.

12. The Appellant submitted that pending application before the Adjudicating Authority, the Respondent No. 1 filed an application bearing C.A. No. 503 of

2019 to bring on record work completion certificate 09.05.2019 issued by the Corporate Debtor with reference to BTG work as additional document which was dismissed by the Adjudicating Authority vide order dated 17.01.2022.

13. It has also been brought out that on 23.09.2019, the Respondent No. 1 issued notice to the Corporate Debtor invoking arbitration under Section 21 of the Arbitration Act. The Arbitral Tribunal was constituted on 24.11.2019 to adjudicate upon the claims and counter claims in the matter of *Shapoorji Pallonji and Company Private Limited Vs. Sinnar Thermal Power Limited*. The final arbitration award was passed on 22.04.2022.

14. It is the case of the Appellant that Arbitral Tribunal award was challenged by him before Hon'ble High Court of Delhi under Section 34 of Arbitration Act being O.M.P. (Comm.) No. 324 of 2024 which is still pending. The Appellant submitted that in view of the pendency of the challenged Arbitral Tribunal's Award, the averment made by the Respondent No. 1 regarding their claims allowed by the Arbitral Tribunal should not be given undue reliance and weightage.

15. The Appellant gave reference to the judgements of Hon'ble Supreme Court of India in the matter of *K. Kishan Vs. Vijay Nirman Company Private Limited*, [(2018) 17 SCC 662]. The Appellant also relied upon the judgement of this Appellate Tribunal in the matter of *M/s Annapurna Infrastructure Pvt. Ltd. vs. M/s Soril Infra Resources Ltd. in Company Appeal (AT) (Insolvency)*

No. 32 of 2017. The Appellant also referred to several judgements in support of his averments i.e., ***Umesh Saraf Vs. Tech India Engineers Pvt Ltd.*** passed by this Appellate Tribunal bearing *Company Appeal (AT) (Insolvency) No. 548 of 2020, Karpara Project Engineering Private Limited Vs. BGR Energy Systems Ltd.* in *Company Appeal (AT) (Insolvency) No. 622 of 2018, M/s. Raunaq EPC International Ltd. Vs. M/s. Hiranmaye Energy Ltd.* in *Company Appeal (AT) (Insolvency) No. 439 of 2020, Major (Retd.) Inder Singh Rekhi Vs. Delhi Development Authority [(1988) 2 SCC 338]* and *Sundaram Finance Ltd. Vs. NEPC India Ltd. [(1999) 2 SCC 479]*.

16. It is the case of the Appellant and that his appeal should be allowed primarily on the following grounds :-

- a) There have been pre-existing disputes between the parties.
- b) The Adjudicating Authority erred in assuming that the Corporate Debtor has not filed any application under Section 34 of the Arbitration Act, challenging the Arbitral Award dated 22.04.2022.
- c) The completion certificate dated 09.05.2019 relied upon by the Adjudicating Authority was dismissed earlier by the Adjudicating Authority vide order dated 17.01.2020.

17. The Appellant alleged that the Respondent No. 1 has been indulging in forum shopping by way of raising the same/ similar references before different

judicial/ legal fora including the Adjudicating Authority, this Appellate Tribunal, the Arbitral Tribunal and Hon'ble High Court of Delhi.

18. It is the case of the Appellant and that IBC should not be allowed for recovery mechanism and the Impugned Order should be set aside for the errors committed by the Adjudicating Authority both on law and on the facts.

19. Concluding his arguments, the Appellant pleaded that the power plant of the Corporate Debtor can be revived and he should be given adequate opportunity by dismissing the Impugned Order.

20. Per Contra, the Respondent No. 1 refuted all the averments made by the Appellant treating these to be as misleading, mischievous, frivolous and without any substantial basis.

21. At the outset, the Respondent No. 1 submitted that the Impugned Order has been passed by the Adjudicating Authority after detailed consideration and after going into all details of facts and law.

22. The Respondent No. 1 refuted the allegations made by the Appellant that the Respondent No. 1 concealed the fact regarding arbitration proceeding pending before the Hon'ble High Court of Delhi.

23. The Respondent No. 1 gave full background of the case, including the awarded work through legally binding contracts on account of the Corporate Debtor executed by them and chequered history of pending payments.

24. It is the case of the Respondent No. 1 that out of total cumulative work done worth Rs. 208.33 Crores, the Appellant paid only Rs. 146.14 Crores and thereby leaving outstanding dues of Rs. 62.19 Crores. The Respondent No. 1 submitted that he gave all the opportunities to the Corporate Debtor to settle the dues but the Corporate Debtor miserably failed to meet its obligation according to the contracts and therefore, the Respondent No. 1 was compelled to issue demand notice under Section 8 of the Code on 16.08.2019 which was replied by the Corporate Debtor on 29.08.2019. It is the case of the Respondent No. 1 that in their reply, nowhere the Corporate Debtor could link any documents or any evidence of any pre-existing disputes w.r.t. the contracts prior to issue of demand notice by him to Corporate Debtor on 16.08.2019. The Respondent No. 1 stated that the bogus plea of pre-existing disputes was tried to be created by the Corporate Debtor in order to avoid payments to be paid to Respondent No. 1. The Respondent No. 1 submitted that the Corporate Debtor tried to raise the issues which were not relevant for the execution of the work or regarding quantity or quality of the work executed and completed by the Respondent No. 1.

25. The Respondent No. 1 also denied alleged slow progress work levelled by the Corporate Debtor. The Respondent No. 1 further referred to counter claims made by the Corporate Debtor only in response to the demand notice which are

without any basis and was done by the Corporate Debtor only to derail the entire CIRP process.

26. The Respondent No. 1 strongly objected to the allegations made by the Appellant regarding non- admission of completion certificate dated 09.05.2019 issued by the Appellant. In this connection, the Respondent No. 1 submitted that the Adjudicating Authority rejected C.A. No. 503 of 2019 which was made with a request to place additional document, only on the ground that this document was not legible. The Respondent No.1 alleged that the Appellant concealed the fact before this Appellate Tribunal that the work completion certificate dated 09.05.2019 was indeed on record, since it was annexed with the Rejoinder filed by the Respondent No. 1 before the Adjudicating Authority and the same was duly considered by the Adjudicating Authority correctly in the Impugned Order.

27. The Respondent No. 1 also refuted the fact that the Corporate Debtor is financially viable and stated that the Corporate Debtor could not even pay their share of fee to the Arbitral Tribunal in the arbitral proceeding.

28. The case of the Respondent No. 1 is that in terms of Clause 21.6.2 of Special Conditions of Contract (in short ‘SCC’) an ‘Engineer-in-Charge’ was to be nominated by the Corporate Debtor as owner and in terms of Clause 21.62 of General Conditions of contract (in short ‘GCC’) any difference or dispute regarding any items of schedule of work was to be referred to ‘Engineer-in-

Charge' appointed by the Corporate Debtor. The Respondent No. 1 strongly pleaded that during the entire duration of contract or even during the 'Defect Liability Period' (in short '**DLP**') or even prior to issue of demand 8 notice, the Appellant never raised any dispute and so-called issue being raised in response to the demand notice No. 8 are only with ulterior motives.

