

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL**  
**NEW DELHI**

**Company Appeal (AT) (Insolvency) No. 288 of 2019**  
**[ arising out of Order dated 20<sup>th</sup> February, 2019 by NCLT, Hyderabad Bench, Hyderabad in CP (IB) No. 413/9/HDB/2018 ]**

**IN THE MATTER OF:**

**M/s. Jyoti Ltd.**

**...Appellant**

**Versus**

**M/s. Prasad & Company (Project Works) Ltd.**

**...Respondent**

**Present:**

**For Appellant :**                    **Mr. Alok Dhir, Ms. Varsha Banerjee and Ms. Juhi Bhambhani, Advocates**

**For Respondent:**                **Mr. Abhay Kolte, Advocate**

**J U D G M E N T**

**SUDHANSU JYOTI MUKHOPADHAYA, J.**

The Appellant – ‘M/s. Jyoti Limited’ (Operational Creditor) filed an application under Section 9 of the ‘Insolvency and Bankruptcy Code, 2016 (for short, ‘the I&B Code’) for initiation of ‘Corporate Insolvency Resolution Process’ against ‘M/s. Prasad & Company (Project Works) Limited’ (Corporate Debtor) alleging the default on the part of the ‘Corporate Debtor’ for repaying a sum of Rs.2,97,79,977.24 as on 10<sup>th</sup> December, 2016 along with interest w.e.f. 25<sup>th</sup> May, 2018 till date of realization. The Adjudicating Authority (National Company Law Tribunal), Hyderabad Bench, Hyderabad by impugned order dated 20<sup>th</sup> February, 2019 rejected the application with the following observations :

“FINDINGS

14. *It is not in dispute 25% of the retention money to be paid after erection, commissioning and trial run. The rest of the purchase Order was completed. 75% of the amount covered by the Purchase order was also paid. The contention of Operational Creditor, as completion of project was delayed only on account of Corporate Debtor, then it is entitled to claim retention money as per the terms of payment. It is the duty of Operational Creditor to prove that there is a debt due by the Corporate Debtor and it has committed default. The money deducted towards 25% of the purchase Order under each invoice was calculated and contended this amount became due and payable by the Corporate Debtor in terms of Purchase Order. The contention of Counsel for Operational Creditor that it is not in dispute Corporate Debtor had not paid 25% of the retention money. However, Corporate Debtor is contending that the Operational Creditor has not completed the rest of the contract as per Purchase order and therefore, there was no liability to pay the same to the Operational Creditor.*
15. *The contention of the Learned Counsel for Operational Creditor that it is not responsible for any delay. Counsel contended, Operational Creditor is ready to erect, commission and trial run the equipment as per the terms of payment but site is not handed over to the Operational Creditor by Corporate Debtor. If delay is occurred on account of Corporate Debtor then Operational Creditor is*

*entitled at least 20% of the retention money in terms of payment of the purchase order. The question whether delay occurred on account of Corporate Debtor. Admittedly, Corporate Debtor was given contract for completing the project for Majalgaon Lift Irrigation System on Turn Key Basis and equipment was transported to the project site. At that stage authorities of Government of Maharashtra issued order suspending the work. It is an unforeseen event. Parties to the Purchase order did not visualize such an event will take place. In the normal course if there is no suspension order, Operational Creditor can erect, commission and trial run the equipment. In case in the normal course, delay occurred on account of Corporate Debtor for completing the project on any ground other than the ground now referred to, then it can be said the retention money becomes due up to 20% and if not paid it amounts to default.*

*16. The situation is otherwise. Without any fault from the side of Corporate Debtor concerned authorities of Government of Maharashtra issued order of suspension of the project work. The Corporate Debtor cannot be blamed for the suspension order passed by the authorities of Government of Maharashtra. The suspension order does not show that it was issued on account of failure on the part of Corporate Debtor to perform its part of the contract given to it by the Government of Maharashtra.*