29. It is further the case of the Respondent No. 1 that in reply to demand notice dated 29.08.2019, the Corporate Debtor admitted that the entire work was done by the Respondent No. 1 and did not raise any issue regarding quality or quantity of services provided under the contracts.

30. The Respondent No. 1 submitted that only in response to his petition before the Hon'ble High Court of Delhi filed under Section 9 of the Arbitration Act, the Corporate Debtor raised alleged pre-existing disputes in order to illegally encash PBG of the Respondent No. 1 of Rs. 9 Crores.

31. The Respondent No. 1 submitted that the very fact that unqualified work completion certificate was issued by the Corporate Debtor as on 09.05.2019 to the Respondent No. 1, indicate that entire work was completed without any grievances and therefore at this stage such plea of pre-existing disputes should not be allowed.

32. The Respondent No. 1 submitted that even after issue of the completion work certificate dated 09.05.2019, one year elapsed i.e., period relating to DLP

and the Corporate Debtor did not raise any dispute even during this extended period as the work was completed by 31.03.2018 itself.

33. The Respondent No. 1 stated that allegation of the Corporate Debtor regarding alleged forum shopping by the Respondent No. 1, is nothing but false and stated that he was compelled to approach the Hon'ble High Court of Delhi under Section 9 of the Arbitration Act to protect illegal encashment of PBG by the Corporate Debtor. The Corporate Debtor failed to return PBG of the Respondent No. 1 despite several reminders and incidentally the Hon'ble High Court of Delhi gave the verdict in the favour of Respondent No. 1.

34. The Respondent No. 1 submitted that the judgment cited by the Appellant specifically of *K. Kishan (Supra)* is not applicable since that case was based on Arbitral award which is not the case herein. The Respondent No. 1 amplified that in the matter of *K. Kishan (Supra)*, the demand notice under Section 8 of the Code was issued by the Operational Creditor on the basis of final award delivered by the Arbitral Tribunal in favour of the Operational Creditor, whereas in the present case the Respondent No. 1 filed the application under Section 9 of the Code based on unpaid invoices and therefore, the same has got no relevance in the present case.

35. The Respondent No. 1 reiterated that the Corporate Debtor is not financial sustainable entity and as per annual financial statements of the Corporate Debtor for the financial year 2021, the company incurred heavy loss

of Rs. 1761 Crores and the company had accumulated loss from operation amounting to Rs. 7,176 Crores which resulted in complete erosion of the net worth of the Corporate Debtor. The Financial statement of the year 2020-21 also reveal that the total outstanding loans not paid by the Corporate Debtor was of Rs. 1413 Crores payable to banks and Rs. 5,688 Crores payable to the financial institutions.

36. The Respondent No. 1 also submitted that all the assets owned by the Corporate Debtor are mortgaged with the bank and therefore the revival of the Corporate Debtor is practically impossible.

37. Concluding his arguments, the Respondent No. 1 requested this Appellate Tribunal to dismiss this Appeal with exemplary costs.

Finding

38. From the above averments, the following issues emerges :-

- a) Whether there were any pre-existing disputes between the parties prior to the issue of demand notice issued under Section 8 of the Code by the Respondent No. 1 to the Corporate Debtor on 16.08.2019.
- b) Whether the arbitration case pending before the Hon'ble High Court of Delhi has any impact on Section 9 application under the Code by the Respondent No. 1 which is subject matter of the present appeal before this Appellate Tribunal.

c) Whether, the work completion certificate dated 09.05.2019 was rightly relied upon by the Adjudicating Authority.

39. These issues and other issues raised in the appeal are inter-connected and inter- dependent and hence we shall deal all the relevant issues conjointly in the following discussions.

40. We will go through some of cited judgments by the Appellant which reads as under :-

a) ***K. Kishan v. Vijay Nirman Co. (P) Ltd., (2018) 17 SCC 662***

b) ***M/s Annapurna Infrastructure Pvt. Ltd. vs. M/s Soril Infra Resources Ltd. in Company Appeal (AT) (Insolvency) No. 32 of 2017.***

41. The first case is of ***K. Kishan v. Vijay Nirman Co. (P) Ltd.,*** which reads as under :-

“27. We repeat with emphasis that under our Code, insofar as an operational debt is concerned, all that has to be seen is whether the said debt can be said to be disputed, and we have no doubt in stating that the filing of a Section 34 petition against an arbitral award shows that a pre-existing dispute which culminates at the first stage of the proceedings in an award, continues even after the award, at least till the final adjudicatory process under Sections 34 and 37 has taken place.”

(Emphasis Supplied)

In this connection we will like to take into consideration the background of the case which has been captured in initial paras. This judgment was passed by Hon'ble Supreme Court of India in the matter of **K. Kishan Vs. Vijay Nirman Company Private Limited** [(2018) 17 SCC 662], which reads as under :-

“M/s Vijay Nirman Company Pvt. Ltd. (the respondent) entered into a subcontract agreement with one M/s Ksheerabad Constructions Pvt. Ltd. (KCPL) on 1-2-2008, to undertake 50% of Section 2 work of "Construction and widening of the existing two-lane highway to four lanes on NH 67 at km 190000 to km 218215 admeasuring a total of 28.215 km for and on behalf of KCPL." Apart from this Agreement, a separate agreement of the same date was entered into between the said KCPL and one M/s SDM Projects Pvt. Ltd., Bangalore, as a result of which, a tripartite memorandum of understanding was entered into on 9-5-2008 between KCPL, M/s SDM Projects Pvt. Ltd. and the respondent.

During the course of the project, disputes and differences arose between the parties and the same were referred to an Arbitral Tribunal, which delivered its award on 21-1-2017. One of the claims that was allowed by the said award was in favour of the respondent for a sum of Rs 1,71,98,302 which arises out of certain interim payment certificates. Another claim that was allowed related to higher rates of payment in

which a sum of Rs 13,56,98,624 was awarded. Three cross-claims that were made by the respondent were rejected.

A notice dated 6-2-2017 was sent by the respondent to KCPL to pay an amount of Rs 1,79,00,166. This notice was stated to be a notice under Section 8 of the Code.

Within 10 days, by a letter dated 16-2-2017, KCPL disputed the invoice that was referred to in the said notice, stating that the said amount was, in fact, the subject-matter of an arbitration proceeding, and as per KCPL's accounts, the respondent was liable to pay larger amounts to them.

After the notice and reply, on 20-4-2017, a Section 34 petition was filed by KCPL under the Arbitration and Conciliation Act, 1996 (the A&C Act) challenging the aforesaid award. This petition was filed within the period of limitation set down in Section 34(3) of the A&C Act. It is only thereafter that a petition was filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 (the Code), on 14-7-2017.

The issue involved in this appeal was whether the Insolvency and Bankruptcy Code, 2016 can be invoked in respect of an operational debt where an arbitral award has been passed against the operational debtor, but which has not yet been finally adjudicated upon?"

(Emphasis supplied)

Thus, we find that above cited case is based on fact that the Demand Notice was based on the Arbitral Tribunal which was challenged under Section

34 of the Arbitration Act unlike in the present appeal where the Demand notice and Section 9 is on the basis of unpaid invoices.

We will refer to another cited judgment of Hon'ble Supreme Court of India in the matter of ***M/s Annapurna Infrastructure Pvt. Ltd. vs. M/s Soril Infra Resources Ltd.***, which reads as under :-

“26. Under Sec. 36 of the Arbitration Act, an arbitral award is executable as decree but it can be enforced only after the time for filing the application under Sec 34 has expired and no application is made or such application having been made has been rejected That means, the arbitral award reaches finality after expiry of enforceable time under Sec. 34 and/or if application under Section 34 is filed and rejected”

(Emphasis Supplied)

The above cited case referred to the situation where decree based on Arbitral Award could have been executed only after the time for filing Section 34 has expired. In the present appeal Section 9 was not filed based on the Arbitral Award as discussed earlier was pressed for unpaid invoices after completion of work for which completion certificate was issued by the Corporate Debtor.

42. We also note another judgements passed by Hon'ble Supreme Court in the matter of Union of India Vs. Cipla Ltd., [(2017) 5 SCC 262] in this regard which reads as under :-

"155...The decisions referred to clearly lay down the principle that the Court is required to adopt a functional test vis-à-vis the litigation and the litigant. What has to be seen is whether there is any functional similarity in the proceedings between one court and another or whether there is some sort of subterfuge on the part of a litigant. It is this functional test that will determine whether a litigant is indulging in forum shopping or not"

(Emphasis Supplied)

43. As regard allegation above forum shopping by the Respondent No. 1 (discussed earlier), we note that judgment in the matter of ***Parsoli Motors Works Pvt. Ltd. Vs. BMW India Pvt. Ltd.*** [(2023) ibclaw.in 02 HC] give suitable explanation passed by the Hon'ble High Court of Delhi in para 47, which reads a under :-

"47. In this context, it may be observed that it is not a case where there are no arbitrable disputes. The parties may have approached NCLT or other Forums but the scope of adjudication before each of these Fora is independent and merely because the petitioner had approached Competition Commission of India or is a corporate debtor in the proceedings before the NCLT, cannot be held to be a bar to raise the disputes for adjudication by way of arbitration."

(Emphasis Supplied)

44. We also take note of the part IV of demand notice dated 16.08.2019 issued under Section 8 of the Code by the Respondent No. 1 to the Corporate Debtor. In part IV, the Respondent No. 1 specifically asked for pendency of any suit or arbitration proceedings in relation to any pre-existing disputes before the receipt of any demand notice dated 16.08.2019. However, in the reply dated 29.08.2019 no specific reference of any pending arbitration case or suit, has been given and reference were given only to their alleged deficiency of services address to the Respondent No. 1 in their correspondence made earlier especially with regard to alleged slow progress by the Respondent No. 1.

45. We further note from the said part IV of application that the Respondent No. 1 specifically brought to the notice of their petition filed before the Hon'ble High Court of Delhi vide petition number O.M.P. (Comm.) No. 262 of 2019 under Section 9 of the Arbitration Act. As such we do not find any force in the arguments of the Appellant that the Respondent No. 1 concealed the fact regarding arbitration before the Adjudicating Authority.

46. During averments before us, the Respondent No. 1 submitted that the entire work was completed on 31.03.2018 and there was a clause regarding DLP. We note that Clause 13 of SCC contained the clause of DLP which reads as under :-

“Defect liability period applicable for this contract is 12 months from the date of completion of work as per certificate of ‘Engineering –in-charge’.

Since, the work was completed on 31.03.2018, the DLP period could have been upto 31.03.2019. After this date, the Respondent No. 1 became entitled to get back his to PBG given to the Corporate Debtor. We note from the averments that the Respondent No. 1 has been requesting the Corporate Debtor to return his PBG but the Corporate Debtor instead of returning was insisting to extend the same and the Respondent No. 1 was apprehensive that the PBG might be illegally encashed by the Corporate Debtor. In order to protect such action by the Corporate Debtor, the Respondent No. 1 moved the petition under Section 9 of the Arbitration Act before the Hon’ble High Court of Delhi and stay of invocation of PBG was granted on 20.08.2019.

We find merits in the arguments of the Respondent No. 1 that after the DLP Period was over on 31.03.2019 and for non-returning of PBG by the Corporate Debtor, the Respondent No. 1 had to move petition before the Hon’ble High Court of Delhi as independent contractual remedy and this cannot be termed as forum shopping.

47. As regards, the financial viability of the Corporate Debtor, we have carefully noted averment made by the Respondent No. 1 that the Corporate Debtor could not pay fee even to the Arbitral Tribunal. In this connection we

referred to the minutes of Arbitral Tribunal held on 20.04.2021 in part 2 which reads as under :-

“15. The consequence of the above is that the Respondent's counter claim cannot be proceeded with. The Tribunal has fixed hearing for 9 days (18 sessions) in the month of May, 2021 and therefore, the Tribunal grants one more opportunity to the respondent to deposit with the Tribunal its outstanding share of fee in terms of Procedural Order No. 1 and Procedural Order No. 3 by 05.04.2021 failing which the proceedings relating to Respondent's counter claim shall stand terminated. The matter shall then proceed only in relation to Claimant's claim.

16. In the event of Respondent not depositing its share of fee as noted above by 05.04.2021, the Claimants are directed to deposit the entire Reading fee and fee for writing Order in terms of Procedural Order no. 1 and 3 on or before 30.04.2021.”

(Emphasis Supplied)

48. Now we will take up the issue regarding pre-existing disputes between the parties prior to issue of demand notice under Section 8 of the Code on 16.08.2019. Dispute is not mere denial and dispute should be in accordance with the Section 5(6) of the Code.

49. It has been the case of the Respondent No. 1 that alleged pre-existing dispute were raised for the first time by the Corporate Debtor in his reply to petition filed under Section 9 of the Arbitration Act before the Hon'ble High Court of Delhi. Since, the Corporate Debtor raised issues regarding contractual breaches and disputes, the Respondent No. 1 also had to issue notice invoking arbitration in compliance with the terms of contract regarding raising of disputes and had to move a suitable application under the Arbitration Act.

We note that the Arbitral Tribunal comprising of Justice R.M. Lodha, Former Chief Justice of India, Presiding Arbitrator, Justice C.K. Prasad, Former Judge, Supreme Court of India, Co-Arbitrator and Justice A.K. Sikri, Former Judge, Supreme Court of India, Co-Arbitrator was constituted and the Appellate Tribunal heard the parties and examined the documents from time to time and finally passed the final award on 22.04.2022 under which, the Corporate Debtor herein was asked to pay Rs. 62.19 Crores as claimed by the Respondent No. 1 herein before the Arbitral Tribunal. The Arbitral Tribunal also awarded a cost of Rs. 3 Crores in favour of the Respondent No. 1 to be paid by the Corporate Debtor. We also note that in the earlier Interim Order dated 29.07.2020 prayer of the Respondent No. 1 was accepted w.r.t. return of performance bank guarantee by the Corporate Debtor by the Arbitral Tribunal.

50. It may also be observed that a suit for arbitration process taken up subsequent to demand notice filed under Section 9 of the Code this cannot be and should not be considered as existence of dispute and therefore, the plea of the Appellant that the arbitration proceedings which has been challenged by the Appellant before the Hon'ble High Court of Delhi and therefore, the Section 9 should not be entertained, is devoid of any legal basis.