*17. In fact, it is the case of Corporate Debtor it filed applications to the concerned authorities of Government of Maharashtra to lift the suspension*

*order and allow it to complete the contract. The Authorities of Government of Maharashtra are yet to take a decision. It can be safely said that Corporate Debtor was no way responsible for passing suspension order by the authorities of Government of Maharashtra. Therefore, Corporate Debtor cannot be found fault for the delay.*

18. *The Operational Creditor becomes entitled to retention money of 25% or 20% as the case may be only if it completes the terms of purchase order, especially erection, commissioning and trial run. This part of the contract was not completed. The amount becomes due only if Operational Creditor completes the remaining part of the Purchase Order. Till then, the amount does not become due. When the amount does not become due, then there is no question of default. When there is no debt within the meaning of 3 (12) of IBC, then there is no question of default. Thus, Operational Creditor failed to establish that there is a debt due and payable and it was committed default. As far as IBC is concerned, the Operational Creditor to establish debt as well as default. When these two are not established then petition cannot be admitted. Thus, the petition is liable to be rejected.”*

2. Learned counsel appearing on behalf of the Appellant submitted that the Adjudicating Authority cannot give a specific finding with regard to claim and counter-claim made by the parties. According to him, there is a ‘debt’ and ‘default’ and Form 5 with the application under Section 9 is complete, the Adjudicating Authority was required to admit the application.

3. It was contended that against the total invoice amount of Rs.8,93,47,703/- and an amount of Rs.6,65,26,600/- has been received leaving balance of Rs.2,28,21,103/-

4. It was submitted that the Adjudicating Authority failed to notice that the Appellant established the liability of the Respondent for the outstanding amount due payable by it to the Appellant as mentioned in 'Part-IV of 'I&B Code' of Form 5. Initially, 2 orders namely a purchase order of mechanical components i.e. VT Pump sets along with its equipments etc. and a work order to store, erect, test and commission the mechanical components dated 6<sup>th</sup> July, 2013 were placed by the Appellant to a Joint Venture 'Prasad-Shreehari (JV)'. The total consideration of the purchase order was agreed to the tune of Rs.17,55,25,790/- and the total consideration for the work order was agreed to the tune of Rs. 9,65,39,184.50.

5. Thereafter, an amendment to the 'Purchase Order' as well as the work order was done by the Appellant and the 'Joint Venture' on 26<sup>th</sup> February, 2014 and 10<sup>th</sup> March, 2014 respectively. In terms of the said amendments, the purchase order and work orders were issued on behalf of the 'Corporate Debtor' independently and the total consideration of the purchase order was agreed to the tune of Rs.9,65,39,184.50 and total consideration for the work order was agreed to the tune of Rs. 34,50,815.50. In terms of the said purchase order dated 26<sup>th</sup> February, 2014, the payments were to be made in different instalments, as per the details given in the affidavit. However, it is not necessary to discuss all such details at this stage. As the question arises whether a 'debt' is payable and there is a 'dispute' and there is a 'default' and

if so, whether the application filed under Section 9 of the 'I&B Code' is barred by limitation.

6. The Respondent – 'Corporate Debtor' has taken plea that in terms of the agreed payment 10% advance along with the purchase order were to be made. 65% against supply of equipment at the site after confirmation of 3<sup>rd</sup> party inspection against LC was to be made within 60 days period. Thereafter, 12% against erection of equipment within 30 days was payable. Followed by 13% payable at the stage of trial, commission and completion of three months trial operation of equipment of 30 days. If commissioning gets delayed from the side of 'Corporate Debtor' beyond six months, then 8% was to be released and 5% amount was required to be retained till completion of commissioning.

7. The Respondent accepted that the Appellant raised the invoices and stated that it had deducted 12% amount against erection and 13% amount to be payable after completion of the trial operation. In all the invoices, the Appellant has lastly shown an amount which is stated to be "now Balance Payable". Further according to the Respondent, it has paid the entire amount as shown as "now Balance Payable" by the Appellant in each of the invoices and total invoices amount of Rs. 8,93,47,704/-. The amount equal to 75% of the said amount comes to Rs.6,70,10,780/- but the Respondent has actually paid more than the same i.e. Rs.6,67,58,301/- to the Appellant as per details

given below

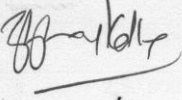
**ANNEXURE-A**

**Details of Amount paid to Jyoti Limited-Vadodara**

**PART - A :**

**TOTAL AMOUNT PAID**

S.NO	DATE	CHEQUE/DD/LC NO	AMOUNT IN Rs.	BANK NAME
1	3.7.2013	DD.NO. 171612	Rs.1,00,00,000	SBI-CAG-PANJAGUTTA - HYD
2	2.5.2014	LC 1303914LC0000164	Rs.10,38,804	SBI-CAG-PANJAGUTTA - HYD
3	23.5.2014	LC 1303914LC0000164	Rs.35,31,788	SBI-CAG-PANJAGUTTA - HYD
4	23.5.2014	LC 1303914LC0000148	Rs.71,24,962	SBI-CAG-PANJAGUTTA - HYD
5	23.5.2014	LC 1303914LC0000148	Rs.26,19,760	SBI-CAG-PANJAGUTTA - HYD
6	25.9.2014	LC 1303914LC0000270	Rs.3,41,55,167	SBI-CAG-PANJAGUTTA - HYD
7	29.11.2014	LC 1303914LC0000589	Rs.88,87,820	SBI-CAG-PANJAGUTTA - HYD
8	16.12.2015	Chq.No.865780	Rs.3,00,000	SBH-MAJALGAON
		<b>TOTAL PAID</b>	<b>Rs.6,76,58,301</b>	



8. In the aforesaid background plea has been taken that there is no unpaid invoice, in absence of performance of the Appellant, the Appellant cannot claim payment.

9. Having heard the learned counsel for the parties and from perusal of the records, we find that the application under Section 9 was filed by the Appellant only with a view to realise the amount and not for the purpose of 'Corporate Insolvency Resolution Process'

10. Apart from the aforesaid facts that we find that the agreement was reached between the Appellant and a work of Joint Venture i.e. 'Prasad-

Shreehari' but in the petition 'M/s. Prasad & Company (Project Works) Limited has been impleaded as the party-respondent and not the joint venture.

11. Enclosure to Form 5 which has been relied upon by the Appellant before the Adjudicating Authority to claim the dues contains one 'Purchase Order' dated 6<sup>th</sup> July, 2013 which has been sent by 'Prasad-Shreehari (Joint Venture), extract of which mentioned below:

*Amir*

**PRASAD - SHREEHARI (J.V.)**

1, Sai Windavan, Near Mahanubhav Ashram, Palthan Road,  
Itkheda, Aurangabad - 431 005.  
☎ : (0240) 2376648 / 49, 3205444, Fax : 2376656, E-mail : office@sapl.biz

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Ref. No. Prasad-Shreehari JV/MLS/2013-14/01.  
Date: 06/07/2013.

**PURCHASE ORDER**

To,  
M/s. Jyoti Limited,  
Nanubhai Amin Marg,  
Industrial Area, PO Chemical Industries,  
VADODARA - 390 002.

Dear Sir,

Sub: Purchase Order for Supply of Mechanical & Electrical components (VT Pump sets and allied equipments) for "Construction of Majalgaon Lift Scheme from Loni Sawangi Barrage (Sadola Village) Tal Majalgaon Dist Beed" under GMIDC.

Ref: 1) Your Offer Dt. 24.07.2011  
2) Our Letter of Intent Ref No. PSJV /MLS/2012-13/ 15 Dt. 19/04/2012




With reference to your offer & our letter of intent, we are pleased to place this Purchase Order for Supply of Mechanical & Electrical components (VT Pump sets and allied equipments) for "Construction of Majalgaon Lift Scheme from Loni Sawangi Barrage (Sadola Village) Tal Majalgaon Dist Beed" under GMIDC.