51. At this stage, we would like to observe that in the Section 7 (5) (a) of the Code the word 'may' has been used 7(5)(a) as contrast to the word 'shall' in Section 9 (5) (a) which clearly indicates legislative intention i.e., discretion has been given to the Adjudicating Authority in case of Section 7 application whereas Section 9 application no such description has been given. The application filed by the Operational Creditor for initiation of CIRP is required to be admitted by the Adjudicating Authority, if the application is complete in all respect. What is to be proved is that there is non-payment of unpaid operational debt without any pre-existing disputes. It may be pointed out that financial debt is usually secured and backed by due documentation whereas the operational debts are usually unsecured and for shorter period. Thus, the Adjudicating Authority is required to admit the CIRP application under Section 9(2), if the application is complete and there is no payment of unpaid operational debt, invoices have been delivered, no notice of disputes has been

received by the Operational Creditor or there is no record of dispute in the information utility.

52. Other cited judgements of the Appellant are not found helping the cause of the Appellant. We will also like to refer here the landmark judgement of Hon'ble Supreme Court of India caring issue of Pre-existing disputes under the Code. In *Mobilox Innovations P. Ltd. vs. Kirusa Software (P) Ltd.* [(2018) 1 SCC 353]. The Hon'ble Supreme Court of India has stipulated the following test for existence of dispute :-

- a) Whether the Corporate Debtor has raised a plausible contention requiring further investigation which is not a patently feeble legal argument or an assertion of facts unsupported by evidence;
- b) Whether the defence is not spurious, mere bluster, plainly frivolous or vexatious;
- c) A dispute, if it truly exists in fact between the parties, which may or may not ultimately succeed.

53. From the various averments of the parties, we note that prior to issue of demand notice, no formal letter has been written by the Corporate Debtor to the Respondent No. 1 regarding raising any specific disputes on aspect of quality and quantity of work executed under the contracts. In this connection, we have taken note of reply dated 29.08.2019 filed by the Corporate Debtor to demand notice. From the said reply, it seems that the Corporate Debtor has referred to

various communications and Minutes of Meeting (in short ‘MoM’), wherein the Corporate Debtor is stated to have raised the issues regarding slow progress of work, non-mobilisation of adequate manpower etc. In fact, the Corporate Debtor in demand notice 8 has referred to several e-mails and letters regarding their concerns about slow progress of work and thereby invoking clause 33 of GCC for termination of contract which, however was withdrawn and original contract was reinstated.

54. We will refer to detailed discussion in the Impugned Order on the aspect of pre-existing dispute which are reproduced as under :-

“6. On the other hand, the corporate debtor filed a detailed reply submitting that there were pre-existing disputes between the parties as the petition under Section 9 of the Arbitration and Conciliation Act 1996 was pending between the parties before the Hon'ble High Court of Delhi and the Arbitrator was duly appointed. Further, it is submitted that letter of charge dated 26.02.2010, for the Construction of BTG Civil and Structural Work for the Project does not pertain to Respondent as the same is signed and acknowledged by “Elena Power and Infrastructure Limited”. Therefore, the said documents do not pertain to Corporate Debtor and there is no privity of contract between the Operational Creditor and the Corporate Debtor.

7. Further, it is submitted that BTG contract also contains an arbitration clause and as per that, parties were to settle

the same by mutual agreement. It is also submitted that though the Respondent/ Corporate Debtor made the appropriate and corresponding payments, however, the applicant miserably failed to complete the assigned scope of work on various occasions and the Corporate Debtor and its representative & associates repeatedly informed the applicant thereby bringing to its notice the delay caused by Operational Creditor in completion of the assigned work as per the agreement including various other quality issues. This can be verified from the various correspondence mode through e-mails and vide e-mail dated 02.05.2016, the Corporate Debtor had brought to the notice of the Operational Creditor that the following significant checks were pending and were to be completed i.e.

- a) Grid wise Column Alignment First & Second part (verticality)*
- b) Span and diagonal between column.*
- c) Alignment of skirt girder & verticality of stub column.*

8. Sufficient time was provided to them, even adequate and qualified erection welders were not deployed at the elevated structure, there was lot of compromise with the quality of the work by the Operational Creditor, as there were various defects in the same. It is also submitted that vide MoM dated 01.11.2014 the Corporate Debtor expressed its concern over the nonavailability of 250 MT Crane, which the Operational Creditor have to provide in the month of Oct 2014 and the Corporate Debtor also asked the Operational

Creditor to provide the completion programmer in line with the requirement of the Corporate Debtor, but no further progress was made. Subsequently, vide MoM dated 12.11.2014, the Corporate Debtor has expressed his concern on shortage of manpower, especially structural manpower and accordingly, the Operational Creditor was asked to immediate argumentation to meet the target dates. Therefore, vide MoM dated 18.12.2014, 22.12.2014 & 29.01.2015 the Corporate Debtor expressed its serious concern over the poor supervision at the project and repetitive failure on the part of the Operational Creditor for the weekly execution of works completion targets commitments. Vide MoM dated 06.01.2015 the same concern were expressed to the Operational Creditor and this get on repeated the expressed on 03.03.2016, 31.03.2016, 02.04.2016, 07.04.2016, 14.04.2016, 21.04.2016, 05.05.2016, 11.05.2016, 19.05.2016, 26.05.2016, 02.06.2016, 09.06.2016, 17.06.2016, 23.06.2016, 30.06.2016, 07.07.2016, 19.07.2016, 04.08.2016, 11.08.2016, 18.08.2016, 27.08.2016, 01.09.2016, 07.09.2016, 22.09.2016, 01.10.2016, 13.10.2016, 27.10.2016, 03.11.2016, 10.11.2016, 01.12.2016, 08.12.2016, 22.12.2016, 01.01.2017, 12.01.2017, 16.02.2017, 23.02.2017, 09.03.2017, 23.03.2017, 13.04.2017, 04.05.2017, 11.05.2017, 25.05.2017, 08.06.2017. Thus, there were constant delay and deficiency of services on the part of the Operational Creditor in completing the project site and the Corporate

Debtor was constrained to issue e-mail on 22.01.2016, however, the Operational Creditor vide e-mail dated 23.01.2016 denied their liability and requested the Corporate Debtor to withdraw their termination requests, even after repeated representations and assurance to provide best services by the Operational Creditor, the Operational Creditor still lacked in completing the work of the Corporate Debtor. The Corporate Debtor vide e-mail dated 22.02.2016 had brought to the notice of the Operational Creditor that the mobilization of manpower and machineries till date was not enough to cater the required work pace to achieve the agreed work completion plan. It is further submitted, vide letter dated 27.07.2017, the present director stated that the work of waterproofing as guaranteed was done, but there was leakage from the roofs of various building, at the project site. Hence, the work done by the Operational Creditor was of poor quality and in violation of the contract.

13. From the aforesaid decision, it is clear that the existence of 'Dispute' must be 'pre-existing' i.e. it must exist before the receipt of the demand notice or invoice. If it comes to the notice of the Adjudicating Authority that the 'operational debt' is exceeding Rs. 1 lakh and the Application shows that the aforesaid debt is due and payable and has not been paid, in such case , in absence of any 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', the

Application under Section 9 cannot be rejected and is required to be admitted.

*14. On a cojoint reading of the provision envisaged under Section 9 of the Code, 2016 and **the Mobilox Innovations (Supra)**, we are of the considered opinion that it is a settled preposition that the adjudicating authority must follow the mandate of Section 9, as outlined above, and in particular the mandate of Section 9(5) of the Act, and admit or reject the application, as the case may be, depending upon the factors mentioned in Section 9(5) of the Act.*

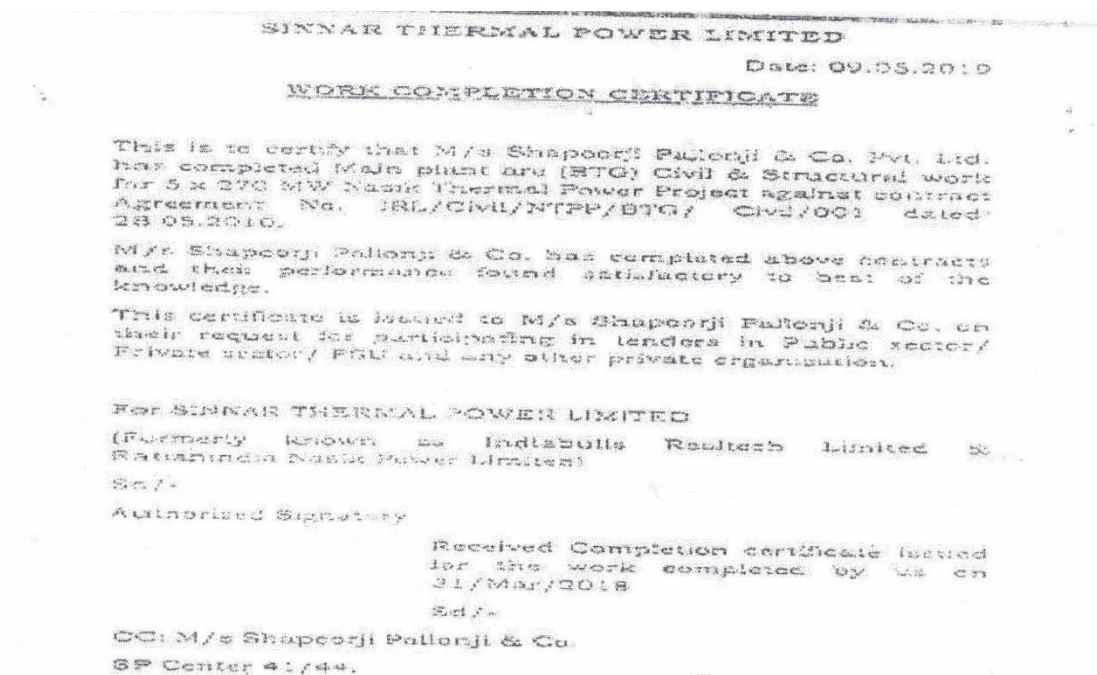
15. Adverting to factual matrix of the present case, we are satisfied that present petition is complete as per the provisions of Code, 2016 read with rules made thereunder, outstanding operational debt claimed in part IV of Form-5 of the petition is above the pecuniary threshold limit as envisaged under Section 4 of the Code, 2016 and duly supported by Agreement dated 28.05.2010 and addendums thereto, Running Account Bills and other ancillary documents, therefore, the requirements as envisaged under Section 9(5)(i)(a), 9(5)(i)(b) and 9(5)(i)(c) of the Code, 2016 are satisfied.

*16. The only issue this Adjudicating Authority have to determine is **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?*

17. It is apparent from the records that the corporate debtor had rwt raised any substantial objection or dispute pertaining to the work performed by the Operational Creditor prior to the issuance of the demand notice dated 16.08.2019. It was on 29.08.2019 when the corporate debtor had responded for the first time in its reply dated 29.08.2019 to the demand notice issued by the Operational Creditor under Section 8(1) of I&B Code raising dispute making reference to its own communications to establish that there is deficiency of services and the works were incomplete by the applicant, consequent of which that alleged operational debt is disputed.

18. As a preface to our analysis, we observe that the concerns raised by the corporate debtor in the communications referred by the corporate debtor in its reply were addressed by the applicant to the full satisfaction of the corporate debtor, resultant to which the corporate debtor had issued completion certificate dated 09.05.2019 to the applicant. It is pertinent to note here that by then the Defect Liability Period of 12 months had already expired. Further, call period of two months beyond the expiry of the Defect Liability Period was also over without raising any dispute by the corporate debtor regarding any defects in work completed by the applicant. This evidently proves that if there were any discrepancies, the applicant could not have obtained Work Completion Certificate from the corporate debtor with a remark that the applicant performance was found satisfactory to the best of their

knowledge. This also shows that all the defects, if any, pointed out by the corporate debtor have been timely rectified within the appropriate time, so that the corporate debtor found it appropriate to issue the Work Completion Certificate, otherwise, the corporate debtor would not have issued an incorrect certificate. Therefore, the corporate debtor is estopped from raising the plea of the pre-existing dispute between the parties. The work completion certificate dated 09.05.2019 is as below:-



(Emphasis Supplied)

55. We note that the Adjudicating Authority has taken all efforts to go into every detail of the reply of the Corporate Debtor including reference to their

various e-mails, other correspondences regarding slow progress of work, etc., and only after detailed analysis, the Adjudicating Authority came to conclusion that the Corporate Debtor has not raised any substantial objection or dispute pertaining to work performance by the Operational Creditor prior to issuance of demand notice dated 16.08.2019.

56. In Civil contract for construction of certain civil facilities like in the present case of BTG and OBTG contracts, what is to be seen is that the work has been completed and there has been no issues regarding quality or quantity of the services. Mere allegations regarding less mobilisation of manpower or regarding delay during the contract which was ultimately completed to the satisfaction of the Corporate Debtor for which the completion certificate, without any caveat or qualifications or conditions was issued to the Financial Creditor, such allegations may not fall in the definition of dispute under Section 5(6) of the Code and also will not meet the test as stipulated by the Hon'ble Supreme Court of India in the *Mobilox Innovations P. Ltd. (Supra)*.