**SCOPE OF WORK:**

Complete Design, manufacture and supply of Pumpsets, electrical equipment and EOT crane etc. as per BOQ & specifications for Majalgaon LIS on turnkey basis. Attached As Annexure.

Your scope covers complete basic engineering and detailed engineering of product, Design, Procurement, Manufacturing, Assembly, Inspection, Shop testing, Painting, Packing, Supply, Delivery to site of equipment required for complete pumping system as per requirements and contract specifications of end user (GMIDC), as handed over to you.

The design parameters recommended by the Chief Engineer (Mech.) Nashik is already forwarded to you vide letter No. MLS/2011-2012/33 Dtd. 27/06/2011. The RPM for Pump House State -I is finalized as 375 RPM and that for Stage-II is finalized as 428 RPM. The same may be considered while design.

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## PRASAD - SHREEHARI (J.V.)

L. Sai Vrindavan, Near Mahanubhav Ashram, Paithan Road,  
Ikhdeda, Aurangabad - 431 005.  
☎ : (0240) 2376648 / 49, 3205444, Fax : 2376656, E-mail : office@sapl.biz.

The scope of work shall include all Mechanical, Electrical work complete in all respects as per BOQ and specifications sheets attached. (Mechanical works – Specification Volume II B.

**TOTAL CONSILATED PRICE FOR THE SUPPLY OF MECHANICAL & ELECTRICAL COMPONENTS (WT PUMP SETS AND ALLIED EQUIPMENTS): Rs. 17, 55, 25,790/- (RUPEES SEVENTEEN CRORE FIFTY FIVE LAKHS TWENTY FIVE THOUSAND SEVEN HUNDRED NINETY ONLY).**

The details of Billing (Shreehari Associates Pvt. Ltd. & Prasad & Company (Projects Works Ltd.)) will be confirmed to you before the delivery of the material.

### PRICE BASIS:

- ✓ The prices are firm and FOR Site basis, inclusive of Freight and Insurance upto site & upto complete Erection .
- ✓ Excise duty @12.36% is included in price. Central sales Tax @ 2% is also included in price, against form 'C.

The Detailed BOQ & Specifications is attached herewith as per Annexure

### PAYMENTS TERMS:

- ✓ 10% Advance along with the purchase order (includes approval of major drawing and documents)
- ✓ 65% against supply of equipments at site after confirmation of Third Party Inspection against LC with 60 days usance period.
- ✓ 12% against erection of equipment, within 30 days.
- ✓ 13% against trial, commissioning and completion of 3 months trial operation of equipment within 30 days. If commissioning gets delayed from our side beyond 6 months 8% shall be released & 5% amount shall be retained till completion of Commissioning.

### TERMS & CONDITIONS:

1. Jyoti Limited shall be responsible for complete Design, Manufacturing, and Shop testing of pump sets and allied equipment as per the contract specifications. The equipment for this works shall be in the line with client's (GMIDC) specifications.
2. Statutory Variation – Present Rate of E.D 12.36% & CST 2% is included in the Price. Any Increase /Decrease in taxes and duties other than above shall be paid at actual as applicable from time to time by us , during the course of the contract.



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12. In view of the aforesaid fact, as we find that there is a disputed question of fact relating to payment of 'debts' and the purchase order was issued by 'Joint Venture' dated 6<sup>th</sup> July, 2013 relied by the Appellant was issued by the Joint Venture i.e. 'Prasad – Shreehari (J.V.)' which is not a party to this appeal

or was not impleaded as the co-applicant in the application filed under Section 9 of the 'I&B Code', we are not inclined to grant any relief to the Appellant.

The appeal is accordingly dismissed. No costs.

[Justice S.J. Mukhopadhaya]  
Chairperson

[ Justice A.I.S. Cheema ]  
Member (Judicial)

[ Kanthi Narahari ]  
Member (Technical)

New Delhi

18<sup>th</sup> November, 2019

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