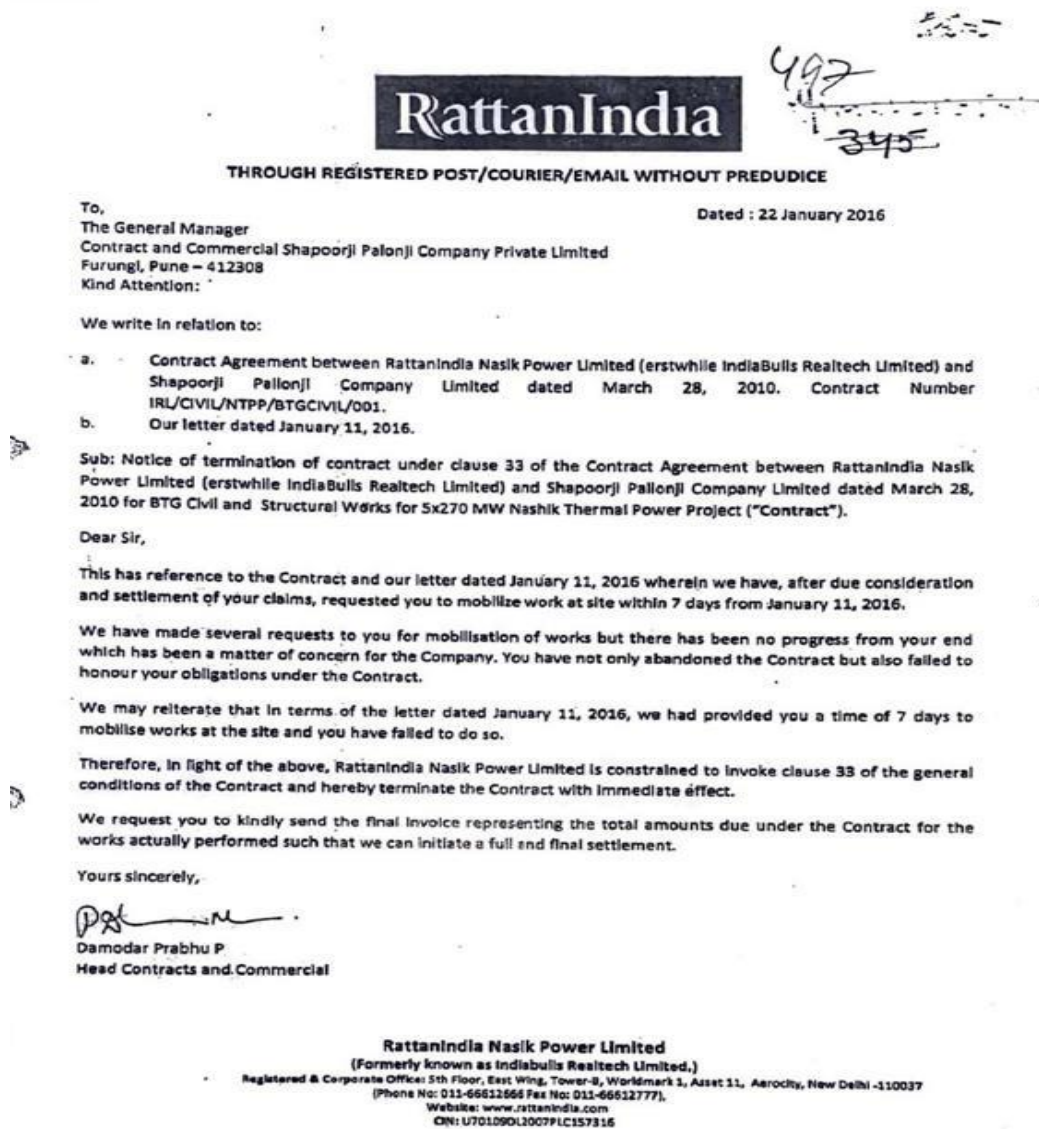
57. It may also be kept in view that the Adjudicating Authority is conducting summary proceedings and is not expected to go in detailed scrutiny of evidence. The Adjudicating Authority should look into whether the dispute tantamount to be substantial, genuine and bona-fide and not spurious, speculative, illusory or misconceived. The Adjudicating Authority at the stage of admission of CIRP is not expected to hold a full trial in the matter and it must be decided whether the

ground appears to be substantial. However, it is also a settled law that if such operational debt are bona-fide disputed on substantial ground, the Adjudicating Authority ought to dismiss the petition and such parties are required to seek other alternative legal recourse.

58. It is pertinent to note that both GCC and SCC provided for specific clause regarding “Engineer-In-Charge” whose job was to look into matter of dispute raised and the same was appointed by the Corporate Debtor as owner of the project. We have noted from the averments, that no such dispute was ever referred to such Engineer-In-Charge. This fact also goes against the cause of the Appellant, who has taken the plea of pre-existing dispute and it is felt that when such specific provision did exist in the contracts, the Corporate Debtor should have raised pre-existing dispute relating to quality of the services if any, which is not found in the present appeal. Hence, we are not inclined to agree to the plea above pre-existing dispute made by the Appellant.

59. At this stage, we would also like to refer to the various communications relating to termination of contract by the Corporate Debtor, reply of the Respondent No. 1 as Operational Creditor and final withdrawal letter of termination by the Corporate Debtor. These letters will be helpful in looking to the aspect of pre-existing disputes which can be covered under section 5(6) of the Code as well as under Section 9 of the Code or otherwise.

60. These communication/ letters pertaining to termination letter, correspondence exchanged and final termination withdrawal letter by the Corporate Debtor, which reads as under :-



From: SANJAY.KARKHANIS

[mailto:SANJAY.KARKHANIS@shapoorji.com]

Sent: Saturday, January 23, 2016 7:54 AM

To: T K Prasad

Cc: MAHIM.LAL; Damodar Venkatesh Prabhu; Rajesh Kumar (Sr.GM - C&C); Subodh Dixit; Sampath Kumaran Narasimha Raghavan
Subject: Re: Letter of contract Termination

Dear Mr Prasad,

It is surprising and shocking to read the contents of the mail. Last week only we had meeting at your office and our talk on phone on Monday wherein we confirmed that we have started mobilisation on site from 1/1/16. We have deputed Mr Thomas Project Manager and Mr Watve Structural steel in charge from 1/1/16. Around 15 staffs are also available onsite.

We completed Labour Camp and Batching Plant was also made ready. Any one on site can see it. Labour Contractors were also finalised for steel work. All the fabricated steel members were identified and numbered for erection.

We were waiting for Cement and Steel to be delivered from your end to site which was committed by 1/01/16.

We were also waiting for Amendment and Payment release which was assured to us before restart of the work.

We believe in Partnership concept and quality service. We have supported you from day one till now against all odds like delay/ Non release of payments, Delay in supply of materials, suspensions of works by incurring huge losses. At Amaravati we have demonstrated above and completed our works which you all are aware.

I strongly feel the spirit of the contract in which we@SP have supported you, the letter saying "Termination of Contract" is painful considering the support and service we have given to you as client both at Nashik and Amaravati.

I request you to please withdraw Termination letter and allow us to complete the works.

Thanks

SYK

TRUE COPY

TRUE COPY

From: Damodar Venkatesh Prabhu <499 ~~Answer R-61~~
damodar.prabhu@rattanindia.com>
Date: 23/01/2016 15:29 (GMT+05:30)
To: "MAHIM.LAL" <MAHIM.LAL@shapoorji.com>, 347
"SANJAY.KARKHANIS" <SANJAY.KARKHANIS@shapoorji.com>
Cc: Subodh Dixit <SDixit@Shapoorji.com>, T K Prasad
<tkprasad@rattanindia.com>, "Rajesh Kumar (Sr.GM - C&C)"
<rajesh.k17@rattanindia.com>, Sampath Kumaran Narasimha Raghavan
<sampath.kumaran@rattanindia.com>
Subject: Request form SPCL mangement to retrive the Letter of
termination

Dear Kharkanis Saheb / Mahimlalji

The termination letter was a last resort after 3 months of trying to resolve the issue with SPCL and we would like reiterate that the RNPL management based on the relation both companies enjoyed had considered the one time settlement beyond the budgetary norms. Now that has got delayed and there has been action initiated by the lenders / LE and we had to go out shopping for the contractors and to the surprise of RNPL management and Lenders we have received interest to work with value much lesser to that we had committed to SPCL due to our relation. Now there is a drive form the lenders that we need to perceive this mode with new contracts and they don't want any exposure beyond the contract for both projects. Second concern surely being the delay of the project due to this procrastination on decision to mobilize by SPCL.

So after getting the market norms, there is little doubt to the RNPL management that SPCL will not be interested to complete this job as there is profitability involved in the execution. Therefore we would want you to accept the letter unconditionally so that we can put up the request to the management & lenders as said in the letter attached.

The hard copy of the letter will be reaching you by registered post very soon.

Thanks and warm regards

Damodar Prabhu P

Head Contracts and commercial

TRUE COPY

TRUE COPY



500
Amravati-R-62
348

THROUGH REGISTERED POST/COURIER/EMAIL WITHOUT PREJUDICE

To,
The General Manager
Contract and Commercial Shapoorji Pallonji Company Private Limited
Furungi, Pune - 412308
Kind Attention:

Dated : 23 January 2016

Dear Mr. Mahimlal

Ref: SPCL contract No. IRL/Civil/NTTP/BTGCIVIL/001

Our Letter dated January 11, 2016

Our Termination letter dated Jan 22, 2016

Your Request letter dated Jan 22, 2016 with Ref SP/PRO/RNPL/PPS/15-16/366

Sub: Regarding request by SCPL to call back the termination letter served to them on 22nd Jan 2016

This has references to the above we would like to bring to your notice that the pre start confirmation letter which has been sent by you on 22nd Jan 2016 again indicates conditions and statements which were not part of the discussion mentioned by you between the managements on 15th December 2016.

We would like to reiterate the discussion which were held on the above referred day was as follows

1. An amount of 20 crores would be paid in proportion to work done beyond the contractual completion date of October 2012 to completion of work
2. An amount of Rs 1 Cr would be paid as bonus on completion of work as agreed
 - a. All bunkers structures with silos and operating floors by End September 2016
 - b. All major foundations by End October 2016
 - c. All civil works by End March 2017
3. Amount of Rs. 2.5 crores would be paid for Amravati as per existing arrangement dated 1st Dec 2014
4. All accepted amendments due at Nasik shall be facilitated and completed by RNPL
5. Release of 50% of the due payments immediately after sufficient mobilization of manpower and tools and plants. Subsequent 50% shall be paid in the due course of time.

There was no further discussion other than the above points. Subject to your unconditional acceptance of this letter we will request our lenders and management to reconsider the retrieval of the notice to terminate the contract. All terms and conditions of the contract shall remain the same.

Yours faithfully,

Damodar Prabhu P
Head Contracts and commercials

RattanIndia Nasik Power Limited
(Formerly known as Indiabulls Realtech Limited.)

Registered & Corporate Office: 5th Floor, East Wing, Tower-B, Worldmark 1, Asset 11, Aerocity, New Delhi - 110037
(Phone No: 011-66612565 Fax No: 011-66612777),
Website: www.rattanindia.com
CIN: U70109DL2007PLC157316

TRUE COPY

501



349

SP/PRO/RPNL/PPS/15-16/366
RattanIndia Nasik Power Limited
5th Floor, Tower B,
Worldmark 1, Asset 1, Aerocity,
New Delhi, 110037

25th January 2016

For the attention of Mr. Damodar Prabhu P

Dear Sir,

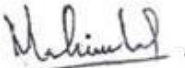
Project: - Civil & Structural work for proposed 5*270 MW at Musalgaoon, Sinner, District Nasik
Subject: - Resumption of works.

We refer to your letter dated the 23rd January 2016 and we accept that content of your letter is accepted as a record of our meeting dated 16th December 2015 between the managements of both organizations; accordingly can we please request that the Notice of termination of Contract dated 22nd January 2016 is now withdrawn.

We confirm that we shall abide by the terms of your letter dated the 23rd January 2016 and that we shall re-commence the Works in accordance, and subject to, the terms and conditions of the Contract

Yours Faithfully

For Shapoorji Pallonji & Co. Pvt Ltd.


(Mahim Lal)



CC : Mr.TK Prasad, RNPL



Shapoorji Pallonji & Co. Pvt. Ltd.
Regional Office : SP Infocity, Incubator No. 4, Pune - Saswad Road, Fursungi, Pune - 412 308.
Maharashtra, INDIA. (T) : +91 20 66725000 (F) : +91 20 66725001. Website : www.shapoorji.in
Registered Office : 70 Nagindas Meher Road, Fort, Mumbai - 400 023.
CIN-U45200MH1943PTC003812



ENGINEERING &
CONSTRUCTION

TRUE COPY

RattanIndia

Ref: RNPL/SPCL/15-16/1453

Date: - 26.02.2016

M/s. Shapoorji & Pallonji Co. Ltd., Nashik.
Attn: Mr John Thomas, DGM - Projects

Sub: - Slow Pace of Work in Unit 3, 4 & 5 in BTG civil and structural work

Ref: - 1. Contract No: 3320000190
2. Your letter No. SPCL/IPPS/15-16/05 dtd. 4th Feb'16.
3. Approved completion plan for units 3, 4 and 5.

Dear Sir,

This is with reference to the above subject; please note that the mobilization of manpower and machineries till date is not enough to cater to the required work pace to achieve the agreed work completion plan. This can be seen from the following facts and figures.

Activity	Plan for the February'16	Achieved till 25 th Feb'16
Concrete	959 Cum	390 Cum
Fabrication	456 MT	5 MT
Erection	445 MT	82 MT
Completion of foundation	Mill foundation for Mill A, B, E and F for unit 3	Only Foundations for E and F mill are ready

From the above, it is very clear that you will not be able to achieve the targeted quantity by the end of this month and this will create the huge work demand in next month. We would like to inform you that all other agencies for unit 3, 4 and 5 like turbine erection agency; Electrical & C&I work, are finalized and already mobilized at site. In order to make the front available for these agencies, you need to complete the work on priority and handover the same to respective agencies in time, as per agreed time frame.

Lot of work fronts like Coal Bunkers for unit 3, 4 & 5 transformer yard unit 3, 4 & 5, Unit 4 & 5 UCR are still lying untouched and can be taken up in parallel. In view of the upcoming monsoon, we required you to push your efforts to complete all outside Brickwork & plastering, roof water proofing works, fixing of doors, rolling shutters, ventilators & windows and all major balance structural erection where maximum output can be achieved without any hindrance from rain.

As per your recent discussion on 23rd Feb 2016 with our DMD, it was agreed by you to mobilize the additional manpower as required for completing the works at all the fronts.

You are once again requested to augment the manpower and material resources immediately so as to complete all the works as planned.

Thanking you,

Yours truly,

For RattanIndia Nashik Power Limited


26/2/2016
Authorized Signatory

RattanIndia Nashik Power Ltd
(Formerly Known as Indiabulls Realtech Ltd.)

CIN U70109DL2007PLC157816

Site office: Indiabulls Realtech Limited (SEZ - Co-Developer), Indiabulls Industrial Infrastructure Limited (Multi-product SEZ), Village - Mustalgan Gulvanah, Taluka Sinnar, Nashik, Maharashtra - 422103

Registered Office: M-62 & 63, First Floor, Connaught Place, New Delhi - 110 001

TRUE COPY

61. From the letter dated 22.01.2016 written by the Corporate Debtor to the Respondent No. 1, it is seen that letter was written on “mobilisation work” w.r.t. progress of the work and nowhere any other aspect of disputes have been mentioned. In the response to the same, the Respondent No. 1 replied the Corporate Debtor vide e-mail dated 23.01.2016, refuting the content and indicating action taken to mobilise resources and further raised the issue regarding pending payments to be released by the Corporate Debtor to the Respondent No. 1. This was followed with the communication from the Corporate Debtor on 23.01.2016, giving outcome of discussion with the Respondent No. 1 relating to payment to be made by the Corporate Debtor and mobilisation of manpower and tools and plants to be made available by the Respondent No. 1. The content of the letter was confirmed by the Respondent No. 1 vide their letter dated 25.01.2016 and finally the Corporate Debtor withdrew the termination letter. Thus, we find from above correspondence that the issue was regarding release of payment by the Corporate Debtor and in turn mobilisation of resources especially manpower and tools and plant by the Respondent No. 1 for which the termination letter was issued and subsequently withdrawn.

Thus, we do not find any issue raised by the Corporate Debtor regarding quality or quantity of services resulting into pre-existing disputes hence, on the contention of the Appellant that the work was terminated indicates pre-existing

disputes, we do not find much substance to this argument of the Appellant. In fact, the termination letter was withdrawal by the Corporate Debtor and original contract was restored.

62. In view of detailed discussions this Appellate Tribunal do not find any error in the finding of the Adjudicating Authority on the aspect of pre-existing dispute.

63. Yet another issue which has been raised by the Appellant is regarding admissibility of the completion certificate issued dated 09.05.2019 by the Corporate Debtor to the Respondent No. 1. The Appellant has taken two-fold argument i.e., the completion certificate was not formerly part of the original pleadings before the Adjudicating Authority and the Respondent No. 1 tried to get it included by filing CA No. 503 of 2019 seeking permission from the Adjudicating Authority to file additional document of the completion certificate dated 09.05.2019, which was rejected by the Adjudicating Authority.

Second argument of the Appellant is that the completion certificate was issued with Caveat that this was being issued at the request of the Respondent No. 1, therefore, cannot be relied upon.

64. In this connection, we would like to refer to the completion certificate issued by the Corporate Debtor to the Respondent No. 1 which reads as under :-

True typed copy 141 7

SINNAR THERMAL POWER LIMITED
Date: 09.05.2019

WORK COMPLETION CERTIFICATE

This is to certify that M/s Shapoorji Pallonji & Co. Pvt. Ltd. has completed Main plant are (BTG) Civil & Structural work for 5 x 270 MW Nasik Thermal Power Project against contract Agreement No. IRL/Civil/NTPP/BTG/ Civil/001 dated: 28.05.2010.

M/s Shapoorji Pallonji & Co. has completed above contracts and their performance found satisfactory to best of the knowledge.

This certificate is issued to M/s Shapoorji Pallonji & Co. on their request for participating in tenders in Public sector/ Private sector/ PSU and any other private organization.

For SINNAR THERMAL POWER LIMITED
(Formerly known as Indiabulls Realtech Limited & Rattanindia Nasik Power Limited)
Sd/-
Authorized Signatory

Received Completion certificate issued for the work completed by us on 31/Mar/2018.
Sd/-

CC: M/s Shapoorji Pallonji & Co.
SP Center 41/44.

True copy
A.

8
142

Mumbai,
Maharashtra - 400 005

SINNAR THERMAL POWER LIMITED
(Formerly known as Indiabulls Realtech Limited & Rattanindia Nasik Power Limited)
Regd. Office - A- 150-151, Ground Floor, K.H. No. 407, A Block, Mahipalpur Extension, New Delhi - 110037

65. For this issue, we observe that the Adjudicating Authority has recorded following while dismissing the CA No. 503 of 2019

ORDER

“CA No. 503/2019 is an application filed by the Operational Creditor, seeking to place on record the additional documents which is to be placed on record and relied upon by the Operational Creditor and Page No. 6 is supposed to be work completion certificate. The original documents annexed with the typed copy is not readable/legible at all. In view of the same, CA No. 503/2019 is dismissed...

(Emphasis supplied)

66. Thus, it seems that the CA No. 503 of 2019 was dismissed since this was not readable/ legible. As regard, other argument the completion certificate dated 09.05.2019 was issued to the Respondent No. 1 based on their request for participating in tenders in public and private sector, PSUs or any other private organisations and therefore, this should be treated as Caveat and should not be relied upon. In this connection, on a pointed query by this Appellate Tribunal put to the Appellant, the genuineness and issuance of the work completion certificate was not denied by the Appellant. We note that the Corporate Debtor has issued completion certificate on 09.05.2019 prior to issue to demand notice on 16.08.2019 stating that the Respondent No. 1 has completed the contract and their performance was found satisfactory.

We find that the completion certificate was unqualified and without raising any issue regarding quality or quantity or progress of the work by the Respondent No. 1. Merely the fact that the certificate was issued at the request of the Corporate Debtor, the existence and validity and impact of the same cannot be denied at this stage by the Corporate Debtor. Thus, the work completion certificate was rightly taken into consideration by the Adjudicating Authority in their analysis and we do not find any error on the same.

67. We are conscious of the fact that completion of project in time along with requisite quality is the heart of the contract management. It can be no one's case that extra-ordinary delay which changes viability of the project can be simply brushed aside and should not be taken into consideration while deciding Section 9 application under the Code by the Adjudicating Authority. However, we need to acknowledge the fact in commercial world, occasional delay may happen and may be attributable to both parties. In instant case, we have seen that the Corporate Debtor raised issues regarding slow progress and less mobilisation of manpower, tools and plants whereas in reply to the Corporate Debtor, the Respondent No. 1 has been categorically stated that due payment in order to mobilise resources at site has not been paid by the Corporate Debtor. Hence, what is to be seen here whether delay was on account of only one party and whether such delay effected the project. We also need to factor into consideration if finally, project was completed to satisfaction of the Corporate

Debtor and whether the same was accepted by the Corporate Debtor without any caveats and qualification. In the instant appeal we note carefully that the Corporate Debtor issued the completion certificate (already discussed in detailed by us earlier) without any reservation and to full satisfaction to the Corporate Debtor. In such background, the alleged delay during course of execution of contracts, cannot be treated as an issue which may adversely affect rights of the Operational Creditor under Section 9 of the Code. We clarify position on delay/ slow progress during contract period accordingly.

68. After detailed analysis, we do not find any error in the Impugned Order.

69. In fine, the appeal, devoid of any merit, stand dismissed. No Costs. Interlocutory Application(s), if any are Closed.

[Justice Rakesh Kumar Jain]
Member (Judicial)

[Mr. Naresh Salecha]
Member (Technical)

Sim